

## COMPETITION OR CONTROL V: PRODUCTION AND DISTRIBUTION OF ELECTRIC ENERGY \*

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The initial study in this series set forth the thesis that public utilities should be subject to the antitrust laws in inverse proportion to the degree of control exercised by regulatory agencies. Three succeeding surveys, examining industries with increasing degrees of regulation, confirmed the propriety of the original thesis, if they failed to demonstrate its consistent application.

We now turn to a comprehensively controlled industry: the generation and distribution of electric energy.<sup>1</sup> Such a business constitutes the typical public utility today. Federal,<sup>2</sup> state,<sup>3</sup> and even municipal<sup>4</sup> agencies are vested with sweeping powers of control over firms in the industry. Our purpose, as before, is to determine whether the inter-

\* Prior installments in this series appeared in 106 U. PA. L. REV. 641 (1958) (public utilities generally); in 107 U. PA. L. REV. 585 (1959) (radio and television broadcasting); in 108 U. PA. L. REV. 775 (1960) (motor carriers); and in 109 U. PA. L. REV. 311 (1961) (air carriers). The present Article is based upon an examination of the Federal Power Act, various state power acts, and leading cases thereunder. The authors also made a page by page examination of volumes 38 through 100 of Public Utility Reports, New Series, and volumes 1 through 13, 21, and 27 through 31 of Public Utility Reports, Third Series. The authors gratefully acknowledge the assistance of W. P. Gilbert, Esq., of the Illinois bar, whose long experience in the law of electric utility regulation permitted him to eliminate several erroneous statements appearing in an earlier draft of this Article.

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<sup>1</sup> We do not consider questions with respect to the definition of public utilities. See, *e.g.*, Boston Edison Co., 98 P.U.R. (n.s.) 427, 441, 443, 449, 459 (Mass. Dep't Pub. Util. 1953).

<sup>2</sup> Federal Power Act, 41 Stat. 1063 (1920), as amended, 16 U.S.C. §§ 791a-825r (1958), as amended, 16 U.S.C. §§ 791a-823 (Supp. II, 1961). Section 19 of that act, 41 Stat. 1073 (1920), 16 U.S.C. § 812 (1958), provides for jurisdiction over rates and service of public utilities until state authority is exercised. The FPC also enjoys authority over interstate transmission of energy. 41 Stat. 1063 (1920), added by 49 Stat. 847 (1935), 16 U.S.C. §§ 824-824h (1958); see TROXEL, ECONOMICS OF PUBLIC UTILITIES 92-93 (1947); TWENTIETH CENTURY FUND, ELECTRIC POWER AND GOVERNMENT POLICY 196 (1948) [hereinafter cited as POWER AND POLICY]. The latter is a valuable survey of regulation of the electrical energy industry in action on which the authors of the present study have relied extensively.

<sup>3</sup> *E.g.*, ILL. ANN. STAT. ch. 111½, §§ 1-344 (Smith-Hurd 1954). Comparable statutes in other states are described in POWER AND POLICY 54. State controls are not necessarily comprehensive. POWER AND POLICY 54; TROXEL, *op. cit. supra* note 2, at 74, 77.

<sup>4</sup> JONES & BIGHAM, PRINCIPLES OF PUBLIC UTILITIES 166-67, 188-90, 619-22 (1931); POWER AND POLICY 106-16. It is generally considered that regulation by municipalities, particularly the smaller cities, is ineffective. POWER AND POLICY 107-08, 113, 116.

vention is so pervasive as to render antitrust enforcement impossible or undesirable.

## I. CREATION, MERGERS, AND DIVERSIFICATION

### A. Entry

In the free sector of the economy it is axiomatic that entry shall be as free as economic circumstances permit. The antitrust laws forbid the raising of barriers to entry.<sup>5</sup> In the industry here under examination, however, both federal<sup>6</sup> and state<sup>7</sup> legislation requires a license either to enter the business of, or to construct facilities for, the generation of electric power.

It is orthodox doctrine that the license granted an electric utility—except, in some states, municipal and cooperative companies—is an exclusive franchise. At least as long as satisfactory service is rendered, no second firm may be admitted into competition with the first comer. Thus the Idaho Supreme Court has stated:

[The public utility commission act] substitutes reasonable rates to be determined by the commission for those that would otherwise be fixed by competition. . . . Under this law it must therefore be conceded that competition with its disastrous effects is no longer needed to protect the public against unreasonable rates, hence there is no longer any justification whatever for competition or the duplication of utility plants under the pretense of preventing monopoly.<sup>8</sup>

In Wisconsin, the supreme court went so far as to enjoin a municipal corporation from generating its own power.<sup>9</sup> The only apparent exception to this doctrine was stated by the Illinois Supreme Court:

<sup>5</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 430-36 (2d Cir. 1945); see *Associated Press v. United States*, 326 U.S. 1 (1945).

<sup>6</sup> Federal Power Act §4(e), 49 Stat. 840 (1935), 16 U.S.C. §797(e) (1958); see Seavey, *Functions of the Federal Power Commission*, 201 *Annals* 73, 74 (1939). Federal licenses for the development of hydroelectric power are issued with a recapture clause which permits the federal government to take over the rights at the expiration of fifty years. POWER AND POLICY 494. In an inflationary period the recapture clause might constitute a considerable barrier to entry.

<sup>7</sup> *E.g.*, CAL. PUB. UTIL. CODE §1001; PA. STAT. ANN. tit. 66, §1121 (1959); see BARNES, *THE ECONOMICS OF PUBLIC UTILITY REGULATION* 213 (1942).

<sup>8</sup> *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 248-249, 141 Pac. 1083, 1091 (1941); see *Trico Elec. Co-op. v. Corporation Comm'n of Ariz.*, 86 Ariz. 27, 339 P.2d 1046 (1959); *People ex rel. New York Edison Co. v. Willcox*, 207 N.Y. 86, 100 N.E. 705 (1912); *R. H. Quinn*, 8 P.U.R. (n.s.) 134, 138 (Colo. Pub. Util. Comm'n 1935); *City of Dover v. Delaware Power & Light Co.*, 3 P.U.R.3d 181, 191 (Del. Pub. Serv. Comm'n 1953); *Tri County Elec. Co.*, 19 P.U.R. (n.s.) 113, 120 (Mass. Dep't Pub. Util. 1937); *Missouri Power & Light Co.*, 89 P.U.R. (n.s.) 119, 122 (Mo. Pub. Serv. Comm'n 1951); *Spingler Elec. Corp.*, 1933D P.U.R. 493, 507-08 (N.Y. Pub. Serv. Comm'n 1933).

<sup>9</sup> *Wisconsin Power & Light Co. v. Beloit*, 215 Wis. 439, 254 N.W. 119 (1934) (based on prohibitory statute).

If the company now occupying the territory is incapable of providing adequate service, then, and not until then, will a situation arise when the public convenience and necessity may require the establishment of another utility.<sup>10</sup>

Similarly, regulated electric utilities may agree with competitors to divide territory into exclusive sales areas, although such agreements are illegal per se under the antitrust laws.<sup>11</sup> The common rationale for permitting such agreements among utilities is that regulation will counteract the evils of monopoly, competition would increase costs,<sup>12</sup> and, in cases of dispute, the utility commission is available to supervise the drawing of boundary lines between utilities.<sup>13</sup>

Nevertheless, a few states permit competition among electric utility companies.<sup>14</sup> Competition is more likely to be tolerated from a governmental body than from another investor-owned utility company. During the depression there was much dissatisfaction with the results of regulation. It was thought that governmental competition might prove economically beneficial and politically attractive. At that time federal, state, and municipal governments embarked upon pro-

<sup>10</sup> *Illinois Power Corp. v. Commerce Comm'n*, 320 Ill. 427, 429, 151 N.E. 236, 237 (1926) (dictum); see *Illinois Power & Light Corp. v. Consolidated Coal Co.*, 251 Ill. App. 49, 74 (1928) (injunction available to prevent rival firm from entering territory).

<sup>11</sup> HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS 17 (TNEC Monograph No. 38, 1941); see *Intermountain Rural Elec. Ass'n v. Colorado Power Co.*, 135 Colo. 42, 49, 307 P.2d 1101, 1105 (1957); *Weld v. Gas & Elec. Light Comm'n*, 197 Mass. 556, 84 N.E. 101 (1908); *John R. Murgatroyd*, 28 P.U.R.3d 88 (Wis. Pub. Serv. Comm'n 1959). *Contra*, *Montana-Dakota Util. Co. v. Williams Elec. Co-op.*, 263 F.2d 431 (8th Cir. 1959); *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co.*, 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950). See generally Hadley, *Public Utilities and the Antitrust Law*, 10 B.U.L. REV. 351, 353-56 (1930).

<sup>12</sup> POWER AND POLICY 373-79.

<sup>13</sup> *Arizona Edison Co.*, 61 P.U.R. (n.s.) 5, 10 (Ariz. Corp. Comm'n 1945); see *Union Rural Elec. Ass'n*, 17 P.U.R.3d 160, 178, 181 (Colo. Pub. Util. Comm'n 1957). A consumer may be enjoined from obtaining a supply of electric energy from a producer who does not have a franchise in the area. *Holston River Elec. Co. v. Hydro Electric Co.*, 17 Tenn. App. 122, 130, 66 S.W.2d 217, 220 (1933); see BEHLING, COMPETITION AND MONOPOLY IN PUBLIC UTILITY INDUSTRIES 165 (Illinois Studies in the Social Sciences No. 23, 1938); POWER AND POLICY 29, 30, 57-58. Compare *Intermountain Rural Elec. Ass'n v. Colorado Power Co.*, 135 Colo. 42, 307 P.2d 1101 (1957); *Rockton Elec. Co. v. South Beloit Water Gas & Elec. Co.*, 1921D P.U.R. 17, 19, 21 (Ill. Commerce Comm'n 1921). In Illinois similar holdings have been recorded with respect to other types of utilities. *E.g.*, *State Pub. Util. Comm'n ex rel. Clow v. Romberg*, 275 Ill. 432, 114 N.E. 191 (1916); *Village of Brookfield v. Goldblatt Bros.*, 33 P.U.R. (n.s.) 82, 92 (Ill. Commerce Comm'n 1940).

<sup>14</sup> *Fairbanks Morse & Co. v. Texas Elec. Co.*, 63 F.2d 702, 705-06 (5th Cir. 1933), *cert. denied*, 290 U.S. 655 (1933); *Jones v. Carter*, 45 Tex. Civ. App. 450, 101 S.W. 514 (Civ. App. 1907); *Clarksburg Elec. Light Co. v. City of Clarksburg*, 47 W. Va. 739, 35 S.E. 994 (1900); see *Pennsylvania Power & Light Co. v. Public Serv. Comm'n*, 112 Pa. Super. 500, 171 Atl. 412 (1934); *People's Land Mfg. Co. v. Beyer*, 161 Wis. 349, 154 N.W. 382 (1915) (by implication). See also *Pennsylvania Water Co. v. Consolidated Gas Co.*, 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950); *State v. Central Power & Light Co.*, 147 S.W.2d 330, 334 (Tex. Civ. App. 1941) (dictum), *aff'd*, 139 Tex. 51, 161 S.W.2d 766 (1942).

grams of generating and distributing electricity in competition with privately owned utilities. The courts frequently sustained the validity of such enterprises against the argument that the established utility had protected rights in the field.<sup>15</sup> Nevertheless, they permitted the first comer to test the legality of competition on other grounds.<sup>16</sup>

### B. Transfers and Mergers

A prime purpose of the antitrust laws is to prevent the diminution of competition through legal arrangements—such as mergers—whereby an economic joinder of competitors is effected.<sup>17</sup> By contrast, both federal<sup>18</sup> and state<sup>19</sup> legislation for the electric utility industry contemplates transfers of certificates, conveyances of facilities, interlocking directorates, mergers, consolidations, and the like, but only upon the approval of the regulatory agency. This permissiveness is balanced by a high degree of administrative intervention; indeed, an electric utility may not even lease or mortgage its plant or purchase securities of any other public utility without administrative approval.<sup>20</sup>

Commissions frequently grant approval for mergers of public utilities.<sup>21</sup> In doing so, they look to the ability of the consolidated concern to render adequate public service. They do not seek to pre-

<sup>15</sup> See *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 139 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938); *Western Pub. Serv. Co. v. City of Minatare*, 99 F.2d 844, 845-46 (8th Cir. 1938); *Carolina Power & Light Co. v. South Carolina Authority*, 94 F.2d 520, 523 (4th Cir. 1938); *Mississippi Power Co. v. Starkville*, 4 F. Supp. 833, 836 (N.D. Miss. 1932); *cf. Public Serv. Co. v. Public Util. Comm'n*, 142 Colo. 135, 350 P.2d 543 (1960). See generally POWER AND POLICY 115, 338, 386-95; Kneier, *Competitive Operation of Municipally and Privately Owned Utilities*, 47 MICH. L. REV. 639, 642, 644 (1949).

<sup>16</sup> *Kansas Gas & Elec. Co. v. City of Independence*, 79 F.2d 32, 35 (10th Cir. 1935); *cf. Arkansas-Missouri Power Co. v. City of Kennett*, 78 F.2d 911 (8th Cir. 1935). Compare *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 928 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955).

<sup>17</sup> See Hale, *Mergers and Acquisitions*, 41 CHL. BAR REC. 185 (1960).

<sup>18</sup> Federal Power Act §§ 8, 203, 49 Stat. 817, 849 (1935), 16 U.S.C. §§ 801, 824(b) (1958). See *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 252-53 (1951) (dictum); *Pennsylvania Elec. Co.*, 9 F.P.C. 91 (1950); Seavey, *supra* note 6, at 73, 76. Federal antitrust legislation, in regulating the acquisition by one company of stock in another, provides that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission. . . ." Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914). The foregoing language suggests that the exception provided by § 7 might not be applicable to public utilities insofar as they are regulated by state authorities.

<sup>19</sup> *E.g.*, ILL. ANN. STAT. ch. 111½, § 22 (Smith-Hurd 1954); ILL. ANN. STAT. ch. 111½, § 27 (Smith-Hurd Supp. 1960). The older law is represented by the decision in *Dunbar v. American Tel. & Tel. Co.*, 238 Ill. 456, 87 N.E. 521 (1909).

<sup>20</sup> *E.g.*, ILL. ANN. STAT. ch. 111½, §§ 27(b)-(e) (Smith-Hurd Supp. 1960); ILL. ANN. STAT. ch. 111½, § 29 (Smith-Hurd 1954). See generally BARNES, *op. cit. supra* note 7, at 212-14; POWER AND POLICY 73, 186-87, 254, 279.

<sup>21</sup> See *Phelan v. Edison Elec. Illuminating Co.*, 24 Misc. 109, 53 N.Y. Supp. 305 (Sup. Ct. 1898); *Motter v. Kennett Twp. Elec. Co.*, 212 Pa. 613, 62 Atl. 104 (1905); 1953 NIAGARA MOHAWK POWER CORP. ANN. REP. 10.

serve competition between the parties to the merger; regulation is relied upon to curb monopoly power.<sup>22</sup> In many instances the commissions have been convinced that economies of scale resulting from the merger would prove beneficial to the public—that the consolidated concern would enjoy lower costs which would redound to the benefit of patrons.<sup>23</sup>

An electric utility is not allowed to abandon its business without commission approval.<sup>24</sup> Owing to the growth of demand for electric energy, abandonment has not frequently been the subject of administrative action. If and when the industry enters into a declining state, abandonment may become a more active topic.

### C. Diversification and Dispersion

While merger of rival electric utilities has generally been approved, public policy has sometimes frowned upon diversification of a utility into allied fields and dispersion of its lines over a broad territory. Such diversification and dispersion can, of course, result from internal growth as well as from merger. Most of the antagonism to such utility growth has been manifested in the administration of the Public Utility Holding Company Act of 1935,<sup>25</sup> another depression-born measure aimed at the then unpopular utility industry.

Under state law a single corporation is usually permitted to engage in the business of supplying electric energy and at the same time to furnish gas, hot water and steam heat, traction, and other utility services to patrons in its area.<sup>26</sup> In administering the Public Utility

<sup>22</sup> Pennsylvania Water & Power Co., 14 F.P.C. 706 (1955); Manila Elec. Co. & Gen. Pub. Util. Corp., 37 S.E.C. 623 (1956); Puget Sound Power & Light Co., 100 P.U.R. (n.s.) 129, 152 (Wash. Pub. Serv. Comm'n 1953); POWER AND POLICY 342, 343-44, 353-55; TROXEL, *op. cit. supra* note 2, at 167. Compare Louisiana Power & Light Co., 10 F.P.C. 688 (1951); Mississippi Valley Generating Co., 36 S.E.C. 159 (1955); Central Ill. Pub. Serv. Co., 32 S.E.C. 202 (1951); State Pub. Util. Comm'n *ex rel.* Clow v. Romberg, 275 Ill. 432, 439-40, 445, 114 N.E. 191, 194, 196 (1916).

<sup>23</sup> See Scranton Elec. Co., 15 F.P.C. 1078 (1956); American Gas & Elec. Co., 32 S.E.C. 130 (1951); POWER AND POLICY 340, 342; TROXEL, *op. cit. supra* note 2, at 29-31. *But see* 1953 KANSAS CITY POWER & LIGHT CO. ANN. REP. 17. The older view, under which mergers were disapproved, is represented by Keene Syndicate v. Wichita Gas, Elec. Light & Power Co., 69 Kan. 284, 76 Pac. 834 (1904); San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S.W. 289 (Civ. App. 1899). Compare People *ex rel.* Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N.E. 798 (1899); People *ex rel.* FitzHenry v. Union Gas & Elec. Co., 254 Ill. 395, 409, 98 N.E. 768, 773 (1912) (dictum).

<sup>24</sup> ILL. ANN. STAT. ch. 111½, § 49a (Smith-Hurd Supp. 1960); see, e.g., Application of Casco Castle Co., 141 Me. 222, 42 A.2d 43 (1945); Commonwealth Edison Co., 63 P.U.R. (n.s.) 129 (Ill. Commerce Comm'n 1946); TROXEL, *op. cit. supra* note 2, at 485.

<sup>25</sup> 49 Stat. 838 (1935), 15 U.S.C. § 79 (1958).

<sup>26</sup> See, e.g., People *ex rel.* Municipal Gas Co. v. Rice, 138 N.Y. 151, 33 N.E. 846 (1893); Motter v. Kennett Twp. Elec. Co., 212 Pa. 613, 62 Atl. 104 (1905); TROXEL, *op. cit. supra* note 2, at 202-03.

Holding Company Act, however, which required the disintegration of large electric utility systems, the SEC has taken the position that gas and other distribution systems must be separated from electric holdings.<sup>27</sup> It has been questioned whether the "competition" thus made possible will prove of significant benefit to the public, and even whether the purpose of keeping the different types of utility service separate is to promote competition.<sup>28</sup> The aim may be to avoid that discrimination which results when one type of service is operated at a loss and must be sustained by patrons of the other. In recent years, for example, utility companies furnishing both electric energy and traction service have sometimes been required to subsidize the latter with revenues from the former.<sup>29</sup> In many states, however, each "department" is required to be self-supporting.<sup>30</sup>

A principal purpose of the "death sentence" imposed by the Holding Company Act was, of course, to reduce the geographic size of electric utility systems. Apparently the theory behind the statute was that far flung holding companies were so powerful that the state commissions were unable to regulate them in accordance with local desires.<sup>31</sup> Whatever rational basis may exist for such hostility to geographic dispersion, it did not reflect a desire to promote competition.<sup>32</sup> The purpose was not to create rivalry among electric generating and distributing companies; rather, the goal was to reduce the wealth and economic power of those who managed utility holding companies.

The sale of appliances by electric utilities has also been a fruitful source of controversy. The utilities regard the promotion of appliance sales as desirable because of the increase in line loads resulting therefrom.<sup>33</sup> In general, the courts and commissions have taken a similar view, despite the protests of "independent" appliance dealers.<sup>34</sup> Such

<sup>27</sup> See *Louisiana Gas Serv. Co.*, 38 S.E.C. 129 (1957); *Electric Bond & Share Co.*, 33 S.E.C. 21, 37-38 (1952); *New England Elec. Sys.*, 32 S.E.C. 215 (1951); *Troxel*, *op. cit. supra* note 2, at 203; Comment, *Geographic Integration Under the Public Utility Holding Company Act*, 50 *YALE L.J.* 1045, 1052 (1941). A state case following the SEC view is *Lynn Gas & Elec. Co.*, 31 P.U.R.3d 209, 212-13 (Mass. Dep't Pub. Util. 1959).

<sup>28</sup> *Troxel*, *op. cit. supra* note 2, at 190-191, 200.

<sup>29</sup> See *St. Joseph Light & Power Co.*, 27 P.U.R.3d 403, 405-06, 409 (Mo. Pub. Serv. Comm'n 1959).

<sup>30</sup> *E.g.*, *Tampa Elec. Co.*, 37 P.U.R. (n.s.) 440, 459 (Tampa (Fla.) Util. Bd. 1940); *Consumers Power Co.*, 99 P.U.R. (n.s.) 414 (Mich. Pub. Serv. Comm'n 1952); *accord*, *Fleming v. Illinois Commerce Comm'n*, 388 Ill. 138, 153-54, 57 N.E.2d 384, 392 (1944), *appeal dismissed*, 324 U.S. 823 (1945).

<sup>31</sup> See 49 Stat. 803 (1935), 15 U.S.C. § 79a (1958); S. REP. No. 621, 74th Cong., 1st Sess. 14 (1935). See generally *Troxel*, *op. cit. supra* note 2, at 171, 172, 181.

<sup>32</sup> See generally *HALE & HALE, MARKET POWER* ch. 7 (1958).

<sup>33</sup> See 58 SOUTHERN CAL. EDISON CO. ANN. REP. 19 (1954).

<sup>34</sup> See *Public Serv. Co. v. State*, 102 N.H. 150, 160-61, 153 A.2d 801, 808-09 (1959); *City Ice & Fuel Co. v. Consolidated Edison Co.*, 29 P.U.R. (n.s.) 193,

activity upon the part of the utilities—as the protests of the “independent” dealers suggest—is likely to promote rather than retard competition in the appliance field, but it does not affect competition in the distribution of electric energy.

## II. NORMAL BUSINESS ACTIVITIES

### A. Service

Antitrust legislation has no direct bearing upon the quality of products supplied by industry. It merely serves to keep the channels of trade open and to encourage competition in providing better products. In contrast, commissions are vested with abundant authority to regulate the amount and quality of service to be rendered by electric utility companies.<sup>35</sup> Not only are such companies under a duty to serve all patrons who may apply, but there is no lack of statutory authority for the detailed supervision of the quality of this service.<sup>36</sup>

When a patron seeking service which a utility must provide is not geographically adjacent to existing lines, a question of involuntary dispersion may arise. Tariff rules generally require the customer to contribute to the expense of the extension or to make a deposit thereon when more than specified distances are involved.<sup>37</sup> In some instances,

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200-01 (N.Y. Pub. Serv. Comm'n 1939); *Groggins v. New York Edison Co.*, 16 P.U.R. (n.s.) 365, 371-72 (N.Y. Pub. Serv. Comm'n 1936). *But see* *Peoples Light & Coke v. Slattery*, 373 Ill. 31, 64-66, 25 N.E.2d 482, 498-99 (1940); *Montana-Dakota Util. Co.*, 28 P.U.R.3d 355, 362-63 (Mont. Pub. Serv. Comm'n 1959). Compare *Consumers' Sanitary Coffee & Butter Stores v. Illinois Commerce Comm'n*, 348 Ill. 615, 181 N.E. 411 (1932). See generally *HALE & HALE, MARKET POWER 202-39* (1958). Legislation frequently provides for commission inquiry into the unregulated business. *E.g.*, ILL. ANN. STAT. ch. 111½, § 8 (Smith-Hurd 1954).

<sup>35</sup> See, *e.g.*, Federal Power Act § 207, 49 Stat. 853 (1935), 16 U.S.C. § 824f (1958); ILL. ANN. STAT. ch. 111½, §§ 32, 33, 38, 49, 53, 54 (Smith-Hurd 1954); *POWER AND POLICY 163*.

<sup>36</sup> Commissions utilize such powers to prescribe the precise manner in which electric service shall be rendered. In Maryland, for example, an electric utility desired to install a new 220-volt line eight feet away from the location of an existing 110-volt line. The patron, a householder, sought to have the new wire installed at the same location as the former one. The patron prevailed and the utility was required to use the old point of entrance. *Aquilla v. Baltimore Gas & Elec. Co.*, 31 P.U.R.3d 361 (Md. Pub. Serv. Comm'n 1959). In another instance, a public utility changed its rules and required a safer entrance switch box with a ground connection. Old patrons, however, were permitted to continue the use of the former switch box. Commission approval was given to the rules, but the fact that such approval was necessary indicates the detail in which electric utility service is regulated. *Hawkins v. Vermont Hydro-Elec. Corp.*, 98 Vt. 176, 126 Atl. 517 (1924); *accord*, *Hunt v. Marianna Elec. Co.*, 114 Ark. 498, 170 S.W. 96 (1914); *F. & R. Lazarus & Co. v. Public Util. Comm'n*, 162 Ohio St. 223, 122 N.E.2d 783 (1954); *Texas Power & Light Co. v. Doering Hotel Co.*, 147 S.W.2d 897 (Tex. Civ. App. 1941). In the latter two cases the regulations of the utility were held discriminatory in character. See *TROXEL, op. cit. supra* note 2, at 464-66. Compare *Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295 (1940).

<sup>37</sup> *E.g.*, Illinois Power Company Tariff No. 10, Rule 3.2(b) (extensions of three phase facilities beyond two poles at patron's expense).

however, commissions require extension of lines even though discrimination against centrally located patrons may result.<sup>38</sup> On the other hand, electric utilities are not usually required to sell at wholesale rates unless they have "held themselves out" to do so.<sup>39</sup> "Sub-metering" may provide a measure of competition between the company generating the electricity and another distributor. In Massachusetts, however, the supreme judicial court sustained an order eliminating submetering, saying that state policy encouraged a monopoly of electricity supply.<sup>40</sup> In New York and Illinois submetering has also been forbidden, and wholesale rates may be "closed" to new patrons.<sup>41</sup>

### B. Operations

One might suppose that the management of an electric utility would retain considerable discretion with respect to internal operations. No doubt it does enjoy a measure of discretion with respect to methods of production, manner of distribution, employee relations and the like.<sup>42</sup> At the same time, commissions exercise considerable authority even over such matters.<sup>43</sup>

<sup>38</sup> Public Serv. Elec. & Gas Co., 28 P.U.R.3d 155 (N.J. Bd. Pub. Util. Comm'n 1959); see TROXEL, *op. cit. supra* note 2, at 473. *But cf.* Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 211 Ga. 223, 85 S.E.2d 14 (1954). Compare McDONALD, LET THERE BE LIGHT 284-85 (1957).

<sup>39</sup> City of High Point v. Duke Power Co., 34 F. Supp. 339, 342-43 (M.D.N.C. 1940), *aff'd on other grounds*, 120 F.2d 866 (4th Cir. 1941); Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 211 Ga. 223, 85 S.E.2d 14 (1954); Chicago Dist. Pipeline Co. v. Illinois Commerce Comm'n, 361 Ill. 296, 197 N.E. 873 (1935). In *City of High Point v. Duke Power Co.*, *supra*, the court wrote:

Under the law of North Carolina it is well settled that one public service corporation cannot be made to supply a competitor, another public service corporation of like character, with the material to enable the latter to discharge its duty to the public. . . . It seems to be the rule prevailing everywhere that where a public service corporation is adequately serving the public through its own facilities it cannot be compelled to serve the same public through the facilities of a competitor or to supply a competitor with the means of competition.

*Id.* at 343. Compare Wisconsin Trailer Coach Ass'n v. Wisconsin Power & Light Co., 91 P.U.R. (n.s.) 65, 71 (Wis. Pub. Serv. Comm'n 1951).

<sup>40</sup> Boston Real Estate Bd. v. Department of Pub. Utils., 334 Mass. 477, 136 N.E.2d 243 (1956), *affirming* Boston Edison Co., 98 P.U.R. (n.s.) 427, 431, 441 (Mass. Dep't Pub. Utils. 1953).

<sup>41</sup> Niagara Mohawk Power Corp., 30 P.U.R.3d 479, 492 (N.Y. Pub. Serv. Comm'n 1959); Illinois Power Company Tariff No. 5, Rate No. 40 § 1. See *City of St. Charles v. Illinois Commerce Comm'n*, 21 Ill. 2d 259, 172 N.E.2d 353 (1961).

<sup>42</sup> In Massachusetts, for example, an electric utility cannot be compelled to carry energy underground purely for aesthetic reasons. *Residents of Princeton Street v. Charlestown Gas Co.*, 1925B P.U.R. 362 (Mass. Dep't Pub. Utils. 1924).

<sup>43</sup> Thus the Illinois statute provides:

The commission shall have general supervision of all public utilities . . . . It shall . . . keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated . . . .

ILL. ANN. STAT. ch. 111½, § 8 (Smith-Hurd 1954); see *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 414 Ill. 275, 281, 111 N.E.2d 329, 333 (1953). Numerous



In actual practice, utility management retains some discretion either alone or with commission approval to effect changes in methods of operation. Over the years, for example, Southern California Edison has gradually switched from dependence upon water power to oil and gas-fired steam boilers as a source of energy.<sup>44</sup> The Arizona Public Service Company has installed new bookkeeping machines, and Indianapolis Power has run its modern, low-cost plant at full capacity and curtailed the output of its older stations in order to effect an overall reduction of expenses.<sup>45</sup> Similarly, it has been held improper for a commission to reduce allowances for current operating expenses with respect to the maintenance of facilities below the amounts actually expended.<sup>46</sup> Nevertheless, commissions have been permitted to control

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other statutory provisions permit specific controls to be exercised. Thus, under the Illinois Public Utility Act, ILL. ANN. STAT. ch. 111½ (Smith-Hurd 1954), a utility must "furnish the Commission with all information required to carry into effect the provisions of the act" (§ 9); commission approval is required before a utility may divert its assets to a nonregulated business (§ 9), contract to operate lines or plants in connection with another utility (§ 27(a)), guarantee the obligations of another person or firm (§ 27(f)), or construct a new plant or additions to the old plant (§ 56); a utility must file with the commission all contracts with other utilities (§ 33); the commission may prescribe methods of operation to safeguard the safety of employees and the public (§ 49); and the commission may order the construction of new facilities if it finds existing service to be inadequate (§ 50). *But cf.* Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 211 Ga. 223, 227, 85 S.E.2d 14, 19 (1954), where the court held that "no Georgia statute . . . confers upon the . . . Commission authority to require one public utility to buy or merge with another . . . ."

The Federal Power Act § 202, 49 Stat. 847 (1935), 16 U.S.C. § 824 (1958), authorizes the Federal Power Commission to order the establishment of interconnections and to arrange the exchange of energy. See also Federal Power Act § 10(h), 49 Stat. 844 (1935), 16 U.S.C. § 803(h) (1958): "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited." It is not apparent what useful function could be served by the foregoing statutory provision.

<sup>44</sup> 58 SOUTHERN CAL. EDISON CO. ANN. REP. 13, 18-19 (1954). Note that another utility as early as 1953 participated in studies investigating the feasibility of utilizing atomic reactors to generate electric power. 1953 AMERICAN GAS & ELEC. CO. ANN. REP. 16.

<sup>45</sup> 1953 ARIZONA PUB. SERV. CO. ANN. REP. 4; 1953 INDIANAPOLIS POWER & LIGHT CO. ANN. REP. 10. The latter company reported that it had organized an economy committee, which by intensive efforts had succeeded in effecting important savings in various details of its operations. It had simplified customer billing, put in modern electronic equipment to do clerical work, and the like. *Id.* at 16. Another utility company retained engineers to study its service area and to predict future demand. The object was to forecast needs for expansion. 1953 KANSAS CITY POWER & LIGHT CO. ANN. REP. 17. Still another utility ordered an incremental transmission-loss computer to determine the most efficient use of circuits and generating facilities under any set of operating conditions. 1953 AMERICAN GAS & ELEC. CO. ANN. REP. 15. See TROXEL, *op. cit. supra* note 2, at 221, 549.

<sup>46</sup> Peoples Gas, Light & Coke Co. v. Slattery, 375 Ill. 31, 61-62, 25 N.E.2d 482, 497 (1939). In the same case the court also held it improper for the commission to allow less than the full amount of assessed local taxes as operating expenses, stating that it was unwarranted for the commission to assume that the company would litigate the taxes and succeed in securing their reduction. *Id.* at 61, 25 N.E.2d at 497. Similarly, a commission may accept a public utility's figures for boiler and generator maintenance in a rate-making case, Southern Cal. Edison Co., 21 P.U.R.3d 15, 26

just such matters in detail. In fixing rates, for example, the Illinois commission disallowed various expenditures on the ground that a greater use of coal gas and less use of water gas would have been more economical.<sup>47</sup> Similarly, the California commission reduced Southern California Edison's claimed expenses for damage suits, saying that experience showed lesser amounts would suffice to satisfy claimants.<sup>48</sup>

The classic case of the divergence of utility regulation from the antitrust philosophy occurs in the area of interconnection of systems to form "power pools."<sup>49</sup> Thus the FPC directed the maintenance of arrangements<sup>50</sup> substantially identical to those held illegal under the Sherman Act in the familiar *Penn Water* litigation.<sup>51</sup>

During the holding company era, it was common for operating electric utilities to enter into contracts for the performance of management services by the holding company or affiliated interests. It was widely suspected that such contracts afforded a means of syphoning off profits which would otherwise have been destroyed by rate reductions. As a consequence, commissions carefully scrutinize such service contracts and are empowered to abrogate them if they are found not to be in the public interest.<sup>52</sup>

(Cal. Pub. Util. Comm'n 1957); it may approve payments for research expenses in the development of a nuclear power plant, *Yankee Atomic Elec. Co.*, 27 P.U.R.3d 308, 312-13 (Mass. Dep't Pub. Utils. 1959); and it may approve the sale and leaseback of an office building constructed and used by the utility company to permit dispersion of its clerical staff, *Kansas City Power & Light Co.*, 21 P.U.R.3d 236, 239 (Mo. Pub. Serv. Comm'n 1957).

<sup>47</sup> The Illinois court approved the action of the commission but warned it against substituting its judgment for that of the board of directors of the company. *State Pub. Utils. Comm'n ex rel. Springfield v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 234, 125 N.E. 891, 901 (1920).

<sup>48</sup> *Southern Cal. Edison Co.*, 21 P.U.R.3d 15, 27 (Cal. Pub. Util. Comm'n 1957). Note that in several states electric utilities are required to present annual budgets in advance for approval to commissions. *POWER AND POLICY* 59, 254.

<sup>49</sup> Commissions frequently compel or permit such interchange. See, e.g., *Texas Elec. Serv. Co.*, 9 F.P.C. 1373 (1950) (compelling power pool); *POWER AND POLICY* 54, 183, 184-85.

<sup>50</sup> *Pennsylvania Water & Power Co.*, 8 F.P.C. 1, *rehearing denied*, 8 F.P.C. 170, *order amended*, 8 F.P.C. 1193 (1949), *aff'd*, 193 F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

<sup>51</sup> *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950). See also *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); *Consolidated Gas Elec. Light & Power Co. v. Pennsylvania Water & Power Co.*, 194 F.2d 89, 95, 98 (4th Cir.), *cert. denied*, 343 U.S. 963 (1952).

<sup>52</sup> See ILL. STAT. ANN. ch. 111½, §8(a)(3) (Smith-Hurd Supp. 1960); *TROXEL, ECONOMICS OF PUBLIC UTILITIES* 238, 245-49 (1947); *POWER AND POLICY* 77, 126-27, 190, 253-56. Note also the drastic power which commissions may exercise to abrogate contracts with patrons. See *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937); cf. *Hiite v. Cincinnati I. & W.R.R.*, 284 Ill. 297, 119 N.E. 904 (1918).

Labor relations lie largely within the sphere of management discretion. Thus management may bargain with unions over wage increases, inaugurate safety programs, and the like.<sup>53</sup> Commissions, however, consider wage increases in the rate-making process<sup>54</sup> and from time to time exercise their authority to control employee compensation. Thus the Michigan commission disallowed the expense of a discount on merchandise sold by an electric utility's appliance department as a means of compensating employees.<sup>55</sup>

Even stockholder relations are not free from commission control. The Missouri commission, for example, expressed the opinion that the management of an electric utility should furnish its stockholders blank proxies for the annual meeting, which the shareholders might return to management or others as they saw fit.<sup>56</sup> Donations to charity also fall under the scrutiny of regulatory authorities which, from time to time, disallow such expenses.<sup>57</sup>

Management usually enjoys considerable discretion with respect to sales and promotional methods. Thus efforts are made to attract industry to the territory through the employment of personnel furnishing territorial information and data of interest to prospective industries,<sup>58</sup> and engineers may even be detailed to work with schools in home economics courses.<sup>59</sup> Commissions nevertheless scrutinize such

<sup>53</sup> See 1953 AMERICAN GAS & ELEC. CO. ANN. REP. 17; 1953 KANSAS CITY POWER & LIGHT CO. ANN. REP. 15; 1953 PUBLIC SERV. ELEC. & GAS CO. ANN. REP. 14, 15.

<sup>54</sup> See Central Me. Power Co., 29 P.U.R.3d 113, 127 (Me. Pub. Util. Comm'n 1959), *modified*, 156 Me. 295, 163 A.2d 762 (1960); Consumers Power Co., 29 P.U.R.3d 133, 138-39 (Mich. Pub. Serv. Comm'n 1959); Missouri Power & Light Co., 21 P.U.R.3d 404, 410 (Mo. Pub. Serv. Comm'n 1957).

<sup>55</sup> Consumers Power Co., *supra* note 54, at 136. The appliance department of an electric utility is usually unregulated. Where the utility elects to compensate its employees partly by granting a discount on the sale of appliances, the fact that the appliance department is unregulated would not seem to require disallowance of such a method of compensation. As to salaries paid to executives, see TROXEL, *op. cit. supra* note 52 at 241.

<sup>56</sup> Union Elec. Co., 29 P.U.R.3d 254, 266 (Mo. Pub. Serv. Comm'n 1959). In the same case, however, the Missouri commission refused to force the utility to issue preemptive rights to shareholders in order to alleviate the need for attracting additional capital. It said that utilization of such rights fell within the discretion of management. *Ibid.* Under the Public Utility Holding Company Act, 49 Stat. 838 (1935), 15 U.S.C. § 79j (1958), the SEC has exercised control over the composition of boards of directors. POWER AND POLICY 321-25.

<sup>57</sup> See Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 64, 25 N.E.2d 482, 498 (1940), *appeal dismissed*, 309 U.S. 634 (1940); Central Me. Power Co. v. Public Utils. Comm'n, 153 Me. 228, 233, 136 A.2d 726, 731 (1957); Consumers Power Co., 29 P.U.R.3d 133, 136 (Mich. Pub. Util. Comm'n 1959). Compare Public Serv. Co. v. State, 102 N.H. 150, 160-61, 153 A.2d 801, 808-09 (1959), *affirming*, 27 P.U.R.3d 113, 125 (N.H. Pub. Serv. Comm'n 1959); Vrtjak v. Illinois Bell Tel. Co., 32 P.U.R.3d 385 (Ill. Commerce Comm'n).

<sup>58</sup> 1953 AMERICAN GAS & ELEC. CO. ANN. REP. 11, 17; 1953 DUQUESNE LIGHT CO. ANN. REP. 4; 1953 INDIANAPOLIS POWER & LIGHT CO. ANN. REP. 14-15; WELCH, PREPARING FOR THE PUBLIC UTILITY RATE CASE 227 (1954).

<sup>59</sup> 1953 KANSAS CITY POWER & LIGHT CO. ANN. REP. 15.

expenditures<sup>60</sup> and from time to time disallow promotional expenses on one ground or another.<sup>61</sup>

### C. Rates.

Antitrust statutes reflect a belief that monopolies and restraints of trade enhance prices.<sup>62</sup> Accordingly, they seek to insure that pricing results from the free play of market forces. By contrast, the fixing of rates is a central feature of the control of electric utilities, and to that end ample authority is vested in the regulatory commissions. The regulatory process, of course, reaches rules and regulations as well as the dollar amounts charged by the utility.<sup>63</sup> Statutes customarily require utilities to file tariffs with the commission which bind both utility and patron until they are changed according to prescribed procedures. The utility must initiate the rate-making process by filing the tariff,<sup>64</sup> but the commission may be obliged to set rates if a tariff is set aside under its statutory authority.<sup>65</sup> Moreover, it is apparent that utility management is generally conscious of administrative power to reject filed rates and deliberately scales rates down to levels that it believes are acceptable to the regulatory bodies.<sup>66</sup>

A striking feature of rate regulation is the ability of commissions to abrogate contracts between public utilities and their patrons. The procedures for altering contractual rates differ somewhat from one jurisdiction to another, but there is no doubt of the power of administrative agencies to change prices arrived at by negotiation between the electric utility and its patron, at least when their effect is to shift

<sup>60</sup> Southern Cal. Edison Co., 21 P.U.R.3d 15, 27 (Cal. Pub. Util. Comm'n 1957); Union Elec. Co., 29 P.U.R.3d 254, 266 (Mo. Pub. Serv. Comm'n 1959).

<sup>61</sup> Central Me. Power Co. v. Maine Pub. Utils. Comm'n, 153 Me. 228, 243-46, 136 A.2d 726, 736-37 (1957); cf. Consumers Power Co., 29 P.U.R.3d 133, 138 (Mich. Pub. Serv. Comm'n 1959); Uniform Sys. of Accounts for Elec. Utils., 21 P.U.R.3d 412, 413 (Wis. Pub. Serv. Comm'n 1957). The latter two decisions concerned the propriety of including as an expense advertisements against public ownership of electric power facilities.

<sup>62</sup> THORELLI, THE FEDERAL ANTITRUST POLICY—ORIGINATION OF AN AMERICAN TRADITION 54-163 (1955).

<sup>63</sup> E.g., Federal Power Act §§ 19, 20, 201, 205, 41 Stat. 1063 (1920), as amended, 49 Stat. 838 (1935), 16 U.S.C. §§ 812, 813, 824, 824d (1958); Illinois Public Utility Act, ILL. ANN. STAT. ch. 111½, §§ 11, 30, 32, 33, 35, 36, 37, 41 (Smith-Hurd 1954); POWER AND POLICY 54, 69.

<sup>64</sup> Pennsylvania Water Co. v. Consolidated Gas Co., 184 F.2d 552, 567 (4th Cir.), cert. denied, 340 U.S. 906 (1950); Streator Aqueduct Co. v. Smith, 295 Fed. 385, 388 (S.D. Ill. 1923); Lowden v. Illinois Commerce Comm'n, 376 Ill. 225, 231, 33 N.E.2d 430, 434 (1941).

<sup>65</sup> Compare Illinois Public Utility Act, ILL. ANN. STAT. ch. 111½, § 41 (Smith-Hurd 1954), with Central Illinois Pub. Serv. Co. v. Illinois Commerce Comm'n, 5 Ill. 2d 195, 206-07, 125 N.E.2d 269, 275 (1955). It is interesting to note that competitive bidding requirements are frequently dispensed with when a regulated public utility is the only possible supplier of energy. Murphy v. Paull, 192 Wis. 93, 96, 212 N.W. 402, 403 (1927).

<sup>66</sup> TROXEL, *op. cit. supra* note 52, at 557-59.

burdens to other customers.<sup>67</sup> In all instances the filed tariff must prevail regardless of contractual obligations.<sup>68</sup>

In order to assure that rate regulation will result in control of utility profits, legislation has authorized commissions to regulate accounting practices of utilities,<sup>69</sup> sometimes in great detail,<sup>70</sup> and it is common for the commissions to prescribe in detail the methods of depreciation which may be used by utilities and taken into account in determining revenue needs.<sup>71</sup>

The effects of rate regulation are not wholly clear. Rates and costs of unregulated utilities are not necessarily higher than those of regulated ones.<sup>72</sup> Despite the contentions of advocates of the "original cost," "prudent cost," and "replacement cost" theories of rate base determination,<sup>73</sup> it appears that most commissions today fix rates on the attraction of capital theory, which allows rates that will give an investment return approximately equal to the cost of money, thereby

<sup>67</sup> *City of Lamar v. Town of Wiley*, 80 Colo. 18, 24, 248 Pac. 1009, 1011 (1926); *Jefferson Bldg. Corp. v. Central Ill. Light Co.*, 350 Ill. 237, 240-41, 183 N.E. 19, 21 (1932); *Commonwealth ex rel. Page Milling Co. v. Shenandoah River & Power Corp.*, 135 Va. 47, 72-73, 115 S.E. 695, 702-03 (1923); *Central Me. Power Co.*, 8 P.U.R.3d 61, 63 (Me. Pub. Util. Comm'n 1955), *modified*, 156 Me. 295, 163 A.2d 762 (1960); *cf. Sierra Pac. Power Co. v. FPC*, 223 F.2d 605, 607 (D.C. Cir. 1955), *aff'd*, 350 U.S. 348, 355 (1956); *Birmingham Elec. Co. v. Alabama Pub. Serv. Comm'n*, 233 Ala. 675, 678, 173 So. 19, 20 (1937); *Central Ill. Pub. Serv. Co. v. Illinois Commerce Comm'n*, 5 Ill. 2d 195, 125 N.E.2d 269 (1955); *Schiller Piano Co. v. Illinois No. Util. Co.*, 288 Ill. 580, 587, 123 N.E. 631, 633-34 (1919). See also *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911).

<sup>68</sup> *E.g.*, *United States v. Oklahoma Gas & Elec. Co.*, 297 Fed. 575, 578 (8th Cir. 1924); *Halifax Paper Co. v. Roanoke Rapids Sanitary Dist.*, 232 N.C. 421, 428, 61 S.E.2d 378, 384 (1950); *Messapona Sand & Gravel Corp. v. Virginia Elec. & Power Co.*, 166 Va. 405, 413, 186 S.E. 3, 7 (1936).

<sup>69</sup> *E.g.*, ILL. ANN. STAT. ch. 111½, § 11 (Smith-Hurd 1954); MONT. REV. CODES ANN. § 70-107 (1947); PA. STAT. ANN. tit. 66, § 1211 (1959).

<sup>70</sup> *Accounting Procedures*, 21 P.U.R.3d 414 (Ind. Pub. Serv. Comm'n 1957); *Consumers Power Co.*, 30 P.U.R.3d 251, 257-58 (Mich. Pub. Serv. Comm'n 1959); *POWER AND POLICY 54*, 174-75; *TROXEL, op. cit. supra* note 52, at 77-78, 115-37; see *McDONALD, op. cit. supra* note 38, at 322.

<sup>71</sup> *POWER AND POLICY 54*. A current controversy is whether a utility company which takes advantage of INT. REV. CODE of 1954, §§ 167 (depreciation) and 168 (amortization of emergency facilities) may "normalize" federal income taxes on its books so as to fix its rates at a level which permits it to retain the benefits of these sections. See *Southern Cal. Edison Co.*, 21 P.U.R.3d 15, 21 (Cal. Pub. Util. Comm'n 1957); *Niagara Mohawk Power Corp.*, 28 P.U.R.3d 171, 193 (N.Y. Pub. Serv. Comm'n 1959); *Union Elec. Co.*, 29 P.U.R.3d 177, 189-90 (Ill. Commerce Comm'n 1959); *Swiren, Accelerated Depreciation Tax Benefits in Utility Rate Making*, 28 U. CHI. L. REV. 629 (1961).

<sup>72</sup> *POWER AND POLICY 208-09, 223-24, 227, 238, 241*.

<sup>73</sup> For a discussion of the theories of rate base determination, see *City of Chicago v. Illinois Commerce Comm'n*, 4 Ill. 2d 554, 558-60, 123 N.E.2d 500, 502-03 (1954); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 414 Ill. 275, 290, 111 N.E.2d 329, 337 (1953); *CLEMENS, ECONOMICS AND PUBLIC UTILITIES*, 140-61 (1950); *POWER AND POLICY 123-25*. Competition somewhat affects rate levels under the "value of service" principle. *State Pub. Util. Comm'n ex rel. City of Springfield v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 218, 125 N.E. 891, 895 (1920). It does not appear, however, that commissions attempt to simulate competitive pricing in the regulation of utility earnings. *TROXEL, op. cit. supra* note 52, at 214.

attracting enough capital for needed plant improvements and no more.<sup>74</sup> In some areas incentive plans have been established to induce rate reductions on the promise that a part of whatever additional profits may result from higher demand schedules will accrue to stockholders.<sup>75</sup> Nevertheless, the role of competition in determining rates is generally negligible.<sup>76</sup> And although it is sometimes asserted that government-owned facilities provide a "yardstick" for rates,<sup>77</sup> the value of this measure is offset by such factors of difference as tax exemptions, and is certainly dubious in discontinuous territories where costs almost invariably differ.<sup>78</sup>

#### D. Discrimination

In the free sector of the economy the Robinson-Patman Act<sup>79</sup> contains a vigorous if somewhat blundering prohibition of discriminatory practices. By its terms the legislation is applicable to the sale of commodities rather than to the rendering of services and hence does not control the relationship between an electric utility and its patrons. Stringent legislation on the subject of discrimination, however, has long been a prominent feature of public utility regulation.<sup>80</sup> At the same time, distributors of electricity are permitted to classify their services and to charge different prices, provided the classifications

<sup>74</sup> See *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 414 Ill. 275, 286, 287, 111 N.E.2d 329, 335, 336 (1953); *State Pub. Util. Comm'n ex rel. City of Springfield v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 217, 218, 125 N.E. 891, 895, 896 (1920); *Potomac Elec. Power Co.*, 28 P.U.R.3d 206, 213 (D.C. Pub. Util. Comm'n 1959); *Central Me. Power Co.*, 29 P.U.R.3d 113, 131-32 (Me. Comm'n 1959); *Montana-Dakota Util. Co.*, 28 P.U.R.3d 355, 364 (Mont. Pub. Serv. Comm'n 1959); *McDONALD, op. cit. supra* note 38, at 120; *NICHOLS, RULING PRINCIPLES OF UTILITIES REGULATION* 61-62 (1955); *Brozen, Welfare Theory, Technological Change and Public Utility Investment*, 27 LAND ECON. 123, 125 (1951). Under the "cost of capital" theory questions may arise as to fairness between old and new stockholders. An original stockholder may have paid \$100 per share. Changes in interest rates and other factors may compel later sales of stock at \$80. Is it proper to let the shareholders participate equally in dividends? The same question does not necessarily arise in unregulated fields where expansion is voluntary.

<sup>75</sup> Scharff, *An Incentive Plan of Rate Adjustment*, 16 J. LAND & P.U. ECON. 475 (1940).

<sup>76</sup> See POWER AND POLICY 115, 218, 219.

<sup>77</sup> See Joint Comm. on the Investigation of the Tennessee Valley Authority, *Report*, S. Doc. No. 56, 76th Cong., 1st Sess. 185-98 (1939). *But see id.* at 285-90 (minority views).

<sup>78</sup> See *Georgia Power & Light Co. v. Georgia Pub. Serv. Comm'n*, 8 F. Supp. 603 (N.D. Ga. 1934); *Southern Berkshire Power & Elec. Co.*, 28 P.U.R.3d 296, 301 (Mass. Dep't Pub. Util. 1959). *But cf. Jourolmon, Social Performance of Public Utilities: Effects of Monopoly and Competition*, 17 TENN. L. REV. 308, 313 (1942).

<sup>79</sup> 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

<sup>80</sup> See *Minneapolis, St. P. & S. Ste. M. Ry. v. Menasha Wooden Ware Co.*, 159 Wis. 130, 136, 150 N.W. 411, 412 (1914), *aff'd per curiam*, 245 U.S. 633 (1917); *ILL. ANN. STAT.* ch. 111½, §§ 37-39 (Smith-Hurd 1954), as amended, *ILL. ANN. STAT.* § 39 (Smith-Hurd Supp. 1960). The burden of proof, however, is on the patron to show that the rate is discriminatory against him. *City of St. Charles v. Illinois Commerce Comm'n*, 21 Ill. 2d 259, 172 N.E.2d 353 (1961).

are reasonable.<sup>81</sup> As in the case of the railroads, adherence to filed tariffs is relied upon to prevent discrimination; contracts inconsistent with the filed tariffs are broadly condemned.<sup>82</sup>

Electric utilities are prevented from favoring one patron at the expense of another; commissions vigorously stamp out personal discrimination of that kind.<sup>83</sup> Indeed, it has been common in the electric field to separate rates into a demand charge and an energy charge in order to make sure that each patron pays no more than his share of the cost.<sup>84</sup> At the same time, the existence of competition frequently causes rates to differ widely among classes of customers. Thus industrial patrons often enjoy preferential rates because they are most likely to be able to generate their own electricity.<sup>85</sup> Time and distance are also factors in customer classification. A patron located near the generating plant may well pay a lower rate than a rural patron many miles away.<sup>86</sup> Nevertheless, billing complexities which would result from infinite gradations have led commissions to establish zones within which rates are uniform, even though patrons on the fringes of the zones may enjoy some advantages over those situated nearer the center.<sup>87</sup> Again, a patron who needs service only during "off-

<sup>81</sup> *E.g.*, ILL. REV. STAT. ch. 111½, § 32 (Smith-Hurd 1954).

<sup>82</sup> *Jefferson Bldg. Corp. v. Central Ill. Light Co.*, 350 Ill. 237, 183 N.E. 19 (1932); *In re Ransom's Estate*, 219 Iowa 284, 288, 258 N.W. 78, 80 (1934); *Springfield Gas & Elec. Co.*, 1920A P.U.R. 446, 475-76 (Ill. Pub. Util. Comm'n 1920).

<sup>83</sup> *State ex rel. Utilities Comm'n v. Mead Corp.*, 238 N.C. 451, 462, 78 S.E.2d 290, 298 (1953); *F. & R. Lazarus & Co. v. Public Util. Comm'n*, 162 Ohio St. 223, 122 N.E.2d 783 (1954); *cf. Postal Tel.-Cable Co. v. Associated Press*, 228 N.Y. 370, 127 N.E. 256 (1920); *Kousal v. Texas Power & Light Co.*, 142 Tex. 407, 179 S.W.2d 283 (1944); *Walnut Creek v. Pacific Gas & Elec. Co.*, 29 P.U.R.3d 81, 87 (Cal. Pub. Util. Comm'n 1959); *Potomac Elec. Power Co.*, 28 P.U.R.3d 206, 224 (D.C. Comm'n 1959); *Southern Berkshire Power & Elec. Co.*, 28 P.U.R.3d 296, 301-02 (Mass. Dep't Pub. Utils. 1959).

<sup>84</sup> *See Antioch Milling Co. v. Pub. Serv. Co.*, 4 Ill. 2d 200, 206-08, 123 N.E.2d 302, 306 (1954); *South Chicago Coal & Dock Co. v. Illinois Commerce Comm'n*, 365 Ill. 218, 219-21, 6 N.E.2d 152, 153 (1936); *New York Edison Co.*, 16 P.U.R. (n.s.) 120, 131-34 (N.Y. Pub. Serv. Comm'n 1936); *TROXEL, op. cit. supra* note 52, at 598-610 (1947); *WELCH, op. cit. supra* note 58, at 292-94 (1954).

<sup>85</sup> *See Boston Edison Co.*, 98 P.U.R. (n.s.) 427, 452-53 (Mass. Dep't Pub. Util. 1953); *POWER AND POLICY* 131, 216-20, 245; *cf. Tampa Elec. Co.*, 30 P.U.R.3d 75 (Fla. R.R. & Pub. Util. Comm'n 1959). *See generally CLEMENS, ECONOMICS AND PUBLIC UTILITIES* 247-73 (1950).

<sup>86</sup> *See Southern Cal. Edison Co.*, 21 P.U.R.3d 15, 34-37 (Cal. Pub. Util. Comm'n 1957); *Potomac Elec. Power Co.*, 28 P.U.R.3d 206, 223 (D.C. Pub. Util. Comm'n 1959); *W. I. Bohannon*, 8 P.U.R. (n.s.) 173, 177-78 (Mont. Pub. Serv. Comm'n 1934); *Cross Plains Elec. Co.*, 88 P.U.R. (n.s.) 65 (Wis. Pub. Serv. Comm'n 1951); *Kennedy, Territorial Aspects of Electric Rate Making by the Public Utilities Commission of California*, 26 LAND ECON. 325 (1950).

<sup>87</sup> *See Southern Cal. Edison Co.*, *supra* note 86, at 34-37; *Grant-Pacific Rock Co.*, 63 P.U.R. (n.s.) 484 (Cal. R.R. Comm'n 1946); *Kennedy, supra* note 86, at 325, 327, 331. *But see Montana-Dakota Util. Co.*, 28 P.U.R.3d 335, 359, 365-66 (Mont. Pub. Serv. Comm'n 1959); *Village of Black Earth*, 31 P.U.R.3d 402 (Wis. Pub. Serv. Comm'n 1959). A similar problem in boundary determination occurs when one patron occupies two or more nearby premises. *See, e.g., Sheets v. Pennsylvania Pub. Util. Comm'n*, 171 Pa. Super. 151, 154, 90 A.2d 633, 635 (1952); *Atlas-United Co.*, 31 P.U.R.3d 1 (Ill. Commerce Comm'n 1959); *Consolidated Edison Co.*, 28 P.U.R.3d, 243, 287 (N.Y. Pub. Serv. Comm'n 1959).

peak" hours or seasons may receive a lower rate than one who insists on service when facilities are fully utilized. Often off-peak rates are established between a ceiling set by competition and a floor based on the requirement that the rates contribute something over the incremental cost of the service.<sup>88</sup> Here competition is a disruptive factor, but the apparent discrimination against regular customers is usually not deemed unlawful.<sup>89</sup>

Electric energy may be furnished more cheaply in large quantities than in small. Accordingly, it is common to provide that energy rates shall be built in "blocks" or have a "ladder" structure. Such rates are designed to encourage additional consumption of energy.<sup>90</sup> Promotional rates of other types have also been tried by electric utilities. Thus when a new appliance becomes available—hot water heaters, for example—a utility may attempt to offer energy at lower rates for operating such devices. Commissions, however, are not well disposed toward this type of promotion, believing that it often results in unjustified discrimination.<sup>91</sup>

An electric utility is sometimes permitted to lower its rates in areas where, for one reason or another, competition prevails, such as at the borderlines of districts occupied by other utilities. If one or the other utility enjoys lower costs and its rates are not geographically graduated, the higher cost rival may be compelled to reduce its rates at junction points unless a dividing line can be drawn between the two areas.<sup>92</sup> Even when competition indicates that rates must be reduced, some commissions are reluctant to do so, particularly when one com-

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<sup>88</sup> See *Produce Terminal Corp. v. Illinois Commerce Comm'n ex rel. Peoples Gas, Light & Coke Co.*, 414 Ill. 582, 592-94, 112 N.E.2d 141, 145-46 (1953); *Illinois Coal Operators' Ass'n*, 7 P.U.R. (n.s.) 403, 415 (Ill. Commerce Comm'n 1934); *cf. Fleming v. Illinois Commerce Comm'n*, 388 Ill. 138, 150-54, 57 N.E.2d 384, 391-93 (1944).

<sup>89</sup> *But cf. DAVIDSON, PRICE DISCRIMINATION IN SELLING GAS AND ELECTRICITY* 216-18 (1955).

<sup>90</sup> *City of St. Charles v. Illinois Commerce Comm'n*, 21 Ill. 2d 259, 172 N.E.2d 353 (1961); *Southern Cal. Edison Co.*, 21 P.U.R.3d 15, 38 (Cal. Pub. Util. Comm'n 1957); *POWER AND POLICY* 54; *CLEMENS, op. cit. supra* note 85, at 247; *Cutler, The Elasticity of the Residential Demand for Electricity*, 17 J. LAND & P.U. ECON. 242, 245 (1941).

<sup>91</sup> *New York State Elec. & Gas Corp.*, 6 P.U.R. (n.s.) 113, 117, 119 (N.Y. Pub. Serv. Comm'n 1934); *accord*, *Mississippi River Power Co.*, 1 Ill. Commerce Comm'n Rep. 34 (1921); *TROXEL, op. cit. supra* note 52, at 541, 544. Compare *Idaho Power Co.*, 1924E P.U.R. 399, 403 (Ore. Pub. Serv. Comm'n 1924). Under § 2 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 13 (1958), amending 38 Stat. 731 (1914), such promotion has likewise been discouraged. See *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 923-24 (5th Cir.), *modified*, 190 F.2d 73 (5th Cir.), *petition for cert. dismissed*, 342 U.S. 875 (1951).

<sup>92</sup> *Wedron Silica Co. v. Illinois Commerce Comm'n*, 387 Ill. 581, 585-86, 57 N.E.2d 349, 351 (1944); *Pacific Gas & Elec. Co.*, 22 P.U.R.3d 209, 211-12 (Cal. Pub. Util. Comm'n 1958); *BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION* 294 (1942); *POWER AND POLICY* 217.



pany intentionally undercuts the prices of the other.<sup>93</sup> Here again it will be observed that competition, to the extent it appears, is a disruptive force destroying the integrity of rate schedules. To the extent that it reduces rates in borderline areas, it must cause comparable increases elsewhere and hence discrimination among patrons.

### III. FINANCE

The financing of electric utilities is a subject of detailed administrative intervention. Although many commissions seem to feel that control over rates and services is more important than scrutiny of security issuance and capitalization,<sup>94</sup> at least thirty-two states provide extensive powers for regulatory commissions to control the issuance of stocks and bonds by electric companies,<sup>95</sup> apparently on the premise that utility rates are directly affected by these activities. Thus the Massachusetts department, which recently considered the financing of a joint subsidiary designed to generate power from an atomic reactor, approved the issuance of stock by the generating company in addition to the customary financing of construction by bank borrowings at short-term rates. It nevertheless required periodic reports of expenditures throughout the construction period for checking by the departmental staff. Furthermore, it passed on the rate of interest on bonds and notes issued by the subsidiary to finance the construction of its plant.<sup>96</sup> As a matter of routine many states require competitive bidding on all security issues rather than private placement.

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<sup>93</sup> *Incorporated Town of Mapleton v. Iowa Pub. Serv. Co.*, 209 Iowa 400, 406-07, 223 N.W. 476, 479 (1929); *State ex rel. Spillman v. Interstate Power Co.*, 118 Neb. 756, 226 N.W. 427 (1929); *Tampa Elec. Co.*, 30 P.U.R.3d 75 (Fla. R.R. & Pub. Util. Comm'n, *modified*, 30 P.U.R.3d 286 (Fla. R.R. & Pub. Util. Comm'n 1959); *Kentucky-Tennessee Light & Power Co.*, 41 P.U.R. (n.s.) 65, 74 (Tenn. R.R. & Pub. Util. Comm'n 1941); *Department of Pub. Serv. v. Puget Sound Power & Light Co.*, 20 P.U.R. (n.s.) 456, 466 (Wash. Dep't of Pub. Serv. 1937). The leading case on the subject under § 2 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 13 (1958), amending 38 Stat. 731 (1914), is *Standard Oil Co. v. FPC*, 340 U.S. 231 (1951).

<sup>94</sup> POWER AND POLICY 256. In Illinois a utility may borrow on one-year notes without commission approval, subject to certain limitations. ILL. ANN. STAT. ch. 111½, § 21 (Smith-Hurd 1954). The tone of public utility annual reports suggests that considerable discretion is left in management with respect to short-term bank loans and even the overall scheme of financing expansion. See, e.g., 1953 ARIZONA PUB. SERV. CO. ANN. REP. 8.

<sup>95</sup> POWER AND POLICY 252-53; see, e.g., ILL. ANN. STAT. ch. 111½, §§ 20, 21, 31 (Smith-Hurd 1954). The Federal Power Act has a similar provision, Federal Power Act § 203, 49 Stat. 849 (1935), 16 U.S.C. § 824b (1958). Wisconsin seems to be one of the most active states in the control of security issuance. McDONALD, *LET THERE BE LIGHT* 119-20 (1957). See generally TROXEL, *op. cit. supra* note 52, at 78, 162; Gray, *Regulation of Securities Issues of Public Utilities by the New York Public Service Commission*, 22 *FORDHAM L. REV.* 77 (1953). Doubts have been expressed as to the effectiveness of such control. POWER AND POLICY 275.

<sup>96</sup> *Yankee Atomic Elec. Co.*, 27 P.U.R.3d 308, 314-18 (Mass. Dep't Pub. Util. 1959).

Other legislation reflects fears that, if left unchecked, utilities might tend to declare unwarranted dividends which would impair capital and weaken their ability to render service to patrons. Accordingly, commissions are sometimes empowered to control dividend payments.<sup>97</sup>

Operating budgets are also scrutinized by some regulatory authorities,<sup>98</sup> and it is common to control the amount of working capital through disallowance in rate-making procedures.<sup>99</sup> Indeed, it has become fashionable to disallow all utility expense for the maintenance of working capital, on the theory that the business can be operated from day to day by using tax accruals.<sup>100</sup> Whatever the merits of such rulings, they surely go far in dictating financial methods.

Capital improvements are normally permitted by public utility regulatory commissions. Recently the New Hampshire commission wrote an understanding opinion allowing the inclusion of a reserve plant in the rate base of an electric utility. The commission explained the indivisibility of the plant and said that it would be necessary for the utility to anticipate future demand and operate under conditions of excess capacity until that demand fully materialized.<sup>101</sup> Similarly, commissions have authorized electric utilities to expend sums in the cooperative development of atomic power plants.<sup>102</sup> On the other hand, the Maine commission slashed some \$2,239,000—representing investment in hydroelectric plants which the commission said had not proved to have been prudent—from an electric utility's rate base.<sup>103</sup> In other words, the commission was retroactively directing the utility to generate energy from coal, oil, or gas, rather than from water power.

#### IV. CONCLUSIONS

From the foregoing description, it is apparent that here and there vestiges of discretion remain in the management of an electric utility.

<sup>97</sup> See, e.g., ILL. ANN. STAT. ch. 111½, § 27(a) (Smith-Hurd 1954); POWER AND POLICY 254, 267, 309; TROXEL, *op. cit. supra* note 52, at 162. Reorganization of public utility companies is frequently controlled, as is the lending of funds to affiliated interests. POWER AND POLICY 254.

<sup>98</sup> BARNES, *op. cit. supra* note 92, at 216-17.

<sup>99</sup> Central Me. Power Co., 29 P.U.R.3d 113, 125 (Me. Pub. Util. Comm'n 1959); Narragansett Elec. Co., 21 P.U.R.3d 113, 131 (R.I. Dep't Business Regulation 1957).

<sup>100</sup> Missouri Power & Light Co., 21 P.U.R.3d 404, 409 (Mo. Pub. Serv. Comm'n 1957); Montana-Dakota Util. Co., 28 P.U.R.3d 355, 361 (Mont. Pub. Serv. Comm'n 1959).

<sup>101</sup> Public Serv. Co., 27 P.U.R.3d 113, 123-24 (N.H. Pub. Serv. Comm'n 1959).

<sup>102</sup> E.g., Consumers Power Co., 30 P.U.R.3d 251, 256 (Mich. Pub. Serv. Comm'n 1959). The commission deferred, however, a decision with respect to the accounting for some aspects of a nuclear power plant and directed the utility to return to the commission for further instructions in the light of its experience. *Id.* at 258.

<sup>103</sup> Central Me. Power Co., 29 P.U.R.3d 113, 120-22 (Me. Pub. Util. Comm'n 1959). *Contra*, State Pub. Util. Comm'n *ex rel.* City of Springfield v. Springfield Gas & Elec. Co., 291 Ill. 209, 231-32, 125 N.E. 891, 900 (1920). State commissions frequently require competitive bidding for the construction of new facilities. POWER AND POLICY 254-55.

Regulatory commissions do not control each and every decision reached by the directors of such an enterprise. Particularly as to "internal" affairs some latitude is allowed to management.

However, even in the "internal" aspects of electric utility management, commissions exercise considerable authority. So far as the utility's relationship to its patrons is concerned, the board of directors is almost wholly powerless. As the Illinois court has said: "The commission is not just an umpire. It has been given active functions of policy making and supervision."<sup>104</sup>

A few activities of electric utilities may remain subject to anti-trust legislation. While it would be absurd to subject the relationship between utility and patron to, for example, the detailed and somewhat incoherent proscriptions of the Robinson-Patman Act, to the extent that the electric utility company is a purchaser of various commodities—such as coal—it is not apparent why that act and other antitrust statutes<sup>105</sup> should not be applied. The test here should be the ability and desirability of commission control supplanting the forces of the market place. Where the relationship in question is that of the utility to its customers, employees, and competitors, the commissions can and should supplant antitrust; where it is that of the utility to its suppliers, regulation may often provide neither an effective nor desirable substitute for antitrust enforcement.

Overall, however, it is abundantly apparent that there is scanty room for application of the antitrust laws to electric utilities. At the very least regulatory commissions should enjoy primary jurisdiction to pass upon the legality of rates and services.<sup>106</sup> And for reasons well stated by several courts there is no reason to entertain antitrust actions against electric distributing and generating companies. Thus it is not surprising that many state court decisions have specifically found that the legislature, in subjecting electric utilities to comprehensive regulation, intended to exempt these businesses from the operations of state

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<sup>104</sup> *Antioch Milling Co. v. Public Serv. Co.*, 4 Ill. 2d 200, 210, 123 N.E.2d 302, 307 (1954). However, state commissioners appointed for political reasons sometimes lack the ability or independence to accomplish sound regulation. TROXEL, *ECONOMICS OF PUBLIC UTILITIES* 88 (1947).

<sup>105</sup> *Cf. Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 334-35 (1961).

<sup>106</sup> See *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 422-24 (1952); *Natural Gas Pipeline Co. of America v. FPC*, 141 F.2d 27, 30 (7th Cir. 1944). It has been said that the FPC has no primary jurisdiction to entertain a complaint with respect to restraint of trade. *Pennsylvania Water Co. v. Consolidated Gas Co.*, 184 F.2d 552, 562 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950). If competitive practices become too vigorous the courts may be called upon to intervene. *Citizen's Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 Fed. 553, 558 (C.C.D. Ala. 1909). It would seem preferable for commissions to control such matters in the normal course of regulation.

antitrust legislation.<sup>107</sup> Even the new chairman of the FTC has taken the position that electric utilities are not within the ambit of antitrust.<sup>108</sup> It follows that contrary decisions, and particularly the amazing opinions of several courts in the *Penn Water* litigation,<sup>109</sup> should be overruled or expressly overturned by statutory enactment.<sup>110</sup>

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<sup>107</sup> See *Weld v. Board of Gas & Elec. Light Comm'rs*, 197 Mass. 556, 558, 84 N.E. 101, 102-03 (1908); *State ex rel. Thompson v. Nashville Ry. & Light Co.*, 151 Tenn. 77, 91-92, 268 S.W. 120, 124 (1925). See also *Pennsylvania Water & Power Co. v. FPC*, 193 F.2d 230, 234 (D.C. Cir. 1951) (dictum), *aff'd*, 343 U.S. 414 (1952); *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 244, 141 Pac. 1083, 1089 (1914) (dictum).

<sup>108</sup> During reported hearings conducted under the auspices of Senator Kefauver's committee, the following colloquy took place:

Mr. [Professor] Richard Ruggles: You put me in a difficult position, because certainly in the industries that are regulated such as electric power, public utilities, railroad transportation, I do not think competition is a good idea.

Mr. Dixon [counsel to committee]: By all means they must be excluded.

*Hearings Pursuant to S. 57 before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 162 (1957). Mr. Dixon has subsequently become chairman of the FTC.

<sup>109</sup> For the history of the *Penn Water* litigation, see note 51 *supra*.

<sup>110</sup> Even the most thoroughgoing regulation appears not to have destroyed the political appeal of diatribes against "monopoly" in the electric power industry. *E.g.*, *Hearings Before the Subcommittee on the Study of Current Antitrust Problems of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 3, pt. 1, at 373 (1955) (remarks of Senator Morse).