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REGULATION OF INTERCONNECTED ELECTRIC UTILITIES: SOME JURISDICTIONAL CONSIDERATIONS

James J. Lopach*
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I. INTRODUCTION

Montana residents have been interested for a long time in public policy questions concerning utility regulation. Although this feeling in Montana has been intense, the governmental response has been little different from the experiences of other states. State legislatures in the early twentieth century established regulatory commissions with control over utility companies to protect the consuming public.¹ Such enactments have been recognized by courts as legitimate expressions of the state’s police power.² Establishment of federal regulatory agencies paralleled the state activity, but the division of regulatory power between the two levels historically has favored the states. Congress noted in the Federal Power Act that it intended to preserve the states’ regulatory control over public utilities.³ Today, however, changing circumstances may lead to displacement of Helena and other state capitals by Washington as the power center of utility regulation.

The diminution of state utility-related regulation would have major implications for Montana residents. One aspect of regulation concerned with energy production especially seems to be at stake,⁴ certification and control over the location of utility facilities.⁵ Montana has been involved in regulating generation sites and transmis-

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¹ See M. GLASSER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 16 (1957).
² Public Service Commission v. City of Helena, 52 Mont. 527, 159 P. 24, 27 (1916).
⁴ The most familiar and long-standing area of utility regulation deals with rates and service. See REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 70-101 et seq.
⁵ The Montana Legislature created the Department of Natural Resources and Conservation in 1971, R.C.M. 1947, § 82A-1501 et seq., and in 1973 the Montana Utility Siting Act, R.C.M. 1947, § 70-801 et seq. vested in the State Board of Natural Resources and Conservation the authority to approve or reject applications by utilities for new facility sites. R.C.M. 1947, § 70-810 prohibits the Board from granting a certificate unless it finds that “duly authorized state air and water quality agencies have certified that the proposed facility will not violate state and federally established standards. . . ."
sion corridors for only a few years, but the controversy surrounding
the state's first activity in this field\(^6\) rivals the political acrimony
that traditionally has accompanied regulation of utility prices and
operations. The controversy is heightened because of the interests
held in the balance: Montana's environmental integrity and the
energy requirements of a multi-state area.

The two coal-fired electrical generating units at Colstrip, Monta-
na, would be a part of an interstate utility network which would
transmit electricity generated in Montana to consumers throughout
the Pacific Northwest. Even though this system would serve resi-
dents of many states, the initial decision whether or not to permit
construction rests solely with Montana. The Colstrip certification
question could provide the impetus for sweeping regulatory change
capable of advancing regional interests with respect to interstate
electrical systems. In the past decade, Congress has failed to realign
state and federal authority over utility plant siting in order to elimi-
nate the problem of unilateral state action. Should congressional
inaction continue, the Commerce Clause of the United States Con-
stitution\(^7\) might provide the legal underpinning for such regulatory
change. The purpose of this article is to place the Montana public
discussion about the Colstrip plants in a heretofore absent, but
seemingly indispensable, context—the allowable reach of state ac-
tion affecting interstate commerce.

This article will discuss, in turn, how recent developments in
electric utility technology can provide benefits to a multi-state area,
and how these advantages cannot be realized under the existing
regulatory system. It will be argued that regulatory reform is
needed, but most likely will not be forthcoming from Congress, and
that a legal challenge based on the Commerce Clause to the present
regulatory framework might therefore be sustained.

II. THE ADVANTAGES OF ELECTRIC UTILITY INTERCONNECTION

A general statement about current trends in electric utility
technology is that interconnected operations are favored from a
number of perspectives. This view is not based exclusively on indus-
try and government statistics predicting substantial growth in com-
ing years in demand for electricity. Its significance is primarily due
to the fact that many problems created by increased demand can
be collectively resolved by utility operation and coordination on a

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6. The Board of Natural Resources and Conservation presently has under consideration
the application of The Montana Power Company and four other northwest utility companies
for certification of two generating plants at Colstrip, Montana, and a high voltage transmis-
sion line from Colstrip to Hot Springs, Montana.
7. U.S. Const. art. I, § 8, cl. 3.
multi-state basis. Specifically, claims are being heard today on technological grounds that small and restricted utility systems cannot meet future demands and secure potential economic and environmental advantages. Utility interconnection technology and arguments in favor of interconnected utility systems will be described below.

A. Electric Utility Interconnection

Recent technological developments in the electric power industry permit a scope of utility operation that renders state boundaries insignificant. Advances in methods of generating and transmitting electricity have made a regional approach to meeting increased future demand more promising than isolated single company efforts. An electric power company today can install a generating unit with a capacity in excess of 1,000 megawatts. Additionally, it has become feasible to transmit electricity from the generation site over extremely high voltage lines to distant customers. Economies of scale can accompany the large generating plants, but in most instances, single electric utility systems do not have sufficient demand and projected growth to warrant the massive capital outlay that large generating plants require. As a result, interconnections between separate utility companies have become a widespread practice in the electric power industry.

Interconnecting, pooling, and coordination are essentially similar approaches to utility cooperation. Two generating systems are interconnected when they are joined by a high power transmission line through which electric current from either of the systems can be transmitted to the other. This type of mutual arrangement can also include provision for transmission reliability (that is, the lines of the separate systems can withstand equally intense power surges), and centralized dispatching of electricity (that is, each system surrenders its autonomous control over assignment of the electricity it generates to various locations). Interconnected electric utility systems can, therefore, in different degrees, approach the operating status of a single system.

B. Future Demand for Electricity

The substantially increased demand that consumers are expected to place on the electric power industry during coming years is one reason electric utilities have turned to multi-state energy

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systems. The Federal Power Commission (F.P.C.) estimated in 1964 that the nation would require approximately 300 million kilowatts of new generating capacity between 1967 and 1980.\textsuperscript{10} The \textit{Project Independence Report} of the Federal Energy Administration (F.E.A.) stated that demand for electricity has been increasing at an annual rate of seven percent.\textsuperscript{11} Because of energy loss during generation and transmission and a peak and valley pattern of consumer demand, generating capacity must be increased in excess of the average rate of growth in consumption. The F.E.A. concluded that with the seven percent annual growth rate in demand, more than six times the 1970's electricity capacity would be needed by the year 2000 to satisfy the total national demand.\textsuperscript{12}

Responsibility for meeting the projected increase in demand for electricity will fall on investor-owned utilities. There are over 3,500 utility systems in the nation's electric power industry,\textsuperscript{13} only seven percent of which are investor-owned. However, the dominance of the investor-owned utilities in the electric power industry can be appreciated from the fact that they supply approximately 80 percent of the nation's retail need for electricity.\textsuperscript{14}

The increased generating capacity will have the following sources (in approximate percentages): hydroelectric plants, 11 percent; fossil-fueled thermal plants near urban centers, 38 percent; mine-mouth thermal plants, 22 percent; nuclear plants, 22 percent; pumped storage plants, 6 percent; and peaking plants, 1 percent.\textsuperscript{15} Given the industry's vertically integrated organization, investor-owned utilities will retail the bulk of the power they produce directly to ultimate consumers.

\textit{Interconnection and Cost Savings}

Utility technology provides interconnecting electric power companies with significant benefits, such as reduction of the high costs inherent in their present mode of operation. In planning its generating capacity, an electric company knows that a number of circumstances can cause its average consumer demand to be exceeded. Reserve capacity must be provided to handle such eventualities as daily and seasonal peak demand periods, plant shutdowns for maintenance work, and occasional plant failure. As a result, "a typical

\begin{itemize}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id. at 182 in Appendix.
\item \textsuperscript{13} Miller, \textit{supra} note 8 at 641.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 658.
\end{itemize}
utility system must have an installed generation capacity about twice the average load demand.” 18 To restate the situation, only 50 percent of the potential annual generating capability of electric utilities is actually used. Because the electric power industry is capital intensive, the construction, financing, and maintenance costs of this reserve capacity ultimately find their way into consumer prices by way of rate base calculations and operating expense allowances.

Utilities have entered into cooperative arrangements to reduce the capital outlays and operating expenses necessitated by maintenance of an adequate reserve generating capacity. The financial motive for cooperative ventures is by itself overwhelming. The F.E.A. reported that:

the most pressing financial problem in the energy sector pertains to public utilities. This is true in terms of its immediacy, its size and its impact on future energy supply. . . . The current inability to raise substantial amounts of capital and the uncertainty of demand forecasts are causing utilities to delay construction of long lead-time, high capital, low fuel cost base-load plants. . . .” 17

Public utilities, through such forms of cooperation as power pools and regional utility councils, have sought to realize important cost savings in the following five categories: 1) operating costs, because power plants can be used in priority of marginal efficiency; 2) peak demand generating costs, because there is a vast difference in energy consumption in different areas with respect to seasonal and daily periods; 3) reserve costs, because sharing reserve capacity can reduce capital outlays; 4) plant costs, because the economies of scale inherent in large generators can be enjoyed by small utilities through cooperation; and 5) transmission costs, because coordinated planning can increase reliability by precluding breakdown due to power surges. 18

D. Interconnection and Environmental Protection

Although for years the American public held electric utilities to the twin performance standards of reasonable price levels and service reliability, another public concern has increasingly been expressed during the last decade. Friends and protectors of the environment presently are calling attention to the damage that utility facilities can do to air and water purity. Environmental protection is another reason for advocating interconnected utility systems which might reduce overall environmental degradation.

17. Id. at 285.
18. BREYER, supra note 9 at 91-93.
This discussion will proceed from the assumption that the American public will continue their present life style and will necessarily insist upon considerable expansion of utility facilities, which would inevitably result in some measure of permanent damage to the environment. In the interests of environmental protection, the question of whether the logic of beneficial interconnection extends to conservation considerations as well as to cost and service reliability concerns must be examined.

It can be argued that coordinated regional power systems will sufficiently satisfy the environmental sensitivities of a majority of Americans. Construction of a large number of small, uncoordinated, inefficient, urban-based power facilities could result in unnecessary environmental harm. Construction of power plants as a part of a regional energy system, however, could substantially reduce the amount of utility plant expansion and, consequently, environmental harm if viewed from a multi-state perspective. 19

The single-state perspective may be radically different, however. Residents of a state such as Montana may feel that they have much to lose and little to gain from a regional power system. Montanans could find themselves giving up the state’s most environmentally sound utility sites for which the state has no current but possible future need in order to meet the energy needs of residents of other states. While the environmental quality of the consuming areas would be maintained, that of Montana, the generating area, would be altered.

In sum, the practical question is whose environment is to be exploited, and the vantage point is all-important. From the Montana perspective, the regional resolution tends to be black or white, with single-state gain or loss seen as the sole issue. From the multi-state view, which must be reckoned with seriously because of reinforcing technological and cost considerations, a regional resolution means fewer facilities and overall decreased environmental damage. The key issue simply put is, to what degree should one state’s environmentalism be allowed to interfere with construction and operation of part of an integrated utility system, when that system serves consumers in several states?

E. Interconnection in Practice

Despite the existence of the arguments for increased utility interconnection, there was insignificant growth in pooling arrangements between 1963 and 1970. 20 Utilities have failed to achieve the full benefit of interconnection because attempts at coordination

19. Id. at 93.
20. Id. at 98.
have been loose and incomplete. Centralized authority in the power pools has been insufficient to realize the optimum benefit from a minimum reserve capacity; to schedule plant utilization, excess energy exchange, and plant maintenance; and to complement peak demand characteristics of separate utilities. The typical power pool lacks centralized power dispatching, centralized planning of plant additions, and system-wide operating standards. Individual utility companies, therefore, have taken the initiative in designing new facilities, and merely have submitted these plans to a power pool committee for review.21

The judgment of industry observers is that power pools and reliability councils have not fully realized these benefits because association ties have been too informal and operating decisions have not been made by a central authority.22 Thus, interconnection has yet to bestow on the consuming public its promise of reduced costs, increased reliability, and environmental protection.

When the electric utility industry is loosely coordinated, total system costs cannot be reduced. Capital additions are not foregone unless a company is positive that it will be able to depend upon the reserve generating capacity of another company. The only substitute for self-sufficiency is a well-planned and well-run system of interdependency.

III. PUBLIC UTILITY REGULATION TODAY: A FAILURE TO ADDRESS REGIONAL NEEDS

The benefits to be gained from interconnection discussed above—ability to meet increased demand, reduced costs, and restricted environmental damage—may not be forthcoming under the current regulatory scheme. Utility regulation is currently the responsibility of both state and federal commissions, with the state agencies holding the bulk of authority. Because state regulatory jurisdiction ends at the state line, state regulation cannot provide the impetus necessary to achieve regional benefits of interconnection. The electric power industry, whose impact has so many national ramifications, demands a unified and comprehensive regulatory response.

A. Limited Powers of the F.P.C.

Federal utility regulation, as it now exists, cannot provide a workable design for an interstate electric power system. The F.P.C. possesses a limited form of national jurisdiction, but its authority

to act within this jurisdiction is severely limited. Congress has not
given the F.P.C. the power to put the nation’s electric utility indus-
try on a fully integrated basis. As a result, the F.P.C. historically
has not acted “as if it realized that economy, reliability, and protec-
tion of the environment are interrelated goals that call for coordi-
nated industry planning.”

Congress has given the F.P.C. responsibility for regulating the
operations of the electric utility industry only to the degree that
state utility commissions have not undertaken a parallel regulatory
activity. This division of labor is an important aspect of the Federal
Power Act that states that federal regulatory powers are to “extend
only to those matters which are not subject to regulation by the
States.” More specifically, the Act states that federal regulation
“shall not . . . deprive a State or State Commission of its lawful
authority now exercised over the exportation of hydroelectric energy
which is transmitted across a State line.” As it now stands, the
Federal Power Act anticipates a two-tiered, mutually exclusive sys-
tem of regulation.

The division of regulatory jurisdiction has developed as follows:
the F.P.C. has controlled licensing of hydroelectric generating
plants, interstate transmission of some electricity, and rates for in-
terstate wholesale of electricity; state utility commissions have
had indisputable control over retail electricity rates, generation and
local distribution facilities, and facilities used to transmit electric
energy in intrastate commerce. Two standards have been used
most often for determining whether regulatory jurisdiction should
be exercised by the F.P.C. or by state commissions. These are the
interstate and the wholesale characteristics of any energy transac-
tion, which give rise to F.P.C. control. The F.P.C., however, has not
interpreted its jurisdiction in a consistent fashion, and, as a result,
it has been “virtually impossible to know, at any single point in
time, over which companies it had jurisdiction.”

The United States Supreme Court, in recent years, has ruled on the meaning of the specific phrases, “transmission of electric
energy in interstate commerce” and “sale of electric energy at

23. Id. at 119.
26. FEDERAL POWER COMMISSION, FEDERAL AND STATE COMMISSION JURISDICTION AND REG-
27. Id.
28. BREYER, supra note 9 at 89.
wholesale in interstate commerce.'" The extent of the F.P.C.'s jurisdiction has, thereby, been somewhat clarified. In F.P.C. v. Southern California Edison Co., the Court said the Federal Power Act granted the F.P.C. "jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself. . . ." The Federal Power Act, the Court ruled, clearly distinguished between state and federal regulatory jurisdiction: "It cut sharply and clearly between sales for resale and direct sales for consumptive uses." The view that the F.P.C.'s jurisdiction over interstate energy sales at wholesale should be determined by a "case-by-case analysis" was soundly rejected.

In F.P.C. v. Union Electric Co., supra note 29, and again in F.P.C. v. Florida Power and Light Co., supra note 29, the Supreme Court dealt with the other basic criterion of the F.P.C.'s jurisdiction. In both instances, the Court inquired if interstate or intrastate commerce was present. This question went to the heart of the F.P.C.'s constitutional underpinning—exactly what are the dimensions of interstate commerce? In other words, the Court was asking over how broad an area can the F.P.C. exercise its powers?

In F.P.C. v. Union Electric Co., the Supreme Court stated that "the interstate transmission of electric energy is fully subject to the commerce powers of Congress." It then found that power projects which generate electricity for an interstate power system "affect commerce among the States and therefore are within the purview of the commerce power. . . ." The import of the majority opinion was underscored by the dissenting Justice Goldberg. He said that the upholding of F.P.C. jurisdiction where "a project affects the interests of interstate or foreign commerce in any way, seems to be based upon an overly literal reading of the statute." The majority opinion substantially expanded the meaning of interstate commerce with respect to utility regulation and thus F.P.C. jurisdiction.

In F.P.C. v. Florida Power and Light Co., the Supreme Court went even further in defining interstate commerce. Here it found that electricity was transmitted in interstate commerce by a utility company when none of its transmission lines directly tied into those of out-of-state companies. But because the utility company was

34. Id. at 215.
38. Id.
39. Id. at 113 (emphasis added).
linked to another in-state utility which was connected to an out-of-state utility, the Court decided that "energy was commingled . . . and thus was transmitted in interstate commerce." 40 Again, the implication of the decision was spelled out by a dissenting justice. Justice Douglas said the result is that "every privately owned interconnected facility in the United States . . . is within the F.P.C.'s jurisdiction." 41

The United States Supreme Court, accordingly, has given a national scope to the F.P.C.'s jurisdiction. The actual or potential effectiveness of the F.P.C., however, cannot be appreciated in terms of jurisdiction alone. To secure the benefits of regional utility systems, the F.P.C. must possess sufficient authority to act within the full extent of its jurisdiction. In terms of powers, the Commission is not well equipped.

The F.P.C.'s regulatory reach is inadequate because Congress has not put the proper tools into its hand. The only generating facilities which now fall within the Commission's jurisdiction are hydroelectric dams. 42 The F.P.C. has no authority over licensing of thermal generating plants, 43 over the construction of transmission lines that carry electricity in interstate commerce that are not linked to a hydroelectric dam, 44 or over transmission facilities linked to a thermal plant that carry electricity directly to ultimate consumers. 45 This lack of power is significant because thermal power plants "now provide over ninety percent of the electricity generated by investor-owned public utilities in the country" 46 and will provide "eighty percent of generating capacity which is to be installed by 1980." 47

The specific authority that the F.P.C. lacks but which is necessary to pursue the objectives of cost savings, power reliability, and environmental protection, is the power to require interconnection. One study of electric utility interconnection concluded that the best source of competence in the federal government for designing and implementing a schedule of industry integration is the F.P.C. 48 In 1935 the F.P.C. was given the power to order interconnections, but such action can be taken only "upon application of any State commission or of any person (utility company) engaged in the transmis-

41. Id. at 471.
43. Id. at 1076.
45. 16 U.S.C. § 824(b) (1970). See also, Miller, supra note 8 at 639.
46. Miller, supra note 8 at 639.
47. Id. at 660.
sion or sale of electric energy.” 9 Prior to 1964, 97 percent of the nation’s generating capacity already was linked together in varying degrees of interdependence in five pooling systems. 50 Since 1964, the Commission has processed a “steady flow of 202 (b) applications” from municipal utilities. 51 In addition to the Section 202 (b) authority, the Federal Power Act gives the F.P.C. the power to order temporary interconnections “whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy, or of facilities for the generation or transmission of electric energy. . . .” 52 Frequent use was made of this provision during World War II, but it has since seen little use.

The F.P.C., however, has sought increased interconnection after a fashion even though it lacked the power to require it. Since 1964, the “F.P.C. has actively encouraged coordination,” 53 and since the 1965 power blackout in the northeastern United States, the Commission has sponsored the organization of regional reliability councils. 54

Neither the F.P.C.’s persuasive efforts nor the industry’s reliability councils have achieved a very high degree of coordination. The regional councils primarily have been concerned with increasing the reliability of transmission facilities and not with the cost savings and reduced environmental damage possible through close coordination of generating facilities. And these largely voluntary efforts are not subject to comprehensive planning or supervision by a government agency. 55

B. State Regulatory Deficiencies

The pattern of fragmented electric utility operation is paralleled by the narrow jurisdiction of state regulatory bodies. These state regulatory commissions were set up early in this century to meet the need for flexibility and expert knowledge in attempting to achieve fair utility rates and reasonable service. 56 The Montana

50. Wirtz, supra note 48 at 1718.
51. Id. at 1719.
53. Breyer, supra note 9 at 94.
54. Id. at 97.
Public Service Commission (P.S.C.) was established in 1913;\textsuperscript{57} by 1921, all but one state, Delaware, had set up a regulatory commission with control over utilities.\textsuperscript{58} These utility commissions are creatures of state legislatures, possessing only those powers which the legislative body confers on them.\textsuperscript{59}

Despite the Public Service Commission's responsibilities concerning utility rates and service,\textsuperscript{60} it lacks many of the powers that other state commissions have to regulate the internal business operations of utilities.\textsuperscript{61} For example, the P.S.C. is not permitted to do the following things: require or authorize interconnection of electric utilities; require one utility to "wheel" power for other utilities (that is, make its transmission facilities available to enable a power supply contract between two other unconnected utilities), authorize initiation of service; regulate exports of electricity; authorize hydroelectric development; or regulate the sale, merger, and purchase of facilities.

Most state regulatory commissions have the authority to control initiation of service and construction of facilities by electric utilities through a licensing or certification process.\textsuperscript{62} If diligently exercised, this power can prevent construction of excess generation capacity and inflation of consumer rates. Montana, Texas, and Hawaii are the only states whose public service commissions possess no power to license or issue certificates.\textsuperscript{63} This deficiency means that the Montana P.S.C. does not pass on initiation of electric service by a utility and construction of major additions to electric transmission and distribution lines. Additionally the P.S.C. does not set standards and evaluate the effect of utility facilities on air and water quality, water rights and usage, and land usage. Furthermore,
the P.S.C. does not have authority to set legal standards for and to evaluate relative environmental impacts of alternative utility sites and to set criteria for evaluating projected utility needs. To fill this regulatory vacuum, the Montana Legislature created the Department of Natural Resources and Conservation in 1971, and in 1973, gave the State Board of Natural Resources the authority to approve or reject applications by utilities for new facility sites. Thus, the Montana utility regulatory scheme is incapable of both considering regional energy needs and of dealing with state utility problems in an integrated fashion.

The Montana Public Service Commission represents the extreme situation of state utility regulatory bodies with respect to inadequate jurisdiction and authorization for achieving an integrated electric utility industry. Although Congress expressed its intent in the Federal Power Act to preserve and rely on state utility regulation, this policy may be currently out of touch with the nation’s energy needs and the state agencies’ abilities. Most utilities undoubtedly prefer continued regulation by the states, as opposed to federal agency regulation, but forces are already in motion to undo “a regulatory pattern which has become an impediment to the efficient, economic, and timely supply of the power needs of the country.”

IV. SOME REGULATORY REFORM PROPOSALS: CONGRESSIONAL INACTION IN THE FACE OF REGIONAL ENERGY NEEDS

There is no doubt that in coming years one of Congress’ major preoccupations will be energy-related policy. Many of the considerations that will go into these deliberations are predictable. Consumers are becoming increasingly upset about the level of electricity rates that they are paying. Utilities are concerned that they will be unable to finance the plant additions necessary for meeting growing consumer demand. Environmentalists are seeking to protect natural resources against the damaging effects of new utility facilities. And, states are desirous of preserving their regulatory jurisdiction and of thereby securing their own objectives.

Congress could take due notice of other matters. Whereas the most efficient electric generating plants require a regional market, “provincialism” has been a major obstacle to pooling. The authorization of these multi-state projects “must entail a surrender by each

64. R.C.M. 1947, § 82A-1501.
65. R.C.M. 1947, § 70-801 et seq.
66. Ross, supra note 55 at 43.
67. Miller, supra note 8 at 635.
68. BREYER, supra note 9 at 110-111.
state commission of some of its parochial concern in the interests of all of the affected market." It seems highly doubtful, however, that separate utilities and state agencies can achieve through voluntary cooperation the equivalent of single system harmony. Such coordination "involves complicated problems of engineering, economics, finance, law, and politics. . . ." Besides the probable unwillingness and inability of state regulatory agencies to cooperate with each other, there also is bound to be considerable doubt about their competence to carry out a regulatory task of this proportion. The resources of state regulatory bodies are few and their failures are near legend, and this reputation undoubtedly will have some influence on congressional policy making.

Another major consideration of Congress will be the present fragmented system of energy regulation, from both jurisdictional and substantive perspectives. Congress, as discussed above, did not provide in the Federal Power Act a comprehensive utility regulatory scheme. Many federal agencies possess jurisdiction over utility company operations and facilities, including the F.P.C., the Securities and Exchange Commission, the Nuclear Regulatory Commission, and the Environmental Protection Agency. The same situation exists within the states where various state and local agencies possess varying degrees of control over utility companies.

This fragmentation is especially severe with respect to regulation of the impact of utility facilities on the natural environment. In some states, one agency, arguing from esthetic grounds, is able to overturn a prior finding of another agency that new facilities should be built on the basis of need and that their design and location is in the interest of the public. One judgment of this situation is that:

power plants and transmission lines . . . are subject to too many different authorities with the capacity to undo each other's efforts and to delay the installation of needed facilities. The consequence is greater expense and a larger risk that the industry will lack sufficient reserve capacity to meet regional needs.

69. Miller, supra note 8 at 662-663.
70. Id. at 644.
71. The central theme in literature critical of regulatory bodies is that regulators are overwhelmed by the expertise, knowledge, resources, and political skill of the regulated company. Lacking the spirit and ability to "take on" a company in the regulatory process, the agency compromises with or capitulates to the company. See, e.g., J. Bauer, Transforming Public Utility Regulation (1960); J. Bauer, Updating Public Utility Regulation (1968); M. Bernstein, Regulating Business by Independent Commission (1955); L. Kohlmeier, The Regulators (1969); L. Metcalf and V. Reinemer, Overcharge (1967); and, M. Mintz and J. Cohen, America, Inc. (1971).
72. See L. McKinsey, Consolidated vs. Fragmented Structural Approaches to Environmental Protection (1975).
73. Miller, supra note 8 at 658.
A range of reform measures has been put forth to deal with the present and to anticipate the future electric utility situation, but until now Congress has not adopted any approach. The more moderate proposals would build on the established state-federal scheme of utility regulation, while the most radical approach would do away with regulation altogether by establishing a government-owned and managed public utility industry. Some of the proposals have been introduced in Congress, and the status of other plans is still limited to the public discussion stage. These various regulatory reform possibilities will be discussed below.

A. Nationalization of the Electric Power Industry

Perhaps the most radical approach to present regulatory problems is nationalization of the electric power industry. A bill introduced in the Ninety-second Congress would have established a National Power Grid Corporation consisting of publicly-owned regional corporations. Under this plan, regional production companies, which would operate generation plants and transmission lines on an interstate basis, would be separated from local distribution companies. This bill, like the measures to restructure the power industry and to alter the F.P.C.'s jurisdiction, discussed below, has not been enacted.

This plan is prompted by the inherent weakness of utility regulation. It would radically restructure the public utility industry so that its operation and management more closely approached the model of a single system. Support for such a proposal is found in a recent study of the F.P.C. by two leading experts in the utility regulation field. They come to the following conclusion:

[energy policy planners, who are now groping with the problems posed by the need for economy, reliability, and environmental protection, ought not to look to traditional regulation for solutions.]

The primary problem with regulation, according to the authors Breyer and MacAvoy, is the inevitable but crippling distance between the regulators and the regulated company. In their view, the F.P.C.'s failures:

... go beyond any lack of adequate statutory authority. They spring in large part from the practical difficulties involved in having regulators make complex managerial decisions or in finding incentives for private managers that would lead them to make decisions more to the regulator's liking. The problems also derive

75. BREYER, supra note 9 at 133.
in part from the tendency of the agency to respond to problems as they arise—incrementally, the tendency to pull away from sustained long-term planning in favor of attacks on whatever arises.76

The judgment here is that regulation cannot "create a rationalized power industry" and that "to expect the F.P.C. to plan for the well-being of the power industry (or the industry's consumers) is utopian."77

The solution Breyer and MacAvoy propose seeks the same goals as other reform plans, that is, a unified industrial system, coordinated planning, centralized control of operations, interstate scope, economic benefits of large scale facilities, and minimal environmental damage. The essence of their proposal is direct governmental involvement in the ownership and management of the electric power industry:

Such governmental involvement might take a variety of forms, ranging from the creation of special task forces with power to order the building of particular lines and plants to the creation of industry/government regional power authorities with direct planning and operating responsibilities.78

Large publicly-owned regional corporations controlled by the government might allow a better-planned power industry, an equitable rate structure and price level, and increased environmental consciousness.

B. Major Regulatory Realignment

A less radical approach than nationalization of the electric utility industry is realignment of the utility regulatory relationship between states and the federal government, shifting the balance of power to Washington. This proposal was set forth in a 1970 FORDHAM Law Review article by John T. Miller, Jr.79 Although this plan has not been presented to Congress, it is valuable as a thorough discussion of the relationship between energy needs and regulatory inadequacies. Miller argued the nation should be divided into regions, each region having a single federally-chartered corporation engaged in generating and transmitting electricity in interstate commerce. The regional corporations would be privately-owned utilities formed out of the facilities and easements of currently autonomous corporations. The large regional corporations would wholesale electricity to small, state-based distribution companies. The existence of a single

76. Id. at 119.
77. Id.
78. Id. at 133-134.
79. Miller, supra note 8.
regional generating and transmitting corporation would preclude the problems of multi-company coordination and planning and insure such benefits as cost savings, service reliability, and conservation of natural resources.

The F.P.C., under Miller's plan, would be given "complete licensing, financing, and rate jurisdiction over the regional public utility corporations." Miller would centralize under federal control the environmental aspects of utility regulation as much as the rate and operational aspects. When a regional public utility corporation would apply to the F.P.C. for a license to build generation and transmission facilities, the matter would be resolved in one forum with one hearing. A federal hearing examiner would conduct the proceedings in the area most directly affected by the proposed plant, and there would be no other hearing on the same application before any other governmental body at any level. The only prescribed subsequent proceeding would be judicial review on limited grounds.

C. State, Federal, and Industry Cooperation

Congress has considered reform proposals which preserve to a greater degree the present framework of utility operation and regulatory jurisdiction than does Miller's plan. While Miller calls for substantial centralization in both the industry and regulatory sectors, another approach consists of increased cooperation among state and federal regulators and industry representatives. Most energy regulation proposals that Congress has considered in recent years have been built on this cooperation model.

The Electric Power Coordination Act of 1971, for example, stated that its objectives "shall be achieved as far as possible through consultative processes and in particular through intergovernmental cooperation." Under this bill, industry dominated regional councils would have formulated construction plans and coordination standards, and the F.P.C., in cooperation with other federal and state agencies, would have certified the plans before construction began. State governments were left with the power to regulate locations of facilities. Similarly, the Electric Power Supply and Environmental Protection Act of 1971 would have required regional councils to file an annual document with both the F.P.C. and a state agency detailing advance construction plans. The state

80. Id. at 665.
81. Id.
83. Id. at § 4(b).
agency would have been authorized by the bill to handle all siting issues within its jurisdiction, and the Secretary of the Interior would have been designated to coordinate all federal proceedings concerning construction and operation of bulk power facilities and to coordinate such federal activities with the proceedings of state authorities. Both acts would have left present areas of state and federal control largely untouched.

Other bills have been introduced in Congress that would expand the authority of the F.P.C. even while calling for extensive state, federal, and industry cooperation. The Electric Power Reliability Act of 1967 would have established regional planning councils to coordinate construction plans and to establish reliability standards. Additionally, it would have given the F.P.C. authority to mandate the interconnection of interstate electric facilities on its own initiative and to review plans for extra-high-voltage transmission lines for compliance with reliability, land use, and esthetic standards.

Two other bills were introduced in 1971 in the Ninety-second Congress which sought to increase federal control over location of utility facilities. These two bills were the Electric Power Plant Siting Act of 1971 and the Power Plant Siting Act of 1971. The first bill would have required the F.P.C. only to:

conduct a national powerplant siting study and prepare a comprehensive national powerplant siting plan for the purpose of designating optimum locations for large power generating facilities of all types to insure availability of an abundant, low-cost, and reliable supply of electricity . . . and to protect environmental assets. . . .

The second bill was even less reform-minded, leaving the states the responsibility "for the certification of sites and related bulk power supply facilities of any electric entity." Provision was made for a company to take an unfavorable decision of the state certifying agency to the federal certifying agency if the lower body had not acted "upon a timely or conclusive basis."

The measures discussed in this section, none of which were enacted, built in varying degrees on the present state-federal utility regulatory scheme. The accent was on cooperation and coordination of regulatory efforts, even though some bills would have enhanced
the states' position and others would have considerably strengthened federal regulatory power. Other regulatory proposals are being discussed, however, that would simply strengthen state regulatory commissions. These, it would appear, stand the greatest chance of acceptance because of their moderation and the support of the present administration.

D. Strengthening State Commissions

The F.E.A. in its PROJECT INDEPENDENCE REPORT recommended using existing state regulatory commissions as the primary vehicle for resolving problems in the electric power industry. The Report gave strong encouragement to state commissions to act along specified lines and stated that, in the event of state inaction, amendments to the Federal Power Act would be sought to make the desired regulatory activity mandatory. The important point is that the states would do the regulating and not a federal agency.

The F.E.A. began with the assertion that regulatory action was needed 1) to diminish demand for electricity, 2) to increase significantly efficiency in electricity generation and transmission, and 3) to discourage the use of scarce fuels for generating electricity. To accomplish these objectives, the following tactics were recommended: 1) new rate structures and metering practices to level peak demand periods, 2) interconnection of utility systems that have complementary peak demand periods, and 3) joint state commission and utility company activities to reduce consumer demand. The F.E.A. also said that state regulatory officials should be encouraged to permit utility companies automatically to pass through to their customers any increases in costs of generating electricity. This use of an “automatic adjustment” procedure precludes the holding of a regulatory hearing on the rate increases. The rate increase is also meant to be a method of moderating demand.

The F.E.A. rejected a number of alternative approaches for realizing its objectives. Reliance on such market forces as a leveling of population and income growth and the relative price of electricity to other energy forms was judged to be too uncertain. Large-scale federal involvement had too many political and financial drawbacks, given the significance of the traditional state role in

91. F.E.A. REPORT, supra note 10.
92. Id. at 182 in Appendix.
93. Id. at 173-174.
95. F.E.A. REPORT, supra note 10 at 190.
utility regulation. And complete reliance on voluntary state commission-utility company cooperation was rejected because of the industry's traditional conservatism with respect to innovations and the unpredictability of the commissions in the face of massive consumer protests. The chosen method, therefore, was a mild nudging of the state commissions by the federal government, to be followed by stronger measures if compliance were not forthcoming.

The F.E.A.'s approach emphasizes the state's role in the American scheme of federalism. According to this theory, states and their agencies are experimental units for the nation with respect to policy innovations. The state utility commissions are given the first opportunity to initiate energy conservation measures. Program results then could be more broadly adopted at the state level through federal encouragement.

V. THE COMMERCE CLAUSE AND STATE REGULATION OF INTERSTATE UTILITY SYSTEMS

For the last decade, regulatory reform proposals have repeatedly appeared before Congress. Congressional failure to enact any of these proposals is not indicative of a lack of concern, but seems to reflect a lack of consensus. If a new policy is formulated by Congress, its complexion undoubtedly will be moderate, given the conflicting interests concerned. It can be expected, therefore, that states will continue to dominate utility regulation.

Continuation of the present regulatory pattern will inevitably produce a head-on conflict between local interests and regional energy demands. The Colstrip siting controversy in Montana may represent a preview of widespread conflicts of a similar nature. This problem occurs when one state's strong environmentalism results in denial of certification of part of an interconnected utility system. Because future congressional action probably will not resolve this regional-state clash, the matter could come before the United States Supreme Court by way of a challenge to state obstruction of interstate commerce.


The intervention of courts in such a controversy has longstanding recognition under the Constitution. In construing the Commerce Clause, the Supreme Court has reserved to itself the task of determining the limits of permissible state action with respect to interstate commerce. The Court in *Southern Pacific Co. v. Arizona* gave clear definition to this role:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislatures, is under the commerce clause the final arbiter of the competing demands of state and national interests.

In keeping with its role as umpire of the federal system, the Court has formulated a number of tests to be used in measuring the impact of state action on interstate commerce. Interpretation of the Commerce Clause has been typified by consideration of several factors. The Court has repeatedly emphasized the need for a particularized, case-by-case application of a variety of tests in determining the legitimacy of state action. Such tests for analyzing challenges to state action based on the Commerce Clause can be grouped into two general categories: 1) congressional pre-emption of a policy area, and 2) state action running afoul of Congress' dormant commerce power.

Compared to the application of the dormant commerce power tests, the pre-emption test is relatively easy to apply. The pre-emption approach consists of a determination of whether federal legislation occupies an area in such a way that state action is precluded. When Congress has clearly stated its intent to occupy a field, a court has no problem in finding pre-emption. Conflicting state action in such a case would be invalidated. Where congressional intent to pre-empt state action has not been clearly stated, a finding of pre-emption is possible, although it requires a more exacting analysis. Pre-emption, however, is not at issue in the controversy over certification of the Colstrip generating plants, since the

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98. 325 U.S. 761 (1945).
99. *Id.* at 769.
100. *Id.* at 770.
103. The basis of a finding of pre-emption by act of Congress is the Supremacy Clause of the U.S. Constitution: U.S. CONST. art. VI, § 2.
United States Supreme Court has ruled that the F.P.C. has no licensing jurisdiction over thermal electric generating units. 105

Even though Congress has neither directly nor by implication authorized a federal agency to pass upon project applications for plants like those at Colstrip, challenges based on the Commerce Clause to state regulatory action may still arise. The Supreme Court has held that state action affecting commerce may be invalid even in the absence of conflicting federal regulation. 106 In this instance the Court acts as the guardian of a range of federal commerce powers which, even though dormant, are protected from state intrusion. The Court at various times has articulated three separate tests for state action in possible conflict with the dormant commerce power. These three tests, all of which remain available for the Court's use, will be discussed in relation to the Montana siting controversy.

The earliest elaboration of the extent of the dormant commerce power was in the case of Cooley v. Board of Wardens of the Port of Philadelphia. 107 Here, the Supreme Court set down the uniform-local subject test, and made some statements which may be applicable to the Colstrip situation. The Court inquired whether a state interest, expressed through a state regulatory scheme, was overshadowed by a national interest in the absence of congressional action. The Court held that Congress retained complete power over certain subjects even when it had failed to take positive action. Whether or not Congress possessed exclusive control would be determined by the circumstances of each case. Specifically, the Court said:

Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. 108

The states would be free to act, therefore, in those areas where a uniform approach was not required.

The pertinent question here is whether such a regulatory subject as location of utility facilities is of "national" concern and demands a uniform approach, or whether it is primarily of local concern and should be handled differently in the various states. In applying the uniform-local subject test, the Court could be influenced by the contemporary arguments, discussed above, that the benefits of environmental protection, cost savings, and operational efficiency are tied to an integrated regional electric industry. In such

105. Chemehuevi Tribe of Indians v. F.P.C., supra note 42 at 1076.
107. Id.
108. Id. at 319.
a situation, the Court could rule that electric power has become a matter of essentially national proportion, and that some forms of state regulation, which take into account only local considerations, are therefore invalid.

An interesting and analogous case which the Court might choose to rely upon in reaching such a result is *Wabash, St. L. & P. Ry. Co. v. Illinois.* Here the Court invalidated long-standing state control over interstate railroad rates because such rates, in the Court's view, required uniform regulation by Congress. Utilizing the *Cooley* rule, the Court found that control by individual states caused an unacceptable disruption of commerce. Four months later, Congress established the Interstate Commerce Commission in order to provide the uniform regulatory scheme the Court viewed as necessary.

The second test available to the Court in determining whether a state action conflicts with the dormant commerce power of Congress can be called the degree of burden test. This test says that state regulation is valid only if it affects interstate commerce indirectly or incidentally. As such, the distinction between allowable and invalid state action is a matter of degree. A clear expression of this test is found in *Shafer v. Farmers Grain Co. of Embden,* where the Supreme Court said:

[A] state statute enacted for admissible state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause . . . and . . . a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.

The degree of burden test was used by the Supreme Court in a 1923 case, the facts of which closely parallel the potential situation that could be created by a refusal to certify thermal generating plants in eastern Montana. In *Pennsylvania v. West Virginia,* the legislature had cut off supply of natural gas from West Virginia to Pennsylvania and Ohio. The Court ruled that "a state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohib-

111. See Southern Pac. Ry. Co. v. Arizona, supra note 98 at 779, 782, and Huron Portland Cement Co. v. Detroit, supra note 104 at 448, for other statements of the uniform-local subject test.
113. Id. at 199. See also Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
The Court found favor with the complainants' claim of irreparable injury: the gas was needed to heat homes, supply industries, and preserve jobs. In reaching its decision of the statute's unconstitutionality, the Court observed that "the apprehensions of the complainant states respecting the injury which will ensue from its enforcement are well founded and . . . it obviously will operate most inequitably against these states. . . ." Moreover, the Court speculated, "[w]hat may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used."

A denial of certification by an agency of the State of Montana would have the effect of prohibiting the flow in interstate commerce of a commodity which residents of other states directly depend upon for sustaining their general welfare. Such a prohibition would seem to be neither indirect nor incidental. The effect of denying this flow in interstate commerce to other states would mean that their residents could suffer economic disruption. The determinative fact here would seem to be that the burden would be borne by persons other than Montana residents:

The greater the impact on the local population relative to out-of-staters, the more "incidental" is the burden on interstate commerce.

The third judicial test relative to the dormant commerce clause involves the balancing of state and national interest. One of the strongest formulations of this test is found in Southern Pacific Co. v. Arizona. This case involved a challenge to a 1912 Arizona act which limited train lengths within the state. The Court found that the obstruction of interstate commerce exceeded the safety benefits derived from application of the act. The Court summarized the approach it followed in reaching its decision as follows:

The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it. . . .

The balancing test possibly permits a court to give fuller consideration to the complete array of interests involved in a commerce

115. Id. at 596-597.
116. Id. at 600.
117. Id. at 596.
120. Id. at 775-776.
clause controversy than do the prior two tests discussed. This test applied to the possible denial of certification of the Colstrip plants could allow consideration of such Montana interests as environmental integrity, public health, and safety. These state objectives would be weighed against the concern in other states for possible job losses, retardation of economic growth, and public safety hazards occasioned by inadequate energy supplies.

The denial of certification thus could be upheld if a court found that the consequent burden on interstate commerce was less significant than achievement of the state’s objectives. To reach such a decision, it would seem that the court must find that the quality of life Montana sought to preserve for its residents was not arbitrarily high when compared to the health and safety standards of other states. The court also might find that the burden on commerce was reduced by the availability of an alternative avenue of commerce—the shipment of Montana coal by train to be used for generating electricity near the site of its consumption.

VI. Conclusion

This article has argued that there are good reasons for giving serious thought to realigning federal and state jurisdiction concerning regulation of utility plant siting. If such restructuring occurs, the federal government undoubtedly will be the recipient of increased jurisdiction and power, and the stature of state regulation accordingly will be diminished. New regulatory policy of this sort will have to be made by the United States Congress, although the United States Supreme Court, by ruling on the question of state regulation of interstate commerce, could set the tone for subsequent congressional action.

There have been no major amendments to the Federal Power Act in recent years. Demands on the electric power industry and available technology, however, have changed considerably. The industry has become increasingly more interdependent, and the solu-

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121. In Huron Portland Cement Co. v. Detroit, supra note 104, the Supreme Court found that a regulation based on state police power, and relating to protection of air quality, could stand even though interstate commerce was thereby burdened. But see, Lemke v. Farmers Grain Co., 258 U.S. 50, 58 (1922) for an opposite result regarding a state environmental regulation affecting commerce.

122. See Bradley v. Public Util. Com. of Ohio, 289 U.S. 92 (1932). In this case the Supreme Court upheld a state’s denial of a certificate of public convenience and necessity to an interstate carrier where the state’s action was based on considerations of public safety. The Court found, among other things, that the burden on interstate commerce did not outweigh the benefits derived from the denial because alternative truck routes were available to the carrier. In the Montana situation, however, the alternative course available to the applicant utilities might be viewed as so different from the originally anticipated mode of commerce as to be unfeasible and, therefore, not a proper “alternative.”
tion to its present problems appears to require an even greater degree of interdependence. Utility regulation, it has been argued, may have to be adjusted to reflect the essentially interstate character of the electric power industry.

National jurisdiction and expanded regulatory powers for the Federal Power Commission would mean reduced regulatory powers for the states. Montana, for example, could lose considerable control over how its natural resources are to be developed and used. If the United States Supreme Court were to set the trend toward national regulation, the situation would be not unlike school segregation and legislative apportionment following the Supreme Court decisions of Brown v. Board of Education\textsuperscript{123} and Baker v. Carr.\textsuperscript{124} States could again be forced to give up control over a policy area that arguably should have been left to local discretion.

In the matter of utility regulation, many signs point to some form of nationalization. The quandary Montana could find itself in is one of the oldest predicaments of our federal form of government. Pro-state pronouncements echo the nullification arguments of John C. Calhoun. For some Montanans, however, a way of life and not rhetoric is at stake. But, it is unlikely that narrow, state sentiments will bear much weight in the coming era of utility regulation.

\textsuperscript{123} 347 U.S. 483 (1954).
\textsuperscript{124} 369 U.S. 186 (1962).