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Federal Merger Review Authorities and Electric Utility Restructuring

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Summary

Reform of federal agency oversight of electric utility mergers is among the issues addressed in the conference report of H.R. 6, the Energy Policy Act of 2003. The current version of the bill would repeal the Public Utility Holding Company Act of 1935 (PUHCA), fundamentally altering the current regulatory system by curtailing Securities and Exchange Commission (SEC) involvement in the merger oversight process. The conference report also incorporates provisions from both the House and Senate versions of the bill, including changes to the merger review process conducted by the Federal Energy Regulatory Commission (FERC) and the antitrust agencies. This report will explain the regulatory environment now in place and address some of the proposed changes to current merger review procedures; it will be updated as necessary.

Under current law, the primary agencies responsible for merger oversight are the SEC, FERC, the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Each agency's role in merger oversight is governed by agency specific federal statutes, providing oversight responsibilities differing in purpose and procedure.

SEC responsibilities are governed by PUHCA, which defines and regulates public utility holding companies, subjecting such entities to, among other things, merger, acquisition, and holdings regulation. The SEC reviews a transaction and its resulting business combinations to insure that they comport with the public interest. Both the House and Senate versions of the energy bill would have repealed PUHCA, removing SEC oversight, and transferred certain SEC responsibilities to FERC and state regulators. The conference report adopts these provisions as well.

Section 203 of the Federal Power Act subjects all mergers of public utilities within FERC jurisdiction to FERC review, often the most extensive agency review undertaken. Without FERC approval, the transaction cannot occur. Under current law, FERC's jurisdiction attaches whenever a particular size or type of transaction is proposed. FERC reviews these transactions to insure they will secure adequate service and coordinates the public interest with the interest of regulated facilities. The conference report version would amend the transactions which fall under FERC jurisdiction and require future studies of FERC's oversight responsibilities with an emphasis on streamlining the process as a whole.

DOJ and FTC enforce the generally applicable antitrust laws. These laws prevent transactions that would substantially impede competition and can require premerger notification. Neither of these acts would be directly affected by any provision in the currently pending legislation. However, as mentioned above, the conference report may anticipate potential alterations to merger review authority by the agencies.

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Federal Merger Review Authorities and Electric Utility Restructuring

Disagreement over environmental and electric utility restructuring issues had stalled comprehensive energy reform legislation for several years prior to the recent cascading power outages.[1] The power blackout of August 14, 2003, however, provided new impetus for Congressional action regarding electricity regulation reform.[2] Among the current issues is federal oversight of electric utility mergers.[3] The H.R. 6 conference report (108th Congress) combines provisions from the earlier House and Senate versions of the legislation and would fundamentally change the current regulatory system by, *inter alia*, repealing the Public Utility Holding Company Act of 1935 (PUHCA) and modifying the oversight responsibilities of the primary regulators.[4] A brief overview of the current system and the changes that would be wrought by the bill follows.

Under current law, four federal agencies – the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), the Department of Justice (DOJ), and the Federal Trade Commission (FTC)–regularly play significant roles in electric utility merger oversight.[5] Each agency approaches the merger process from a different perspective, pursuant to the dictates of various federal statutes.

The SEC's role is governed by the PUHCA,[6] which grants the SEC the authority to regulate mergers, acquisitions, and the holdings of "public utility holding companies."[7] FERC generally undertakes the most extensive and substantive review of utility mergers and does so pursuant to section 203 of the Federal Power Act

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[1] Samuel Goldreich, *Blackout Turns Spotlight on Energy Overhaul Bill*, CQ TODAY, Aug. 18, 2003, at 1,4, *available at* [http://www.cq.com/display.do?dockey=/usr/local/cqonline/docs/html/news/108/news/108-000000799450.html@allnews&metapub=CQ-NEWS7seqNum=1&searchIndex=1].

[2] *Id*.

[3] *See* Energy Policy Act of 2003, H.R. 6 (Conference Report), 108th Cong. §§ 1291, 1292 (2003).

[4] *Id*.

[5] Nuclear Regulatory Commission review of transactions involving nuclear facilities and Internal Revenue Service review of transaction tax consequences have been excluded because they are not pertinent to this discussion.

[6] 15 U.S.C. §§ 79 *et seq*.

[7] *E.g,.*, 15 U.S.C. §§ 79b, i, j, k, l.

(FPA).[8] DOJ and FTC are both charged with enforcing the applicable antitrust statutes, § 7 of the Clayton Act[9] and the premerger provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[10]

SEC Review Under the Public Utility Holding Company Act

As mentioned above, the conference report of H.R. 6 would repeal PUHCA. The following summarizes the Act as it currently exists.

PUHCA regulates holding companies which have subsidiaries that are electric utility companies or that are engaged in the retail distribution of natural gas or manufactured gas. The Act defines a holding company as:

> (A) any company which directly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B) of this paragraph, unless the Commission [Securities and Exchange Commission], as hereinafter provided, by order declares such company not to be a holding company; and
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> (B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon holding companies.[11]

Under PUHCA all holding companies which have subsidiaries that are engaged in the electric utility business or in the retail distribution of natural or manufactured gas must register with the SEC if they engage in interstate commerce.[12] Several kinds of holding companies are exempt under the Act from the registration and regulation requirements. These exemptions include: 1) a predominantly intrastate holding company which substantially carries on its business in the state in which it and all of its subsidiaries are organized and derives a material part of its income from such intrastate activity; 2) a holding company which is predominantly a public utility company and whose operations do not extend beyond the state in which it is

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[8] 16 U.S.C. §§ 791a *et seq;* 16 U.S.C. § 824.

[9] 15 U.S.C. § 18.

[10] 15 U.S.C. § 18a (Title II of P.L. 94-435).

[11] 15 U.S.C. § 79b(a)(7).

[12] 15 U.S.C. § 79d.

organized and states contiguous to it; 3. a holding company which is only incidentally a holding company; 4. a holding company that is only temporarily a holding company because of acquiring securities for liquidation or distribution; and 5. a holding company that does not derive a material part of its income from a subsidiary whose principal business is that of a public utility company.[13]

Holding companies required to register with the Securities and Exchange Commission must disclose information concerning the company's operations and a description of its management structure. Among the items required by the registration statement are the charter or articles of incorporation, bylaws, rights of the different classes of securities, underwriting arrangements under which the securities have been offered, directors and officers, material contracts, balance sheets, and profit and loss statements.[14]

However, PUHCA goes beyond the disclosure-type requirements of the Securities Act of 1933[15] and the Securities Exchange Act of 1934.[16] PUHCA also places substantive requirements upon the operations of a registered holding company. Holding companies not exempt from PUHCA registration have two other requirements–geographical integration and corporate simplification.[17]

The geographical integration requirement provides that a holding company is limited to a single integrated electric or gas utility system and other businesses which are reasonably incidental or economically necessary or appropriate to the operations of the integrated public utility system. The SEC will permit a registered holding company to continue to control one or more additional public utility systems if it finds that each of the additional systems cannot be operated as an independent system without the loss of "substantial economies"; the additional systems are located in one state, in adjoining states, or in a contiguous foreign country; and the continued combination of the systems is not so large as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.[18]

Corporate simplification under PUHCA requires the elimination of corporate structures or companies which unduly or unnecessarily complicate the structure of a holding company system or which unfairly or inequitably distribute the voting power among security holders of a holding company system. Further, the SEC is required to take whatever action is necessary to ensure that a holding company ceases

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[13] 15 U.S.C. § 79c(a).

[14] 15 U.S.C. § 79e(b).

[15] 15 U.S.C. §§ 77a *et seq*.

[16] 15 U.S.C. §§ 78a *et seq*.

[17] 15 U.S.C. § 79k. It should be noted that exempt companies will themselves comply with the geographic integration and corporate simplification requirements. Should an exempt holding company fail to meet the requirements, it would become a registered company under PUHCA and be subject to these same regulations.

[18] 15 U.S.C. § 79k(b)(1).

to be a holding company concerning each of its subsidiary companies "which itself has a subsidiary company which is a holding company."[19]

PUHCA was not intended to eliminate all holding companies. Those remaining public utility holding companies, however, must adhere to certain constraints. For example, registered holding companies must obtain SEC approval before they or their subsidiaries acquire any subsidiaries, utility assets, or any other interest in any business.[20] SEC approval is also usually required before any person owning 5 percent or more of the voting securities of a public utility or holding company acquires 5 percent or more of any other public utility.[21]

Argument over the continuing relevance of PUHCA has been ongoing for some time. There has been some agreement in Congress that, if not repealed, PUHCA, at least, requires significant modernization, with the regulated entities and the SEC itself recommending repeal on several occasions.[22] Consumer groups and some state regulators, on the other hand, have claimed that PUHCA continues to serve a valuable purpose and should not be changed.[23] PUHCA was originally enacted in the wake of the stock market collapse of 1929 to deal with abuses stemming from consolidated ownership of utility and non-utility interests.[24] Supporters of repeal have argued that the conditions that originally necessitated PUHCA's enactment no longer exist in the current market and that, even if they should arise again, state and other federal regulators are equipped to efficiently regulate financial transactions without SEC involvement. Additionally, supporters of repeal argue PUHCA prevents regulated companies from fully and beneficially participating in the electric power industry.[25] Opponents of PUHCA repeal argue that PUHCA protects consumers and

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[19] 15 U.S.C. § 79k(b)(2).

[20] 15 U.S.C. § 79i(a)(1).

[21] 15 U.S.C. § 79i(a)(2).

[22] Lifting PUHCA Restrictions: Joint Hearing Before the Subcomm. on Energy and Power and the Subcomm. on Telecommunication and Finance of the House Comm. on Energy and Commerce, 103d Cong., 2d Sess. 16 (1994). For SEC support of repeal, *see*, SEC, The Regulation of Public-Utility Holding Companies (1995); *see also* U.S. Securities and Exchange Comm'n, Statement Concerning Proposals to Amend or Repeal the Public Utility Holding Company Act of 1935 (1982); *see also* S. 1977, 97th Cong., 2d Sess. (1982); H.R. 5465, 97th Cong., 2d Sess. (1982); Public Utility Holding Company Act Amendments: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 2d Sess. (1982).

[23] *Rates & Regulation: Senate Panel to Mark Up PUHCA Real Bill; One CEO Sees Votes for Passage*, ELECTRIC UTILITY WK., April 23, 2001, *available at* 2001 WL 10440035; *PUHCA Bandied About at Workshop; DOE Opposes Stand-Alone Repeal*, INSIDE F.E.R.C. 16, June 30, 1997, *available at* 1997 WL 9127543.

[24] *See* 15 U.S.C. § 79(a)(c); Joris M. Hogan & Rodrigo J. Howard, Viable Deal Formats for Merging Utilities, MERGERS & ACQUISITIONS, 41 (Sept./Oct. 1996).

[25] *See, e.g.*, Richard F. Vander Venn, "Michigan is Now Entering a New Electrical Energy Field: Competition, 78 MICH. B. J. 164, 168 (1999). For additional information see CRS Report RL32728, *Electric Utility Regulatory Reform: Issues for the 109th Congress*, by (continued...)

the economy by effectively limiting opportunities for cross-subsidization and the likelihood that public utility holding companies will enter into risky business transactions.[26]

Questions concerning whether PUHCA should be repealed alone or in conjunction with comprehensive energy regulation reform have often contributed to no final action on past attempts at PUHCA repeal. In addition, there has been concern over the resulting roles of federal and state regulators if repeal were to take place.[27]

The current version of H.R. 6 would repeal PUHCA in conjunction with other comprehensive energy industry reforms. The bill would grant FERC and state regulators access to the books and records of public utility holding companies and their affiliates and provides that FERC "shall have the same powers as set forth in section 306 through 317 of the Federal Power Act (16 U.S.C. 825e-825p) to enforce [these provisions]."[28] Section 1292 of the bill would also amend section 203(a) of the FPA, directly placing review of public utility holding company mergers within the ambit of FERC jurisdiction.[29] The earlier Senate version of the bill would have provided for a Government Accounting Office study on anticompetitive practices following PUHCA repeal and would have requested recommendations for any further legislative action to correct them, a provision the conference report does not include.[30]

The Federal Energy Regulatory Commission and Merger Review

Section 203 of the Federal Power Act[31] requires FERC to approve any merger attempted by the public utilities within the agency's jurisdiction before the transaction can occur, and the section authorizes what is often the most extensive

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[25] (...continued)
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[26] *See, e.g.*, Michael E. Stern & Margaret M. Mlycznak Stern, "A Critical Overview of the Economic and Environmental Consequences of Deregulation of the U.S. Electric Power Industry," 4 ENVTL. L. 79 (1997).

[27] Practicing Law Institute, "Recent Developments Affecting the Work of the Securities and Exchange Commission–December 29, 2000," 11234 PLI/CORP 797, 909-915, (March 2001).

[28] Energy Policy Act of 2003, H.R. 6 (Conference Report), 108thCong. §§ 1264, 1265, 1270 (2003).

[29] Energy Policy Act of 2003, H.R. 6 (Conference Report), 108th Cong. § 1292(a)(2) (2003). For additional information see CRS Report RL32033, *Omnibus Energy Legislation (H.R. 6): Side by Side Comparison of Non-tax Provisions*, by Mark Holt and Carol Glover.

[30] Energy Policy Act of 2003, H.R. 6 (Senate version), 108th Cong. § 235 (2003).

[31] 16 U.S.C. §§ 791a *et seq*.

agency review undertaken.[32] Under current law, FERC's jurisdiction attaches whenever a regulated utility:

(1) Proposes a transfer of its own assets valued over $50,000;

(2) Attempts to merge or consolidate; or

(3) Moves to acquire another public utility's securities.[33]

Under current law, FERC reviews the above-mentioned transactions to insure that they will be consistent with the "public interest," a term that has never been explicitly defined.[34] Still, FERC's FPA-based public interest standard establishes a somewhat different set of review principles than those used by the antitrust agencies.[35] Whereas DOJ and FTC look for utility compliance with the terms of the antitrust statutes, which generally punish anti-competitive behavior, FERC's review process can potentially condition or prevent a proposed transaction in the absence of antitrust violations.[36]

Until 1996, FERC followed the guidelines set forth in *In re Commonwealth Edison Co.* when reviewing merger applications.[37] The nonexclusive factors included: a potential merger's effect on the operating costs and rate levels of the newly formed company, the effect on competition in the industry, the reasonableness of the purchase price, whether the merger was voluntary on the part of the involved companies, the effect on federal and state regulation, and the contemplated accounting treatment of the merged entity.[38]

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[32] 16 U.S.C. § 824b. This section states: "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 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 first having secured an order of the Commission authorizing it to do so.... [I]f the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same."

[33] *Id.*

[34] *Id.*

[35] The courts have held that the public interest standard requires an application of antitrust principles. Gulf States Utils. Co. v. FPC, 411 U.S. 747, 760 (1973); Kansas City Power & Light Co. v. FPC, 554 F.2d 1178, 1184 (D.C.Cir. 1977). FERC has complied with these rulings but also weighs "other important public interest considerations." Utah Power & Light Co., 45 F.E.R.C. ¶ 61,095, at 61, 283 (1988).

[36] Albert A. Foer and Diana L. Moss, *Electricity in Transition: Implication for Regulation and Antitrust*, 24 ENERGY L. J. 89, 100 (2003).

[37] In re Commonwealth Edison Co., 36 F.P.C. 927 (1966).

[38] *Id.* at 14-15.

In 1996, as policy was shifting toward the creation of a competitive electric industry, FERC altered its merger review policy, setting forth its revised position in Order 592.[39] FERC's revised position limits review to prospective effects on competition, rates, and regulation.[40] As to competition, the Commission adopted the guidelines generally used by DOJ and FTC in evaluating antitrust concerns.[41] However, several differences remain between FERC review and the analysis conducted by its antitrust counterparts. The analysis of merger impact on rates and federal and state regulation stems from the public interest standard and does not have immediate corollaries in antitrust review, as the FERC standard is geared to assess merger impact from consumer rate protection, state interest, and regulatory efficiency points of view.[42] In addition, unlike the antitrust agencies, under FERC review the burden of proving consistency with the merger guidelines falls upon the regulated entities.[43]

Debate over the extent to which FERC should continue to review electric utility mergers has accounted for a portion of the controversy surrounding the new energy legislation.[44] Proponents of FERC's continuing role in merger review cite the agency's expertise in the field and its specialized review focus based upon a public interest standard. Proponents also argue that, until the market has been competitive for a sufficiently long time, the antitrust agencies will be poorly equipped to accurately gauge a participant's market power.[45] Those opposed to FERC's involvement cite the development of competition in the industry as making agency involvement beyond DOJ/FTC antitrust oversight unnecessarily duplicative. Opponents also argue that the increased transaction costs of multiple agency review

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[39] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Statutes and Regulations ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (hereinafter "1996 Policy Statement").

[40] *Id*. at 61 Fed. Reg. 68606.

[41] *Id*.; U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, revised 41 Trade Reg. Rep.(CCH) ¶ 13,104 (Apr. 8, 1997). Additionally, FERC has issued a final rule implementing this policy at 18 C.F.R. § 33 (2003). These regulations set out the filing requirements for mergers and other transactions in an attempt to streamline the review process.

[42] 1996 Policy Statement, 61 Fed. Reg. 68596.

[43] 5 U.S.C. § 556(d) (2003)("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

[44] *See* Samuel Goldreich, *Blackout Turns Spotlight on Energy Overhaul Bill*, CQ TODAY, Aug. 18, 2003,at 1,4, *available at* [http://www.cq.com/display.do?dockey=/usr/local /cqonline/docs/html/news/108/news/108-000000799450.html@allnews&metapub=CQ-NEWS7seqNum=1&searchIndex=1].

[45] *See, e.g.*, Joel I. Klein (then Assistant Attorney General in charge of the Antitrust Division), Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electric Power Restructuring, Address Before the FERC (Jan. 21 1998) at 14-16, available at [http://www.usdoj.gov/atr/public/speeches/1332.pdf].

and the regulatory uncertainty that stems from the "public interest" standard are further indications that the system is not optimally structured.[46]

The conference report combines elements from both the House and Senate versions of H.R. 6. The current bill would not fundamentally alter FERC's review process or mission, although it would amend the considerations and types of transactions FERC must take into account. Section 1292 of the proposed legislation would effect the following changes:

> (1) Increase FERC's jurisdictional amount from $50,000 to $10,000,000 for transactions disposing of a utilities' own facilities or for a utility's acquisition of an interest in another utility;
>
> (2) Require FERC review of any merger or consolidation involving an electric utility acquisition of existing electricity generating facilities; and
>
> (3) Require review of holding company acquisitions and mergers as the SEC currently does under PUHCA.[47]

Additionally, section 1291 would require analysis by DOE, FERC, and DOJ to determine which, if any, of FERC's current oversight responsibilities are duplicative of the authority of other agencies or authority already vested in FERC by other sections of the FPA.[48] While this analysis would not in itself substantially alter the current regulatory scheme, it could lead to a more significant change in the future.

Antitrust Review by DOJ and FTC

DOJ and FTC each enforce the Clayton Act and Hart-Scott-Rodino Antitrust Improvements Act, both of which will generally apply to electric utility mergers. Accordingly, in addition to whatever review is required by FERC, mergers in the energy industry are reviewed from the perspective of their compliance with the requirements of antitrust/economic market-based concerns by DOJ and FTC. Section 7 of the Clayton Act prohibits mergers or acquisitions which "substantially" lessen competition or which "tend to create a monopoly"; the Premerger Notification provisions of the Hart-Scott-Rodino Act require that certain mergers and acquisitions (those meeting applicable size and other criteria) be notified to both the Attorney General and the Chairman of the Federal Trade Commission prior to consummation of the transaction.[49] The Premerger Notification statute prohibits the consummation

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[46] Martin A. Marquis, *DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 LOY. U. CHI. L. J. 783, 788-89 (Summer 2000).

[47] Energy Policy Act of 2003, H.R. 6 (Conference Report), 108th Cong. § 1292 (2003).

[48] Energy Policy Act of 2003, H.R. 6 (Conference Report), 108th Cong. § 1291 (2003).

[49] The requirement that parties to a *proposed merger* notify the Attorney General and the (continued...)

of any transaction covered by it prior to the expiration of a statutorily specified "waiting period" unless the reviewing agency grants an "early termination."[50]

Implied exemptions from the antitrust laws, except when application of the antitrust laws would frustrate another congressionally mandated policy or scheme, are not assumed (*e.g.*, merger transactions are not presumed exempt from antitrust challenge by DOJ or the FTC because they have been approved by, in this case, FERC) :

> Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.[51]

Moreover, 16 U.S.C. section 2603 currently states that "[n]othing in this [Public Utility Regulatory Policies] Act ... affects

> (1) the applicability of the antitrust laws to any electric utility ..., or
>
> (2) any authority of the Secretary or of the [Federal Energy Regulatory] Commission under any other provision of law (including the Federal Power Act [15 U.S.C.A. § 791 *et seq.*] and the Natural Gas Act (15 U.S.C.A. § 717 *et seq.*) respecting unfair methods of competition or anticompetitive acts or practices.

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[49] (...continued)
Chairman of the FTC prior to the consummation of the transaction – *premerger review* - does contain some exemptions, although none pertaining to the electric utility industry (*see, e.g.*, 15 U.S.C. §§ 18a(c)(7) and 18a(c)(8)); but even those exemptions pertain only to the requirement that documents relating to a *future*, proposed merger transaction be filed with the Attorney General and the FTC, and not to the mergers themselves.

[50] 15 U.S.C. §§ 18a(b)(1),(2).

[51] Otter Tail Power Co. v. U.S., 410 U.S. 366, 372 (1973) *quoting* United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963). *See also* National Gerimedical Hospital and Gerontology Center v. Blue Cross, 452 U.S. 378, 388-389 (1981): "'Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system,'" quoting from United States v. National Association of Securities Dealers, 422 U.S. 694, 719-720 (1975); "[Our earlier] holdings [including Otter Tail] are based on the guiding principle that, where possible, 'the proper approach ... is an analysis which reconciles the operation of both statutory schemes with one another, rather than holding one completely ousted,'" quoting from Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary," quoting from Silver at 357.

Overlapping Jurisdiction of FERC, DOJ and FTC

As noted *supra* at pp. 5-8, mergers in the electric utility industry are also reviewed by FERC pursuant to 16 U.S.C. section 824b. This section requires a "public utility" subject to FERC jurisdiction to secure FERC approval before undertaking action to "sell, lease, or otherwise dispose of" its facilities, merge, or consolidate; FERC's approval must be granted provided that it finds that the proposed transaction would be "consistent with the public interest."

While an industry-specific regulatory agency is presumed to have the expertise to know whether a particular proposed transaction would be in the "public interest" or would further the "public convenience and necessity," the regulatory agency may have neither the expertise or the inclination to evaluate the antitrust/economic market implications of a transaction. In any event, there is no requirement that a regulatory agency utilize the antitrust laws, although it may be encouraged to consider them, or at least the competitive consequences of a transaction. Similarly, although the antitrust agencies possess expertise concerning the likely competitive or market aspects of utility mergers, they may not be steeped in the intricacies of the electric utility industry itself: "... while the Justice Department and the Commission have shared jurisdiction in this area, our statutory responsibilities and missions are somewhat different."[52] Thus, while DOJ, FTC and FERC each utilize the DOJ/FTC Horizontal Merger Guidelines (Guidelines),[53] and theoretically at least, all are proceeding from the same assumptions, and will, on the basis on the Guidelines, all reach the same conclusion with respect to particular merger transactions, the differing prisms through which the Guidelines are necessarily filtered may produce differing results; and that has been generally accepted:

> *Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.*
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> In California v. FPC, 369 U.S. 482, 489 ... the Court held that approval of an acquisition of the assets of a natural gas company by the Federal Power Commission pursuant to § 7 of the Natural Gas Act "would be no bar to (an) antitrust suit." Under § 7, the standard for approving such acquisitions is "public convenience and necessity." Although the impact on competition is relevant to the Commission's determination, the Court noted that there was "'no pervasive regulatory scheme" including the antitrust laws that ha(d) been entrusted to the Commission.'" Id. at 485. Similarly, in United States v. Radio Corporation of America, 358 U.S. 334 ... [1959] *the Court held that an exchange of radio stations that had been approved by the Federal Communications Commission as in the 'public interest' was subject to attack in an antitrust proceeding.*[54]

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[52] Klein, *supra*, note 46.

[53] Promulgated in 1992 and revised in 1997 to take account of possible efficiencies resulting from a merger transaction. FERC utilizes the Guidelines to further its examination of utilities' market power.

[54] Otter Tail Power Co. v. U.S., *supra*, note 4 at 372, 373 (parts of citations omitted; (continued...)

A further point concerning the respective abilities of FERC and the antitrust agencies to address adequately the issue of market power in a restructured electric power industry which may have important consequences in a future, deregulated electric utility industry has been noted by DOJ: There is no concept of "no fault" monopolization in antitrust law; the mere fact that an entity is a particular size is, by itself, of no antitrust significance; the antitrust agencies may not, therefore, order the divestiture (restructuring) of any entity deemed to be "too big" unless that entity has achieved or is maintaining its monopoly position by virtue of something violative of the antitrust laws. The Antitrust Division has expressed some thoughts on its inability to challenge market structure in the electric utility industry and a possible means of addressing that concern:

> In other words, to whatever extent restructured electric power markets are too highly concentrated to yield pricing at or near competitive levels, the antitrust laws provide no remedy. To address these kinds of structural problems, some states have encouraged or required divestiture as part of their restructuring efforts, and these divestiture efforts have progressed substantially. In support and furtherance of such efforts, the Antitrust Division suggested in testimony before the House Judiciary Committee last June that Congress might want to look into providing authority to order divestiture in any federal restructuring legislation. *Such authority, if conferred, would presumably go to the [Federal Electric Regulatory] Commission.*[55]

The current bill would not directly affect either of the antitrust statutes. It may, however, anticipate alterations to the current scheme of merger review: Section 1291 would require FERC, the Secretary of Energy, and the Attorney General to conduct a study of whether FERC merger review authority under section 203 of the Federal Power Act is "duplicative of authorities vested in other agencies of Federal and State government."[56]

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[54] (...continued)
emphasis added).

[55] Klein, *supra*, note 46 (emphasis added), referencing the suggestion put forth in the June 4, 1997 testimony of A. Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, Department of Justice, before the House Committee on the Judiciary, during the hearing, "Legislative and Oversight Hearing on Antitrust Aspects of Electricity Deregulation," 105th Cong.

[56] Energy Policy Act of 2003, H.R. 6 (Conference Report), 108th Cong. § 1291 (2003).