DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

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Article: REASSESSING THE ROLE OF REGULATORS OF COMPETITIVE ENERGY MARKETS, OR: WALKING THE WALK OF COMPETITION

"There is no substitute for seeing whether competition does

in fact succeed rather than assuming it will not" -

Prof. Alfred E. Kahn n1

n1. A. Kahn, "Letting Go: Deregulating the Process of Deregulation" at 43, MSI Public Utilities Papers (The Institute of Public Utilities and Network Industries 1998) [hereinafter Kahn].

Honorable Vicky A. Bailey*

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SUMMARY: ... Despite thirteen years of service as a Commissioner on the Federal Energy Regulatory Commission (FERC or Commission) and, before that, on the Indiana Utility Regulatory Commission, on occasion I still find the need to turn to the true experts on the subject of regulation. ... Recent developments across all segments FERC regulates lead me to suspect that the Commission, despite the successes derived from large open access rulemakings of the early and mid-1990s, may not be inclined to give competitive markets and competitive market participants the benefit of the doubt. ... Given the prospect of delay - admittedly not the sole province of the FERC, and a problem occasionally exacerbated by incomplete or successive utility filings - many utilities may decide that it simply is not worth the time and effort to procure federal approval of a contemplated merger. ... Just as numerous utilities have been eager to respond to competitive opportunities by separating utility ownership of generating assets from ownership of transmission and distribution assets, through divestiture, so too have numerous utilities been eager to place operational control of their transmission assets in the hands of an independent operator of a regional, multi-utility grid system. ...

TEXT: [*1]

I. Introduction

Despite thirteen years of service as a Commissioner on the Federal Energy Regulatory Commission (FERC or Commission) and, before that, on the Indiana Utility Regulatory Commission, on occasion I still find the need to turn to the true experts on the subject of regulation. One of my new favorite treatises is by Dr. Alfred E. Kahn, entitled Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness. I cite this title, written with Dr. Kahn's characteristic wit and charm, in full, because it captures the challenge confronting federal and state regulators at the millennium - how to regulate in an era of increasing deregulation. Or stated another way, how regulatory "kleptocrats" can overcome a persistent impulse or tendency to "steal" or exercise whatever regulatory authority they can lay their hands on.

It's hard for a regulator not to regulate. With a large, agency-wide staff at one's disposal, and various regulated constituencies asking for relief on various grievances, either real or imagined, the natural tendency is to want to act decisively and forcefully. It takes effort, however, not to act, and to resist bearing down on regulated activity with all of the force of the regulatory tools at one's command. On occasion, I must admit, I too have given in to this abnormal desire referred to by Dr. Kahn.

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[*2] But emboldened by my "veteran" status on the Commission, I try to remind myself, when confronted with the impulse to actively regulate, who (or what) is in the best position to promote the interest of regulated utilities and the customers of those utilities. Increasingly, the answer to that question is the competitive marketplace.

I came to the FERC six years ago with certain core beliefs. One was the notion that markets, rather than regulators, could best serve the interests of utility suppliers and customers. This was not a widely accepted notion at the time, but it has gained greater acceptance in most quarters. Regulatory policies leading to, adopting, and later implementing Order No. 636 n2 and Order No. 888 n3 have produced open access, competitive markets that almost all - including the most impulsive of "kleptocrats" - can now readily agree best serve the needs of suppliers and customers alike. One need only look at the Commission's "Mission" and "Values" Statement to see that the Commission's number one "vision" is "promoting competitive markets."

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n2. Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, F.E.R.C. Stats. & Regs. P 30,939, *57 Fed. Reg. 13,267 (1992)* (codified at 18 C.F.R. 284). [hereinafter Order No. 636]

n3. Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, F.E.R.C. Stats. & Regs. P 31,036, *61 Fed. Reg. 21,540,* (1997), order on reh'g, Order No. 888-A, F.E.R.C. Stats. & Regs. P 31,048 (1997) (codified at 18 C.F.R. 35), order on reh'g, *Order No. 888-B, 81 F.E.R.C. P 61,248, 62 Fed. Reg. 64,688 (1997),* order on reh'g, *Order No. 888-C, 82 F.E.R.C. P 61,046 (1998).*

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The easy part is articulating the vision. The hard part, of course, is deciding how best to advance that vision. This requires a continuing reassessment of the role and activity of federal regulators and their relationship to the markets they regulate.

While I would not want to trade my years of service for those during any of the Commission's pre-"competitive markets" years, I do at times suffer a tinge of envy for my predecessors of decades past. Life must have been easier when the regulatory emphasis was less on assessing competitive forces and more on assessing utility cost structures. (I recognize, of course, that Commissions of bygone days had problems of their own - for example, the Federal Power Commission of 1960 acknowledged that it was over eighty years behind in its processing of natural gas wellhead producer price cases.) n4 Regulators can do a fine job of determining revenue requirements and designing capital structures with the goal of producing - perhaps after years of intensive litigation - rates that balance the profit and capital investment needs of utilities with the public interest needs of consumers for reliable utility services at the lowest reasonable rates.

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n4. *Permian Basin Area Rate Cases, 390 U.S. 747, 757-58 & n.13 (1968).*

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The Commission's directive is much less certain at present. To be sure, the Commission's mandate under the Natural Gas Act and Federal Power Act remains the same - to ensure just and reasonable rates and to protect against regulated conduct that is unduly discriminatory and preferential. n5 But that task [*3] is much harder when applied to regulated activity that increasingly is guided not by statutory and regulatory prescription, but rather by market forces.

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n5. *15 U.S.C. 717c,* 717d (1994); *16 U.S.C. 824d,* 824e (1994).

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During my service at the FERC, wholesale electric and natural gas markets have undergone dramatic changes in response to market forces. The companies that the FERC regulates are more entrepreneurial in function and much more diverse in structure and operation than those operating only a few years ago. The wholesale electric power industry, for example, is represented not just by traditional vertically-integrated utilities, providing generation, transmission and distribution services in defined franchise service territories, but also by power marketers and brokers which might not own or operate any hard utility assets. Competitive generation-only companies are continuing to increase their presence in wholesale bulk power markets. Wires-only utilities and regional multi-utility transmission entities are beginning to emerge. An increasing array of bundled and stand-alone services are being offered. Financial and risk-hedging instruments of only recent vintage and applicability to the industry - futures, swaps, options, puts, calls, insurance, and the like - are increasingly being utilized.

While wholesale and retail utility markets undergo restructuring and become more competitive, the FERC is busier than ever in implementing its pro-competitive, pro-access policies. These policies require close monitoring of emerging competitive markets and after-the-fact review of transactions to ensure: (1) the absence of market power, undue discrimination or affiliate abuse; and (2) that utilities continue to operate in a manner that is just and reasonable and consistent with the public interest - as the sixty-four year-old Federal Power Act and the sixty-one year old Natural Gas Act continue to require. Because our pro-competitive initiatives will require continued oversight, I do not view the Commission's recent efforts as "deregulating" utility industries; rather they simply reflect a different, more market and consumer-responsive, form of regulation.

to require. Because our pro-competitive initiatives will require continued oversight, I do not view the Commission's recent efforts as "deregulating" utility industries; rather they simply reflect a different, more market and consumer-responsive, form of regulation.

I strongly support the efforts undertaken by FERC in recent years to reassess its traditional regulation of regulated markets. Any agency that hopes to promote competitive markets must operate in a manner that is responsive to the needs of competitive market participants - if not in real time, then in much quicker than traditional regulatory time. n6 I am also willing to abide by an increased level of Commission regulatory activity - at least for the time being - to ensure that the regulatory flexibility we offer is not abused. But I am increasingly concerned that the increased pace of regulatory activity, to promote "deregulated" competitive markets, may be more than simply a transitional phase.

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n6. In this regard, I endorse the Commission's recent efforts to revise and expedite its complaint procedures to reflect the Commission's regulation of energy industries that operate in an environment that is increasingly driven by competitive market forces. See Order No. 602, Complaint Procedures, Final Rule, Docket No. RM98-13-000 (Mar. 31, 1999).

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[*4] Recent developments across all segments FERC regulates lead me to suspect that the Commission, despite the successes derived from large open access rulemakings of the early and mid-1990s, may not be inclined to give competitive markets and competitive market participants the benefit of the doubt. With respect to emerging electric markets, my preference would be to let recent competitive initiatives percolate for awhile. Electric utilities have had little opportunity to digest and contemplate the Commission's open access initiatives and to assess how best to respond to the release of competitive forces into wholesale markets. I am prepared to allow competitive markets to develop and to afford market participants time and experience in deciding how they will operate and what services they will provide in a rapidly-changing industry. However, as I discuss infra, with respect to the more mature unbundled gas industry, progress may not be as far along as it should be by now.

I can understand regulators' reluctance with respect to reliance on competitive market forces. Competitive markets can be messy. Prices can suddenly spike skyward, and profits can plunge. Conventional utilities with less of an entrepreneurial spirit may fall prey to their risk-taking brethren. Or conservative strategies may prove successful. Bankruptcies may ensue. Corporate mergers, including those crossing product lines, may accelerate. n7

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n7. In his recent book, Daniel Yergin traces the continuing withdrawal of the regulatory state from the "commanding heights" of decades past. He explains that market risk is a "very evident part of this new world," and counsels that it should be respected, rather than feared: "For it is out of risk that emerge the innovation and the incentives - and the imagination - that carry the world forward." Daniel Yergin & J. Stanislaw, The Commanding Heights: The Battle Between Government and Marketplace that is Remaking the Modern World 390 (1998)

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None of this should come as a surprise. Regulators need only look at other industries with a history of pervasive regulation (airlines, railroads, telecommunications, etc.) to discern the inevitable results of less-pervasive regulation. But the question of the day is whether the current FERC, whose members frequently advocate greater reliance on competitive markets, will have the willingness to forsake interceding when competitive markets work the way competitive markets do. In other words, will regulators have the conviction not to intercede immediately when the competition they are fostering does not produce the immediate benefits they had contemplated?

I am increasingly concerned that fellow regulators may not share this conviction. Recent developments lead me to conclude that the Commission may not be satisfied with the results of its open access and pro-competitive initiative, and that it remains convinced that competition in wholesale energy markets must be better managed and optimized.

In the sections that follow, I trace recent developments prompting my skepticism. Parts II, III, and IV address developments in the Commission's regulation of the electric, natural gas, and hydroelectric industries. I will discuss my view of FERC's willingness to rely on market forces to regulate these industries or to pay attention to business realities where market issues are not in play. I conclude in Part V with a brief discussion of the evolution and application of my regulatory philosophy.

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II. Competition in Electricity Markets

I'll admit to an obvious bias in characterizing the Commission's Order No. 888 rulemaking as an unqualified success. I was, after all, one of the Commissioners that voted for its issuance, as well as all of its progeny (Order Nos. 888-A, 888-B, etc.) I have to admit I was concerned that the electric utility industry might not be ready for the advent of non-discriminatory, open access transmission. I was a little anxious at the projected expenditure of time, money, and effort in unbundling the wholesale merchant (power sales) function from the transmission (system reliability) function of transmission-owning public utilities.

In retrospect, I need not have worried. Utility executives with whom I have spoken have been quick to point out that their companies were proceeding down the path to increased competition in any event, regardless of Commission action. For this reason, I am reluctant for the Commission to accept too much credit for the competitive forces that have been unleashed on the electric utility industry. (And state regulators deserve considerable credit for restructuring and retail competition initiatives pursued in many regions of the country.)

too much credit for the competitive forces that have been unleashed on the electric utility industry. (And state regulators deserve considerable credit for restructuring and retail competition initiatives pursued in many regions of the country.)

A. Mergers and Corporate Reorganizations

I do take some credit, however, for the Commission's decision to resist acting in an even more dramatic fashion in Order No. 888. Specifically, the Commission resisted the temptation to move beyond functional unbundling as the means to defeat the incentive of vertically-integrated utilities to favor their own wholesale merchant function through monopoly control of transmission assets. Admittedly, "functional" separation is difficult to implement and even more difficult to monitor or regulate. While structural separation - formal disaggregation of functions such as through asset divestiture - might have been cleaner (I have no particular fondness for utility codes of conduct), the Commission deliberately decided not to pursue such action. The hope was that utilities, unencumbered by a formal federal mandate, might decide voluntarily, as a business decision, or under a push from state regulators, to adopt structural disaggregation as a better means of pursuing competitive opportunities.

And this is exactly what has happened. The Commission has been presented with numerous proposals to sell off generation assets (mostly, non-nuclear) by utilities inclined to focus on transmission and distribution services. n8 These are generally easy decisions for federal regulators, because the generation sales typically increase the number of generation sellers in defined markets, thus reducing market concentration. And the regulatory decision - at least from the federal, wholesale perspective - is made all the easier by the high premiums [*6] being fetched by generation asset sales, considerably in excess of book value. n9 The acquisition premium can then be used to retire otherwise uneconomic (or what we call "stranded") capital investment or to reduce rates to consumers. n10

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n8. See, e.g., *Bangor Hydro-Electric Co., 86 F.E.R.C. P 61,281 (1999); New York State Electric & Gas Corp., 86 F.E.R.C. P 61,020 (1999); Central Maine Power Co., 85 F.E.R.C. P 61,272 (1998).*My understanding is that, at this time, the Commission has been presented with applications related to two utility proposals to sell nuclear generating assets. See *Boston Edison Co. and Entergy Nuclear Generation Co., 87 F.E.R.C. P 61,053 (1999)* (sale of Pilgrim nuclear unit); *Jersey Central Power & Light Co., 87 F.E.R.C. P 61,014 (1999)* (sale of Three Mile Island Unit No. 1).

n9. *Duke Energy Moss Landing LLC, 83 F.E.R.C.P 61,318 (1998),* on reh'g, *86 F.E.R.C. P 61,227 (1999)* (discussing ratemaking treatment of acquisition premiums resulting from the sale of generating units at a price in excess of book value).

n10. In a press release issued February 18, 1999, San Diego Gas & Electric Company, a subsidiary of Sempra Energy, announced that it would reduce significantly the base rates for all of its electric customers and eliminate the "Competition Transition Charge" line item - reflecting otherwise uneconomic capital investments - from customer bills. The utility explained that it was able to reduce its costs and reduce ratepayer bills by virtue of its sale of its fossil-fuel power plants at prices significantly above book value.

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The Commission's job is a little harder when it comes to utilities combining their assets in an effort to remain competitive. In this area, I believe that the Commission can do a better job of allowing utilities to respond effectively to the competitive market forces that have been unleashed on the industry.

In some respects, the Commission's merger policy reflects the new competitive realities of the marketplace. As the pace of utility merger filings started to pick up in the mid-1990s, the Commission was compelled to reassess and streamline its approval process and to better educate applicants and parties as to the basis for its decisions. In this regard, the Commission adopted a policy statement and later issued a notice of proposed rulemaking governing agency review of utility merger applications. n11 (Regrettably, more than a year has passed since issuance of the merger NOPR, with no final rule on the subject.)

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n11. Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Policy Statement, Order No. 592, *61 Fed. Reg. 68,595 (1996),* F.E.R.C. Stats. & Regs. P 31,044 (1996), reconsideration denied, Order No. 592-A, *62 Fed. Reg. 33,341 (1997), 79 F.E.R.C. P 61,321 (1997) ;* Notice of Proposed Rulemaking, Revised Filing Requirements Under Part 33 of the Commission's Regulations, *63 Fed. Reg. 20,340 (1998), F.E.R.C. Stats. & Regs. P 32,528 (1998), 83 F.E.R.C. P 61,027 (1998).*

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One of the principal goals - if not the principal goal - of these generic issuances was to speed up the Commission's processing of applications. In this regard, I believe that the Commission can do a better job in satisfying its mission. To be sure, I have great respect for the expertise and work ethic of those Commission staff members assigned to review merger and corporate restructuring applications. And the pace of Commission action has improved. Nevertheless, there remains room for improvement. By way of recent example, it took the Commission over six months to process the application of American Electric Power Company and Central and South West Corporation for merger authorization before setting the matter for hearing. n12 And the Commission required over one year to finally act on the application of Allegheny Energy, Inc. and DQE, Inc. for merger authorization. n13

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n12. *American Electric Power Co. and Central and South West Corp., 85 F.E.R.C. P 61,201 (1998).*

n12. *American Electric Power Co. and Central and South West Corp., 85 F.E.R.C. P 61,201 (1998).*

n13. *Allegheny Energy, Inc. and DQE, Inc., 84 F.E.R.C. P 61,223 (1998).*

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Given the prospect of delay - admittedly not the sole province of the FERC, and a problem occasionally exacerbated by incomplete or successive utility filings - many utilities may decide that it simply is not worth the time and effort to procure federal approval of a contemplated merger. I have long stated my belief that it is inconsistent for the Commission to promote competition on the one hand, while on the other hand fail to respond in a timely or predictable [*7] manner to the efforts of regulated utilities to restructure themselves in a manner that, in the utilities' judgment, is best able to respond and adapt to competitive realities.

My opinion is that the Commission can speed up the process by focusing more intently on the adequacy of proposed mitigation measures. Popular mitigation measures of the day are: (1) the divestiture of generating units in highly concentrated markets; and (2) participation in regional, multi-utility transmission entities. Some utility applicants are willing to concede either market concentration in identified markets, or to concede Commission jurisdiction over the proposed merger, in an effort to focus Commission attention on the adequacy of proposed mitigation measures.

In a concurring statement attached to a recent merger order, I expressed concern that the Commission, in setting a merger application for hearing on its competitive effects, deemed itself unable to assess the adequacy of the applicants' various commitments to alleviate any potential adverse merger-related effects on competition. n14 I also expressed concern with the increasing frequency with which the Commission is identifying flaws in the supporting data and assumptions employed by applicants in their market power analyses. I understand that the process of both preparing and reviewing a merger application can, at times, resemble more of an art than an exact science. Nevertheless, it is increasingly apparent to me that, after more than two years of experience under the Commission's Merger Policy Statement, merger applicants still may lack sufficient guidance as to what the Commission is looking for when it receives a merger application - and what type of presentation a merger applicant need make to ensure processing of its application in a timely manner.

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n14. *Western Resources, Inc. and Kansas City Power & Light Co., 86 F.E.R.C. P 61,312 (1999)* (concurring statement). In other cases, the Commission has deemed proposed mitigative measures sufficient to avoid the need for a hearing. See *Consolidated Edison Co. of New York, Inc. and Orange and Rockland Utilities, Inc., 86 F.E.R.C. P 61,064 (1999).*

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Moreover, Commission review can be expedited if the Commission remains cognizant of (what I understand to be) the view of courts and antitrust experts that the relevant inquiry should be on any post-merger changes in market concentration in identified markets. The Commission should refrain from determining whether additional mitigative measures are necessary to mitigate any market problems that are unrelated to, or otherwise predate, the proposed combination. Thus, there is no need to compel the applicants, for example, to submit to participation in a regional transmission organization for the purpose of remedying market power or undue discrimination concerns unrelated to the proposed combination. n15

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n15. Nevertheless, even without an explicit Commission directive, and without conceding market power, some merger applicants voluntarily commit to participation in an independent system operator, transco or related structure in an effort to obtain expeditious Commission approval of their applications. See *Sierra Pacific Power Company and Nevada Power Co., Docket Nos. EC99-1-000, ER99-34-000, 1999 WL 219893,* (Apr. 15, 1999); *Western Resources, Inc. and Kansas City Power & Light Co., 86 F.E.R.C. P 61,312 (1999).*

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Similarly, Commission review can be expedited if it focuses on the particular business combination in front of it - not those that were or may be contemplated, but never filed. Such a concern provided the basis for my recent dissent in an [*8] order involving an interlocutory appeal of a discovery dispute arising in the context of litigation of the AEP/CSW merger application. n16 I remain concerned that the prospect of compelled disclosure of internal corporate communications related to the mere contemplation of possible corporate alignments and combinations may act to stifle precisely the type of strategic thinking and innovation otherwise promoted by the Commission. To the extent the Commission believes that this type of business or strategic thinking is relevant to its consideration of a merger application, I strongly recommend the adoption of procedures - similar to those exercised by the Department of Justice and the Federal Trade Commission - designed to protect the disclosure of commercially sensitive information to potential competitors.

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n16. *American Electric Power Co. and Central and South West Corp., 86 F.E.R.C. P 61,091 at 61,332-34 (1999)* (dissenting statement).

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Given these developments, I can understand a sense of utility and investor wariness and frustration with Commission merger review. n17 My concern is that this frustration could inhibit consideration of not just conventional utility mergers, but also vertical combinations crossing traditional product lines - what regulators and pundits commonly refer to as "convergence" mergers.

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n17. The Wall Street Journal reports that in the two weeks following the March 25, 1999 announcement of a merger between Northern States Power Company and New Century Energies, the stock price of the two companies fell 14% and 12%, respectively. Wall St. J., Apr. 12, 1999, p. C2, "Electric Utilities, Eager to Shed Dinosaur Label, Stumble in Wooing Investors on New Strategy." Another trade publication, noting that Northern States' previous effort to merge with Wisconsin Energy failed after two years of unsuccessful effort to obtain necessary regulatory approvals, attributes the stock slump to the companies' own statements (and those of analysts) that the merger could take up to 18 months to procure necessary approvals. Electric Utility Week, Mar. 29, 1999, p.1, "NCE and NSP Stocks Both Fall on Merger Announcement, on Concerns About Time."

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To date, convergence mergers have been confined to a handful of mergers between electric and natural gas utilities. I suspect, however, that in the not-so-distant future, federal and state commissions will confront other alignments blending together, for example, electric utilities with telecommunications companies offering, perhaps, telephone, cable, and/or Internet service. I also anticipate the continuation of a trend that will increasingly combine domestic and foreign utilities. Two such proposals already have been announced, from Scottish Power and National Grid Company in the United Kingdom to take over electric utilities in the United States.

I have some concern that the Commission's traditional review of utility mergers and convergences - even pursuant to recently revised procedures - may not be flexible and timely enough to respond effectively to future corporate initiatives and innovations. I hope that as traditional utility product lines increasingly blur, and as utilities diversify their product offerings, the Commission will work closely with its sister agencies to avoid needless duplication of effort and regulatory review.

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B. Development of Regional Transmission Entities n18

Utility innovation and creativity in the aftermath of Order No. 888 is not the sole province of corporate mergers and divestitures. Just as numerous utilities have been eager to respond to competitive opportunities by separating utility ownership of generating assets from ownership of transmission and distribution assets, through divestiture, so too have numerous utilities been eager to place operational control of their transmission assets in the hands of an independent operator of a regional, multi-utility grid system.

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n18. The Commission has committed to initiate a "rulemaking or other generic proceeding" on the topic of "regional transmission organizations." *Midwest Independent Transmission System Operator, Inc., 84 F.E.R.C. P 61,231 at 62,142 (1998).* At the time of this writing, however, the Commission has not yet issued any generic guidance on the subject, other than to initiate a series of consultations with state commissions.

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As was the case of generation divestiture, the development of independent system operators (ISOs) is something that the Commission encouraged, but did not mandate, in Order No. 888. Specifically, in Order No. 888, the Commission encouraged the development of ISOs as a means of promoting competition in larger wholesale markets, as well as improving system reliability and efficiency. The Commission's thinking was that independent, third-party operators of regional, multi-utility transmission networks would offer the assurance to transmission customers that transmission access will be truly non-discriminatory. This is because such ISOs would lack any incentive to favor the wholesale merchant function of any transmission-owning utility. The Commission's hope was that ISOs would develop and would produce filings to the Commission that satisfy the Commission's eleven identified principles of ISO governance and operation. n19

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n19. See Order No. 888, FERC Stats. & Regs. at 31,655, 31,730.

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And this is precisely what has happened - without a formal mandate from the Commission. In the last two years, the Commission has reviewed ISO filings from groups of utilities located in California, New York, New England, the Mid-Atlantic (PJM), and the Midwest. Other ISO and related proposals are in various stages of development in other portions of the country. I have been gratified by these developments to the extent that utilities have voluntarily come to the conclusion - perhaps nudged in that direction by state commissions - that increased cooperation and coordination with neighboring utilities will enhance the competitive and reliable operation of wholesale power markets.

I have also been enthused by recent utility proposals to develop other types of regional grid management structures. A number of utilities have announced proposals to form single-utility or multi-utility "transcos", which combine ownership with operational control of for-profit, stand-alone transmission companies. Presently, there are four "transcos" which include: (1) Entergy; (2) Commonwealth Edison; (3) FirstEnergy, AEP, Consumers Power, and VEPCO (Transmission Alliance); and (4) Northern States and Alliant. Each of these proposals, as I understand them, has its

Consumers Power, and VEPCO (Transmission Alliance); and (4) Northern States and Alliant. Each of these proposals, as I understand them, has its own variations. n20

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n20. As of the date of this writing, the Commission has received two such filings. On April 5, 1999, Entergy filed in Docket No. EL99-57-000 a petition for a declaratory order, seeking Commission confirmation that its plan to create an independent, regional transmission company that will operate the transmission system of Entergy and other transmission-owning companies is consistent with the ISO principles established by the Commission in Order No. 888. Earlier, on March 19, 1999, the FirstEnergy Operating Companies filed in Docket No. EC99-53-000 an application for authorization to transfer ownership and operational control of their jurisdictional transmission facilities to American Transmission Systems, Inc., a wholly-owned subsidiary of FirstEnergy Corp.

It is my hope that the Commission can act promptly on these or any other transco or ISO applications it may receive, regardless of the pendency of Commission action in a generic proceeding on the subject of regional transmission organizations.

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[*10] I look forward to reviewing these and other alternative proposals, as different types of regional transmission entities might be appropriate for different regions of the country. I have no particular preference for any particular form of regional structure. I do recognize that a transco or related proposal to join together utilities with an incentive to maximize profits through control and operation of the transmission facilities they own may raise antitrust concern. At this juncture, however, I am not bothered by a profit orientation, and I have not been presented with persuasive arguments that for-profit alternatives to ISOs - as long as they are independent - necessarily will have the incentive or the ability to undermine fair competition. Transco alternatives to not-for-profit ISOs should lack vertical integration and will continue to be regulated as public utilities by the FERC. And a profit orientation can send price signals that should encourage needed investment in transmission and generation capacity.

I am not enthused, however, by the prospect of intrusive regulation that may have the effect of dictating to utilities what type of corporate or regional structure federal regulators deem to be best - i.e., most efficient and most competitive - for the industry. My position in this regard is already well known. I authored a separate dissenting statement to a notice issued by the Commission in November, 1998, initiating a series of consultations with state commissions on the subject of regional transmission organizations. n21 In that notice, I expressed satisfaction with the rapid pace of utility initiatives intended to promote enhanced competition. And I also expressed concern that an ambitious generic undertaking, to define for ourselves what type of regional transmission structure would best maximize efficiency and competition in wholesale power markets, would act to stifle precisely the type of innovation and flexibility that utilities voluntarily have been advancing.

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n21. Notice of Intent to Consult Under Section 202(a), Regional Transmission Organizations, F.E.R.C. Stats. & Regs. P 35,038, *63 Fed. Reg. 66,158 (1998).*

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In recent months, I have listened to representatives from all of the state commissions willing to inject their opinion into this debate. n22 It still is clear to me that there is little consensus as to how vigorously the Commission should act to promote regional cooperation and coordination in the operation of the transmission grid.

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n22. I found the judgment of the states, as presented to the Commission at regional conferences held in February, 1999, in St. Louis, Las Vegas, and Washington, D.C., to be extremely well informed and quite helpful. I have also participated in informal discussions on this topic with officials and representatives from all segments of the electric utility industry.

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In the absence of any such consensus, I am wary of the Commission doing anything too prescriptive. Unlike some observers, I do not view competitive wholesale power markets as evolving too slowly. To the contrary, I remained [*11] pleased with the rapid pace of utility restructuring - and the relative paucity of complaints (only a handful) alleging undue discrimination or abuse in the operation of bottleneck facilities in restructured markets. n23 I am inclined to afford utilities additional time to develop experience in dealing with Order Nos. 888 and 889 policies, and in selecting business strategies that respond to the injection of competitive forces in wholesale power markets. I do not view utilities that have not yet advanced ISOs or other regional structures for Commission approval as dilatory or otherwise uncooperative with the Commission's open access policies and ideals.

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n23. I realize, of course, that the small number of formal customer complaints actually reaching the Commission for decision may not be truly indicative of utility compliance with the open access goals and policies of Order Nos. 888 and 889.For this reason, in my informal discussions with transmission providers and their customers, I am eager to listen to their impressions as to the relative success or failure of the Commission's open access initiatives in promoting competitive markets and in addressing concerns for discrimination in the provision of utility services.

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For these reasons, my opinion is that the Commission should act to jump start lagging or dormant regional discussions by articulating what it is looking for when it receives a proposal to form some type of regional transmission organization. n24 And, because I believe that utility participation in regional transmission organizations should be voluntary, rather than mandated by the federal government, I am open to proposals that the Commission offer incentives to transmission-owning utilities to participate in RTOs.

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n24. Inside the FERC, or at least my office, we refer to this type of guidance as minimum criteria, or lowest common denominators.

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I am less open to the suggestion that the Commission should be more proactive and prescriptive in encouraging a particular type of regional structure. I am particularly disinclined to favor an agency mandate - however subtlely it is phrased - that all transmission-owning utilities turn over operational control of their transmission assets by a date certain. In my opinion, and in the absence of more explicit federal legislative guidance on the subject, any such mandate or strong encouragement should originate from the states rather than the FERC.

Moreover, I am particularly uncomfortable with the idea of the Commission actively engaged in the design of regional districts and the drawing of regional boundaries. I have real concern with the extent of the Commission's existing legal authority to fit all transmission-owning utilities into geographic lines of the Commission's choosing. n25 More importantly, from a policy perspective, I have [*12] great difficulty seeing why my colleagues and I are in a better position to determine competitive optimalities and efficiencies than the companies we regulate and the customers they serve.

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n25. I have provided the details of my legal concern for the scope of the Commission's authority under recently-delegated section 202(a) of the Federal Power Act, *16 U.S.C. 824a*(a) (1994), in a legal memorandum attached to my dissenting/concurring statement to the Commission's November 24, 1998 notice of intent to consult with the states on the subject of RTO development. See supra note 21 (citing Commission notice of intent).

It is my opinion, based on my understanding of relevant legislative history and case precedent, that while the Commission can act affirmatively to encourage, promote and supervise utility participation in regional districts, it lacks the power to compel participation. Rather, Congress left it, in the language of the legislative history of section 202(a), to the "enlightened self-interest" of utilities to work cooperatively in the advancement of the cause of utility interconnection and coordination. I think the Commission should work to better "enlighten" utilities why it may be in their best economic self-interest to cooperate voluntarily with their neighbors in advancing regional solutions to lingering competitive and operational problems, rather than adopt a more heavy-handed approach.

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I have no grand design as to how wholesale power markets should look and operate five, ten, or twenty-five years into the future. I would much prefer to allow utilities to continue the rapid pace of utility restructuring, and to work out among themselves and with their customers - with encouragement from the Commission rather than a legal directive - how best to design regional markets that serve all interests in an efficient and competitive manner.

C. Other Issues Requiring a Balancing of Competitive and Regulatory Considerations

The preceding subjects - addressing various forms of corporate restructuring and reorganization - present the Commission with "big picture" topics of the type that clearly implicate competitive concern. My colleagues and I have not been reluctant to adopt visible, high profile positions on the topic of mergers and RTOs - this is the stuff of conference invitations and law review articles. I suspect, however, that as wholesale power markets become increasingly competitive, the Commission's focus will increasingly turn to lower-profile, but equally important, topics that require a careful balancing of competitive and regulatory considerations.

The early returns indicate to me, however, that when presented with a conflict between competition and regulation, the FERC's traditional bias in favor of regulation will, in most circumstances, win out. By way of example, I twice have dissented from the requirement that transmission customers divulge publicly, on the Internet-based OASIS, "source and sink" (generation and load) information concerning the transactions they schedule. n26 The Commission imposed this requirement over the objection of power marketers, which argued strenuously that real-time disclosure of such information would seriously impede their ability to transact in short-term energy markets. In my opinion, the public's and the Commission's immediate need for such information, for the purpose of detecting possible undue discrimination and preference, was outweighed by (what I understand to be) the commercial and competitive sensitivity of that information.

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n26. *Open-Access Same-Time Information System and Standards of Conduct, 83 F.E.R.C. P 61,360, at 62,467-69 (1998),* reh'g denied, *86 F.E.R.C. P 61,139, at 61,493 (1999).*

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If in doubt, I tend to err on the side of support for competitive operations over support for additional regulation. For this reason, I have expressed

If in doubt, I tend to err on the side of support for competitive operations over support for additional regulation. For this reason, I have expressed concern with reporting and filing requirements that are disparate in their application and may have competitive implications, without promoting any compelling regulatory benefit. For example, I was uncomfortable with the public posting of lower level employee names on the OASIS sites of transmission providers, when the non-transmission owning power marketers with which they compete have no such public posting obligation. n27 And I remain uncomfortable with Commission [*13] reporting requirements which, for reasons I do not understand, are different for power marketers than they are for traditional utilities.

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n27. *American Electric Power Service Corp., 82 F.E.R.C. P 61,131 (1998),* order on reh'g, *83 F.E.R.C. P 61,357 at 62,440-41 (1998).*

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For this reason, I felt compelled to concur separately in a recent order, involving Entergy and the municipal system of Clarksdale, Mississippi, in which the utility decided - for no reason other than to avoid immediately reporting price information - to divide up a three-year power sale transaction into three separate, identical one-year power sales. n28 The utility took this action because generation-owning utilities, unlike marketers, must report transactions exceeding one year in duration differently than those one year or less in duration. I am discouraged to see deals structured in a manner simply to defeat Commission information requirements.

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n28. *Clarksdale Public Utilities Commission v. Entergy Services, Inc., 85 F.E.R.C. P 61,268, at 62,079-80 (1998).*

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I am also discouraged by customer (and regulator) pleas for caps on the prices utilities can charge for wholesale power sales and ancillary services. I believe that customers are truly best served by allowing utilities to compete without restraint in markets that have been demonstrated to be truly competitive. To be sure, I did vote for purchase price caps in an order issued last summer in a case approving market-based pricing for the sale of ancillary services in California. n29 But my vote for interim authority to the California ISO to limit the prices it will pay for ancillary services was based on serious structural defects, identified by the California ISO and California utilities, that undermined the competitive operation of that market.

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n29. *AES Redondo Beach, L.L.C., 85 F.E.R.C. P 61,123 (1998); AES Redondo Beach, L.L.C., 84 F.E.R.C. P 61,046 (1998).*

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Given the unique condition of power markets in California at that point in time, I anticipate casting few, if any, additional votes for similar price capping authority. And I have resisted calls for similar price capping authority in other regional power markets (such as PJM, New York and New England) where markets have been demonstrated to be workably competitive. My reluctance to impose limitations on market-based pricing is especially pronounced where, as in PJM, New York and New England, there are local market monitoring or surveillance teams that can report to the Commission any developing market imperfections. n30

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n30. Of course, my colleagues and I have demonstrated a willingness to deny authorization to charge market-based prices in the first instance where the applicant has not been able to demonstrate the absence of (unmitigated) generation or transmission market power.

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The Commission, however, did exercise restraint last summer, when the Midwest was at the center of a furor over wholesale electricity prices. Utilities in the Midwest experienced, in June of 1998, a rise in wholesale electricity prices from $25-50 per megawatt/hour to prices up to $7000 per megawatt/hour - over one hundred times in excess of normal levels. This event precipitated numerous filings with the Commission and calls for immediate remedial action. It also led to the creation of an inter-disciplinary Commission staff team to study the situation, and the preparation of a Commission staff [*14] document, n31 detailing the causes of what is commonly referred to as the 1998 "Midwestern price spike."

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n31. See Staff Report to the Federal Energy Regulatory Commission on the Causes of the Pricing Abnormalities in the Midwest during June 1998 (Sept. 22, 1998). Other reports were prepared by the North American Electric Reliability Council, the U.S. Department of Energy/Energy Information Administration (DOE/EIA), and the Ohio Public Utilities Commission staff. Experts and commentators have published various assessments of this situation in industry journals and newsletters.

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Significantly, nobody refers to this situation as the 1998 Midwestern Blackout and Reliability Crisis. This is because firm service never was interrupted, and utilities never had to resort to unplanned interruptions such as rotating black-outs or voltage reductions. The grid was stressed in ways it had never previously been stressed in a competitive environment. Nevertheless, disruptions were short-lived and newly-competitive utility

ways it had never previously been stressed in a competitive environment. Nevertheless, disruptions were short-lived and newly-competitive utility markets quickly reverted back to normal levels without immediate governmental intrusion.

Against extreme pressures, the FERC and state commissions resisted the temptation to "do something quickly" to demonstrate continuing interest in, and oversight over, the operation of competitive markets. Markets were allowed to return to form. Calls for drastic remedial measures - such as the suspension of market-based pricing authority, or the imposition of price caps or credit-worthiness standards - went unheeded. This measured response afforded the staffs of the FERC and state commissions the time to investigate the situation and to make appropriate findings and recommendations.

While I anticipate price swings to occur periodically in the future - this is what should be expected with competitive markets - I expect future price movements to be much less dramatic. My understanding is that market participants have, with experience, become much more savvy and sophisticated in their understanding of financial instruments intended to better manage market risk. And, to the extent I can find a "silver lining" from recent price volatility, my understanding is that planned generation and transmission capital investment is increasing in response to perceived inadequacies and constraints in market supply and delivery capability - thereby improving system reliability.

But what if similar or different "emergencies" were to arise again this upcoming summer? Would that mean that light-handed regulation of competitive markets is necessarily flawed? Or would it mean that certain market participants and institutions are experiencing a difficult time adjusting to new competitive realities?

I cannot speculate as to the underlying cause of any future market disturbances. I can state that I intend to give newly-competitive energy markets the benefit of the doubt, n32 and will not assume that any such disturbances necessarily reflect badly on the Commission's regulation of competitive markets. [*15] As I explained earlier, the benefits of enhanced competition may not be immediately apparent. Short-term solutions to perceived market imperfections might impede the development of long-term benefits from enhanced competition.

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n32. I am willing to make an exception in the case of those few extraordinary circumstances in which immediate Commission action is truly necessary to protect the reliability of the electrical grid. In the almost three years since issuance of Order No. 888, however, the Commission has not been presented with such an immediate need for Commission action to "keep the lights on." And the Commission has long stated its preference for utility participants, acting in concert with the North American Electric Reliability Council and the regional reliability councils, to work out all reliability-based operating problems among themselves in the first instance. See *Western Systems Coordinating Council, 87 F.E.R.C. P 61,060 (1999).*

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III. Competition in Natural Gas Markets

It is probably quite clear that while I can accept supervising and directing economic activity in markets that are noncompetitive, I prefer relying, wherever possible, on market forces to discipline behavior. Because the evolution of competitive forces in the natural gas market is more developed that in the emerging electric market, I think my time and energy with respect to natural gas issues are best spent on efforts designed to foster regulatory conditions that will allow even more competitive markets to thrive. This does not mean that I see little or no role for natural gas regulation in the near or long term. It only means that I prefer looking for more flexible ways to regulate - recognizing competition when it exists and providing appropriate incentives for regulated businesses in noncompetitive markets.

Thus, the most important job I think regulators now have, and will continue to have for the foreseeable future, is to be flexible and to try to be catalysts - to regulate in ways that will not impede competitive forces and will create opportunities for greater competition. It is important for us to clearly identify and define the markets we need to regulate, and we must ensure that our regulatory approach works in conjunction with competitive markets. Unlike the past, when regulators focused on regulating market outcomes, today we must look for ways to reduce government interference with market forces so that competitive markets can flourish.

It is clear to me that traditional regulatory delay and hand wringing will not serve us well in addressing the current natural gas environment. The very structure of the industry has changed substantially since implementation of Order No. 636. n33 There have been consolidations of pipeline ownership, spin-offs and spin-downs of gathering, the emergence of mega-marketers, advanced unbundling at the state level, electric and gas convergence, and so on. A multitude of services has sprung up designed to increase system flexibility and increase options for both gas sellers and buyers. The industry is more market driven with many more players. Business is now conducted under shorter term contracts with nominations done weekly, daily, or intra-day as opposed to the prior monthly patterns. Electronic trading systems have assumed an increasingly significant role in buyer efforts to identify gas prices and available capacity, and ultimately, to complete transactions. In short, it is an environment where shippers have better alternatives at lower cost and with great reliability.

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n33. Order No. 636, supra note 2.

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Despite these significant developments, the willingness of the FERC to loosen even further the reins of regulation in the natural gas sector has not increased as dramatically as I would have expected when I came to the FERC in 1993. The urge to tightly manage the transition to competitive

Despite these significant developments, the willingness of the FERC to loosen even further the reins of regulation in the natural gas sector has not increased as dramatically as I would have expected when I came to the FERC in 1993. The urge to tightly manage the transition to competitive markets, as well [*16] as markets themselves, continues to rear its head in the FERC's regulation of natural gas companies. While I have voted over the years for many orders that offered more flexibility to the natural gas companies we regulate, I have lately come to the conclusion that our efforts since Order No. 636 have resulted in only marginal progress toward greater acceptance by regulators of a more market- based approach to natural gas regulation.

Today, a palpable reluctance continues to exist with respect to moving toward greater reliance on market-based approaches to pricing of transportation services. This can be seen in the discussion of the history of capacity release issues that I will discuss at a later point. Skepticism exists with respect to how much flexibility can be offered to pipelines for negotiating terms and conditions of service. This is an issue that will be addressed in the pending Notice of Proposed Rulemaking on short-term capacity issues in Docket No.RM98-10-000. n34 Also, there is an increasing hesitancy to rely on markets supported by affiliate company contracts or the financial markets to determine which pipelines should be built in the future. n35

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n34. Notice of Proposed Rulemaking, Regulation of Short-Term Natural Gas Transportation Services, F.E.R.C. Stats. & Regs. P32,533, *63 Fed. Reg. 42,982 (1998)* [hereinafter NOPR].

n35. The extensive questions on certificate policy issues in the NOPR, supra note 28, and the recent refusal by a majority of the Commission to issue so-called Preliminary Determinations for the Independence Pipeline Company and Millennium Pipeline Company, L.P. projects attest to this (discussion only items at the Commission's March 3, 1999, meeting).

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I suppose the reluctance to move toward reliance on market forces and the urge to tightly manage the transition can be understood if one only looks at the levels of market concentration for transportation services in the natural gas sector. Typically they are not as low as obtained in other industries that were deregulated in the past, such as the surface and air transportation sectors. However, the strength of resistance to placing greater reliance on evolving markets forces to discipline natural gas pipeline behavior is difficult to reconcile with much that goes on at the FERC. For example, our response to the 1998 Midwest price spikes discussed earlier demonstrates the agency's ability to rely on market forces even when market reactions seem extreme. Further, both the agency's recently adopted vision and mission statement endorsing competitive markets that I referenced earlier, n36 and the frequent public statements of my colleagues and FERC senior staff professing an acceptance of the idea that market forces offer a better regulatory tool than traditional command and control [*17] cost-of-service regulation, articulate positions that make the resistance to evolving market forces hard to understand.

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n36. The first stated vision of the four articulated in the statement is "Promoting Competitive Markets." The mission statement reads as follows: "The Commission regulates key interstate aspects of the electric power, natural gas, oil pipeline, and hydroelectric industries. The Commission chooses regulatory approaches that foster competitive markets whenever possible, assures access to reliable service at a reasonable price and gives full and fair consideration to environmental and community impacts in assessing the public interest of energy projects." Let me be clear. I support both the vision and mission statements that were developed as an integral part of Chairman Hoecker's "Ferc First" initiative to restructure the agency with an eye toward better serving all our customer needs in the future. However, I believe it is critical that decision makers at the FERC commit to pursuing these goals on a daily basis and in as many venues as possible. If decisions consistently fall short of reflecting these values, we face the prospect of a disconnect between theory and reality that could undermine both our ability and the ability of those we regulate to strategically plan for the future.

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While a concern with concentration levels is a legitimate area for regulatory inquiry, the reluctance to expand the contours of reliance on market forces in natural gas regulation reflects to me a disconcerting unwillingness to recognize the successes that have evolved from earlier initiatives. Those successes described above comprise the changed nature of the industry structure. Customers on the interstate natural gas transportation systems have many more service options available than were in place in 1993. Our current initiatives reflect that their may be an even greater need for more flexibility in providing service options. I firmly believe we should build on our past successes and pursue regulatory initiatives that maximize the pipelines' opportunity to offer, and the customers' opportunity to obtain, customized services at just and reasonable rate that are not unduly discriminatory. In short, I do not believe relying on market forces is inconsistent with our statutory obligations under the Natural Gas Act. In fact, such a course may provide the best opportunity for ensuring high quality service at just and reasonable prices for all customers on the interstate natural gas system as the interstate pipeline grid becomes even more competitive.

I recognize that there are those who advocate leaving the current regulatory scheme alone. They say the system works well; it is not broken; no fixes are necessary. Some openly question whether pipelines can be trusted not to abuse whatever freedoms they are given. My response is that we should continue to fine tune and strive for enhanced market efficiencies. Where abuses are alleged, we should move quickly to determine if they exist and discipline the abuser as appropriate. The Commission already has demonstrated its willingness and ability to effectively respond to problems along the way. For example, in a complaint proceeding involving allegations of serious violations of the Commission's marketing affiliate rules brought by Amoco Production Company against Natural Gas Pipeline Company of America, n37 the Commission was able in a one year time frame to conduct an extensive audit of company practices, order remedial changes and impose a fine for the violations. Further, the Commission's recently adopted revisions to its complaint procedures will enhance our ability to respond quickly to complaints across all our programatic areas. n38 Additionally, I have not been confronted with either concrete or anecdotal evidence that would lead me to conclude that market power abuses are widespread or in

have not been confronted with either concrete or anecdotal evidence that would lead me to conclude that market power abuses are widespread or in any way significant enough to cause me to seriously question our ability to place greater reliance on market forces.

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n37. *Amoco Production Co. and Amoco Energy Trading Co. v. Natural Gas Pipeline Co. of Am., 82 F.E.R.C. P61,038 (1998),* reh'g denied, *82 F.E.R.C. P61,300 (1998).*

n38. See supra note 6.

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Thus, given the tangible evidence of the natural gas market's successful evolution to date, and our demonstrated ability to address abuses when they occur, I am hard pressed to find a compelling reason for the agency's apparent reluctance to more aggressively pursue market oriented approaches to regulation of natural gas companies. I know some readers, and possibly some of my [*18] colleagues, will disagree with my view that we have not gone far enough fast enough. They might point to our Alternative Ratemaking Policy Statement, n39 to our decision to allow negotiated rates for NorAm Gas Transmission Company, n40 or to the pending proceedings in the Notice of Proposed Rulemaking in Docket No. RP98-10-000, and the Notice of Inquiry in Docket No. RP98-12-000 n41 as examples of the Commission's willingness to move toward a more market oriented regulatory world. They probably would also point out that I voted for these and other initiatives without expressing reservations about the pace of change.

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n39. *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Docket No. RM95-6-000, 74 F.E.R.C. P 61,076 (1996).*

n40. *NorAm Gas Transmission Co., 75 F.E.R.C. P 61,091 (1996),* reh'g denied in part, *77 F.E.R.C. P 61,011 (1996).*

n41. Notice of Inquiry, Regulation of Interstate Natural Gas Transportation Service, F.E.R.C. Stats. & Regs. P32,533, *63 Fed. Reg. 42,974 (1998).*

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I recently was reminded of a description of Lyndon Johnson's belief that "Politics is the science of the possible." The same can be said of the regulatory decision making process. While I may have fought hard internally for more aggressive approaches to such issues as pricing, tariff flexibility, and information confidentiality, among others, I have never let failure to achieve the ideal lead me to vote against the good. I have come to conclude that our actions on the natural gas side of our regulatory agenda largely offer the appearance of movement rather than the reality of substantial progress to greater reliance on market forces. They seem like a fine patina hiding an underlying reluctance to depart substantially from the cost-of-service world.

When I first came to FERC in 1993 the dynamics in natural gas revolved around continued implementation of the unbundling and restructuring process mandated by Order No. 636. The benefits to be achieved from open access were widely anticipated. Talk was just beginning as to what further refinements could be made. One focus was on improvements to the secondary transmission market, especially whether the price cap could be lifted for capacity release transactions. n42

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n42. In Order No. 636, the Commission declined to remove the price cap for capacity release transactions because of a concern that not all markets had been shown to be sufficiently competitive. Order No. 636-A, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, F.E.R.C. Stats. & Regs.[Regs. Preambles Jan. 1991-June 1992] P30,950, at 30,560, *57 Fed. Reg. 34,682 (1992).*

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In the fall of 1994, Commission staff began a series of informal meetings with all industry segments on capacity release issues. A vocal few were arguing for removal of our price cap on capacity release transactions and for other refinements to our secondary market regime. The advantages to price cap removal seen then were among the same that are articulated today, e.g., such a move would reveal the true value of capacity at peak periods - efficiently allocating it to those who value it the most, and it also might reveal the existence of capacity constraints that would warrant additional construction. One of the impediments standing in the way of price cap removal then was a concern about the potential exercise of market power by pipelines and others who held [*19] substantial capacity on pipelines. Some argued that this was not a problem and that the Commission should at least try it, possibly experimentally, and if things did not work out, go back to a stricter regulatory model.

After much internal debate, in 1996, the Commission issued a Notice of Proposed Rulemaking on Capacity release issues which included a proposal to lift price caps if releasing shippers and pipelines could demonstrate that they lacked market power under the standards set in the Alternative Ratemaking Policy Statement. in transmission. n43 To date, the Commission has not acted on these proposals and many of the same proposals are being explored in the pending NOPR in Docket No. RM98-10-000. At the same time the Commission issued the NOPR on capacity release issues, it also released a complimentary proposal establishing a pilot program to remove the price ceiling for capacity release, and sales of interruptible and short-term firm transportation markets. n44

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n43. Notice of Proposed Rulemaking, Secondary Market Transactions on Interstate Natural Gas Pipelines, IV FERC Stats. & Regs.[Proposed Regulations] P 32,520, *61 Fed. Reg. 41,046 (1996).*

n44. *Proposed Experimental Pilot Program to Relax the Price Cap for Secondary Market Transactions, 76 F.E.R.C. P61,120 (1996).* To participate, pipelines and shippers had to demonstrate a lack of market power. Further, Local Distribution Companies (LDCs) that desired to participate had to demonstrate that their systems provided an acceptable level of open access service. Pipelines and LDCs were subject to substantial reporting requirements. The few companies that initially sought to participate eventually their withdrew requests and the pilot never got off the ground. Thus, in the seven years post Order No. 636, the Commission has made no real progress to market based pricing for the short term transportation market.

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Today, in the NOPR in Docket No. RM98-10-000 the Commission is still struggling with the issue of whether to remove price caps and how to address the perceived potential for exercise of market power in the secondary market. We should be well into evaluating the comments about the time this article is published (May, 1999). I hope the record that develops in this proceeding will finally give the Commission a comfort level in moving forward with respect to short term capacity issues because we have not come very far since the early 1990s. I would hate to think that after once again holding out the possibility of greater pricing freedom for secondary market transactions, that no progress will be made.

I urge my colleagues to look hard at the rhetoric of our decisions and speeches and to evaluate where we are in reality when viewed against the breadth of our expressions. I believe we are at a point where we must decide if we are willing to go where our words would logically lead us. While I reiterate that I do not view the goal as deregulation per se, I think it is useful to keep in mind the words of Professor Kahn in recalling the experience of deregulating the airline industry. At page 16 in Letting Go: Deregulating the Process of Deregulation, he recounts that deregulation in that industry began "...with the intention of moving gradually and deliberately;...that doing so created more problems than it solved; and... the process, once initiated, took on a life of its own, until there appeared to be no halfway house between comprehensive regulation on the one side and something close to total deregulation on the other." I suggest that for too long we have been in a halfway house between cost-of-service, command and control regulation and a more market oriented [*20] approach to rate and service regulation of the natural gas industry. It is time to catch up to our rhetoric.

IV. Balancing of Considerations in Hydroelectric Cases

Before closing, I would like to include some thoughts about the hydropower industry. Although FERC's mandate under Part I of the Federal Power Act is not the traditional economic regulatory model, the statute does require that market issues be considered when reaching hydropower public interest determinations. Both sections 10(a) and 10(j) require the Commission, when establishing license conditions, to balance power and other developmental interests together with consideration of nonpower values, such as the protection of fish and wildlife resources and the provision of recreation and flood control.

In my view, FERC has largely forsaken the market aspects of this balancing mandate. Often environmental mitigation and enhancement measures are adopted with little regard for evidence that these conditions may bankrupt the hydro project. While such decisions may have been acceptable prior to the advent of competition, when hydro utilities may have passed these costs through to ratepayers, that is no longer a prudent operating assumption. These utilities cannot afford to increase their exposure to stranded costs as a result of high-cost generation resources, and thus cannot accept licenses to continue operating projects that will send them in the direction of raising the cost of producing power sometimes several million dollars per year above competitive market rates. The same agency that has done so much to unleash the competitive forces shaping the electric industry today cannot ignore this reality.

Hydropower projects were deemed to be in the public interest at the time they were licensed. Indeed, national policy encouraged such development. I recognize today that we have additional social and environmental issues to consider. We are all aware that there is a growing national effort to restore major river basins to their historic habitats. Those efforts are certainly legitimate. My primary concern is that the FERC, when confronted with these issue, is able to integrate its various responsibilities under the FPA.

While environmental resource agencies and interested parties advocate legitimate positions, we must keep in mind that it is their mandate to be advocates. It is not their mandate to balance competing resource interests. FERC, on the other hand, is charged with weighing these concerns and should be able to ensure that both water resource values and energy values are given appropriate consideration within the context of the 21st century restructured energy markets. In some instances, I believe we have failed to do this. And I have dissented from the majority in those cases. n45

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n45. *City of Tacoma, Washington, 84 F.E.R.C. P 61,107 (1998),* order on reh'g, *86 F.E.R.C. P 61,311 (1999).* See also, *Edwards Mfg. Co. Inc. and City of Augusta, Maine, 81 F.E.R.C. P 61,255 (1997).*

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When the Commission relicensed the City of Tacoma's Cushman Project last July, it did so in full anticipation that it would cost Tacoma at least $2.5 million more each year to produce power at this project than it would cost to obtain an equivalent amount of power from alternative, less expensive, sources. [*21] I do not believe this signifies a balanced evaluation of the issues presented. In my view, the environmental analysis and the mitigation and enhancement measures imposed in that case were carried forward in isolation of the market realities. The license order placed little value on the continued operation of the project. In so doing, it gave little weight to the fact that a bankrupt project will mean the loss of substantial flood control, the elimination of a clean, renewable source of low-cost power, and the closing of recreational facilities.

continued operation of the project. In so doing, it gave little weight to the fact that a bankrupt project will mean the loss of substantial flood control, the elimination of a clean, renewable source of low-cost power, and the closing of recreational facilities.

As with the other industries the Commission regulates, it is critical that, as we continue the evolution toward competition and the movement toward more national energy markets, FERC's oversight of the hydropower industry will require an openess to new ideas and a willingness to adopt creative regulatory solutions. As the entity authorized to balance the regulation of hydropower as both a water resource and an energy resource, it is my hope that, looking at all the realities of the marketplace, we can better meet the challenges that will continue to accompany this responsibility.

V. 2001: A Regulation Odyssey

Webster's definition of an "odyssey" as a "long wandering or voyage usually marked by many changes of fortune" n46 seems to describe my past thirteen years in public utility regulation.

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n46. Webster's New Collegiate Dictionary 789 (1981).

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As I approach the end of my term in 2001, this article gives me the opportunity to review my decision making process, to discuss those decisions which have punctuated my thinking, and to provide a view of whether or not we are creating an atmosphere for real competition. Is it the Commission's job to shape markets? Should it try?

How does a regulator who joined the industry/arena in 1986, hugging her Bonbright & Phillips text books, move to thinking that government can be a catalyst for change and to promulgating that the marketplace is a much more efficient regulator of goods and services than government command and control. Should I be stripped of my regulator stripes? Am I a heretic such that I am quite comfortable to be branded of the literal laissez-faire philosophy? I think not. I'm mindful of the concern Commissioner Hullihen Moore of Virginia once expressed so eloquently at a meeting where I was in attendance - that it's fine to trust and take a leap of faith, but once you are off the cliff you are basically in a free fall, and there's no turning back.

Beginning as a state commissioner in Indiana, I regulated telecommunication, water and transportation, as well as electric utilities and local gas distribution companies, and I was much more inclined to maintain the status quo. I learned the status quo at a two week regulatory camp at Michigan State University. The services we regulate are essential services, vital to the public interest, natural monopolies, and not fashioned to be entrepreneurial. Yet I came to the Indiana Commission from the unregulated small business community, where there were a plethora of emerging markets and quality of service counted. A variety of service options was key, reliability integral, and [*22] competitive prices a must in order to survive and grow revenue - i.e., "make money." But maybe that's the difference, we had competition, no one had to buy from us, there was redundancy, and there was no set opportunity to earn a return and all the opportunity to fail.

One of the most memorable and complex cases I presided over in Indiana was the filing by Indiana Bell Telephone Company to offer Caller ID service in certain areas in 1990. The State Commission was required by statute to consider whether the service proposed was reasonable, whether it may have an unjust or unfair effect upon any customer group, and whether the service could create a threat to the public safety.

Obviously, the petitioner was seeking to provide a service that modern technology now permitted and that consumers, through the marketplace, were now requesting. But as you might suspect, a final order, even with me as the presiding Commissioner, did not issue until December of 1991, and the offering as proposed, without blocking capability, was denied by unanimous vote. The Indiana Commission, in the face of intense pressure, decided the case based on the "fringes" of the public interest. Privacy was a key issue. The matter through lobbying efforts was subsequently addressed by the State Legislature and resolved by statute in 1992. The legislation required the State Commission to approve Caller ID service without blocking except for law enforcement or crisis prevention agencies. The marketplace won.

Was this outcome inevitable? Was it pre-ordained? Was the State Commission trying to engage in intrusive, before-the-fact shaping of the markets?

In the end, I believe that, regardless of Congressional action and irrespective of FERC internal debates, markets will keep moving and evolving. No matter how strongly regulators desire to place themselves at the core, in the final analysis we can only make public interest decisions on the "fringes."

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