

Fall 1993

FERC-SEC Overlapping Jurisdiction and the Ohio Power Litigation: A Loss for Ratepayers

Gary D. Levenson

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Energy and Utilities Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Levenson, Gary D. (1993) "FERC-SEC Overlapping Jurisdiction and the Ohio Power Litigation: A Loss for Ratepayers," *Indiana Law Journal*: Vol. 68 : Iss. 4 , Article 16.

Available at: <http://www.repository.law.indiana.edu/ilj/vol68/iss4/16>

This Comment is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

FERC-SEC Overlapping Jurisdiction and the *Ohio Power* Litigation: A Loss for Ratepayers

GARY D. LEVENSON*

INTRODUCTION

When the D.C. Circuit Court of Appeals decided *Ohio Power Co. v. FERC*¹ (*Ohio Power II*) in February of 1992, it sparked considerable controversy among public utilities, the customers they serve, and regulators. The court decided, on remand from the Supreme Court, that the Securities and Exchange Commission (SEC) had exclusive jurisdiction—to the disadvantage of the Federal Energy Regulatory Commission (FERC)—to regulate interaffiliate sales of goods under the Public Utility Holding Company Act. The conflict in the *Ohio Power* litigation presages what could prove to be significant developments in the area of competing jurisdiction between FERC and the SEC.²

This Comment sets forth the competing claims of the *Ohio Power* litigants in a trio of cases before the D.C. Circuit Court of Appeals (on appeal and on remand) and the Supreme Court, and it analyzes the reasoning given by these courts for their decisions. In so doing, this Comment criticizes the judicial approaches taken and calls on courts to decide future cases of this type with a closer eye toward the underlying policies inherent in Congress's legislative scheme. Specifically, this legislative scheme commands that more attention be paid to the interests of ratepayers. The courts' refusals to recognize these interests display a sterile approach to the law and a distorted reading of precedents in utility regulation.

Part I of this Comment reviews the steps leading up to the Supreme Court's decision in the case, including regulatory activity by the SEC and FERC as well as the first *Ohio Power* case decided by the D.C. Circuit. Part II focuses on how the Supreme Court decided the case, looking at both the majority and the concurring opinions. It also briefly sets forth the D.C. Circuit's holding and reasoning on remand in the second *Ohio Power* decision. In criticism of the court's

* J.D. Candidate, 1993, Indiana University School of Law—Bloomington; M.P.P., 1990, University of Michigan; B.A., 1986, University of Chicago. I would like to thank the members of the *Indiana Law Journal*, especially Caroline Earle and Meredith Mann, for their editing. My thanks also go to Professors Donald Gjerdingen and Ken Dau-Schmidt for their helpful suggestions on earlier drafts of this Comment.

1. 954 F.2d 779 (D.C. Cir.), *cert. denied*, 113 S. Ct. 483 (1992).

2. At the time this writing went to press, the Supreme Court had denied FERC's petition for certiorari. *Id.* The Court, therefore, left the problems raised in this Comment to be decided in a different case.

reasoning, this Comment discusses an alternative rationale upon which the court could have relied.

Part III explores *Ohio Power II's* holdings and critically appraises the decision by relying on case precedents, legislative history, and the intended regulatory functions of FERC and the SEC. In so doing, this Comment argues that the SEC does not have the tools to protect consumers effectively. As a result, the D.C. Circuit Court's grant of exclusive jurisdiction to the SEC will encourage corporate tactics that will subvert the interests of ratepayers to the advantage of utility security holders. Furthermore, Part III explains that the traditional economic philosophy behind utility regulation justifies protecting utility ratepayers' interests over those of utility investors.

Part IV argues that the ultimate effect of the *Ohio Power* litigation will be confusion in the lower courts due to the ambiguous nature of the Supreme Court's holding. Moreover, it asserts that the Supreme Court will likely revisit the issue. This Comment explains that the Supreme Court's ambiguous holding arguably allows the approaches of the D.C. Circuit to affect other areas of overlap between FERC and the SEC to the detriment of consumers. This Comment also assesses prospects for future litigation and legislative reform. This Comment concludes by questioning the competency of the Supreme Court to decide highly specialized and technical areas of law, such as those present in complex regulatory areas, and suggests a serious inquiry be undertaken to determine whether a national court of appeals for such issues should be established.

I. BACKGROUND: *OHIO POWER I* AND PRECEDING REGULATORY ACTIVITY

In *Ohio Power Co. v. FERC*³ (*Ohio Power I*), the D.C. Circuit Court of Appeals overturned a FERC order calling for the Ohio Power Company (Ohio Power or OPCO) to pay refunds to its customers because it had paid too much for coal purchased from its subsidiary, Southern Ohio Coal Co. (SOCCO).⁴ Both companies are affiliates within the American Electric Power Company, Inc., one of nine holding companies registered under the Public Utility Holding Company Act (Holding Company Act or PUHCA), and regulated as such by the SEC.⁵

3. 880 F.2d 1400 (D.C. Cir. 1989), *rev'd and remanded sub nom.* *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990). This Comment refers to the first Ohio Power case, decided in 1989, as "*Ohio Power I*" and to the second Ohio Power case, decided in 1992 on remand from the Supreme Court, as "*Ohio Power II*." See *supra* note 1 and accompanying text.

4. *Ohio Power Co.*, 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,098, at 61,275 (Apr. 30, 1987).

5. *Mums, Consumer Lawyers Fear Court Ruling Shifts Rate Authority to SEC*, ELECTRIC UTIL. WK., Feb. 10, 1992, at 11 [hereinafter *Ruling Shifts Rate Authority*].

Intervening on the side of FERC were several municipalities in Ohio and a group of industrial customers.⁶

FERC originally acted in response to Ohio Power's application to increase its rates to its wholesale customers in 1982. The Federal Power Act⁷ (FPA) instructs FERC to rule on such applications by employing sections 205 and 206 of the FPA, which mandate that wholesale electric rates be "just and reasonable."⁸ However, the SEC had already issued orders governing the transactions between OPCO and SOCCO. Because OPCO is owned by a public utility holding company, the SEC has jurisdiction over OPCO's transactions under PUHCA.⁹ Section 13(b) of PUHCA makes transactions between "subsidiary compan[ies] of any registered [public utility] holding company" unlawful unless approved by the SEC at terms found to be "in the public interest or for the protection of investors or consumers."¹⁰ Thus, SEC and FERC jurisdiction overlapped.

Because OPCO insisted that the SEC had jurisdiction, FERC's conflicting order forced the D.C. Circuit Court to decide which agency had correctly interpreted the overlapping directives of the FPA and the Holding Company Act. The court decided in the SEC's favor and overturned the FERC order. Before discussing the court's treatment of this case, the discussion below provides an overview of the regulatory actions taken by the SEC and FERC.

A. The SEC's Regulatory Action

The seeds of the *Ohio Power* conflict were planted in 1971 when the SEC approved the first of four transactions relating to coal sales between SOCCO and OPCO. OPCO had entered into a capitalization relationship with its affiliate, SOCCO, in order to secure a reliable source of high-quality coal for the entire American Electric Power (AEP) system. This move came in response to the price and supply upheaval that rocked the coal markets in the late 1960s and early 1970s.¹¹ The SEC's action also anticipated the effect of the Clean Air Act Amendments of 1970 on the availability of lower sulfur coal.¹²

6. The municipalities included fifteen villages and cities, collectively known as the Municipal Wholesale Electric Customers of Ohio Power Company. The industrial customers included LCP Chemicals & Plastics, Inc., Mobay Corporation, Olin Corporation, and PPG Industries, Inc. These "customer intervenors" purchase electric power from Wheeling Power Company, which purchases all its power from OPCO.

7. FPA §§ 201-206, 16 U.S.C. §§ 824-824k (1988).

8. FPA §§ 205, 206(a), 16 U.S.C. §§ 824d(a), 824e(a).

9. PUHCA §§ 1-33, 15 U.S.C. §§ 79a to 79z-6 (1988).

10. PUHCA § 13(b), 15 U.S.C. § 79m(b).

11. Ohio Power Company's Certificate as to Parties, Rulings, and Related Cases at 6, *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779 (D.C. Cir.) (No. 88-1293), cert. denied, 113 S. Ct. 483 (1992).

12. *Id.*

In its 1971 order, the SEC determined that OPCO could obtain coal from SOCCO at a price "based on an amount equal to the actual cost" of coal production, including a reasonable rate of return on OPCO's capital investment.¹³ Similarly, in 1978 the SEC authorized OPCO to purchase coal so long as the price "will not exceed the cost thereof to the seller."¹⁴ Two more SEC orders dealing with various transactions between OPCO and SOCCO followed in 1979 and 1980, the last of which also included the provision that sales of coal to AEP system companies will "not exceed the cost thereof to the seller."¹⁵

B. FERC Responds

Under the SEC orders, the OPCO-SOCCO purchases allowed Ohio Power to pass its coal costs entirely to its wholesale customers. Under FERC, utilities cannot pass through to customers any portion of their coal costs that do not satisfy FERC's "comparable market test."¹⁶ Thus, when OPCO filed with FERC for an increase in its wholesale rates in 1982, the agency, acting under its mandate from the FPA to protect ratepayers from excessive charges, sought to prevent this cost "pass-through." FERC determined that Ohio Power had paid in excess of the market price for coal from 1980 through 1986, including fifty percent more in 1980 and ninety-four percent more in 1981,¹⁷ and had included these excess costs in its rates to its customers. If FERC had applied the comparable market test, it would have forced OPCO to sell power reflecting a lower market price for coal, even though the SEC required Ohio Power to pay its affiliate the higher at-cost price.

C. The D.C. Circuit's Resolution of the Dilemma

In response to FERC's order, the D.C. Circuit Court was asked to resolve two issues. First, did section 318 of the FPA,¹⁸ which governs overlaps in jurisdiction between the SEC and other agencies, divest FERC of jurisdiction? Second, did the FERC order violate the doctrine against illegal cost trapping?

13. Ohio Power Co., Holding Company Act Release [hereinafter HCA Release] No. 17,383 (Dec. 2, 1971).

14. *In re* Ohio Power Co., 14 S.E.C. Docket 928, 929 (Apr. 24, 1978).

15. *In re* Southern Ohio Coal Co., 19 S.E.C. Docket 1309 (Apr. 25, 1980).

16. Public Serv. Co. of New Mexico, 17 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,123, at 61,245-46 (May 6, 1981), *aff'd sub nom.* Public Serv. Co. of New Mexico v. FERC, 832 F.2d 1201 (10th Cir. 1987).

17. Ohio Power Co., 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,098, at 61,291 n.87 (Apr. 30, 1987).

18. 16 U.S.C. § 825q (1988).

1. Did Section 318 Divest FERC of Jurisdiction?

Section 318 of the FPA provides that, in the absence of an SEC-granted exemption, the requirements of PUHCA govern when a company is subject both to (1) a requirement of the SEC-administered PUHCA with respect to an enumerated list of transactions and (2) a requirement of the FERC-administered FPA "with respect to the same subject matter."¹⁹ Judge Sentelle's opinion for the D.C. Circuit Court of Appeals explained that the FPA divested FERC of jurisdiction because the SEC and FERC sought to regulate the "same subject matter"²⁰ in conflicting ways,²¹ thus triggering the SEC's exclusive jurisdiction. Even though the Supreme Court later threw out the appellate court's basis for resolving the jurisdictional issue,²² the analysis in *Ohio Power I* provides the groundwork for the competing views in this litigation.

Under section 318, the court of appeals also needed to determine whether the respective requirements of FERC and the SEC were *in conflict*. If there was no conflict between FERC and SEC requirements, there might not be any reason for FERC to yield to the SEC. FERC, however, was unsuccessful in arguing that no conflict existed between FERC and the SEC and that, therefore, section 318 was not triggered.²³ At issue was whether section 13(b) of PUHCA mandated "at cost" pricing or merely permitted it. If it only permitted it, FERC's regulation to the contrary created no dispute. On the other hand, if the SEC could authorize prices

19. 16 U.S.C. § 825q. A fuller quotation of the statute is as follows:

Conflict of jurisdiction

[if] with respect to the issue, sale, or guaranty of a security or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person subject to a requirement of [PUHCA] and to a requirement of [the FPA], the [PUHCA] requirement shall apply, and such person shall not be subject to the [FPA] requirement with respect to the same subject matter

Id. (emphasis added).

20. *Ohio Power Co. v. FERC (Ohio Power I)*, 880 F.2d 1400, 1405-06 (D.C. Cir. 1989), *rev'd and remanded sub nom. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990).

21. *Id.* at 1408.

22. The Supreme Court ruled that § 318 of the FPA did not apply *substantively* to the issues at stake. *Arcadia*, 498 U.S. at 77-85 (ruling that regulation of the recoverability or reasonableness of coal charges in Ohio Power's wholesale rates was outside the scope of the enumerated list of items in § 318, *supra* note 19, that would trigger the provision). The Supreme Court's view is explained fully at *infra* notes 61-65 and accompanying text. The Court's decision not to rely on § 318 is questionable in itself because both sides assumed that the proper construction of § 318 would decide which agency would have jurisdiction. Thus, the Court decided an issue not raised by the litigants, which arguably runs counter to the rules of Supreme Court practice. See *infra* notes 143-44 and accompanying text.

23. See *Ohio Power I*, 880 F.2d at 1408 ("[FERC's argument] proceeds from a premise that the [grant of authority to the SEC under] § 318 applies only when there is a present conflict between SEC and FERC prescriptions.").

no other way, FERC's directives had no authority. This issue would prove important later in *Ohio Power II*.

OPCO argued that section 13(b) mandates at-cost pricing for transactions between public utility holding companies and their affiliates.²⁴ Section 13(b) states in pertinent part that:

[I]t shall be unlawful for any subsidiary company of any registered holding company to enter into [any service, construction, or sales contract with] any associate company thereof except in accordance with [SEC rules and regulations] necessary or appropriate in the public interest or for the protection of investors or consumers and to insure [the efficient and economic performance of such contracts] for the benefit of such associate companies *at cost*, fairly and equitably allocated among such companies.²⁵

The court found the "at cost" language controlling. Yet the SEC's orders and regulations (known as "Rules") indicate that the SEC ignores section 13(b) and does not interpret this "at cost" language literally, but instead construes it to establish only a price maximum. Therefore, the SEC orders do not foreclose the possibility that FERC *can* override the "at cost" mandate in section 13(b).

As FERC argued in its 1987 order, "it is not clear that the SEC *requires* Ohio Power to purchase coal from its subsidiary at cost"²⁶ because the SEC's orders regarding OPCO-SOCCO transactions appeared to lay down a less-than-ironclad rule. For instance, the SEC orders state that charges for coal "will be based on . . . actual cost"²⁷ and "will not exceed the cost thereof to the seller."²⁸ This language does not appear to mandate a cost-based price where a market price would be lower; rather it permits a price "up to a cost-based price."²⁹ Thus, the SEC orders impose a cost ceiling, but not a cost floor. Moreover, FERC cited the SEC's Rule 92, which provides that "the price for seller-produced goods between associated companies may not exceed 'the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere.'"³⁰ Rule 92 thus implies that the SEC *may require* market pricing if the market price is lower than cost.

FERC further argued that none of the SEC's orders regarding the OPCO-SOCCO transactions cite section 13(b), or indicate that the SEC was "particularly mindful"³¹ of the "at cost" language of the statute. For instance, none of the

24. *Id.* at 1411 (Mikva, J., concurring).

25. PUHCA § 13(b), 15 U.S.C. § 79m(b) (emphasis added).

26. Ohio Power Co., 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,098, at 61,276 (Apr. 30, 1987) (emphasis added).

27. HCA Release (Dec. 2, 1971), *supra* note 13.

28. *Id.*

29. Ohio Power Co., 39 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,276.

30. *Ohio Power I*, 880 F.2d at 1408 (quoting 17 C.F.R. § 250.92(b) (1992)).

31. *Id.* at 1408.

orders mentions the kind of purchase agreement between SOCCO and OPCO, nor describes any element of costs other than the cost of capital.³² Nonetheless, the court felt that section 318 of the FPA should determine the outcome. According to this view, the SEC's order controlled since section 318 "in fact bars FERC jurisdiction whenever a person is 'subject to a requirement[]' of PUHCA."³³ Since OPCO was subject to section 13(b)'s requirements, FERC was divested of jurisdiction. It was irrelevant if the SEC regulated the coal transactions without careful attention to its own statutory and regulatory mandates. The court noted that "[w]hether the SEC acquits itself well or ill is not [the court's] present concern."³⁴

Thus, the court of appeals based its view of SEC-precedence on the ground that section 318 of the FPA controls. But if section 318 does not apply, as the Supreme Court later held,³⁵ Ohio Power would have to demonstrate other, independent reasons for the SEC to win. Perhaps the particular regulatory responsibilities of the SEC justify its exclusive jurisdiction. On the other hand, sound public policy might dictate that the regulatory responsibilities of FERC outweigh those of the SEC. In any case, from at least an academic point of view, the stage was set for an examination of the merits of the two agencies' regulatory approaches.

2. Did FERC Violate the Cost-Trapping Doctrine?

The second question before the court was whether the FERC order "trapped costs" in violation of the doctrine that one agency cannot reform an agreement that has already been regulated by another agency.³⁶ In the landmark case of *Nantahala Power & Light Co. v. Thornburg*,³⁷ a state utility commission made a different allocation between related companies of a fixed quantity of low-cost power than had FERC at the wholesale level. Under the conflicting regulations, the utility had to "pretend that it [was] paying less for the power it receive[d] , under agreements not subject to [the state's] jurisdiction, than [was] in fact the case."³⁸ In other words, the retail-ratesetting state utility commission forced the utility to sell an allocation of power containing a larger share of low-cost power than FERC had approved for the utility's wholesale rates. Thus, the state's order prevented the utility from recovering the full costs of acquiring power under the

32. *Id.*

33. *Id.* (quoting 16 U.S.C. § 825q (1988)).

34. *Id.* at 1409.

35. *See supra* note 22.

36. "Trapped costs occur when two governmental agencies tell the same person to do two different things." *Ruling Shifts Rate Authority*, *supra* note 5, at 11 (quoting Scott Hempling, attorney for Environmental Action).

37. 476 U.S. 953 (1986).

38. *Nantahala Power*, 476 U.S. at 971, *quoted in Ohio Power I*, 880 F.2d at 1409.

FERC-approved scheme. A portion of the costs incurred by the utility in procuring its power was therefore "trapped."³⁹ The Supreme Court would not let this stand and held that the FERC-set rate was binding.⁴⁰

Though dressed in the clothing of a separate doctrine, the "trapped costs" issue, stripped to its essentials, once again illustrates the jurisdictional conflict between the two agencies' regulatory approaches. As FERC argued in *Ohio Power II*,⁴¹ for the "trapped costs" argument even to apply in the first place, the agencies in question must be regulating the same subject matter, and in conflicting ways.⁴² To illustrate the conflict, OPCO argued in its discussion of cost trapping in *Ohio Power II* that "[t]he SEC cannot fulfill [its] congressional mandate if FERC may with impunity ignore the SEC's implementation of Congress' directive."⁴³ Consistent with its view that the regulatory directives of FERC and the SEC conflicted, the *Ohio Power I* panel also found conflict in the context of cost trapping.

According to the panel, cost trapping had occurred because the situation was analogous to those in *Nantahala Power & Light Co. v. Thornburg*⁴⁴ and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.⁴⁵ Both cases involved unsuccessful attempts by state utility commissions to disregard—in violation of FERC mandates—the rate that wholesale sellers of electric power could receive. The panel found FERC's relationship with the SEC in the instant case analogous to the state regulators' relationship to FERC in *Nantahala Power* and *Mississippi Power*. Just as FERC's rates preempted the states' regulations and foreclosed cost trapping, the SEC preempted FERC. The court found that its analysis of the cost-trapping doctrine "buttressed" its decision,⁴⁶ which was otherwise based solely on its statutory interpretation of the FPA and PUHCA.

39. *Id.* at 971.

40. *Id.* at 971-72.

41. This Comment utilizes the *Ohio Power II* opinion to explain the trapped costs issue because it was more squarely addressed in that opinion than in *Ohio Power I*.

42. Brief for Respondent Federal Energy Regulatory Commission at 20-27, *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779 (D.C. Cir.) (No. 88-1293), *cert. denied*, 113 S. Ct. 483 (1992). One can detect the same underlying arguments by FERC on the trapped costs issue in *Ohio Power I*. See *Ohio Power I*, 880 F.2d at 1409.

43. Reply Brief for Petitioner's Ohio Power Company on Remand at 17, *Ohio Power II* (No. 88-1293).

44. 476 U.S. 953 (1986).

45. 487 U.S. 354 (1988).

46. *Ohio Power I*, 880 F.2d at 1409.

D. Judge Mikva's Concurrence: A Contrary Statutory Interpretation

In *Ohio Power I*, Judge Mikva concurred in the judgment of his colleagues, but did not join in the court's reasoning. In stark contrast to the majority, he decided that the orders of the two agencies *did not* conflict. He still found that FERC could not prevail, however, because its order violated one of its own regulations, thus barring the agency from imposing its market-rate test to the SOCCO-OPCO transactions. This reasoning became crucial on remand because it provided an alternative ground for granting exclusive jurisdiction to the SEC, regardless of whether the FERC and the SEC regulatory actions really did conflict or even whether the FERC order impermissibly trapped costs. Judge Mikva's construction of the two agencies' orders represents a fundamentally different approach to statutory interpretation.

Judge Mikva interpreted section 318 to divest FERC of jurisdiction only if a person is subject to *conflicting* requirements of the FPA and the Holding Company Act and the requirements are "with respect to the same subject matter."⁴⁷ For Judge Mikva, any application of section 318 logically required a conflict, "for even if dual jurisdiction existed over the 'same subject matter,' there would be no reason to favor the SEC over FERC if there was no conflict."⁴⁸ Judge Mikva held that the second condition was met, for FERC and the SEC were "clearly regulating the same subject matter, namely, the price of coal between Ohio Power and Southern Ohio."⁴⁹ He did not find that the first condition had been met, however, because in his view the agencies' orders did not conflict.

In reaching this conclusion, Judge Mikva rejected OPCO's view that section 13(b) of PUHCA required a literal interpretation of the phrase "at cost." First, he argued, Congress intended section 13(b) to avoid "*excessive charges*" resulting from a lack of arm's length dealing between public utility holding companies and their subsidiaries.⁵⁰ Second, Judge Mikva found that the SEC interpreted section 13(b), as demonstrated by its own Rule 90, to mean that interaffiliate transactions contracts cannot be for "*more than cost*."⁵¹ Thus, he reasoned that the SEC does

47. *Id.* at 1410-11 (quoting 16 U.S.C. 825q (1988)).

48. *Id.* at 1411.

49. *Id.*

50. *Id.* (emphasis in original) (citing PUHCA § 1(b)(2), 15 U.S.C. § 79a(b)(2) (1988)). For another argument that Congress intended § 13(b) to avoid excessive charges in a similar case, see *North Am. Co. v. SEC*, 327 U.S. 686, 701 & n.11 (1946).

51. *Ohio Power I*, 880 F.2d at 1411 (emphasis in original) (citing 17 C.F.R. § 250.90(a)(2) (1992)). Judge Mikva also cited SEC Rule 92, 17 C.F.R. § 250.92(b), to illustrate that the SEC "even permits a market-price test for the sale of goods between affiliates." *Id.*

not prohibit a market-price test for such transactions. Third, Judge Mikva noted that a review of the SEC's orders regarding the coal transactions showed that they only limited the price of coal to *cost as a ceiling*, not cost as a floor. Ohio Power's view that the orders impose a strict cost-based standard "reads too much into what seems to be merely boilerplate language."⁵² Judge Mikva concluded that because FERC could impose a market-price test without conflicting with the SEC's statutory responsibilities, the two agencies were not at loggerheads.⁵³ Since the agencies were not in conflict, the regulatory target—OPCO—could, by definition, comply with both agencies.

Judge Mikva's approach to the relevant statutes shows no particular solicitude to the underlying policies behind them. He relied mostly on the text of the statutes and regulations involved, though he took note of a Supreme Court case that cites the congressional findings underlying the passage of PUHCA.⁵⁴ *North American Co. v. SEC* supports his view that PUHCA is intended to protect against corporate abuse by encouraging "open competition between public utility holding companies and their subsidiaries."⁵⁵ Judge Mikva found OPCO's view that the SEC should have exclusive jurisdiction grossly misplaced, because reliance on the SEC's approach as opposed to FERC's market-test would run counter to the pro-competitive policies of PUHCA. Thus, Judge Mikva reached his decision at least in part by relying on the legislative history to illuminate his understanding of the legislative purposes of PUHCA.

While Judge Mikva found FERC's order statutorily permissible, he ultimately sided with Ohio Power on the ground that FERC violated section 35.14(a)(7) of its own regulations, which governs fuel price adjustment clauses in file rate schedules. According to Judge Mikva, this regulation barred the agency from imposing its market-price test. It provides:

52. *Ohio Power I*, 880 F.2d at 1412. See *supra* notes 24-31 and accompanying text for a discussion of the SEC's orders.

53. Notably, Judge Mikva made no comment on the cost-trapping rationale put forth by the majority. See *Ohio Power I*, 880 F.2d at 1410-14.

54. *Id.* at 1411 (citing to *North Am. Co.*, 327 U.S. at 701 & n.11).

55. *Id.* at 1411. *North American Co.* was decided only eleven years after the 1935 passage of the Holding Company Act. In a case where a holding company unsuccessfully challenged the Act's authority to require a company to dispose of securities not connected with a primary integrated utility system, PUHCA § 11(b)(1), 15 U.S.C. § 79k(b)(1), the Court relied, *inter alia*, on exhaustive and comprehensive congressional findings referred to in § 1(b) of PUHCA that reported the extensive abuses of holding companies. *North Am. Co.*, 327 U.S. at 701 & n.11 (explaining that unfettered control of securities by holding companies leads to "unreasonable fees"). Thus, Judge Mikva's citation—with a parenthetical explaining Congress's findings—shows some recognition of the regulatory purposes at which PUHCA was directed. *Ohio Power I*, 880 F.2d at 1411.

Where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, *such cost shall be deemed to be reasonable* and includable in the adjustment clause.⁵⁶

The dispute focused on the meaning of the word “deemed” in this context. FERC argued that the language created only a “rebuttable presumption” of reasonableness,⁵⁷ but OPCO argued, and Judge Mikva agreed, that it established a “conclusive presumption.”⁵⁸ This issue, though important to the outcome in *Ohio Power II*, is not, however, relevant to the topic at hand. The process of interpreting one of FERC’s regulations yields no doctrinal guidelines on how to resolve conflicts between FERC and the SEC in general, or with regard to interaffiliate transactions of public utility holding companies in particular. FERC can simply respond to an adverse ruling by changing its regulations, if it so desires.⁵⁹ Because of the relative unimportance of the section 35.14(a)(7) issue, the body of this Comment does not address the courts’ treatment of it.⁶⁰

Following the appellate court’s ruling that FPA section 318 divested FERC of jurisdiction, the municipalities, FERC, and the customer intervenors thereafter appealed to the Supreme Court.

56. *Ohio Power I*, 880 F.2d at 1412 (emphasis in original) (quoting 18 C.F.R. § 35.14 (a)(7) (1986)).

57. *Ohio Power Co.*, 39 Fed. Energy Reg. Comm’n Rep. (CCH) ¶ 61,098, at 61,278-79 (Apr. 30, 1987); Brief for Respondent Federal Energy Regulatory Commission at 31-41, *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 783 (D.C. Cir.), cert. denied, 113 S. Ct. 483 (1992) (No. 88-1293); see also Brief on Remand for Intervenors (1) Municipal Wholesale Electric Customers of Ohio Power Company and (2) Industrial Intervenors at 26-34, *Ohio Power II* (No. 88-1293).

58. *Ohio Power I*, 880 F.2d at 1412; Reply Brief for Petitioner Ohio Power Company on Remand at 26-41, *Ohio Power II* (No. 88-1293).

59. To the extent that rescinding a regulation and promulgating a new one may be ultra vires with respect to the mandate of Congress, a probing inquiry into this matter is beyond the scope of this Comment. For a discussion of this topic, see Marianne K. Smythe, *Judicial Review of Rule Rescissions*, 84 COLUM. L. REV. 1928, 1937-40 (1984).

60. On the other hand, the issues of conflicting regulatory directives and cost trapping go to the heart of the statutory interpretation of both the FPA and the Holding Company Act. In short, they have broad significance for future jurisdictional conflicts that may arise.

Judge Mikva resolved the issue by relying primarily on the fact that most courts construing the word “deemed” when employed in statutory law have found that it established a conclusive presumption. *Ohio Power I*, 880 F.2d at 1413 (citing *H.P. Coffee v. Reconstruction Corp.*, 215 F.2d 818, 822 (Emer. Ct. App. 1954); *Kyzar v. Califano*, 597 F.2d 68, 71 (5th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); *Kohn v. Myers*, 266 F.2d 353, 357 (2d Cir. 1959)); *Dameron v. Brodhead*, 345 U.S. 322, 326-27 (1953). On remand, the D.C. Circuit Court of Appeals endorsed Judge Mikva’s construction of the word “deemed” in holding that § 35.14(a)(7) barred FERC from applying its market-price test, see *infra* notes 75-76 and accompanying text, and also cited *Gaither v. Myers*, 404 F.2d 216, 218 (D.C. Cir. 1968), and *Forrester v. Jerman*, 90 F.2d 412, 413 (D.C. Cir. 1937), as further evidence that “deemed” created a conclusive presumption. *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 783 (D.C. Cir.), cert. denied, 113 S. Ct. 483 (1992).

II. *ARCADIA, OHIO V OHIO POWER CO.*
THE SUPREME COURT'S DISPOSITION OF THE ISSUES

A. *The Opinion of the Court*

In the Supreme Court, the appellants challenged the holding of the court of appeals that section 318 of the FPA divested FERC of jurisdiction. The appellants conceded that the two agencies were regulating the same subject matter, but argued that section 318's rule of SEC precedence takes effect only when the regulatory obligations of the two agencies conflicted, and that no actual conflict occurred in this case.

The Supreme Court construed the statute in a much different way. Writing for a unanimous Court, Justice Scalia reasoned that the language of section 318 did not apply to the settlement of a jurisdictional battle between FERC and the SEC over the acquisition of SOCCO coal by Ohio Power.⁶¹ Justice Scalia arrived at this conclusion by noting that the subject matter regulated by the respective agencies was *different*.⁶² First, FERC's rate requirement was imposed with respect to electric power, which was a different subject matter than the SEC's regulation of OPCO's acquisition of SOCCO.⁶³ Thus, FERC's order was outside the scope of section 318, and the jurisdictional battle would require other methods for resolution.⁶⁴ Second, Justice Scalia observed that *even if* FERC's rate order

61. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990). The Consumer Federation of America, the American Public Power Association, Environmental Action, and the Indiana Municipal Power Agency filed as amici curiae on the Supreme Court level on behalf of FERC, the municipalities, and customer intervenors were The Registered Holding Company Group filed an amicus brief for OPCO.

62. *See id.* at 85.

63. *Id.* Scalia wrote that OPCO's acquisition of SOCCO coal, or its capitalization of SOCCO as an affiliate, might be encompassed under the statutory language of § 318, "acquisition or disposition of any security, capital assets, facilities, or any other subject matter." *Id.*, 16 U.S.C. § 825q. The interpretive rule of *ejusdem generis* (of the same kind, class, or nature), however, prevented the inclusion of electric power as "other subject matter" at the end of a list that includes securities, capital assets, and facilities. *Arcadia*, 498 U.S. at 84-85. The Court cautioned against reading statutory language enumerating a specific list of subjects in an expansive manner that "swallows" or "renders entirely superfluous" the preceding language. *Id.* at 78-79. Furthermore, the legislative history showed no conclusive indication that the phrase "other subject matter" was meant to be a general conflicts provision. *Id.* at 86 n.1 (Stevens, J., concurring).

64. Note the radical difference between this approach and Judge Mikva's holding. Judge Mikva ruled that the two agencies were regulating the *same* subject matter, for example, the "price of coal." Thus, he rejected the formalistic approach (per Scalia) of looking at the "form" of the transactions and instead focused on the "effect." To focus on "form" would require the view that FERC's order regulates "rates" and the SEC order regulates the "price of coal." Judge Mikva recognized that FERC and the SEC were regulating the same thing because FERC's regulation imposed a genuine burden upon Ohio Power in recovering its coal costs. For Judge Mikva, the SEC did not possess the statutory authority to prevent FERC from using its market-test. This result, while not explicitly stated in his concurrence, obtains (setting aside for the moment FERC's violation of § 35.14(a)(7)) because of the policies behind the

qualified under section 318, it was “with respect to a *different* subject matter from (and not, as section 318 requires, ‘with respect to the same subject matter’ as) the acquisition of SOCCO.”⁶⁵ Thus, even using the approach of the D.C. Circuit—for example, deeming FERC’s regulation to fall within section 318—the high Court reached a different conclusion.

The Supreme Court, having disposed of the section 318 analysis, remanded the case to the court of appeals to decide two questions. First, the court of appeals was to determine whether FERC had violated its own regulations, as Judge Mikva had argued. Second, and more controversially, the lower court was to decide whether the “FERC-prescribed rate is not ‘just and reasonable’ because it ‘traps’ costs which the government itself has approved.”⁶⁶

Although the Court repudiated *Ohio Power I* by deciding that FERC and the SEC were not regulating the same subject matter, the Court viewed the cost-trapping issue separately. On its surface, this would appear to be a curiously ambiguous formulation. Apparently, the Court felt that each agency could regulate the utility’s recovery of coal costs differently, without regard to the other, and not violate the conflict of jurisdiction provisions of section 318. Yet, if cost trapping occurred, they could not both regulate, and one agency would have to cede to the other.⁶⁷ As this Comment argues below, this formulation is not good law and will confuse lower courts. This ambiguity in part stems from the Court’s failure to take into account the legislative purposes behind the statutes. Justice Stevens emphasized this in his concurrence. In a more sweeping view, Justice Stevens believed that the FERC and the SEC orders did not collide in this case.

exercise of FERC’s regulatory power. Judge Mikva tacitly endorsed the view that the scheme of federal legislation gives FERC precedence over the SEC in ratemaking matters.

Justice Scalia, on the other hand, viewed the regulation of “rates” as a separate animal from the regulation of the “price of coal.” He thus adhered to a formal reading of the statute by deciding that FERC’s regulatory target was a *different subject matter* than the SEC’s, and therefore the statute did not apply. This is a perfectly reasonable reading of the statute if one believes that FERC has separate responsibilities from the SEC and thereby should not lose this jurisdictional battle to it. Justice Scalia’s approach, however, prevented him from considering the possibility that the statutory scheme gave FERC precedence. He instead concluded that the lower court should decide who wins, without any particular guidance from the high Court. See *infra* notes 65-66 and accompanying text. If not a formalistic approach, Justice Scalia’s aversion to interpreting the underlying policies of statutes at least shows his disdain for “judicial lawmaking” or for inquiring into legislative history. For an in-depth discussion of Justice Scalia’s “text- and rule-based” approach to statutory interpretation—to the exclusion of legislative purpose—see William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1138, 1156, 1160 (1992).

65. *Arcadia*, 498 U.S. at 85.

66. *Id.*

67. The Court specifically declined to express an opinion about whether cost trapping had occurred, or whether § 35.14(a)(7) was violated. See *id.*

*B. Justice Stevens's Concurrence:
A Serious Regard for Legislative Purpose*

In a concurring opinion joined by Justice Marshall, Justice Stevens argued more pointedly that section 318 did not apply. In contrast to the opinion of the Court, his argument ultimately relied on the legislative purposes behind the passage of the relevant statutes. Justice Stevens agreed with the Court that the statutory language rendered the statute inapplicable to the particular jurisdictional conflict up for review. But Justice Stevens went further: he emphatically argued that there was "no risk" of conflict between the two agencies' requirements in this case.⁶⁸ According to Justice Stevens, the SEC orders only limited what portion of its costs Ohio Power could pass through to its customers. Thus, Ohio Power was able to comply with both the SEC and FERC.⁶⁹ Justice Stevens's analysis relied on legislative intent, noting that a contrary reading of section 318 "would create a gap in the regulatory scheme that Congress could not have intended"⁷⁰ in light of the purposes behind the passage of the Holding Company Act.

PUHCA, Stevens noted, empowered the SEC to regulate interaffiliate transactions in order to eliminate potential conflicts of interest. The SEC has expertise in "financial transactions and corporate finance."⁷¹ The FPA, on the other hand, gave FERC the authority to regulate the wholesale interstate sale and distribution of electricity. FERC, appropriately enough, had the "proper technical expertise to regulate energy transmission [one principle goal of which] is to ensure that the rates customers pay are 'just and reasonable.'"⁷² Chiding the court of appeals' view that the SEC took precedence, Stevens declared that PUHCA's purpose is to "supplement [but] not supplant the FPA. Yet, this is the effect that the court of appeals opinion would have in those areas where the two agencies overlap."⁷³

68. Justice Stevens agreed with the majority that the legislative history did not illuminate the meaning of the phrase "other subject matter." *Arcadia*, 498 U.S. at 87 (Stevens, J., concurring); see *supra* note 63.

69. *Arcadia*, 498 U.S. at 87 (Stevens, J., concurring).

70. *Id.*

71. *Id.*

72. *Id.* (citing FPA §§ 205, 206(a), 16 U.S.C. §§ 824d, 824e(a) (1988)); see also *Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973) (delineating—according to Justice Stevens—the differing regulatory goals of the two agencies). *Gulf States* observes that the Public Utility Act of 1935, ch. 687, 49 Stat. 803, had

two primary and related purposes: to curb abusive practices of public utility holding companies by bringing them under effective control [under PUHCA, Tit. I, 15 U.S.C. §§ 79a to 79z-6, whose administration is entrusted to the SEC], and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce [under the FPA, Tit. II, 16 U.S.C. §§ 791a to 828c, whose administration is entrusted to FERC].

Gulf States, 411 U.S. at 758.

73. *Arcadia*, 498 U.S. at 88 (Stevens, J., concurring).

In light of Justice Stevens's observation that the regulatory missions of the two agencies diverge, FERC would prevail in this dispute because the case involved the regulation of rates. Justice Stevens concluded that the court of appeals decision would ultimately allow public utility holding companies to avoid regulatory requirements applying to electric power wholesalers in general merely because of corporate structure. For example, PUHCA requirements would shield utilities owned by holding companies from FERC's "substantial technical regulation."⁷⁴ Thus, if certain aspects of OPCO-SOCCO-like transactions became impervious to FERC regulation, a regulatory gap would emerge. As Justice Stevens interpreted the statutes, Congress intended these utilities to be subject to "both SEC and FERC as much as practical." Justice Stevens, then, drew his conclusions from a clearly defined view of the distinct legislative purposes behind the drafting of the respective statutes.⁷⁵

In light of Justice Stevens's rich reliance on legislative history, the majority opinion gave Ohio Power reason to feel relieved, despite the reversal—and FERC, correspondingly agitated—because the opinion accorded broad latitude to the court of appeals to decide anew the questions of compliance with FERC regulations and cost trapping. FERC and the municipalities could not rejoice at the reversal because, given such broad latitude, the lower court could easily decide in favor of Ohio Power again.

C. Ohio Power II. *FERC—Two-Time Loser*

Called upon by the Supreme Court to decide the two questions of compliance with FERC regulations and cost trapping, the D.C. Circuit found in favor of Ohio Power and the SEC on both issues. The court of appeals found, in the first part of a two-part analysis, that FERC violated section 35.14(a)(7) of its regulations.⁷⁶ According to the panel, this regulation, properly obeyed, precluded FERC from imposing its market-price test.⁷⁷ Second, in a section entitled, "Reconciliation of the Overlapping Regulatory Authorities," the panel found that even though section 318 did not govern the case, there was nonetheless an "unavoidable conflict[]" between the SEC's authority under section 13(b) of PUHCA and FERC's authority

74. *Id.*

75. In contrast to Justice Scalia's reliance on statutory text, Justice Stevens characteristically uses the "common law case by case approach," relying on legislative intent and the historical context of the statute's enactment. For more discussion on this topic, see William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1105-10; Popkin, *supra* note 64, at 1171 (contrasting common-law and textualist approaches).

76. See *supra* note 60 and accompanying text.

77. *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 782-84 (D.C. Cir.), *cert. denied*, 113 S. Ct. 483 (1992).

under sections 205 and 206 of the FPA.⁷⁸ The panel also found that the conflict resulted in impermissible cost trapping, for FERC's order "undeniably affect[ed] the economic relationship between Ohio Power and SOCCO, a relationship approved by, and under the jurisdiction of, the SEC."⁷⁹

The court of appeals erred because it misinterpreted the cost-trapping precedents⁸⁰ and because SEC exclusive regulation is insufficient and contrary to the legislative scheme of Congress.⁸¹ Ultimately, this Comment argues, the decision lacks coherence. One justification for the court's decision exists, however. The court could have used a "process-oriented" approach to deny FERC jurisdiction.⁸² Though unmentioned in the court opinions in this case and discussed only briefly by the litigants,⁸³ there is a good argument that, under a process-oriented model of regulation, FERC's market test should not apply to utilities owned by holding companies.

FERC's market test derived from its 1981 opinion in *Public Service Co. of New Mexico*,⁸⁴ which held that a utility with a captive coal operation had to refund ratepayers if it could have purchased cheaper coal than its own. But since the New Mexico utility was not PUHCA-regulated, and, therefore, not part of a holding company,⁸⁵ it is at least debatable whether FERC's *New Mexico* opinion applied equally to PUHCA-regulated utilities.

Congressional hearings in 1982 on the need to amend or repeal PUHCA revealed that the SEC and FERC were applying different standards in the area of interaffiliate transactions.⁸⁶ Therefore, Congress was aware of the differential treatment. So, the argument goes, if Congress had wanted to change this scenario, it would have done so, especially in view of the purpose behind its 1982 hearings. Because

78. *Id.* at 784. FPA §§ 205-206 mandate that FERC set rates that are "just and reasonable." FPA §§ 205-206, 16 U.S.C. §§ 824d(a) & 824e(a) (1988).

79. *Ohio Power II*, 954 F.2d at 782-84 (citing *Nantahala Power & Light v. Thornburg*, 476 U.S. 953, 971).

80. *See infra* notes 88-102 and accompanying text.

81. *See infra* notes 116-32 and accompanying text.

82. Under the process-oriented approach, an agency's regulatory practice should be adhered to in successive situations if Congress acquiesced to it. Any deviations from the regulatory scheme are illegitimate because if Congress did not approve the deviation, it implicitly endorsed the preexisting regulatory practice.

83. OPCO Brief in Opposition of Cert. Petition at 14, *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (No. 89-1283).

84. 17 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,123, at 61,245-46 (May 6, 1981), *aff'd sub nom.* *Public Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

85. *Public Serv. Co. of N.M.*, 17 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,246.

86. OPCO Brief in Opposition of Cert. Petition at 11 n.8, *Arcadia* (No. 89-1283) (citing *The Public Utility Holding Company Act of 1935: Hearings of the Sub-Comm. on Energy and Commerce*, 97 Cong., 2d Sess. 583 (June 9, 1982)).

Congress did not act to alter this differential treatment, it must have wanted no changes.

Despite the problems with this decision-making rationale,⁸⁷ it is more coherent than the court's rationale. The process-oriented approach offers a more coherent justification for the outcome in *Ohio Power II* because it is rooted in bedrock principles of democracy and a healthy distrust of the regulatory state. It is democratic because it relies on Congress's action (or inaction) as the representatives of the people. If Congress had an opportunity to act but did not, the fullest expression of democracy must be to follow Congress's inaction. "Distrust of the regulatory state" is essentially a restatement of democratic principles. Since government bureaucrats are not elected, adhering to their ever-evolving interpretations of statutes would threaten democracy. Before regulators can be allowed to act, democratic principles require a consensus among elected leaders. This view is coherent, and preferable to the misreading of precedents and legislative history that occurred in *Ohio Power II*. However, while coherent, the process-oriented approach is unsatisfying because it does not articulate which policies the two agencies should pursue. It relies on a mechanical formula rather than policy analysis. The process-oriented approach, therefore, while somewhat more coherent, must also be rejected.

III. OHIO POWER II: A CRITICAL ANALYSIS

Parts I and II of this Comment explained the chronology of events and highlighted the main issues in this litigation, which resulted in the *Ohio Power II* decision. Part III analyzes and critiques both the court of appeals' and the Supreme Court's jurisprudence. Section A asserts that the court of appeals' cost-trapping rationale is inappropriate because it misinterprets the Supreme Court's prior understanding of this doctrine. Section B shows that the court of appeals' preference for exclusive SEC jurisdiction derives from an erroneous view that interaffiliate transactions uniquely deserve cost-based pricing. Section B also argues

87. Congressional inaction does not ordinarily provide insights into legislative intent. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-600 (1981) (drawing conclusions from congressional inaction, but noting that this is rarely possible); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) (rejecting congressional inaction as a basis for ignoring plain meaning and legislative history); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969) (commenting that "unsuccessful attempts at legislation are not the best guides to legislative intent"). It takes an extraordinary claim of legislative acquiescence for a federal agency's construction of an existing statute to be controlling. *See Bob Jones Univ.*, 461 U.S. at 600 (upholding agency's rulings because Congress was "acutely aware" of the issue through repeated failure to pass legislation that would achieve contrary result). No such evidence was proffered by *Ohio Power* regarding the extent of legislative acquiescence. Moreover, there is nothing in FERC's *New Mexico* opinion that indicates an intent to limit the scope of its ruling. The FPA contains no express limitations on FERC's authority to mandate a market test for captive coal purchases, whether the regulatory target is under PUHCA or not.

that the SEC does not have the tools to adequately protect consumers. Section C focuses on the legislative history of the statutes, and demonstrates that exclusive FERC jurisdiction is consistent with Congress's intent that the interests of ratepayers be protected over those of utility investors. In the end, SEC jurisdiction will not provide the sufficient regulatory tools. Section D shows that economic regulation favoring ratepayers over investors is further justified because it is sound economic policy

*A. The Advent of an Equitable Cost-Trapping Doctrine:
A Misplaced Endeavor*

The *Ohio Power II* court's approach to cost trapping resembles the approach used in *Ohio Power I*. This approach warrants scrutiny because the precedents on cost trapping call for a narrow applicability *Nantahala Power & Light Co. v. Thornburg*,⁸⁸ which the court relied upon to illustrate cost trapping, dealt with a state regulatory commission acting in contravention of a FERC mandate. The *Nantahala Power* case held that FERC preempted the state regulation. Thus this holding derives not from a rule preventing a utility from charging a rate higher than that "approved" by a regulatory agency—trapping the utility's costs—but rather from federal preemption of state authority in certain regulatory areas. In other words, FERC's rates preempted the state's under the Supremacy Clause. *Nantahala Power* is best viewed not as a battle between two equivalent regulatory entities, but as "a matter of enforcing the Supremacy Clause" in the state-federal [ratemaking] context."⁸⁹

As the Supreme Court explained in *Nantahala Power*, the trapped-cost principle⁹⁰ arises from the "filed rate" doctrine, which essentially restates the Supremacy Clause in the utility ratemaking context. The filed-rate doctrine holds that "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates."⁹¹

88. 476 U.S. 953 (1986).

89. Brief for Respondent Federal Energy Regulatory Commission at 22, *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 784 (D.C. Cir.) (No. 88-1293) (quoting *Nantahala Power*, 476 U.S. at 963), cert. denied, 113 S. Ct. 483 (1992).

90. The "trapped cost principle" was first articulated by Justice O'Connor in her opinion for the Court in *Nantahala Power*. Brief for Respondent Federal Energy Regulatory Commission at 22, *Ohio Power II*, (No. 88-1293) (citing *Nantahala Power*, 476 U.S. at 970, 972).

91. *Nantahala Power*, 476 U.S. at 962. The filed-rate doctrine has a long pedigree beginning with *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), which upheld the ratemakings of FERC's predecessor, the Federal Power Commission (FPC), against a challenge by a utility in federal court. See also *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (extending filed-rate doctrine to decisions of state courts); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (filed-rate doctrine as applied to actions of Interstate Commerce Commission assisted in the enforcement of the supremacy of federal law).

Likewise, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, the Court observed that the filed-rate doctrine bound the state under the Supremacy Clause to adhere to FERC's mandate.⁹²

Seen in this light, cost trapping is more properly associated with a state-federal tug of war, illustrated by the states' attempts to alter the scheme of regulation established by FERC. Both *Nantahala Power* and *Mississippi Power* can fairly be read as an application of the constitutional principle that a federal statute "occup[ies] [the] field"⁹³ to the exclusion of state law when the pervasiveness of federal regulation indicates that Congress intended the preemption. Both *Nantahala Power* and *Mississippi Power* represent the view that the FPA occupies the field with respect to interstate power rates with certain exceptions;⁹⁴ the Supreme Court's reference to cost trapping in these cases was a superfluous observation.⁹⁵

Beginning with *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), cert. denied, 435 U.S. 972 (1978), state courts began to apply the filed-rate doctrine to decisions of state utility commissions and state courts that concerned matters addressed in FPC (FERC's predecessor) ratemakings for electricity. *Accord* *Eastern Edison Co. v. Department of Pub. Utils.*, 446 N.E.2d 684 (Mass. 1983). *Narragansett* specifically held that state utility commissions are precluded from redetermining supply or fuel costs approved by FERC. The *Nantahala* decision expanded the doctrine when it ruled that neither costs nor "cost allocations" approved by a federal agency "could be relitigated by a state authority." Diane S. Boiler, *Filing Away at the Filed-Rate Doctrine*, PUB. UTIL. FORT., June 1, 1992, at 33.

92. 487 U.S. 354, 371 (1988) (citing *Nantahala Power*, 476 U.S. at 963). *Mississippi Power* expanded the doctrine yet again by ruling that "capacity purchases" as well as fuel purchases could not be reviewed by states if already approved by federal authorities. Boiler, *supra* note 91, at 33.

93. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988) (describing preemption of Natural Gas Act of 1938 over state law); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

94. The *Pike County* exception holds that states can determine that a particular quantity of power procured by a utility is imprudent. *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 737-38 (Pa. Cmmw. Ct. 1983); accord *Nantahala Power*, 476 U.S. at 972 (dicta). For a brief explanation of *Pike County* and other exceptions to the filed-rate doctrine, see Boiler, *supra* note 91, at 33-35. For a more detailed discussion of *Pike County*, see James E. Hickey, Jr., *Mississippi Power & Light Company: A Departure Point for the Extension of the "Bright Line" Between Federal and State Regulatory Jurisdiction over Public Utilities*, 10 J. ENERGY L. & POL'Y 57, 79-82 (1989).

95. Notably, virtually all available scholarly commentary that discusses *Nantahala Power* or *Mississippi Power* describes them in terms of FERC preemption of state regulation or deference to FERC in ratemaking matters, but not in terms of a general notion of impermissibly trapping the costs that a utility previously incurred. See, e.g., S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U.L. REV. 687, 689-90 & n.24 (1991) (noting that *Nantahala Power* illustrates an ever-increasing trend toward more preemption of state action by federal statutes under the Supremacy Clause); Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police Political Institutions?*, 77 GEO. L. J. 2031, 2034 & nn. 23-24 (1989) (referring to *Nantahala Power* and *Mississippi Power* as cases where "state utility rate-making actions [were held] unconstitutional under the Supremacy Clause"); Richard J. Pierce, Jr., *A Proposal to Deregulate the Market for Bulk Power*, 72 VA. L. REV. 1183, 1189 n.45 (1986) (stating that *Nantahala Power* demonstrates that FPA and Supremacy Clause preempted state agency's attempt to prohibit utility from recovering FERC-approved rate); Joseph P. Tomain & Constance D. Burton, *Nuclear Transition: From Three Mile Island to Chernobyl*, 28 WM. & MARY L. REV. 363, 413 n.178 (1987) (arguing that *Nantahala Power* supports

Viewed in this way, the two cases stand for deference to FERC in ratemaking matters, deference that FERC claimed it deserved in the *Ohio Power* case. Moreover, Ohio Power did not cite cost-trapping cases outside the context of a FERC-state regulator conflict.

Given the narrow applicability of *Nantahala Power* and *Mississippi Power*, FERC could plausibly cede jurisdiction to the SEC under an "equitable" notion of cost trapping by analogy.⁹⁶ Ironically, FERC raised this point in its brief, perhaps with the thought that conjuring up a novel theory of an "equitable remedy" would suggest its own absurdity.⁹⁷

A cost-trapping analogy could derive from the view that FERC "affect[ed] the economic relationship"⁹⁸ between OPCO and SOCCO that was previously regulated by another federal agency. Similarly, one could posit that Ohio Power "reasonably reli[ed]" on "a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO."⁹⁹

The analogy fails, however, because FERC's effect on the economic relationship between OPCO and SOCCO was not significant since "[g]overnments do things all the time that affect economic relationships" between entities.¹⁰⁰ Furthermore, no reliance could reasonably be inferred on the part of OPCO to justify SEC preemption on equitable grounds. The "plain language" of the SEC's orders and rules indicated that the SEC was only concerned with a ceiling price, thus negating any reasonable reliance by OPCO on the SEC's orders to guarantee recovery of its

proposition that "under the doctrine of preemption, federal regulation of electricity supersedes state regulation"); Jonathan Galst, Note, "*Phony*" Intent?: An Examination of Regulatory-Preemption Jurisprudence, 67 N.Y.U. L. REV. 108, 134, 136-37 (1992) (noting that *Nantahala Power* and *Mississippi Power* show that investment is tied to FERC-approved interstate agreement); Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 HARV. L. REV. 1306, 1315 n.84 (1990) ("[S]tates may not challenge the reasonableness of FERC's ratesetting or power allocation decisions."); see also Hickey, *supra* note 94, at 76-80 (observing that *Nantahala Power* and *Mississippi Power* show that filed-rate doctrine preempts state action); James E. Norris, *The Shrinking of State Ratemaking Power—Lessons from Grand Gulf*, PUB. UTIL. FORT., Aug. 4, 1988, at 45 (reporting that *Mississippi Power* and *Nantahala Power* decisions hampering state regulatory efforts); cf. *In Re Public Serv. Co. of New Hampshire*, 90 B.R. 575, 583 n.10 (Bankr. D.N.H. 1988) (citing *Mississippi Power* to illustrate that FERC regulation of wholesale rates would preempt a state's attempt to regulate same).

96. Brief for Respondent Federal Energy Regulatory Commission at 20, *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 784 (D.C. Cir.) (No. 88-1293), *cert. denied*, 113 S. Ct. 483 (1992).

97. *Id.* The ironic aspect is that it would seem more natural for OPCO to have argued this point, but it did not do so in either its Brief on Remand or its Reply Brief.

98. *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 784 (D.C. Cir.), *cert. denied*, 113 S. Ct. 483 (1992).

99. Brief for Respondent Federal Energy Regulatory Commission at 20, *Ohio Power II* (No. 88-1293) (quoting *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 85 (1990)).

100. *Ruling Shifts Rate Authority*, *supra* note 5 (quoting Scott Hempling, attorney for Environmental Action).

cost of coal.¹⁰¹ As Justice Stevens observed, Congress could not have intended to immunize such transactions from FERC's scrutiny.¹⁰²

The grant of exclusive SEC jurisdiction cannot be justified, therefore, simply on the grounds of cost trapping. Yet, *Ohio Power II*—without explicit mention—in fact adopted what can only be described as an “equitable” doctrine of cost trapping. This decision misconstrues the specific meaning of cost trapping in *Nantahala Power* and *Mississippi Power* because it sweeps much too broadly. The particular regulatory needs of public utility holding companies must next be examined as a possible justification for exclusive SEC jurisdiction.

B. *Ohio Power II's Comparative Analysis of FERC and SEC Regulation: Is Cost-Based Pricing Necessary in the Interaffiliate Context?*

As shown, the cost-trapping rationale does not explain exclusive SEC jurisdiction, and a better rationale is needed. One alternative would be to focus on whether cost-based pricing is necessary in the context of interaffiliate coal transactions. If it is, this would justify exclusive SEC jurisdiction. This would also show that the issue in *Ohio Power II* was not whether FERC violated the cost-trapping doctrine, but whether the utilities in public utility holding company systems have *particular needs* that should insulate them from FERC regulation generally. In this Section, this Comment examines the cost-based pricing arguments made by the court of appeals, and then argues that cost-based pricing is not justified for these transactions because regulatory rulings should not depend upon the corporate form of the utility. This Section also asserts that the SEC cannot adequately protect consumers of electricity if it has exclusive jurisdiction over these transactions.

On remand, the court of appeals in *Ohio Power II* construed the relevant statutes, orders, and regulations with particular deference toward the cost-based principles arguably embraced by the SEC. Like the *Ohio Power I* court, it held that the specific language of section 13(b) of PUHCA compelled the SEC to price goods “at cost.”¹⁰³ On the other hand, FERC could point to no specific language in the FPA beyond the “general charge to establish ‘just and reasonable’ wholesale

101. Brief for Respondent Federal Energy Regulatory Commission at 20-21, *Ohio Power II* (No. 88-1293) (citing *Ohio Power Co. v. FERC (Ohio Power I)*, 880 F.2d 1400, 1412 (D.C. Cir. 1989) (Mikva, J., concurring), *rev'd and remanded sub nom. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990); *Arcadia*, 498 U.S. at 87 (Stevens, J., concurring)).

102. *Id.* at 27-28 (quoting *Arcadia*, 498 U.S. at 88 (Stevens, J., concurring)).

103. While the SEC has statutory authority under § 13(b) to deviate from the “at cost” standard when a transaction “involve[s] special or unusual circumstances,” PUHCA § 13(b), 15 U.S.C. § 79m(b), the court noted that the SEC did not elect to invoke this authority. *Ohio Power II*, 954 F.2d at 785 n.5.

rates.”¹⁰⁴ The court reasoned that conflicts between specific and general provisions of the same legislation should be resolved in favor of the specific,¹⁰⁵ and therefore concluded that the SEC’s mandate required obeisance.

The court’s view that an irreconcilable conflict between the agencies’ orders persisted was buttressed by its view that the SEC’s regulations were consistent with section 13(b) of PUHCA. This analysis resembled the one made in *Ohio Power I*. For instance, the court found that SEC Rule 90, which prohibits affiliates from selling goods to each other at “more than cost,”¹⁰⁶ and Rule 91, which defines “more than cost” as “not exceed[ing] a fair and equitable allocation of expenses,”¹⁰⁷ required cost-based pricing for interaffiliate transactions. Read literally, of course, these rules plainly do not *require* such pricing. Nevertheless, the panel stressed how the SEC orders “embrace the cost-based principles required” by the SEC rules.¹⁰⁸

The SEC has long recognized that interaffiliate coal operations involve significant capital outlays, and that a “lower-of-cost-or-market interpretation would effectively eliminate affiliate transactions by preventing investors from keeping profits when cost is below market (to offset losses when cost is above market).”¹⁰⁹ As the SEC argued in its amicus statement, many electric utilities in the 1970s began to rely more on coal to meet their fuel needs. Because coal operators reneged on long-term coal supply contracts during the tight market of 1973-1974, utilities like OPCO were forced to enter into “captive coal operations”—that is, the capitalization of affiliates to supply coal to secure a long-term supply.¹¹⁰ The resulting danger of

104. *Ohio Power II*, 954 F.2d at 784.

105. *Id.* at 784-85 (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05, at 105 n.19 (5th ed. 1992)). *But see* 2A SINGER, *supra*, § 46.05, at 103 nn.5, 7 (arguing that courts should construe statutes to “further the intent of the legislature as evidenced by the entire statutory scheme . . . All parts must be construed together without according undue importance to a single or isolated portion”). Moreover, one should note the fundamental flaw in the panel’s argument. The panel apparently relied on the fact that PUHCA and the FPA are both part of a single umbrella statute, the Public Utility Act of 1935, ch. 687, 49 Stat. 803 (1935). Yet, Title I of the statute is PUHCA, and Title II is the FPA, and each agency discharges its responsibilities in identifiably different areas. Moreover, the legislative history shows that Titles I and II resulted from “two bills separately and independently drafted,” which later were consolidated and introduced in Congress as a single bill. Dozier A. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 GEO. WASH. L. REV. 30, 37 (1945). Since a strong argument can be made that the case involves very different pieces of legislation, attributing greater weight to specific language in PUHCA than to general language in the FPA does not make sense.

106. 17 C.F.R. § 250.90(a)(2) (1992).

107. 17 C.F.R. § 250.91(a).

108. *Ohio Power II*, 954 F.2d at 785.

109. *Id.* at 785 n.6 (citing SEC Amicus Curiae Statement on Remand at 4, *Ohio Power II* (No. 88-1293)).

110. SEC Amicus Statement at 3, *Ohio Power II* (No. 88-1293); *see also* Certificate as to Parties, Rulings, and Related Cases for Ohio Power Company at 6-7, *Ohio Power II* (No. 88-1293).

losing a stable and secure supply of coal “would be detrimental to the interests of holding company shareholders by rendering the return on OPCO’s investment in SOCCO uncertain at best.”¹¹¹ Thus, according to the SEC, cost-based principles were necessary within the context of interaffiliate transactions.

However, even if holding companies would face financial difficulty from FERC’s order, it is hard to justify why they would merit special treatment among utilities generally. Public utilities that are not a part of a holding company still face the same supply obstacles. Moreover, the usual FERC rate proceeding, which does not involve the SEC, would “penalize” a regular utility that did not incur costs in a proper manner by forcing its rates to be “just and reasonable.” Thus, under the court’s view, the regulatory review of utilities would depend on whether PUHCA controlled or not.

Allowing OPCO to pass through the entire cost of its coal to its ratepayers would make a “regulatory result depend on corporate form and invite[] utilities to use corporate form as a buffer against regulatory review.”¹¹² Utilities could play hide-and-seek with regulators, shifting to interaffiliate relationships in order to escape inhospitable FERC review, then shift back to producing their own coal if SEC regulation were inhospitable.¹¹³ Such a holding could lead to a major restructuring of the electric utility industry, contrary to the statutory goals of PUHCA to prevent abuses by holding companies. The court’s holding encourages other abuses as well, such as over-capitalization and “gold plating” of plants and equipment.¹¹⁴

But is this parade of horrors realistic? OPCO argued that if it were true, some evidence of these claimed abuses would have appeared in the last fifty years, and none has.¹¹⁵ On the other hand, it is likely that no abuses occurred in the past because it was always anticipated that FERC had the authority to legitimately intervene. In other words, FERC’s perceived regulatory power previously deterred

111. SEC Amicus Statement at 5, *Ohio Power II* (No. 88-1293). *But see* Intervenor’s Response to SEC Statement at 4-5, *Ohio Power II* (No. 88-1293) (arguing that none of the SEC orders on the OPCO-SOCCO transactions relied on this rationale and that an October 1978 statement by SEC staff articulating this rationale deserves no deference because it is a “post hoc rationalization”) (citation omitted). The SEC’s position here curiously displays institutional confusion because the SEC had earlier signed onto FERC’s brief in the *Arcadia* case, which asserted FERC’s jurisdiction over OPCO’s wholesale rates.

112. Amici Brief of American Public Power Association (APPA), Consumer Federation of America and Environmental Action, *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (No. 89-1283), *quoted in APPA, Consumer Groups: Big Import in Ohio Power Case at High Court*, *ELECTRIC UTIL. WK.*, June 11, 1990, at 4.

113. *Id.*

114. *Ruling Shifts Rate Authority*, *supra* note 5 at 11 (remarks by Gregg Ottinger, attorney for municipalities). “Gold-plating” is a slang term used in the utility industry to refer to wasteful spending on overly expensive plants and equipment.

115. OPCO Brief in Opposition of Cert. Petition at 8, *Arcadia* (No. 89-1283).

all abuse. Under this view, the deterrence would evaporate if Ohio Power were to prevail.

Whether exclusive SEC jurisdiction will lead to manipulation of the corporate form may depend on how attentive the SEC can be to ratemaking concerns. The SEC should have to demonstrate as scrupulous attention to ratemaking concerns as FERC does. Arguably, there are serious voids in the SEC's ability to regulate holding company transactions with an eye toward just and reasonable ratemaking. For instance, the SEC lacks the statutory or administrative procedures by which an electric power customer can initiate a complaint.¹¹⁶ Similarly, unlike FERC, the SEC has no authority to order refunds for overcharges if a utility violates the SEC's regulatory requirements.¹¹⁷ Indeed, the SEC recognizes that it "ha[s] no power over [the] dealings [of electric utilities regulated under PUHCA] with their customers, retail or wholesale."¹¹⁸ Thus, the SEC is ill-suited to make decisions that affect ratepayers.

As Justice Stevens noted, the goals and expertise of the two agencies differ widely.¹¹⁹ Early regulatory history demonstrates that FERC and the SEC may be too institutionally separate for one to adequately police the statutory concerns of the other. At the very least, one can discern that there is something not quite right about the SEC regulating a set of transactions that affect ratepayers of electric power without the benefit of FERC's expertise.

C. The Regulatory Goals and the History of FERC and the SEC: A Study in Contrasts

Congress entrusted the administration of PUHCA to the SEC, due to its expertise in financial transactions and corporate finance.¹²⁰ It was an apt choice because PUHCA is directed largely toward financial transactions, acquisition of assets, and

116. Cf. FPA § 206, 16 U.S.C. § 824e(a) (1988).

117. Cf. FPA § 205(3), 16 U.S.C. § 824d(e).

118. Brief for the Federal Energy Regulatory Commission as Respondent Supporting Petitioners and for the Securities and Exchange Commission as Amicus Curiae at 31 n.15, *Arcadia* (No. 89-1283) (quoting *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978); accord *Louisiana Power & Light Co.*, 26 S.E.C. Docket 1422, 1431 (1982); *New England Elec. Sys.*, 24 S.E.C. Docket 298, 308 (1981); *Arkansas Power & Light Co.*, 45 S.E.C. 567, 574 (1974); *Vermont Yankee Nuclear Power Corp.*, 43 S.E.C. 693, 699 (1968)). But see *Ohio Power Co. v. FERC (Ohio Power I)*, 880 F.2d 1400, 1407 (D.C. Cir. 1989) (arguing that *New England Elec. Sys.* is an exemption case under § 13(b), specifically, that the SEC disclaimed jurisdiction in key areas), *rev'd and remanded sub nom. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990).

119. *Arcadia*, 498 U.S. at 87-88 (Stevens, J., concurring).

120. *Id.*

potential conflicts of interest.¹²¹ The impetus for the legislation came from the notorious financial abuses documented in the 1920s by the Federal Trade Commission, which included the “pyramiding” of control of operating public utilities through holding companies.¹²² In contrast, the FPA arose in the wake of the regulatory gap created by *Public Utilities Commission v. Attleboro Steam & Electric Co.*,¹²³ which held that state regulators had no authority to regulate interstate wholesale sales of electricity. The federal government had the power to regulate such sales, but needed an agency to do it.¹²⁴ The Federal Power Commission, FERC’s predecessor, became that agency.¹²⁵ Accordingly, the FPA is directed toward ratemaking issues rather than corporate structure and securities regulation.¹²⁶

It seems far from surprising that a conflict between the aims of the two agencies would arise, since what enriches investors of a utility could work at crosspurposes to the interests of ratepayers. The drafters anticipated conflicts. Thus, PUHCA authorizes the SEC to take regulatory action with respect to holding companies “in the public interest or for the protection of investors or consumers.”¹²⁷

121. See generally *Public Utility Holding Company Act: Hearing on H.R. 5220, H.R. 5465, and H.R. 6134 Before Subcomm. on Energy, Conservation, and Power of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. 553, 579-583 (1982)* (SEC statement).

122. The Federal Trade Commission report and a congressional committee report detailing abuses are expressly referred to in PUHCA § 1(b), 15 U.S.C. § 79a(b) (1988).

123. 273 U.S. 83, 86-90 (1927).

124. S. REP. NO. 621, 74th Cong., 1st Sess. 17 (1935); H.R. REP. NO. 1318, 74th Cong., 1st Sess. 7-8 (1935).

125. See Title II of the Public Utility Act of 1935, ch. 687, 49 Stat. 803, 838 (1935), for designation of the Federal Power Commission (FPC) to administer the Act’s provisions. In 1977, the FPC ceased to exist and its functions were transferred to FERC and the Secretary of Energy. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977); Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (1977).

126. See Francis X. Welch, *Functions of the Federal Power Commission in Relation to the Securities and Exchange Commission*, 14 GEO. WASH. L. REV. 81, 81 (1945) (“[A] cursory glance at the text of both laws, not to mention their legislative and other historical background, leaves little doubt that the [SEC]’s task is mainly to look out for the utility security holder, while the [FPC] is supposed to look out for the utility ratepayer.”); see also *City of Lafayette v. SEC*, 454 F.2d 941 (D.C. Cir. 1971), *aff’d sub nom. Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973). In *Lafayette*, the court of appeals noted that the SEC did not have regulatory authority over the “operations” of a utility, and the SEC therefore “stands in a different posture from the FPC, which has regulatory jurisdiction over operations in view of its authority [over utility rates].” *Lafayette*, 454 F.2d at 955-56. For a brief discussion of *Gulf States*, see *supra* note 72.

127. See, e.g., PUHCA §§ 10(a), 11(b), 13(b), 15(b), 15 U.S.C. §§ 79j, 79k(b), 79m(b), 79o(b) (1988). Though *Arcadia* held it inapplicable to this case, FPA § 318 might convey the impression of a pro-utility investor bias since it gives the SEC precedence over FERC in certain areas of jurisdictional conflict. See *supra* note 19. However, § 318 should not be read to prefer the protection of security

The primary question is whether the “public interest” language in PUHCA is sufficiently consistent with the FPA’s charge to make sure rates do not exceed a “just and reasonable” level. As indicated earlier, PUHCA plainly does not authorize the SEC to regulate as rigorously as FERC.¹²⁸ But OPCO insisted that section 13(b)’s directive “to insure that [contracts between holding company subsidiaries and their associated companies] are performed economically and efficiently” as well as “at cost” represents roughly the same protection for ratepayers as does FERC.¹²⁹

Rejecting the view that overturning FERC’s order would create a “regulatory gap,” OPCO argued that the SEC’s corporate regulatory powers would prevent utilities within holding companies from integrating vertically into non-utility areas without regulatory scrutiny. The SEC’s plenary authority in this area would disfavor a holding company’s expansion into non-utility business if such an action were to “tend[] toward[s] interlocking relations or the concentration of control of public utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers,”¹³⁰ or if the business were not “reasonably incidental, or economically necessary or appropriate to the operations of such integrated public utility system.”¹³¹ While the single mention of “consumers” may give solace to some, it is a hollow reply to those with substantive concerns over insuring the existence of just and reasonable rates. Concern over “interlocking relations,” “concentration of control,” or a business expansion “reasonably necessary or appropriate” to operations indicate traditional corporate regulation. By

holders over the more numerous consumers or ratepayers. As Welch explains, § 318 makes no such choice because it was written in conjunction with PUHCA (as part of the Public Utility Act of 1935), which envisioned that the SEC’s responsibility would recede due to its “liquidating and therefore temporary character as compared with the more permanent and probably expanding scope of the [FPC].” Welch, *supra* note 126, at 84. Under PUHCA § 11, the SEC was purported to be “literally working itself out of a job,” in its duty to break up holding company systems into properties small enough to be confined within a single state and hence part of *intrastate* commerce, no longer within the SEC’s jurisdiction. *Id.* Afterwards, as Welch notes, these smaller utility properties would “come under the control of the [FPC]” if they established connections with other utilities resulting in interstate operations. *Id.* at 86. Seen in this light, Congress intended § 318 to ease the transition of the regulation of utilities to the FPC on a permanent basis. *Id.* at 87. While Welch incorrectly predicted that no serious conflicts would occur between investors under PUHCA and consumers under the FPA, *id.* at 94-95, and perhaps overestimated the contraction of the SEC’s jurisdiction, his point that the FPA intended no bias toward either segment of the public interest remains valid. *See id.* at 95.

128. *See supra* notes 117-18 and accompanying text.

129. PUHCA § 13(b), 15 U.S.C. § 79m(b).

130. PUHCA, § 10(b)(1), 15 U.S.C. § 79j(b)(1).

131. PUHCA § 11(b)(1), 15 U.S.C. § 79k(b)(1), *cited in* Brief of Respondent Ohio Power Company at 20-21, *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (No. 89-1283).

their very language, these concerns are far removed from ratemaking; they are instead directed at maintaining corporate rectitude for the benefit of investors.

FERC can intervene into the SEC's price approval process under SEC Rule 23. Rule 23 requires notice in the Federal Register and an opportunity to comment on the proposed order or regulation.¹³² In light of the foregoing discussion, however, this seems inadequate. The SEC's enforcement mechanisms will not fill the regulatory gap created by the court of appeals in *Ohio Power II*.

D. The Need for Exclusive FERC Jurisdiction: An Economic Analysis

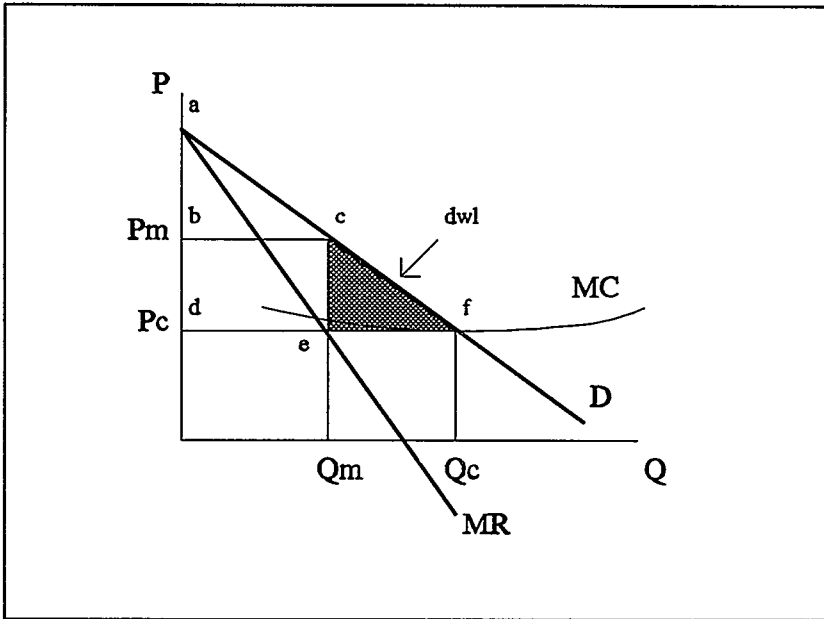
As discussed above, the SEC cannot effectively safeguard the interests of electric utility ratepayers because it is primarily concerned with the interests of shareholders. Only FERC, which is primarily concerned with consumers' interests, can adequately regulate utilities. Under the scheme laid out by the court of appeals in *Ohio Power II*, a gap would persist between utilities regulated by the SEC and utilities regulated by FERC. Section 13(b)'s specific "at cost" language should not carry weight in view of the continued recognition by the courts that FERC is the arbiter of wholesale electric rates. The courts can prevent the monopolistic behavior that SEC regulation would cause only by granting FERC exclusive jurisdiction. Traditional economic theory underlying the regulation of public utilities bears this out.

Due to economies of scale, utilities are natural monopolies. Because of this, strict regulation is needed to prevent the undesirable social costs that arise from monopolistic behavior. If a utility is not regulated, it will maximize its profits by restricting output and increasing price. As it restricts output, price will rise along the demand curve (D). (See Diagram.) The monopolist will seek the "profit-maximizing price" (P_m), which is determined by the price consumers are willing to pay at the quantity (Q_m) where the monopolist's marginal revenue (MR) for each additional unit of output equals marginal cost (MC).¹³³

132. 17 C.F.R. § 250.23 (1992). OPCO argued this point and the *Ohio Power II* panel pointed this out with approval. *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 786 (D.C. Cir.), cert. denied, 113 S. Ct. 483 (1992).

133. HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 16 (1985).

DIAGRAM



Such monopoly pricing results in a transfer of wealth from consumers to producers (rectangle “b-c-e-d”)¹³⁴ and a “deadweight social loss” (triangle “c-e-f”).¹³⁵

To avoid these ill effects, natural monopolies such as utilities must be regulated in the consumers’ interests to keep the price and output of the good at competitive levels (P_c and Q_c , respectively). This results in the most socially efficient outcome as the largest possible quantity of electricity is produced at the lowest possible price.

In reality, monopolists usually cannot reach P , and in the case of Ohio Power, the utility was probably far below it. But if Ohio Power were allowed to pass on the costs of high-priced coal to consumers, it would behave like a monopolist

134. Economists sometimes refer to this transfer of wealth as a “neutral transfer” because by itself it has no efficiency implications. *Id.* at 20. However, consumers are probably not so sanguine about this loss of wealth.

135. This “deadweight loss” is a measure of the transactions that consumers would have made but for the pricing practices of the monopolist. *Id.* at 19-20. HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 422-23 (1987). These consumers might instead purchase substitute goods, but such goods necessarily have less social value. This “inefficient substitution” is the social cost of monopoly. HOVENKAMP, *supra* note 133, at 20.

because it would raise its rates above the competitive level.¹³⁶ Any price above P represents a monopoly profit, and deadweight loss ensues. Of course, this deadweight loss is probably much smaller than triangle "c-e-f," but still not negligible. As argued in Sections B and C above,¹³⁷ the SEC does not pay sufficient attention to the welfare of consumers, and is not adequately equipped to do so. Only FERC can safeguard against monopolistic behavior by utilities such as OPCO. Because of its regulatory mission to advance consumers' interests, FERC can eliminate deadweight loss better than the SEC.

IV. *ARCADIA*: THE SUPREME COURT PROVIDES NO WORKABLE STANDARD

The *Arcadia* Court's approach does not provide a workable standard for lower courts and could upset the pattern of FERC jurisdiction in other areas of FERC-SEC overlap. Section A describes the opinion's ambiguous interpretation of section 318 and how this could create inconsistencies among the various courts of appeals. Section B briefly describes, in a less controversial development, how section 318 will now apply to a narrower range of cases. Section C explores other areas in which FERC and SEC overlapping jurisdiction could produce litigation over the validity of FERC's orders. In merger and acquisition cases involving utilities that are part of public utility holding company systems, recent developments indicate that FERC's jurisdiction might be threatened as a result of the construction of section 318 made in the trio of *Ohio Power* cases. Other areas of overlap are briefly noted, as are the prospects for legislative reform.

A. A Contradictory Message for the Lower Courts

The *Arcadia* opinion presents problems because it does not lend sufficient guidance to the lower courts. It sends contradictory messages and will probably create much mischief.

The Court's conclusion that FERC and the SEC are not regulating the same subject matter is rendered meaningless because it simultaneously permitted the lower court to find that FERC illegally trapped the costs of Ohio Power. The *Arcadia* Court made the unfortunate step of reading the cost-trapping doctrine as articulated in *Nantahala Power* and *Mississippi Power* in a vacuum, or at least it invited lower courts to read it that way. The Supreme Court does not appear

136. In this context, the welfare of utility investors, or stockholders, is the same as the monopolist. This is necessarily the case in any two dimensional analysis that looks at the outcomes of producers and consumers.

137. See *supra* notes 117-33 and accompanying text.

troubled that a finding of cost trapping could upset the traditional deference given to FERC in ratemaking matters. While one could plausibly argue that deference to FERC is somewhat less compelling in the face of another federal statute (in contrast to state regulations), the Court's opinion avoids any attempt to evaluate the competing interests represented by the respective regulatory approaches of FERC and the SEC.¹³⁸ Only Justices Stevens and Marshall recognized the regulatory consequences of FERC jurisdiction on the one hand, and the SEC on the other.¹³⁹

While the D.C. Circuit limited the scope of FERC's regulatory powers, the *Arcadia* opinion still allows lower courts the freedom to find for the agency based on a more faithful reading of the cost-trapping doctrine as expressed in *Nantahala Power* and *Mississippi Power*. Justice Scalia wrote somewhat equivocally that the court of appeals on remand has "available the argument that the FERC-prescribed rate 'traps' costs" and disregards a "governmental assurance, possibly implicit in the SEC approvals."¹⁴⁰ Thus, it is not hard to imagine that other circuit courts will find *Arcadia* a pliable enough standard and will judiciously refrain from adopting the cost-trapping rationale, thus posing a conflict with *Ohio Power II*. Since the Supreme Court did not adequately set a standard, it will probably have to revisit the question.

B. The Limited Applicability of Section 318 of the Federal Power Act

A more concrete command of *Arcadia* is the new, limited applicability of section 318. Because the Court interpreted this section to settle jurisdictional battles in only four specific areas of regulation,¹⁴¹ parties are not free to invoke this section as they once might have been.¹⁴² While the Supreme Court's construction of section 318 may not square with the previous understanding of the section or with its legislative history, *Arcadia* does not appear to have contradicted any previous court decisions on the matter. However, since neither party at any stage even suggested

138. As noted earlier, *supra* note 64, this is a direct consequence of Justice Scalia's textualist approach to statutory interpretation.

139. Not all of the remaining members of that Court were necessarily afflicted with the majority's disability. Justice Souter took no part in the consideration of this case. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 86 (1990).

140. *Id.* at 85 (emphasis added).

141. *Id.* at 79-80; see also *supra* notes 22, 63 and accompanying text.

142. Already, FERC has taken heed of the Supreme Court's construction of § 318. In *City of Auburn v. Indiana Michigan Power Co.* (*In re Indiana & Michigan Municipal Distributors Association*), 59 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,260 (June 3, 1992), FERC rejected the argument that FERC must yield to the SEC under § 318 regarding "accounting conventions in rate treatment." *Id.* at 61,959-60 (relying on a longstanding doctrine announced in *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318, 336 (5th Cir.), *cert. denied*, 385 U.S. 847 (1966)). FERC held that *Arcadia* reinforced the view that § 318 did not grant SEC jurisdiction over this area because it "limited the applicability of [§ 318]." *Id.* at 61,960.

that section 318 did not apply,¹⁴³ the precedential force of the opinion could be questioned on the narrow ground that no valid precedent obtains when the Court decides a point of law based on arguments not raised by the litigants.¹⁴⁴

C. Additional Effects of the Ohio Power & Arcadia Litigation

Besides illuminating the issue over whether exclusive SEC jurisdiction will tend to help or hurt consumers, the *Ohio Power* litigation contributes to the developing understanding of how SEC-FERC relations in general will develop. The *Arcadia* opinion's interpretation of section 318 could affect a variety of cases involving overlapping jurisdiction between FERC and the SEC, most notably in mergers and acquisitions. The *Ohio Power* opinions also contribute to this development.

1. Merger & Acquisition Cases and the *Central Vermont* Doctrine

The *Ohio Power-Arcadia* trio of cases creates nagging doubts about recent FERC orders asserting jurisdiction in mergers and acquisitions involving utilities. The FPA, under section 203, gives FERC jurisdiction over any "public utility" that "dispose[s]" in any manner any of its "facilities."¹⁴⁵ In such cases, FERC must

143. *Arcadia*, 498 U.S. at 86 (Stevens, J., concurring).

144. Justice Scalia's *Arcadia* opinion "never explained or justified what it did." Independent Ins. Agents of Am. v. Clarke, 955 F.2d 731, 742 (D.C. Cir. 1992) (Silberman, J., dissenting) (citing *Arcadia* to support argument that courts improperly create controversies when they inquire into issues not raised by the parties; such inquiry exceeds the courts' "constitutional duty to decide cases and controversies"). As such, the *Arcadia* Court did not mean to establish a precedent on the point. *Id.* Thus, under Judge Silberman's view, courts that decide issues not raised do not mean to establish precedents, and if they are asserted as such, courts should ignore them.

But according to ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 363-68 (6th ed. 1986), this interpretation is not necessarily warranted. Even though Supreme Court Rule 21.1(a) states that the Court will only consider questions raised or fairly included in the petition, this rule is created by the Court and can be waived when other considerations outweigh the "reasonable procedures" embodied by the rule. *Id.* at 364. In most cases cited by the authors, however, the Court explains why it departs from its rule, and there is a fairly well-developed list of exceptions for doing so. Here, of course, the *Arcadia* Court gave no reason for its decision to rely on unraised issues, which could cause some suspicion. But, at bottom, the authors note that when the Court "believes there is sufficient reason to address the point despite its omission the Court may do just that." *Id.* at 368. Thus, there might be no reason to have such a confined view of *Arcadia's* authority as precedent. Moreover, recent authority appears to reinforce this notion. See *Kamen v. Kemper Fin. Servs.*, 111 S. Ct. 1711, 1718 (1991) (relying on *Arcadia* to hold that courts not limited to particular legal theories advanced by parties); see also *McCleskey v. Zant*, 111 S. Ct. 1454, 1460 (1991); *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Batson v. Kentucky*, 476 U.S. 79, 84-85 n.4 (1986), all cited in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting) (protesting Court's refusal to reach issues raised only by amici and also citing *Arcadia*).

145. Section 203(a) provides in pertinent part as follows:

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000, or by

authorize such dispositions. In a recent line of cases beginning with *Central Vermont Public Service Corp.*,¹⁴⁶ FERC broadened its authority under section 203. It determined that a disposition occurs when a public utility transfers the ownership and control of its jurisdictional facilities *via sale of stock*. Prior to *Central Vermont*, FERC viewed section 203 as applicable only to transactions involving sales of real and personal utility property, but not to stock transactions.¹⁴⁷ Thus, FERC explicitly reversed its earlier decisions disclaiming jurisdiction when the disposition involved stock transactions transferring the ownership and control of the utility to a separate corporate entity.¹⁴⁸ Since none of the cases utilizing the new doctrine have been reviewed, their validity remains uncertain.¹⁴⁹

Greater danger might lurk in *Savannah Electric & Power Co.*, in which FERC asserted jurisdiction over Savannah Electric's disposition of its facilities via the sale of its stock to The Southern Company, a holding company registered under PUHCA.¹⁵⁰ In justifying its jurisdiction over the transaction, FERC responded to the view of Savannah Electric and The Southern Company that section 318 of the FPA deprived FERC of jurisdiction by arguing, in part, that section 318 applied only when the same subject matter was involved. To support this proposition, FERC cited *Ohio Power Co.*, the 1987 FERC opinion that provoked the litigation

any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without having first secured an order of the Commission authorizing it to do so

FPA § 023(a), 16 U.S.C. § 824b(a) (1988) (emphasis added).

146. 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,295, at 61,960 (June 1, 1987).

147. *Id.*

148. *Id.*, accord *Central Illinois Pub. Serv. Co.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,073 (Jan. 25, 1988); *Savannah Elec. & Power Co.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240 (Feb. 29, 1988). The earlier decisions that *Central Vermont* reversed include *Iowa Southern Utilities Co.*, 35 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,149 (May 2, 1986); *Texas-New Mexico Power Co.*, 28 Fed. Reg. Comm'n Rep. (CCH) ¶ 61,079 (July 23, 1984); *Sierra Pacific Power Co.*, 27 Fed. Energy Comm'n Rep. (CCH) ¶ 61,081 (Apr. 13, 1984); and *Iowa Power & Light Co.*, 9 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,099 (Oct. 25, 1979).

149. In *Arcadia*, the Registered Holding Companies challenged the validity of FERC's assertion of jurisdiction in *Central Illinois*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,073 and *Savannah Electric*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240. The Companies argued that FERC had incorrectly reversed the earlier decisions, and this contributed to an erroneous interpretation of § 318 by FERC. Registered Holding Companies Brief at 26-27, *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (No. 89-1283). Yet, FERC—as well as other federal agencies—receives substantial deference from reviewing courts on the grounds of agency expertise. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (stating that federal agencies are “presumably equipped or informed to deal with a specialized field of knowledge [and thus] carry the authority of an expertness which courts do not possess and therefore must respect”).

150. *Savannah Elec. & Power Co.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,778. In *Savannah Electric*, FERC relied on *Central Vermont* as precedential authority. *Id.*

at issue.¹⁵¹ Of course, FERC's construction of section 318 failed in *Ohio Power I*,¹⁵² and the agency lost again in *Ohio Power II*. FERC's reliance on *Ohio Power Co.* triggers concern because the controversy in *Savannah Electric* resembles the issues litigated in the trio of cases discussed in this Comment.

In *Savannah Electric*, FERC insisted that Savannah Electric's disposition of utility assets was a different subject matter than The Southern Company's acquisition of utility assets. Yet, the *Ohio Power I* court assailed such logic when it decided that FERC and the SEC were indeed regulating the same subject matter, since FERC's order reformed "in effect" the SEC's coal price regulation, if not "in fact."¹⁵³ Accordingly, *Savannah Electric* might represent another instance in which FERC is guilty of elevating "form" over "substance" in an attempt to justify its continued jurisdiction.¹⁵⁴ However, a good argument could be made that since *Arcadia* reversed *Ohio Power I* by holding that FERC and the SEC were regulating different subject matters—rates versus the price of coal¹⁵⁵—there is little controversy in FERC's assertion of jurisdiction based on its view that it was regulating a different subject matter than did the SEC. Despite this compelling point, the *Arcadia* decision does not speak precisely to the issue in *Savannah Electric*, which is whether dispositions of jurisdictional utilities via stock transactions are a proper subject of FERC regulation. FERC contended that Savannah Electric disposed of "utility assets" through the sale of stock, while The Southern Company acquired

151. *Id.* at 61,779 & n.24 (citing *Ohio Power Co.*, 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,098 (Apr. 30, 1987)).

152. *Ohio Power Co. v. FERC (Ohio Power I)*, 880 F.2d 1400, 1405-08 (D.C. Cir. 1989), *rev'd and remanded sub nom. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990).

153. *Id.* at 1409 (discussing issue in context of a trapped costs rationale); see *infra* notes 160-62 and accompanying text (discussing a cost-trapping rationale or analogy that could be used to justify, however inappropriately in light of the views expressed in this Comment, divesting FERC of jurisdiction in cases like *Savannah Electric*).

154. As *Electric Utility Week* put it, FERC "had [in *Ohio Power I*] put too fine a point on the language of Section 318," thus casting doubt on the validity of *Savannah Electric*. This comment was made in a report on the controversy over whether FERC could validly assert jurisdiction in the Northeast Utilities-Public Service New Hampshire merger. The report noted that in light of *Ohio Power I*, FERC might have to revisit *Savannah Electric*. *Competitive, Jurisdictional Issues Face FERC in NU/PSNH Merger Case*, ELECTRIC UTIL. WK., Jan. 29, 1990, at 10 [hereinafter *NU/PSNH Merger*]. The NU/PSNH merger did not present the same clean set of facts that raised questions about FERC's jurisdiction in *Savannah Electric*, *Central Illinois*, and *Central Vermont*. In the NU/PSNH case, FERC jurisdiction was ultimately noncontroversial because the rate contracts involved clearly triggered FERC's jurisdiction. Moreover, the parties did not challenge FERC jurisdiction. *NU/PSNH Merger*, at 10; see also *Northeast Utils. Serv. Co.*, 56 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,269 (Aug. 9, 1991) (noting that FERC's jurisdiction not disputed). Thus, the NU/PSNH merger is distinguishable, and provides no reassurance that FERC will be able to overcome a challenge to its § 203 authority in the context of overlapping SEC jurisdiction.

155. See *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 84 (1990).

a different subject matter, "utility securities."¹⁵⁶ Admittedly, however, *Arcadia* does point in the direction of viewing these, too, as different subject matters.

To be safe, FERC defended the *Savannah Electric* order on additional grounds. Section 318 applies only when one "person" is subject to both the FPA and PUHCA. In *Savannah Electric*, FERC argued that Savannah Electric is a separate "person" from The Southern Company, and is not subject to the Holding Company Act. Because it is a utility, Savannah Electric is only subject to the FPA.¹⁵⁷ This argument, too, is vulnerable to the criticism of elevating form over substance. After all, Savannah Electric will become subject to PUHCA once the acquisition is finalized.

Similarly, FERC argued that because no conflict in fact existed between FERC's jurisdiction and the SEC's, section 318 was not triggered. Of course, this argument is ripe for ambush by any court that takes seriously the cost-trapping rationale in *Ohio Power II*. The cost-trapping rationale can be read broadly enough so that an *analogy* to cost trapping could negate FERC jurisdiction.

A cost-trapping "analogy" would signify a regulatory agency's inability to regulate an entity already subject to regulation by another regulatory agency. If the regulation by the second agency would "affect[] the economic relationship" of the entity approved by the first agency,¹⁵⁸ or "reform[] the agreement" made by the entity,¹⁵⁹ it creates excess costs for the regulated entity. In the *Savannah Electric* context, the accusation would be that FERC's jurisdiction, if ultimately an impediment to the transaction, would reform the OPCO agreements first approved by the SEC.¹⁶⁰

FERC's "no conflict" argument had familiar overtones. It laid out the different goals of the two agencies by stressing that FERC protects "the interests of ratepayers and ensure[s] reliable and adequate service" while the SEC polices industry structure.¹⁶¹ While these are excellent reasons, a court adopting the *Ohio Power I* or *II* approach could readily find that a decision based on differing agency purposes was not the best reason for concluding that no conflict occurred.

The salient fact in *Savannah Electric* was that FERC happened to *approve* the disposition. If FERC had rejected Savannah Electric's proposal, its claim that its

156. *Savannah Elec. & Power Co.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240, at 61,779 (Feb. 29, 1988).

157. *Id.*

158. *Ohio Power Co. v. FERC (Ohio Power II)*, 954 F.2d 779, 784 (D.C. Cir.), *cert. denied*, 113 S. Ct. 483 (1992).

159. *Ohio Power Co. v. FERC (Ohio Power I)*, 880 F.2d 1400, 1409 (D.C. Cir. 1989), *rev'd and remanded sub nom. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990).

160. This illustrates a most troublesome aspect of the *Ohio Power* litigation: the decision to grant the SEC exclusive jurisdiction seems to turn on the SEC issuing its order ahead of FERC.

161. *Savannah Elec.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,779 & n.25.

jurisdiction did not conflict with the SEC's would have been more difficult to justify, because the SEC had already approved The Southern Company's acquisition proposal.¹⁶² Thus, no conflict occurred because FERC came out the "right" way. Had FERC disapproved Savannah Electric's disposition, it would be difficult to imagine a more stark example of one agency "reforming an agreement" between Savannah Electric and The Southern Company "in effect"¹⁶³ or "affecting the economic relationship" between Savannah Electric and The Southern Company, "a relationship approved by, and under the jurisdiction of, the SEC."¹⁶⁴

Even though it is true that *Ohio Power I* was partly dismantled by *Arcadia*, and that section 318 will not in the future govern FERC-SEC disputes stemming from interaffiliate coal transactions,¹⁶⁵ the course of this litigation shows a proclivity on the part of the D.C. Circuit Court of Appeals to defer to the SEC. Herein lies the danger. Even without the aid of section 318, the court utilized a cost-trapping rationale to preserve the SEC's jurisdiction. The result of *Ohio Power II* plays havoc with FERC's recent jurisprudence because it allows *Ohio Power I* to reassert itself. *Ohio Power I*'s view that different subject matters were the same could pave the way for its return in the form of a cost-trapping analogy, if that analogy is broadly construed.

Put another way, the cost-trapping principles of *Ohio Power II* can be used to diminish FERC's authority under section 203. By broadly applying these principles, FERC's assertion of jurisdiction under section 203 could be challenged as "reforming" the agreement already approved by the SEC.¹⁶⁶ As such, this reasoning could overturn a line of FERC cases involving the disposition of assets by *public utilities* that fall under FERC's jurisdiction.¹⁶⁷ Unfortunately, such a result ignores the legislative purposes behind the enactment of the Federal Power Act.

162. *Id.* at 61,778 & n.8.

163. *Ohio Power I*, 880 F.2d at 1409.

164. *Ohio Power II*, 954 F.2d at 784 (citations omitted).

165. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 84-85 (1990).

166. The cost-trapping rationale in *Ohio Power II* as applied to these merger situations ultimately seems to boil down to granting the SEC exclusive jurisdiction simply because it issued its order before FERC did. This result is completely arbitrary, yet an inescapable aspect of this rationale. If FERC had issued its order first, would not a subsequent SEC order "affect the economic relationship" between the regulated entity and its affiliate?

167. At least some indication that holding companies will look for opportunities to challenge the holding of *Savannah Electric* and its predecessors is evidenced in Registered Holding Companies Brief at 25, *Arcadia* (No. 89-1283). In the course of disputing FERC's interpretation of § 318, the Holding Companies argued that *Savannah Electric* and *Central Illinois* were incorrectly decided. *Id.* at 26.

2. Other Possible Areas of Litigation and Requests for Reform

The *Ohio Power* decisions could jeopardize other areas of traditional FERC regulation. For example, FERC cases ruling on the allocation of taxes when holding company affiliates file consolidated tax returns could be overturned based on a cost-trapping analogy, which is available in light of *Ohio Power II*.¹⁶⁸ In fact, cases that involve any kind of nonpower costs on a holding company system could be affected.¹⁶⁹

State utility regulators have also responded by voicing their concerns that *Ohio Power II* will create confusion, increase jurisdictional tensions, and increase forum shopping in the regulation of holding companies by FERC, the SEC, and state regulatory commissions. The National Association of State Regulatory Commissioners recently proposed a "summit conference" to jointly address the "jurisdictional challenges" posed by *Ohio Power*, compliance with the new Clean Air Act Amendments, and other relevant questions.¹⁷⁰ In this context, it is important to note that as FERC's responsibility expands under new legislation, the potential for conflict with the SEC will grow.

Furthermore, consumer groups are lobbying to give FERC jurisdiction over holding company mergers in the wake of some recent merger cases. Concern emanates from *Missouri Basin Municipal Power Agency v. Midwest Energy Co.*,¹⁷¹ where FERC disclaimed jurisdiction over the merger of two holding companies that owned public utilities. FERC claimed that under FPA section 203 it did not have jurisdiction because the holding companies were not "public utilities" and thus not within the statute. However, FERC noted that if and when the holding companies decided to consolidate their respective utilities, FERC would assert jurisdiction.¹⁷² Eventually, the new holding company merged its two subsidiary utilities and FERC, over the holding company's challenge, asserted jurisdiction.¹⁷³ FERC approved the merger. While the jurisdictional issue in this

168. An SEC rule that holds that no taxes may be allocated to any member of a holding company that exceed what would have been paid if it had filed taxes alone could insulate holding companies from FERC ratemaking decisions affecting such allocations. *Ruling Shifts Rate Authority*, *supra* note 5, at 11 (comment by James Liberman, attorney for Registered Holding Company Group).

169. Observation made by an unnamed attorney following the *Ohio Power II* decision. *Id.* The same article noted that *Ohio Power II* "could have broad implications." *Id.*

170. *States, SEC and FERC Need to Be on Same Page to Regulate*, INSIDE FERC, Mar. 16, 1992, at 17 (quoting Mar. 9, 1992, letter by Ashley Brown, Chairman of the National Association of Regulatory Commissioners' Electricity Committee, to FERC and the SEC).

171. 53 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,368 (Dec. 13, 1990), *reh'g denied*, 55 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,464 (June 21, 1991).

172. *Id.* at 62,299.

173. *FERC Okays Merger of Iowa Utilities; Rejects Argument Over Jurisdiction*, ELECTRIC UTIL. WK., July 20, 1992, at 5.

case seems like a clear winner for FERC, the new holding company, Midwest Resources, may have been emboldened to challenge jurisdiction because of the recent erosion in FERC's authority.

Although consumers appear nervous about utility holding company mergers and desire FERC regulation,¹⁷⁴ there is no reason for FERC to extend its jurisdiction to these mergers as long as it retains authority over the merger of jurisdictional entities—public utilities. As long as FERC rebuffs challenges to its traditional regulatory authority, as it did to Midwest Resources' challenge, there is no danger that consumer protection will erode in this context.

CONCLUSION

The D.C. Circuit Court of Appeals, with help from the Supreme Court, has granted the SEC exclusive jurisdiction in an area of transactions that could do significant damage to the interests of consumers, resulting in a net loss to society. The courts failed to understand the legislative scheme constructed by Congress to regulate the electric power industry. Furthermore, due to *Arcadia's* ambiguous mandate, relitigation of these issues seems likely. If the *Ohio Power II* decision is allowed to stand, the prospects for future erosion of FERC jurisdiction in areas of overlap with the SEC seem significant. Courts, however, have the power to avoid the results of *Ohio Power I & II* by paying closer attention to the legislative purposes behind the creation of FERC and the SEC.

Perhaps a greater concern is the courts' ability to handle the issues presented by the *Ohio Power* litigation. Due to the courts' shortcomings described herein, serious questions are raised as to whether the Supreme Court is competent to exercise judicial review in cases involving complex federal legislation. The Court may not have the necessary familiarity to appropriately handle these complex regulatory matters. While one would hesitate to make a major change in the Court's jurisdiction based on a critique of one case, proposals to institute an intermediate level of review between the courts of appeals and the Supreme Court have sporadically recurred over the past two decades.¹⁷⁵ While concerns over an

174. *NASUCA Seeks Law Giving FERC a Role in Utility Holding Company Mergers*, ELECTRIC UTIL. WK., July 13, 1992, at 8 (expressing concern over the merger of holding companies IE Industries and Iowa Southern Inc., which did not seek FERC approval). (NASUCA is the National Association of State Utility Consumer Advocates.)

175. See, e.g., COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, reprinted in 67 F.R.D. 195, 199, 208 (1975) (popularly known as the Hruska Commission Report); FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, reprinted in 57 F.R.D. 573, 590, 611 (1972) (popularly known as the Freund Commission Report); Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 447 (1983).

excessive workload provoked these proposals, competency or familiarity concerns, although different, are probably related. Despite recent reports that the caseload under Chief Justice Rehnquist has declined significantly,¹⁷⁶ critics have reiterated the claim that a structural change is needed because the Supreme Court "simply lacks the capacity to insure the stability, clarity, and uniformity of the huge body of national law being interpreted and applied in many thousands of state and federal court cases each year."¹⁷⁷ This observation is particularly pertinent to statutory cases like *Arcadia*, a case lacking the glamour or media attention of cross-burning, nude dancing, or abortion rights cases. It may well be the lack of media attention that explains why the Court "drops the ball" in a case like *Arcadia*.

One commentator recently maintained that the Court has not given sufficient guidance in the area of tax and business law, and proposed increased specialization of the appellate system.¹⁷⁸ If a few discrete areas of law were given to a national court of appeals, such as business, tax, or public utilities, the Court could avoid deciding these technical and complex questions. As a result, a consistent and stable body of law with adequate protections for consumers would develop.¹⁷⁹

176. In the October, 1990, term, the Court issued 112 signed opinions, its fewest since 1970. This was down from a high of 151 in 1982 and 1983. Robert J. Giuffra, Jr., *The Rehnquist Court After Five Terms*, N.Y. L.J. July 30, 1991, at A1. The number of decisions was set to drop further to 109 in the next term, which ended in June, 1992. Linda Greenhouse, *Lightening Scales of Justice: High Court Trims Its Docket*, N.Y. TIMES, Mar. 7, 1992, at A1.

177. PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1875 (3rd ed. 1988) (paraphrasing the critics).

178. Paul Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 684, 695 (1990); see also Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405-07, 1414 (1987) (noting that huge growth in the number of appellate judgments since 1960 has made federal law less uniform than ever; Intercircuit Panel needed to address inter-circuit conflicts).

179. See Bator, *supra* note 178, at 695.