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CASE NOTES

Federal Power Commission—Approval of Securities Issue by Public Utility—Duty to Investigate Allegations of Anticompetitive Conduct Raised by Intervenors in a Section 204 Proceeding—*Gulf States Utilities Co. v. FPC.*¹—In October 1970, Gulf States Utilities Company (Gulf States),² in compliance with section 204 of the Federal Power Act (the Act),³ applied to the Federal Power Commission (FPC or the Commission) for authority to sell \$30 million of first mortgage, long-term bonds at competitive bidding to refinance part of its outstanding short-term commercial paper and notes. When the Commission filed notice of Gulf States' application, the Cities of Lafayette and Plaquemine, Louisiana (the Cities) filed a protest and motion to intervene in the proceedings before the Commission. The Cities alleged that Gulf States, together with two other public utility companies, had engaged in a conspiracy beginning in 1968 to thwart the implementation of an interconnection and pooling agreement involving the Cities, Dow Chemical Company (which had a generating plant), and Louisiana Electric Cooperative, Inc. (a super-cooperative in the business of generating and transmitting electric energy). The Cities asserted that the pooling arrangement would assure a market for the parties' surplus electric energy, would coordinate, at substantial savings, the construction of new generators, and would increase the reliability of electric power to the pool members.

In 1964, Louisiana Electric Cooperative had applied to the Rural Electrification Administration (REA) for loans to finance the construction of generation and transmission facilities to serve its member utilities. The Cities claimed that Gulf States and the two other utility companies resorted to repeated litigation to block construction of these facilities and succeeded in delaying the loans for five years. The REA loans were made in 1969, but were by then insufficient to cover the cost of building the generating station and transmission lines due to increased costs. As a result, the pool members were forced to negotiate with Gulf States for the use of its

¹ 411 U.S. 747 (1973).

² Gulf States, a Texas corporation qualified to do business in Louisiana, is a public utility within the meaning of § 201(e) of the Federal Power Act, 16 U.S.C. § 824(e) (1970). 411 U.S. at 750. Gulf States is primarily engaged in the business of generating, distributing and selling electric energy in southeastern Texas and south central Louisiana. *Id.*

³ 16 U.S.C. § 824c (1970). Section 824c(a) states:

No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.

transmission lines. The Cities contended that Gulf States continued to block and limit the plans of the pooling agreement by forcing them to agree to limit their power output in return for the use of the lines. The Cities, therefore, sought to intervene in Gulf States' application before the FPC, maintaining that the proceeds of the proposed \$30 million bond issue would be used to finance Gulf States' alleged anticompetitive conduct. The Cities requested that the Commission proscribe these alleged antitrust violations by placing limits or conditions on the approval of Gulf States' application.⁴

The Federal Power Commission granted the Cities' motion to intervene but declined to hold a formal hearing on the bond issue, asserting that the grievances which the Cities raised had no relevance to a section 204 proceeding and that the FPC could render none of the requested relief.⁵ The Cities' petition for a rehearing⁶ was denied by the FPC.⁷ The Cities then appealed the FPC's order to the United States Court of Appeals for the District of Columbia Circuit.⁸ That court, in a unanimous decision, disagreed with the Commission's position that the Cities' allegations were irrelevant to the securities issue and remanded the case to the FPC for consideration of the Cities' claims.⁹

After this decision, Gulf States sought review by the Supreme Court. In its Memorandum in Opposition to the grant of certiorari, the FPC stated that, although it agreed with Gulf States that the court of appeals had misconstrued section 204, the Commission would follow the court's ruling because it would not seriously impede the Commission's ability to perform its statutory responsibilities.¹⁰ The Supreme Court declined to accept the Commission's position¹¹ and HELD: the FPC must keep a clear record of its findings and conclusions and, because of its statutory duty under section 204, must consider allegations of anticompetitive

⁴ This statement of facts is taken from 411 U.S. at 751-53.

⁵ The Commission ruled:

The requested approval of the issuance of the Bonds allow [*sic*] the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [*sic*] the interest of the Petitioners. *The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities.* There is no relief that the Commission can order in authorizing the issuance of the Bonds, for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.

44 F.P.C. 1524, 1525 (1970), as quoted in 411 U.S. at 753 (emphasis added).

⁶ Required by § 313(a) of the Federal Power Act, 16 U.S.C. § 825l(a) (1970).

⁷ 411 U.S. at 754.

⁸ *City of Lafayette v. FPC*, 454 F.2d 941 (D.C. Cir. 1971). Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b) (1970), provides for such review.

⁹ 454 F.2d at 953.

¹⁰ Memorandum of the Federal Power Commission in Opposition at 4, *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973) [hereinafter cited as *Memorandum in Opposition*].

¹¹ The Court stated: "Inasmuch as the decision of the Court of Appeals raised issues of potential and recurring importance with respect to the authorization of securities by the Federal Power Commission, we granted certiorari." 411 U.S. at 755.

conduct to determine whether a securities issue will be compatible with the public interest.¹²

This note will explore the implications of *Gulf States Utilities* for the administrative procedures to be followed and the proper scope of inquiry when the Federal Power Commission considers the "public interest" in a proceeding under section 204 of the Federal Power Act. The first part will describe the narrower grounds of administrative procedure upon which the Supreme Court's decision rests. Next, the more general directive which the Court gave to the FPC concerning inquiries in the "public interest" will be investigated. Finally, the effect of *Gulf States Utilities* on the electric utility industry will be examined.

I. THE FPC'S ADMINISTRATIVE RESPONSIBILITIES UNDER SECTION 204

The procedural aspect of the *Gulf States Utilities* case led the Supreme Court to emphasize the requirement that the FPC provide an administrative record which clearly supports its actions.¹³ According to the Court, one of the principal faults of the Commission's disposition of the Cities' claims in *Gulf States Utilities* was its summary nature. Without a record stating the Commission's reasons for its action,¹⁴ especially when it declined to hold a hearing on the allegations, a court could not "closely scrutinize" the propriety of the Commission's disposition.¹⁵ As stated by the court of appeals:

[T]he FPC's terse and cryptic statement did not comply with the requirement we see in *Denver & Rio Grande*, that the agency's reason for denying or deferring hearing of anticompetitive issues must be clear on the record, meaningful in findings or discussion.¹⁶

Although the Commission's discretion under the Federal Power Act is not circumscribed in any significant respect as a result of *Gulf States Utilities*, the FPC must continue to justify its administrative decisions under the Act. The requirement of an adequate record

¹² Id. at 762-64.

¹³ Id. at 763.

¹⁴ The lack of an adequate record has resulted in the remand of a number of cases to the FPC for consideration of additional relevant matters and for explanation of the FPC's ruling in light of these additional matters. See, e.g., *Udall v. FPC*, 387 U.S. 428 (1967) (licensing investigation too narrow; record insufficient to support conclusions); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (same); *Michigan Consol. Gas Co. v. FPC*, 283 F.2d 204 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960) (investigation into application for abandonment of gas service by company was too limited; record insufficient).

¹⁵ 411 U.S. at 763-64.

¹⁶ 454 F.2d at 953. See *Denver & Rio Grande Western R.R. v. United States*, 387 U.S. 485 (1967), discussed in text at notes 103-08 *infra*.

serves to ensure that the Commission's discretionary powers will be exercised in a reasonable and appropriate manner.¹⁷ Further, the maintenance of an adequate record in a case such as *Gulf States Utilities* will encourage thorough investigation of all relevant factors under the appropriate sections of the Federal Power Act. The relevant factors which the FPC must consider in a section 204 proceeding are elucidated in the gloss which the Court placed on that section in the balance of the opinion.

In *Gulf States Utilities* the Supreme Court declared that anticompetitive conduct is a relevant factor to be considered in proceedings under section 204. This decision will undoubtedly increase the scope and depth of investigations which the FPC must conduct regarding some applications for securities issuances by public utilities.¹⁸ However, investigations of antitrust violations are not foreign to the Commission. The FPC has conducted such investigations in proceedings under other provisions of the Federal Power Act.¹⁹ Therefore, the requirement that the Commission investigate similar allegations under section 204 imposes no unusual burden.²⁰ As the Court pointed out, if the FPC considers charges of anticompetitive conduct "at a pre-issue stage [it] may avoid the need later to unravel complex transactions in granting relief under the antitrust laws or other sections of the Federal Power Act."²¹

The reasoning in *Gulf States Utilities* suggests a two-step analysis of allegations of anticompetitive conduct under section 204. First, the FPC must determine whether the alleged acts are within its regulatory jurisdiction and colorably constitute violations of the antitrust laws.²² Secondly, if such violations are found, the FPC must ascertain whether a sufficient nexus exists between the violations and the purpose of the securities issue.²³ If the Commission concludes that the allegations warrant serious consideration, it may take any one of four modes of action. The Commission may: (a) defer approval of the securities issue until an investigation of the antitrust charges is completed; (b) grant the authority to issue the securities and defer consideration of the allegations to a later time; (c) condition the approval of the issue upon the utility's agreement to

¹⁷ L. Jaffe, *Judicial Control of Administrative Action* 601 (1965).

¹⁸ "Inclusion of these national policies in the public interest significantly expands traditional agency considerations." Comment, *Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?*, 59 *Geo. L.J.* 420, 426 (1970).

¹⁹ The FPC admitted that allegations of anticompetitive conduct may properly be raised and considered in proceedings under § 202, 16 U.S.C. § 824a (1970) (interconnections); § 203, 16 U.S.C. § 824b (1970) (dispositions and mergers); §§ 205 and 206, 16 U.S.C. §§ 824d, 824e (1970) (rates and rate-making practices); and § 207, 16 U.S.C. § 824f (1970) (adequacy of service). 411 U.S. at 757.

²⁰ The FPC has admitted as much. Memorandum in Opposition, *supra* note 10, at 4.

²¹ 411 U.S. at 760.

²² *Id.* at 758-59.

²³ *Id.* at 759.

cease its illegal activities; or (d) grant part of the requested authorization and defer part while the antitrust allegations are investigated.²⁴

The course which the Commission chooses will depend in large measure upon the purpose for which the securities will be used and the surrounding circumstances. Thus, if there is an immediate need for capital or the securities market seems likely to take an unfavorable turn,²⁵ the Commission may choose to grant wholly or partially the authorization and consider the anticompetitive conduct at a later time. Should the Commission subsequently determine that there is sufficient merit to the claims of antitrust activity, it may modify its previous approval of the securities issue.²⁶ It may also forward such information to the Attorney General of the United States for appropriate action.²⁷ At its discretion, therefore, the Commission may adopt any one or a combination of the above procedures.

Because the FPC has been given wide discretion in its administrative determinations by the Federal Power Act, the necessity of maintaining a complete record is paramount. This is especially clear given the general realities of political life with respect to a scarce energy source. The FPC, as an agency of the executive branch whose members are appointed by the President and confirmed by the Congress, is susceptible to political pressure from these branches.²⁸ In addition, the electric power industry lobbies intensively to influence the passage and enforcement of regulatory legislation and also seeks to influence administrative decisions by the regulatory agency itself.²⁹ Since lobbying to influence the actions of government bodies or administrative agencies is not vulnerable to attack on antitrust grounds,³⁰ the only means by which the courts

²⁴ Id. at 762. See also 454 F.2d at 953-54.

²⁵ The FPC expressed concern in this regard in *Pacific Power & Light Co.*, 27 F.P.C. 623, 629 (1962), discussed in text at notes 42-52 *infra*.

²⁶ Pursuant to § 204(b) of the Federal Power Act, 16 U.S.C. § 824c(b) (1970), the Commission may issue supplemental orders modifying any grant of authorization. These orders may modify the purposes, uses and extent to which, or the conditions under which, any securities previously authorized may be applied.

²⁷ Federal Power Act § 314(a), 16 U.S.C. § 825m(a) (1970). The FPC has no direct authority to prosecute antitrust violations as do some other regulatory agencies. Under § 11 of the Clayton Act, 15 U.S.C. § 21 (1970), only the Interstate Commerce Commission, the Federal Reserve Board, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Trade Commission may prosecute certain antitrust violations.

²⁸ See, e.g., L. Kohlmeier, Jr., *The Regulators* 29-104 (1969); Loevinger, *Regulation and Competition as Alternatives*, 11 *Antitrust Bull.* 101, 137-38 (1966); cf. L. Jaffe, *supra* note 17, at 11.

²⁹ See authorities cited in note 28 *supra*. Gulf States mounted an intensive public relations and lobbying drive against Louisiana Electric Cooperative in an attempt to block action favorable to the pooling agreement. 411 U.S. at 752.

³⁰ The Supreme Court has held that the provisions of the Sherman Act do not apply to associations which seek to influence the legislature or the executive through *political* means to take particular action with respect to the enactment or enforcement of laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). This applies even

may ascertain whether the Commission arrived at its decision for improper reasons is to require a record stating those reasons.

In light of this great latitude afforded the Commission in exercising its regulatory powers, the fears expressed in Mr. Justice Powell's dissenting opinion in *Gulf States Utilities* appear unwarranted. He stated that if the majority found the Cities' claims to be colorably valid and related to the proposed securities issue, then "it is unlikely that any claim can be found wholly irrelevant."³¹ However, this contention is undercut in at least two important respects. First, the Cities' allegation that Gulf States violated the antitrust laws by engaging them in repetitive litigation in order to impede the implementation of the pooling agreement would, if proven, constitute a violation of the antitrust laws. In *California Motor Transport Co. v. Trucking Unlimited*,³² the Supreme Court held that a pattern of repetitive, baseless claims asserted in courts or before administrative agencies by one competitor against another to weaken or destroy him, was violative of the antitrust laws because such "sham" proceedings denied the responding party free access to the courts and administrative agencies.³³ The main purpose of such proceedings was to "interfere directly with the business relationships of a competitor . . ."³⁴ On their face, then, the Cities' claims colorably constituted a contravention of the antitrust laws.

Secondly, it could be argued that the proceeds from the proposed securities issue would be used to support Gulf States' litigation against the Cities or to finance the construction of larger generation plants and thereby place the Cities' power pool at a severe economic and competitive disadvantage.³⁵ The Court recognized that the nexus between the alleged anticompetitive conduct and the securities issue in this case appeared tenuous.³⁶ However, the thrust of the majority's directive to the FPC upon remand was not that the Commission give great weight to the claimed nexus, but that the FPC provide something more than "an inadequate explanation of its reasons for disposing of the Cities' objections on their merits, if that in fact is what occurred."³⁷ The Court did not rule out the possibility that the Commission could justifiably reject the Cities' claims upon remand.³⁸ What was demanded by the Court was that the

where such action might produce a restraint on trade or create a monopoly. *Id.* at 136. But see *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), where the Court refused to extend the *Noerr* rule to situations where associations of persons attempt to use the courts and administrative agencies as vehicles to restrain trade.

³¹ 411 U.S. at 776 (dissenting opinion).

³² 404 U.S. 508 (1972).

³³ *Id.* at 510-11; accord, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973).

³⁴ 404 U.S. at 511.

³⁵ *Cf. Otter Tail*, 410 U.S. at 377.

³⁶ 411 U.S. at 763.

³⁷ *Id.*

³⁸ *Id.*

Commission exercise its discretion only after taking a "hard look"³⁹ at all of the relevant facts and allegations presented by all interested parties.

In addition to its directive to maintain an adequate record, the Court has provided guidelines for the FPC when it conducts an investigation under section 204. Principally, the Court concluded that antitrust issues are relevant in such a proceeding. The next part of this note will investigate the Court's incorporation of antitrust policies into the concept of the "public interest."

II. THE "PUBLIC INTEREST" OF SECTION 204.

In *Gulf States Utilities*, the Supreme Court did not confine the scope of its holding to the limited administrative directive to the FPC. Instead, the Court found it necessary to amplify its holding by clarifying some of the issues which are relevant to the concept of the "public interest" in section 204. The reasoning behind the Court's inclusion of antitrust issues in the "public interest" becomes clearer through an investigation of the FPC's position regarding section 204 proceedings, the wording of section 204 itself, and the developing case law dealing with the responsibility of regulatory agencies to protect the "public interest."

A. *The Commission's View*

Section 204 of the Federal Power Act deals with securities transactions of public utility companies.⁴⁰ It places such transactions under the jurisdiction of the Federal Power Commission. In its regulatory capacity, the FPC must determine that, *inter alia*, a proposed issuance of securities will be "compatible with the public interest."⁴¹

Before *Gulf States Utilities*, the only other occasion on which the FPC was called upon to interpret this phrase was in 1962 in *Pacific Power & Light Co.*⁴² In *Pacific Power & Light* the FPC was required to determine whether the issuance of securities to finance the proposed construction of a 500 megawatt power line between Klamath Falls, Oregon and Round Mountain, California would be "compatible with the public interest." Three commissioners concluded that such a requirement was met when the issuance was found to be lawful and within corporate purposes.⁴³ Specifically, the Commission held that the "plain purpose of Section 204 is to prevent

³⁹ 454 F.2d at 954.

⁴⁰ For the text of § 204, see note 3 *supra*.

⁴¹ 16 U.S.C. § 824c(a)(a) (1970).

⁴² 27 F.P.C. 623 (1962). But cf. *Black Hills Power & Light Co.*, 31 F.P.C. 1605 (1964), and *Black Hills Power & Light Co.*, 28 F.P.C. 1121 (1962), where the FPC was considering a securities issue under § 204 in a stock option plan for company executives. The Commission reaffirmed the position taken in *Pacific Power & Light*, 28 F.P.C. at 1125, and once again equated the public interest with financial considerations, 31 F.P.C. at 1611.

⁴³ 27 F.P.C. at 628.

the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities."⁴⁴ The commissioners further stated that the "provisions of Section 204 make it a particularly unsuitable vehicle for comprehensive licensing-type regulation,"⁴⁵ and that the inquiry should be limited solely to the financial soundness of the proposal. The commissioners then drew an analogy between section 204 and section 20a of the Interstate Commerce Act.⁴⁶ They emphasized the fact that section 204 was modeled after section 20a and that, under the Interstate Commerce Commission's interpretation, section 20a was limited to preventing railroads from making unsound financial arrangements which might impair the "public interest." Since Congress had worded the statutes similarly, the majority of the commissioners maintained that the interpretations given the provisions should be correspondingly similar.⁴⁷

Commissioner Morgan vigorously dissented in *Pacific Power & Light*,⁴⁸ claiming that the majority had not merely construed the public interest in an extremely narrow manner, but had actually written the concept out of the statute.⁴⁹ He declared that the majority had established only three criteria for testing a securities issue under section 204. These criteria implied that the Commission must satisfy itself that the object of the issuance (a) is legal; (b) is within corporate purposes; and (c) would not impair the company's ability to perform its normal functions as a public utility.⁵⁰ Commissioner Morgan referred to the conspicuous absence of any reference to the "public interest" in the majority's opinion with the exception of a cryptic proclamation that the Commission found the proposal to be "compatible with the public interest."⁵¹ It gave no basis for this conclusory statement.⁵²

⁴⁴ Id. at 626.

⁴⁵ Id.

⁴⁶ 49 U.S.C. § 20a (1970).

⁴⁷ 27 F.P.C. at 627. Drawing analogies between statutes is an equivocal exercise at best and seems particularly unsuitable where the statutory provisions are being applied by agencies whose administrative responsibilities cover dissimilar subject matter as in the case of the FPC and the ICC. This is graphically illustrated by the fact that the FPC used the analogy to § 20a to restrict its interpretation of § 204 in *Pacific Power & Light*, while Mr. Justice Powell, in *Gulf States Utilities*, agrees with the FPC's interpretation of § 204 but maintains that the development of § 20a should in no way control the evolution of § 204. 411 U.S. at 774-75.

In any case, the FPC should have been put on notice that its interpretation of § 204 was in jeopardy after the Supreme Court decided *Denver & Rio Grande Western R.R. v. United States*, 387 U.S. 485 (1967), where the Court explicitly rejected the ICC's interpretation of § 20a. See text at notes 103-08 infra.

⁴⁸ 27 F.P.C. at 631-47 (dissenting opinion), 27 F.P.C. at 1388-98 (supplementary dissenting opinion).

⁴⁹ 27 F.P.C. at 1390 (supplementary dissenting opinion).

⁵⁰ Id. at 1391 (supplementary dissenting opinion).

⁵¹ 27 F.P.C. at 626.

⁵² Id. As Commissioner Loevinger has pointed out:

It is hard to escape the conclusion that as used by regulatory agencies the term "public interest" has become bureaucratic cant which is invoked as a justification for

Eight years later, in *Gulf States Utilities*, the FPC again found the proposed securities issuance to be lawful and within corporate purposes. In response to the Cities' claims, the Commission declared that the alleged antitrust violations were "irrelevant to a requested authorization of securities"⁵³ under section 204. The FPC followed a narrow interpretation which precluded consideration of anything other than purely financial matters.

It is submitted that Commissioner Morgan's position in his dissent in *Pacific Power & Light*—that the "public interest" of section 204 includes factors which the majority ignored and which go beyond the narrow considerations of financial soundness—should have prevailed. The next section of this note will examine the "public interest" standard of section 204 in the context of the Public Utility Act of 1935⁵⁴ and the developing case law dealing with regulatory agencies in the late 1960's. It will then be submitted that protection of the public interest in a section 204 proceeding requires consideration of anticompetitive allegations which can be related to the proposed securities issue.

B. *The Public Utility Act of 1935*

1. *Generally*

Public utility holding companies were the chief targets of the Public Utility Act of 1935.⁵⁵ Holding companies function by means of financial and directorial domination of the operating public utilities which they control.⁵⁶ Although these financial institutions are far removed from the ultimate power consumer, Congress recognized that the effects of holding company operations affected the public in significant respects and concluded that regulation was necessary in the "public interest."⁵⁷ Holding company actions were not felt exclusively in the stock market. The influence of the holding companies appeared in service, sales, construction and other contracts and arrangements made and performed by means of interstate

whatever action is felt desirable or expedient at the moment without much more meaning than social banalities such as "pleased to meet you" or "very truly yours."

Loevinger, *supra* note 28, at 131.

⁵³ 411 U.S. at 753. See note 5 *supra*.

⁵⁴ The Federal Power Act is Part II of Title II of the Public Utility Act of 1935, 49 Stat. 803 (1935). Title I of the Act, 49 Stat. 803-38 (1935), 15 U.S.C. §§ 79 to 79z-6 (1970), is designated the Public Utility Holding Company Act of 1935 and gives the Securities and Exchange Commission regulatory authority over the operations of public utility holding companies. Title II of the Act is composed of two parts: Part I, 49 Stat. 838-47 (1935), contains amendments to the original Federal Water Power Act, 16 U.S.C. §§ 791-823 (1970); Part II, 49 Stat. 847-63 (1935), 16 U.S.C. §§ 824-25r (1970), contains additions to the Federal Water Power Act, and gives the FPC jurisdiction over the operations of operating public utility companies. The short title of the Federal Water Power Act was also changed to the Federal Power Act. 49 Stat. 863 (1935).

⁵⁵ 411 U.S. at 758.

⁵⁶ See 79 Cong. Rec. 10,316 (1935).

⁵⁷ *Id.* at 10,317-18.

commerce, and in the transportation of gas and electricity by instrumentalities of interstate commerce. This influence was heightened by the lack of effective state control when holding company operations extended over one state's boundaries.⁵⁸ From section 1(b) of the Holding Company Act, it is apparent that the "national public interest" is a concept distinct from either "the interest of investors in the securities of holding companies and their subsidiary companies and affiliates,"⁵⁹ or "the interest of consumers of electric energy"⁶⁰ Each of these interests is related to the others, but an identity among the terms is definitely not indicated.

The scope of the "public interest" in the Federal Power Act is to be found within the context and concepts of the Act as a whole.⁶¹ Broadly, the scope is the extent to which the FPC's regulatory powers may be employed to ensure adequate and reliable supplies of electric energy to consumers through the most economical and efficient allocation and coordination of resources in the electric power industry.⁶² Section 201(a) of the Federal Power Act states:

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of . . . generation . . . transmission . . . and sale of such energy in interstate commerce is necessary in the public interest.⁶³

Furthermore, section 202(a) of this Act instructs the Federal Power Commission that:

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered . . . to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy *It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district*⁶⁴

⁵⁸ See 15 U.S.C. § 79a(a) (1970).

⁵⁹ 15 U.S.C. § 79a(b) (1970).

⁶⁰ *Id.*

⁶¹ *Accord, United States v. ICC*, 396 U.S. 491, 508 (1970); cf. *United States v. Lowden*, 308 U.S. 225, 230 (1939). The FPC agrees that the content of the public interest must be found by viewing the Act as a whole. *Pacific Power & Light Co. v. FPC*, 111 F.2d 1014, 1017 (9th Cir. 1940).

⁶² 454 F.2d at 951-52.

⁶³ 16 U.S.C. § 824(a) (1970).

⁶⁴ 16 U.S.C. § 824a(a) (1970) (emphasis added).

The FPC recognized that the goal of assuring abundant, reliable sources of electric energy is its primary responsibility in the National Power Survey (the Survey), first conducted in 1964.⁶⁵ One of the major focal points of the Survey was an exploration of coordination and cooperation between power facilities as a means of achieving these abundant and reliable sources of energy.

The Survey suggested means for the nation's electric power systems to move from isolated or segmented operations, and from existing pools of limited scope, to participation in fully coordinated power networks covering broad regional areas. The major purpose of the Survey was to highlight possible patterns of expansion that could reduce utility costs and to indicate the magnitude of potential cost savings.⁶⁶

Pooling arrangements are a principal means for ensuring reliable and adequate supplies of energy at substantial cost savings.⁶⁷ The FPC agrees that more interconnection would serve "the highest public interest."⁶⁸

In view of the present energy crisis,⁶⁹ it is incumbent upon the FPC that it do its utmost within its statutory power to further the goals it promulgated in the Survey. Energy problems show no signs of abating in the near future; therefore, coordination of energy production becomes increasingly imperative if the United States is to continue to enjoy an abundant supply of energy.⁷⁰

⁶⁵ The National Power Survey

represented a major effort to meet the Commission's statutory responsibility under the Federal Power Act to promote and encourage the interconnection and coordination of facilities for the generation, transmission and sale of electric energy with the greatest possible economy and with regard to proper utilization and conservation of natural resources.

Bagge, *The Federal Power Commission*, 11 B.C. Ind. & Com. L. Rev. 689, 717 (1970). See also L. Kohlmeier, Jr., *supra* note 28, at 190.

⁶⁶ Bagge, *supra* note 65, at 717.

⁶⁷ See Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64, 102-04 (1972); L. Kohlmeier, Jr., *supra* note 28, at 190.

⁶⁸ See L. Kohlmeier, Jr., *supra* note 28, at 190.

⁶⁹ See J. Holdren & P. Herrera, *Energy: A Crisis in Power* 9-11 (1971); Warren, *Facing the Energy Challenge*, 91 Pub. Util. Fort. 31 (March 29, 1973).

⁷⁰ Administrative agencies "are supposed to protect the present and future interests of consumers, employees, investors, and the Government." *Economic Report of the President* 108 (1970), as quoted in Baker, *The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries*, 11 B.C. Ind. & Com. L. Rev. 571, 588 (1970). Cf. Mr. Justice Jackson's opinion in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 628-60 (1944) (separate opinion). Speaking of the "public interest" with respect to the natural gas industry, he stated that it included: (a) investor interest, (b) consumer interest, and (c) the long-range public interest which requires stopping unjust impoverishment of future generations. *Id.* at 656-57. Although Mr. Justice Jackson did not view the electric power industry as under the same resource limitations in 1944 as natural gas, the status of electric power generation today may be compared to the crisis he perceived with regard to natural gas production in 1944.

2. Section 204 of the Federal Power Act

Section 204 is not an isolated component of the FPC's regulatory responsibility but is an integral part of the Federal Power Act.⁷¹ It was incongruous for the FPC to maintain that considerations of anticompetitive conduct are proper under sections 202, 203, 205, 206 and 207⁷² but not under section 204. The Supreme Court has observed that there is nothing in the language of section 204 which implies that the scope of the agency's investigations should be narrower than that of other sections, or that the investigations should be limited to purely financial matters.⁷³ Furthermore, one of the most significant aspects of the standards established by the Court in section 204 is that the Commission may approve a securities issue "only if it finds that such issue . . . is . . . compatible with the public interest."⁷⁴ All factors relevant to such a determination must be considered,⁷⁵ and the conclusions as to these factors must be clearly indicated in the record.⁷⁶ Anything short of full consideration of the relevant factors followed by an adequate disposition in the record is thus a breach of statutory duty.⁷⁷ As will be shown below,⁷⁸ the "public interest" delineated in section 204 is not limited to financial considerations alone. The failure to include anticompetitive issues in the record is a failure to meet the statutory standard—since conformity with the "public interest" had not been properly determined by the FPC, the securities in *Gulf States Utilities* could not be issued consistent with section 204.

The insertion in section 204 of the phrase "public interest" does not suggest a restrictive view of the section. However, under the Commission's interpretation of its section 204 duties, the phrase was an irrelevant congressional insertion; the range of the FPC's inquiry in *Pacific Power & Light* and *Gulf States Utilities* would not have been different had these words been omitted. The Commission created an identity between the "public interest" and the other standards enumerated in section 204. That is, once the Commission found that the purpose of the issuance was lawful and would not impair the company's ability to perform its public utility duties, the

Electric power is not in unlimited supply; it cannot forever be produced without adversely affecting the environment and depleting natural resources. See generally J. Holdren & P. Herrera, *supra* note 69, at 26-143; Morris, *Energy Demand and Its Effect on the Environment* (Rand Paper No. P-5048, 1973).

⁷¹ 411 U.S. at 757-59.

⁷² 16 U.S.C. §§ 824a, 824b, 824d, 824e and 824f (1970), respectively. 411 U.S. at 757.

⁷³ 411 U.S. at 757-59.

⁷⁴ Federal Power Act § 204, 16 U.S.C. § 824c(a) (1970) (emphasis added).

⁷⁵ *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965); accord, 411 U.S. at 759. However, "the agency should not be required to decide issues . . . which are remote from its central responsibility." L. Jaffe, *Judicial Control of Administrative Action* 521 (1965).

⁷⁶ Cf. Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A) (1970).

⁷⁷ 354 F.2d at 620-21.

⁷⁸ See text at notes 79-104 *infra*.

Commission declared that the public interest requirement was satisfied.⁷⁹ Even if the FPC had been correct in its narrow interpretation of section 204 in 1962, it should have modified that narrow view as the nature of the "public interest" changed. The "public interest" should not be a static concept⁸⁰ but a dynamic device which must be allowed to develop with the changing realities which call for different approaches to the regulation of an industry.⁸¹

3. *The Public Interest and Anticompetitive Practices*

Even though a definition of the "public interest" cannot be formulated which will apply to all regulatory agencies, certain themes stand out in court decisions which elucidate the concept of the "public interest" for specific agencies.⁸² One theme which appears in many decisions is the national policy to encourage competition through application of the antitrust laws:⁸³

[T]he antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" ⁸⁴

In this statement, Judge J. Skelly Wright reflects the attitude present in the judiciary which urges a regulatory agency to advance anti-trust goals. There are two major ideas embodied in this attitude. First, the antitrust laws, since they reflect a national policy in favor of competition, are integral to the concept of the "public interest." Secondly, the antitrust laws are guidelines which the agency may use, to a greater or lesser degree, to evaluate actions of companies within its regulatory control.⁸⁵ The following four cases will illustrate instances in which the antitrust laws were found to be appro-

⁷⁹ 411 U.S. at 757. This also places a correspondingly narrow interpretation upon the term "lawful" in § 204, since the Commission did not think that the antitrust laws were included in this term. *Id.* at 759.

⁸⁰ There are grave dangers for the viability of the regulatory agency itself if such a "generalized" concept is given a static meaning and that meaning outlives its usefulness and relevance but is not abandoned. See L. Jaffe, *supra* note 75, at 13-18.

⁸¹ See Bagge, *supra* note 65, at 719; Comment, Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?, 59 *Geo. L.J.* 420, 426, 441-44 (1970).

⁸² See, e.g., *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Denver & Rio Grande Western R.R. v. United States*, 387 U.S. 485 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

⁸³ The policy of encouraging competition is not the only concept which is contained in the "public interest." For example, one other primary concern of the FPC, when it acts under its licensing authority, is the effect which the proposed construction of a power facility will have on recreational, historic and scenic resources. *Scenic Hudson*, 354 F.2d at 614.

⁸⁴ *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968), quoting *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968).

⁸⁵ 399 F.2d at 961; accord, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973). See also Baker, *supra* note 70, at 584.

appropriate guidelines for the determination of the "public interest" with respect to the regulatory agencies involved.

In *Northern Natural Gas Co. v. FPC*,⁸⁶ the FPC had evaluated two proposals for transporting natural gas through the Great Lakes region of the United States and Canada. The Commission approved one company's proposal and rejected the other. The unsuccessful company maintained that the FPC had given insufficient consideration to the actual or potential lessening of competition in the successful company's plan. The central issue was whether the "public interest" had been given adequate protection by the FPC's consideration of antitrust law violations in the proceeding under section 7(c) of the Natural Gas Act.⁸⁷ The court concluded that the FPC had failed in its duty, and remanded the case to the Commission to review the applications in light of the relevance of the antitrust laws to regulatory agencies which the court expressed as a theory of "complementary regulation."⁸⁸ Judge Wright, writing for the court, maintained that the antitrust laws and the powers of regulatory agencies are complementary. Both the antitrust laws and the regulatory agencies: (a) are forms of economic regulation; (b) have as their goal the achievement of the most efficient possible allocation of resources (governmental control through administrative agencies is direct, while control through the antitrust laws is indirect); and (c) seek to establish an atmosphere which will stimulate innovations for better service at lower cost.⁸⁹ The court maintains that recent Supreme Court decisions appear to agree with this theory in that they held that regulated industries must, to some extent at least, accommodate the antitrust laws.⁹⁰ Judge Wright further points out that this theory is entirely consistent with the Supreme Court's statement in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*⁹¹ that "[b]y its very nature an illegal restraint of trade is in some ways 'contrary to the public interest'."⁹² Since the court concluded that the FPC had taken insufficient account of the anticompetitive effects of the proposal it had approved, the court remanded the case to the FPC for further consideration.⁹³

In the *Svenska Amerika Linien* case, the Federal Maritime Commission (FMC) had disapproved two practices of transatlantic passenger steamship conferences known as the "tying rule" (which

⁸⁶ 399 F.2d 953 (D.C. Cir. 1968).

⁸⁷ 15 U.S.C. § 717f(c) (1970). See 399 F.2d at 957-58.

The "public interest" declaration of 15 U.S.C. § 717 (1970) bears great resemblance to § 202 of the Federal Power Act, 16 U.S.C. § 824a(a) (1970). Section 202(a) is set forth in the text at note 64 supra.

⁸⁸ 399 F.2d at 959-60.

⁸⁹ Id. at 959. See also Comment, 21 Case W. Res. L. Rev. 812, 812-13 (1970).

⁹⁰ 399 F.2d at 959-60. See also *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

⁹¹ 390 U.S. 238 (1968).

⁹² Id. at 244, cited in 399 F.2d at 960.

⁹³ 399 F.2d at 977.

prohibited travel agents who book passage on ships participating in the conferences from selling passage on competing, non-conference lines) and the "unanimity rule" (which required unanimous action by conference members before the maximum rate of commissions payable to travel agents could be changed).⁹⁴ The Court of Appeals for the District of Columbia Circuit had concluded that according to the statutory language of section 15 of the Shipping Act of 1916,⁹⁵ the Commission could not disapprove of these rules merely because they run counter to antitrust principles.⁹⁶

The Supreme Court, however, specifically disapproved the "excessively formalistic" reading given section 15 of the Shipping Act by the court of appeals,⁹⁷ and approved the Federal Maritime Commission's interpretation of the 'public interest' as encompassing investigation of antitrust issues.⁹⁸ The Court stated that the antitrust test formulated by the FMC was "an appropriate refinement of the statutory 'public interest' standard."⁹⁹

Considering the closely regulated banking industry, the Supreme Court, in *United States v. Philadelphia National Bank*,¹⁰⁰ held that the proposed merger between the Philadelphia National Bank and Girard Trust Corn Exchange Bank would have anticompetitive consequences sufficient to warrant application of the antitrust laws.¹⁰¹ Rejecting the claim that enforcement of the antitrust laws regarding banks would have detrimental effects upon the national economy, the Court declared that, "[s]ubject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy There is no warrant for declining to enforce it in the instant case."¹⁰²

The issue facing the Supreme Court in *Denver & Rio Grande Western R.R. v. United States*¹⁰³ was very similar to that in *Gulf States Utilities*. *Denver* involved an interpretation of section 20a of the Interstate Commerce Act,¹⁰⁴ the section which the FPC referred to in *Pacific Power & Light* as almost identical to section 204 of the Federal Power Act.¹⁰⁵ In *Denver*, the Interstate Commerce Commission (ICC) had refused to hold a hearing to consider allegations of possible violations of antitrust laws which might result from a proposed sale of stock under section 20a. The ICC held that consideration of antitrust issues would not be appropriate before the effects

⁹⁴ 390 U.S. at 240.

⁹⁵ 46 U.S.C. § 814 (1970).

⁹⁶ 351 F.2d 756, 761 (D.C. Cir. 1965).

⁹⁷ 390 U.S. at 244.

⁹⁸ *Id.*

⁹⁹ *Id.* at 246.

¹⁰⁰ 374 U.S. 321 (1963).

¹⁰¹ *Id.* at 354-55, 371-72.

¹⁰² *Id.* at 372.

¹⁰³ 387 U.S. 485 (1967).

¹⁰⁴ 49 U.S.C. § 20a (1970).

¹⁰⁵ See text at notes 46-47 *supra*.

of the sale were definitely established. In rejecting this position, the Court said:

Common sense and sound administrative policy point to the conclusion that such broad statutory standards [*i.e.*, "consistent with the public interest"] require at least some degree of consideration of control and anti-competitive consequences when suggested by the circumstances surrounding a particular transaction.¹⁰⁶

Reasoning in the same vein, the Court in *Gulf States Utilities* declared that "[w]ithout a more definite indication of a contrary legislative purpose, we shall not read out of § 204 the requirement that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws."¹⁰⁷ In *Denver*, the Court also referred to the ICC's specific task in determining the public interest:

[T]he ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a(2).¹⁰⁸

From these cases, it is clear that competition is one of the basic elements of the public interest and that the antitrust laws are designed to further competition. It therefore follows that the antitrust laws must be considered by the agency if the circumstances surrounding a transaction within the agency's jurisdiction have anticompetitive overtones.¹⁰⁹

III. THE EFFECT OF *Gulf States Utilities* ON PUBLIC UTILITIES

Mr. Justice Powell stated that a major effect of the Court's decision in *Gulf States Utilities* is that it will place the securities of operating public utilities at a disadvantage with respect to the securities of public utility holding companies on the securities market.¹¹⁰ He claimed that now a greater burden would be placed upon the operating company seeking authorization for a securities issue from the Federal Power Commission than is placed upon a

¹⁰⁶ 387 U.S. at 492.

¹⁰⁷ 411 U.S. at 759. See also *Otter Tail*, 410 U.S. at 374.

¹⁰⁸ 387 U.S. at 498. Referring to *Denver*, the Court in *Gulf States Utilities* stated: "We perceive no reason to view the responsibility placed on the FPC under § 204 differently from the ICC's responsibility under § 20a of the Interstate Commerce Act." 411 U.S. at 761. This analogy, although helpful, does present difficulties. See note 47 *supra*.

¹⁰⁹ Cf. *Baker*, *supra* note 70, at 584, 586.

¹¹⁰ 411 U.S. at 772.

holding company requesting similar authorization from the Securities and Exchange Commission (SEC). However, a comparison of the Public Utility Holding Company Act of 1935 and the Federal Power Act, its companion legislation, leads to a contrary conclusion.

In issuing securities, public utility holding companies must conform to even more stringent regulations, embodied in the Holding Company Act, than the regulations which operating utilities must observe. Consider, for example, the intricate checks placed on the issuance of securities in section 7 of the Holding Company Act.¹¹¹ The "public interest" is a crucial consideration for the SEC when evaluating an application for a securities issue.¹¹² Also, the SEC may establish rules for the "maintenance of competitive conditions" among holding companies which they are compelled to obey.¹¹³ The SEC's obligation with respect to any violation of a provision of the Holding Company Act, its own rules or other applicable laws is identical to the duty of the FPC.¹¹⁴

Furthermore, the Court's opinion supports the conclusion that a regulatory agency's duty and authority to investigate matters in the "public interest" are directly connected to the scope of its regulatory powers.¹¹⁵ Although the Court did not have occasion to rule on the court of appeals' disposition of the companion case in *Gulf States Utilities*, it did quote the lower court's statement bearing on the propriety of the SEC's refusal to entertain charges of anticompetitive conduct connected with the securities issue.¹¹⁶ Concerning the SEC's responsibilities, the court of appeals said:

[T]he general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company . . . and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which . . . has regulatory jurisdiction over operations¹¹⁷

The court of appeals left open the possibility that the SEC would be required to hold hearings on anticompetitive allegations "if the purpose of the utility's sale of securities is . . . shown to have a

¹¹¹ 15 U.S.C. § 79g (1970).

¹¹² See, e.g., §§ 1, 6, 7 and 12 of the Holding Company Act, 15 U.S.C. §§ 79a, 79f, 79g and 79i (1970).

¹¹³ 15 U.S.C. § 79i(d) (1970).

¹¹⁴ Compare § 18(f) of the Holding Company Act, 15 U.S.C. § 79r(f) (1970), with § 314(a) of the Federal Power Act, 16 U.S.C. § 825m(a) (1970).

¹¹⁵ See 411 U.S. at 758-59.

¹¹⁶ Id. at 754-55 n.4.

¹¹⁷ 454 F.2d at 955.

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reasonable nexus to matters within the SEC's jurisdiction under other provisions [of the Holding Company Act]."¹¹⁸

Therefore, the interpretation given to matters which the SEC must investigate in the "public interest" when considering an authorization to issue securities is congruent with the interpretation given the phrase in the FPC's domain. Accordingly, it does not appear that the securities of holding companies will have any great advantage, if any advantage at all, over the securities of operating companies. What does seem to follow from the decision in *Gulf States Utilities* is that public utilities (and holding companies) will be more reticent about contravening the antitrust laws since it may jeopardize their ability to raise necessary capital.

CONCLUSION

In summary, it is submitted that the Federal Power Commission took an antiquated view of its responsibilities when it ruled that the Cities' antitrust claims were irrelevant under a section 204 proceeding. When the Cities alleged that Gulf States was engaging in anticompetitive conduct, the FPC should have reconsidered its 1962 decision in *Pacific Power & Light* and should have brought itself in line with the Supreme Court's decisions affecting other administrative agencies dealing with similar matters. Thus, the decision in *Gulf States Utilities* brings the FPC up to date and establishes a standard for section 204 proceedings which is in conformity with the current conception of the "public interest."

LARRY E. BERGMANN

Labor Law—Antitrust Liability of Labor Unions—*Connell Construction Co. v. Plumbers Local 100*.¹—Plaintiff, Connell Construction Co. (Connell), a general contractor in the construction industry in Texas, initially instituted this suit against defendant, Plumbers Local 100 (the Union), in Texas state court, alleging that picketing by the Union of Connell's construction project for the purpose of forcing Connell to sign an agreement not to employ nonunion subcontractors violated the antitrust laws of Texas.² The Union re-

¹¹⁸ Id. at 956.

¹ 483 F.2d 1154, 84 L.R.R.M. 2001 (5th Cir. 1973), cert. granted, 42 U.S.L.W. 3631 (U.S. May 14, 1974).

² Tex. Code Ann. §§ 15.02-.04. The text of the proposed agreement was as follows:

WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor Management Relations Act;

WHEREAS, it is understood that by this agreement the contractor does not