Can The FERC Lawfully Order Transmission Providers To Participate In An ISO?

Will It Anyway?

By

Clark Evans Downs
and
Kenneth B. Driver
Jones, Day, Reavis & Pogue

Presented to the
Harvard Electricity Policy Group*
Portland, Oregon
April 9, 1998

*This paper is presented exclusively for the purpose of fostering debate on the questions asked in the title. This paper does not necessarily reflect the views of any client of Jones, Day, Reavis & Pogue, or indeed, the views of the authors. Finally, this paper is submitted with the understanding that one of the ground rules of debate is that all statements shall remain confidential in order to make possible a forum for free discussion.
I. INTRODUCTION

The stage is set for a major battle over the legal authority of the Federal Energy Regulatory Commission to require a public utility to participate in an Independent System Operator, or ISO, organization. On January 15, 1998, the signatories to the Midwest ISO Agreement submitted an application to transfer operational control over virtually all of their jurisdictional transmission facilities to the Midwest Independent Transmission System Operator, Inc. — a.k.a., the Midwest ISO or MISO. The list of members is impressive. Equally impressive is the fact that several major "Midwest" utilities presently do not plan to join the Midwest ISO. The organizers of MISO have requested that the FERC mandate these "recalcitrant" public utilities to join the Midwest ISO.

In Docket No. PL98-3-000, eleven state commissions filed a petition requesting that the FERC generically address ISO issues.¹ Soon thereafter, in Docket No. PL98-5-000, the Commission announced a public conference on ISO issues to be held on April 15-16, 1998. There, the Commission raised a variety of questions, including the following:

The Commission would also like to consider the related issue of whether all public utilities in a region should be required to participate in an ISO when an ISO proposal is geographically fractured? . . . What should the Commission's response be to a proposal that has so many geographic holes that it does not permit effective regional competition and may hinder assurance of reliability?

Appendix to Notice of Conference, Docket No. PL98-5-000 (March 13, 1998). The Commission then listed various possible authorities for such an action:

¹ Petition for Technical Conference or Regional Hearing, Submitted by the State Public Utility or Public Service Commissions of Arkansas, Illinois, Kansas, Michigan, Minnesota, Missouri, North Dakota, Ohio, Oklahoma, Pennsylvania and Texas, Docket No. PL98-3-000 (filed March 2, 1998).
1. the FERC's power under FPA Section 202(a) "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."

2. the FERC's power to find "generically," under FPA Section 203, that participation in an "appropriately structured ISO" is necessary to any finding that a proposed merger is consistent with the public interest, or

3. the FERC's power to "remedy undue discrimination" under Sections 205 and 206 of the FPA.

II. SECTION 202(a) OF THE FEDERAL POWER ACT

Most proponents of mandatory ISO participation refer to Section 202(a) of the Federal Power Act. Section 202(a) states:

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgement will promote the public interest. Each such district shall embrace an area which, in the judgement of the Commission, can be economically served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.²

In Docket No. PL98-3-000, for example, the petition filed by eleven state public utility commissions quotes extensively from Section 202(a) and then notes that one outcome of an ISO proceeding "might be for the Commission to revise and/or refine the policies relating to ISOs to more clearly reflect the importance of boundaries for ISOs in meeting the legislative purposes" expressed in Section 202(a). State Petition, page 3. In the Midwest ISO proceeding, PSI Energy, Inc. and Cincinnati Gas & Electric Company (Cinergy) have argued that FPA Section 202(a) provides the Commission with authority to (1) "prevent the creation" of multiple ISOs within ISO "boundaries" defined by the FERC; and (2) "encourage participation in a single ISO acceptable to the Commission within such boundaries" to enhance reliability and "economic results."3

Nevertheless, proponents of mandatory ISO participation generally stop short of claiming that FPA Section 202(a) authorizes the FERC to require a public utility to join an ISO. This hesitation is probably due to the nettlesome word "voluntary" found in the statute's text. The Commission is empowered to create regional power districts "for the voluntary interconnection and coordination of facilities." 16 U.S.C. § 824a(a) (1994) (emphasis added). The power to "promote and encourage such interconnection and coordination" is not the power to mandate such coordination.

This is confirmed by the Federal Power Act’s legislative history. Parts II and III of the FPA had two basic purposes: (1) the protection of consumers from excessive prices for electricity; and (2) the encouragement of the voluntary regional coordination of bulk power facilities. To protect consumers, Congress sought to fill the gap in rate regulation left by

---

Attleboro and to contend with the problems of "write-ups" of electric utility plant accounts found by the FTC in its investigation of the electric and gas utility industries.

With respect to voluntary regional coordination pursuant to FPA Section 202(a), Senate Report No. 621 states:

Within each such district [established under Section 202(a)] and between such districts the Commission is directed to secure such interconnection and coordination by voluntary action as far as practicable. . . . Under this subsection, the Commission would have the authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The committee is confident that enlightened self-interest will lead the utilities to cooperate with the commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on the subject.5

This legislative history shows that the reference to "voluntary" coordination in the statute was no accident. Although Section 202(a) empowered the Commission to "promote and encourage" voluntary coordination, the FPA ultimately rests on the "enlightened self-interest" of utilities to cooperate with the Commission. The specific language and legislative history of the statute contradicts the notion that Section 202(a) authorizes the FERC to mandate ISO participation or any other form of regional coordination.

The voluntary scheme implemented in Section 202(a) has been recognized by the courts and by the Commission. In Central Iowa Power Coop. v. FERC, 606 F.2d 1156, 1167 (D.C. Cir. 1979) ("Central Iowa"), in upholding a Commission decision, the court noted that Congress has concluded that regional coordination of electric systems is in the public interest. The court then stated:

---

Notwithstanding the desirability of coordination of electric systems, however, Congress decided to make such coordination voluntary, with limited exceptions... Given the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the [Mid-Continent Area Power Pool] Agreement, and failure of the MAPP participants to establish a fully integrated electric system could not justify rejection of the Agreement filed.

606 F.2d at 1167-68 (emphasis added; citations and footnote omitted).⁶

Nor does FPA Section 202(a) establish a broad directive requiring the FERC to promote competition. The drafters of the FPA, Commissioner Seavey of the FPC and Dozier DeVane, the Commission's Solicitor, had in mind the history of regulation of the railroad industry. Initially, Congress had subjected the railroads to only limited regulation, principally of discriminatory rate practices. At the same time, Congress had encouraged competition between railroads. This mode of early railroad regulation resulted in a costly duplication of railroad facilities and, in 1920, the Congress passed further legislation granting to the Interstate Commerce Commission (ICC) authority to regulate maximum rates, to compel joint movements and joint rates and to require ICC certification that railroad investments in additional facilities would further the public interest. The drafters of the Act wished to ensure that the expensive duplication of facilities that had occurred in the railroad industry would not be repeated in the electric utility industry.⁷

---

⁶ Indeed, in the underlying Commission decision in that case, Mid-Continent Area Power Pool Agreement, 58 FPC 2622, 2637 (1977), the Commission stated: "the scope of a power pool is in the first instance a matter for the utilities involved. The mere fact that a particular pool does not offer the same range of services as another pool does not permit the Commission to direct expansion of the narrower pools' scope. Unless the limited scope of the MAPP Agreement is for some other reason unjust, unreasonable or unduly discriminatory, we are not authorized under Part II of the Federal Power Act to direct the pool to offer more services."

⁷ Hearings, House Interstate & Foreign Commerce Committee on H.R. 5423, 2148-49 (1935) (House Hearings).
Interestingly, the electric utility industry faced possible future shortages of electric generating capacity in 1935 but Mr. DeVane contended that the proper response to capacity shortages was coordination, not competition.

The industry is at a point today ... where there is a practical shortage in power facilities in the country, assuming a return of normal conditions, and from that standpoint this is an ideal time to protect the public against the construction of unnecessary facilities and to bring about proper interconnections. When that is done a great saving in the price the public will have to pay for electric energy will follow.  

Indeed, at another point in the hearings, Mr. DeVane said:

There is nothing in this bill, however, that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission [sic], if that is what you may have in mind. There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress. There is nothing in this bill that permits one utility to enter another utility's field and in doing so require the other utility to transport its power for the purpose.

* * * * *

We are seeking regulation. We are not seeking lower rates through competition.  

Thus, the 1935 legislative history of the FPA -- including that of Section 202(a), which was not amended in 1978 or 1992 -- refutes the notion that the goal of Congress was to promote competition between utilities. A "pro-competition" mandate cannot be found in any of the FPA provisions that remain unchanged since 1935.

---

8 House Hearings at 2152-53.
9 Id. at pp. 554, 556.

WAGREG01: 190196_1.WPD
The Energy Policy Act of 1992 ("EPAct") authorized the Commission to order transmission access upon application by individual eligible users of the transmission system. The EPAct also established the concept of exempt wholesale generators to protect independent power producers from the rigors of the Public Utility Holding Company Act. Thus, the EPAct generally has the effect of promoting competition.\(^\text{10}\) However, neither the text nor the legislative history of the EPAct evinces any intent on the part of Congress to authorize the Commission to fundamentally restructure the electric industry. Nor did Congress amend Sections 202(a), 205 or 206 of the Federal Power Act. Rather, the EPAct expressed its discrete pro-competition policies by amending other provisions of the Federal Power Act such as Section 211.\(^\text{11}\)

### III. SECTION 203 OF THE FEDERAL POWER ACT

Whereas Section 202(a) provides the Commission with the power merely to "promote and encourage" the "voluntary" coordination of facilities by utilities, the Commission's powers under Section 203 are expressed in stronger terms. Section 203 lists a series of transactions that can be undertaken only with approval of the Commission. After notice and opportunity for hearing, the Commission shall approve the transaction if it "will be consistent with the public interest[.]

\[^{16}\text{U.S.C. § 824b(a) (1994).}\] In addition, the Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of


\[^{11}\text{For good reason, the Commission did not rely on the revised FPA Section 211 to require mandatory wheeling on an industry-wide basis in Order No. 888, nor did the Commission refer to Section 211 in its Notice of ISO Inquiry. Under Section 211, the Commission must make a series of specific findings in each individual case before it can mandate wheeling.}\]
adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.


The Commission has addressed ISO issues in several recent merger proceedings. In Ohio Edison Co., et al., 81 FERC ¶ 61,110 at 61,401 (1997), the Commission stated that it was "left with some concerns that Applicants could plan and operate their transmission system in such a way as to potentially exercise the substantial generation market power indicated by the relatively high levels of merger-induced market concentration." According to the Commission, "a properly formed regional ISO could attract new entrants into the market and could facilitate the implementation of efficient transmission pricing, thereby expanding the effective scope of the geographic market." Id. Noting that the Midwest ISO negotiations were underway, the Commission stated: "[W]e expect Applicants . . . to participate in this ISO, assuming we ultimately approve the ISO, as a way to address our concerns. Alternatively, Applicants could propose participating in another appropriate regional ISO." Id. at 61,402. The Commission also warned that if FirstEnergy does not participate "in an acceptable ISO," then the Commission "will not hesitate to impose additional conditions under its section 203(b) authority." Id.\(^{12}\)

In Louisville Gas and Electric Co., et al., 82 FERC ¶ 61,308 (March 27, 1998) ("LG&E"), the applicants submitted a merger application that included a mitigation plan to resolve any

\(^{12}\) See also Wisconsin Electric Power Co., 79 FERC ¶ 61,158 at 61,702 (1997) (accepting the applicants' company-specific ISO on an "interim" basis; "We expect Primergy to participate in any proceedings associated with the formation of a broader ISO and to participate in such an ISO, once formed. Should Primergy fail to participate, the Commission will use its authority under Section 203(b) of the FPA to determine whether additional requirements will be necessary."), merger application withdrawn.
possible concerns on the issue of the competitive effects of the merger. An ISO was not part of that mitigation plan. Nevertheless, the Commission seized on the applicants' status as a signatories to the Midwest ISO in finding that the competitive effects of the merger were consistent with the public interest. According to the Commission:

Our approval of the merger is based on LG&E and KU's continued participation in the Midwest ISO. If LG&E and KU seek permission to withdraw from the Midwest ISO proceedings or the ISO once it is operating, we will evaluate that request in light of its impact on competition in the KU destination markets, use our authority under section 203(b) of the FPA to address any concerns, and order further procedures as appropriate.

LG&E, slip op. at 20.\textsuperscript{13}

Despite these recent decisions, several open issues remain regarding the scope of the Commission's authority to impose an ISO-related condition as part of its merger approval process. The Commission has consistently held that it "will remedy only specific harms resulting from a proposed merger" and that an affected entity arguing that a condition must be imposed on a proposed merger must "first establish a nexus between the proposed merger and the alleged

\textsuperscript{13} The Commission's authority to grant requests for market-based rate authority provides the Commission with an analogous power to impose conditions. A utility must first demonstrate that it lacks both transmission and generation market power before the Commission will grant a request for market-based rate authority. The Commission has consistently held that a utility, to show that it lacks transmission market power, must have on file an open access transmission service tariff. See Kansas City Power & Light Co., 67 FERC ¶ 61,183 at 61,557 (1994) (in order to mitigate transmission market power, a utility must have "an open access transmission tariff that is not unduly discriminatory or anti-competitive" -- a tariff that "offer[s] third parties access on the same or comparable basis and under the same or comparable terms and conditions, as the transmission provider's uses of its system").
harm." So far, no merger applicant has challenged the Commission's finding that an ISO remedies a "harm" caused by a merger.

It is not clear that a merger application could be denied on the sole ground that the merger applicants refused to participate in an "appropriate ISO." The proponent of an ISO condition would need to show that the merger as proposed -- including any mitigation plan -- would cause a competitive harm that an ISO could remedy. In the face of strong opposition to such an ISO condition, the Commission or an intervenor may find it difficult to establish such a nexus.

The Commission has suggested in its ISO Inquiry that it may attempt to avoid such a difficult case-by-case analysis by declaring "generically" that participation in "an appropriately structured ISO" is necessary to a finding that a merger of jurisdictional facilities is consistent with the public interest under FPA Section 203. Notice of ISO Inquiry, Appendix, slip op. at 7, citing El Paso Electric Co. and Central and South West Services, Inc., 68 FERC ¶ 61,181 at 61,915 (1994) ("El Paso"). In El Paso, the Commission announced "a transmission comparability requirement for all new mergers." The Commission had the following to say about its "generic" approach:

> We conclude that given the national interest in establishing a competitive wholesale bulk power market, the critical importance of comparable transmission services in establishing such a market, and the ongoing fundamental changes occurring in the electric industry as a whole, it would be a detriment to the national interest to allow mergers or consolidations that do not offer comparable transmission access, absent other compelling public interest factors that would outweigh these interests.

---

Id. at 61,915 n.127. The suggestion contained in the Notice of ISO Inquiry is that the words "comparable transmission services" in the quoted language could be replaced with "ISO."

However, even following El Paso, it remains to be seen whether the Commission's "generic" ISO requirement would survive determined opposition by merger applicants on the ground that a "nexus" between a proposed merger and a specific competitive harm must first be established.

IV. Federal Power Act Sections 205 and 206

If history is any guide, the Commission is likely to rely heavily on FPA Sections 205 and 206 in any effort to impose mandatory ISO participation. Reviewing these provisions of the FPA as well as Sections 4 and 5 of the Natural Gas Act, the Commission in Order No. 888 concluded that it possesses the "authority to remedy undue discrimination and anti-competitive effects by requiring all public utilities that own, control or operate transmission facilities to file non-discriminatory open access transmission tariffs." Order No. 888, FERC Stats. & Regs ¶ 31,036 at 31,673 (1996).15 In Order No. 888-A, the Commission stated:

We reaffirm our strong commitment to the concept of ISOs, and to the ISO principles described in Order No. 888. . . . Nevertheless, we do not believe at this time that it is appropriate to require public utilities or power pools to establish ISOs . . . . We think it is appropriate to permit some time to confirm whether functional unbundling will remedy undue discrimination before reconsidering our decision that ISO formation should be voluntary.

---

Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,249 (1997). Thus, the Commission in Order No. 888-A signaled that it may find it necessary to "remedy undue discrimination" through mandatory ISO participation.

Some participants in the Commission's ISO Inquiry argue that mandatory ISO participation is a logical and necessary step needed to effectuate the purposes underlying Order Nos. 888 and 889. For example, a group known as the Transmission Dependent Utility (TDU) Systems argues that, based on FPA section 206(a), the Commission "can require public utilities to provide service under an ISO tariff and to cede operational control of their facilities to the ISO." TDU Systems Comments, Docket No. PL98-5-000, at 5-6. The TDU Systems predict that "a Commission rulemaking will elicit substantial evidence to support a generic finding that continued provision of transmission service by individual transmission-owning public utilities is unduly discriminatory and preferential." Id.

There are two responses to these arguments. First, accepting as given the Commission's analysis of its legal authority in Order No. 888, the Commission may nevertheless find it difficult to conclude, as a matter of law, that a utility's decision not to join an ISO is "unduly discriminatory" or "preferential." Second, the Commission's arguments regarding its legal authority to remedy undue discrimination on a generic basis in Order Nos. 888 and 888-A contain flaws that may be pointed out more vigorously in the context of an order requiring mandatory ISO participation.

A. Failure to Join an ISO Does Not Constitute "Undue Discrimination"

In Order No. 888-A, the Commission explained that its "undue discrimination analysis" had traditionally focused on whether "factual differences justify different rates, terms and conditions for similarly situated customers[.]" FERC Stats. & Regs. at 30,211. As the
Commission explained in Order No. 888-A, the Commission in its "comparability" decisions concluded that the focal point of undue discrimination claims "has shifted from claims of undue discrimination in rates and services which the utility offers different customers to claims of undue discrimination in rates and services which the utility offers when compared to its own use of the transmission system." Id. Based on this "comparability" standard, the Commission in Order No. 888 required all public utilities to adopt identical non-discriminatory open access transmission tariffs that provided for both point-to-point and network integration transmission service under specific terms and conditions. The goal of this exercise was to assure that a public utility does not favor itself in its role as a transmission customer as compared to third-party customers.

In Order No. 888, the FERC claimed that "comparability" requires that public utilities offer transmission service to others that it is capable of providing even if the transmission owner does not use the same service. This extension of comparability seems in unalterable conflict with the discrimination rationale FERC posited as the basis for using Section 205 to require the filing of open access tariffs. Such a rationale would seem even more attenuated when applied to mandate ISO participation.

To a point, however, the open access regime instituted by the Commission arguably is consistent with the notion of comparability. Generally, the Commission identified those services the transmission provider was already providing itself, such as network integration service, and required that the transmission provider provide those services to third-parties on an equal basis. The utility had already made the business decision that providing itself certain services made sense. Thus, ostensibly, the Commission was not mandating new services, but was instead generally mandating equal access to existing services.
The logic of "comparability" does not extend to the situation where a utility decides not to join or form an ISO. Under the comparability standard, the relevant question is whether the transmission provider is treating itself and other transmission customers in a similar manner. If a transmission provider decides not to hand control of its facilities over to a third party, that action is not "discriminatory." The result of the transmission provider's decision is that neither the transmission provider nor its customers enjoy the benefits and problems associated with ISO participation. The transmission provider is not keeping for itself some special use of, or privilege on, the transmission system.

An order requiring a utility to join an ISO would be imposing on utilities the Commission's view of the ideal organization of transmission service -- robbing the utility of its opportunity to make its own business decision about what services it will provide for itself and others.\(^{16}\) By taking away the utility's ability to initiate its own services, the Commission undercuts the statutory scheme.\(^{17}\) In the case of mandatory ISO participation, the Commission is clearly ordering expanded access rather than merely open access. A utility that has not joined an ISO has not made the business decision to join an ISO. Indeed, such a utility may have decided for sound

\(^{16}\) Compare City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1366-68 (9th Cir. 1992) (analyzing, under the Sherman Act, whether Edison had a legitimate business reason for refusing to provide a specific service).

\(^{17}\) See Western Massachusetts Electric Company, 23 FERC ¶ 61,025 at 61,063-64, reh'g denied, 23 FERC ¶ 61,345 (1983) (rejecting a filing mandated by a state commission, reasoning that such a filing altered the "statutory scheme of the Federal Power Act," which envisions that under FPA Sections 205 and 206, "the utilities continue under the FPA to establish and change their rates, subject only to review by this Commission"; WMEO's involuntary filing was a "legal nullity" that had been made "under duress.").
business reasons not to join a specific ISO.\textsuperscript{18} Rather than responding to a utility's proposal, or correcting a utility's misbehavior, a Commission mandate of ISO participation would supplant the independent decision-making process of the public utility.\textsuperscript{19}

B. Critique of the Commission's Legal Analysis in Order Nos. 888 and 888-A

In Order Nos. 888 and 888-A, the Commission swept aside arguments that it lacked the legal authority to require open access transmission on an industry-wide basis. One of the few utilities to seek rehearing of the Commission's legal analysis in Order No. 888 was Union Electric Company. Among other things, Union Electric argued that the Commission based its analysis on three erroneous assertions: (1) that the Commission's power to remedy undue discrimination gives it broad authority to order open access across the board -- i.e., independent of any voluntary filing or other activity by a utility, (2) that this authority is essentially identical whether it is invoked under the NGA or the FPA, and (3) that differences in the respective legislative histories of the NGA and the FPA -- and, indeed, those legislative histories in general -- are irrelevant. To the extent that the Commission concludes that mandatory ISO participation is a necessary

\textsuperscript{18} There may be a number of legitimate business reasons for refusing to join any specific ISO "club." For example, a utility may believe that its participation would offer more benefits to the ISO than it would receive in return. That utility may believe that the method of establishing ISO rates is unfavorable. A utility may also believe that it can run its own system more reliably and effectively than can a non-profit regional organization, where the utility will have a much smaller voice.

\textsuperscript{19} Even where the Commission's powers are at its height -- such as its power to condition a proposed merger of jurisdictional facilities -- the statutory scheme protects the role of individual business decisions. The Commission may impose only the "minimum necessary" conditions to ensure that a proposed transaction is consistent with the public interest under FPA Section 203. \textit{Energy Services, Inc. and Gulf States Utilities Co.}, 67 FERC ¶ 61,192 at 61,584 n. 26 (1994). In addition, merger applicants have the option to walk away from a proposed transaction if, in their individual business judgment, the conditions imposed by the Commission are too onerous. \textit{See, e.g., Wisconsin Electric Power Co.}, 79 FERC ¶ 61,158 (1997), \textit{merger application withdrawn}, \textit{The Washington Water Power Co. and Sierra Pacific Power Co.}, 73 FERC ¶ 61,218 (1995), \textit{merger application withdrawn}. 

WAGREG01:190196_1.WPD

15
extension of the process initiated in Order No. 888, the Commission may be forced to confront these same legal issues in renewed form.

1. The Lessons of FPA Sections 211 and 212

Pursuant to FPA Sections 211 and 212, 16 U.S.C. §§ 824j, 824k, the Commission indisputably has the authority in an individual, company-specific proceeding to order any "transmitting utility" (a broad term that includes virtually all utilities owning transmission facilities) to provide any of a range of "transmission services" (including open-access transmission) to almost any requesting third party. Rather than rely on FPA Sections 211 and 212 -- where the power to order wheeling is expressly granted and circumscribed -- the Commission in Order No. 888 relied on FPA Sections 205 and 206, which are silent as to wheeling. This approach ignores the principle that, where one statutory provision specifically addresses a given issue (such as the wheeling provisions in Sections 211 and 212), there is no basis for construing other, more general provisions of the same statute to find additional, inconsistent authority with respect to the same matter. Order No. 888 incorrectly finds that the FERC's power to order wheeling is subsumed within Sections 205 and 206, even though the Congress demonstrated in Sections 211 and 212 that where it intended to bestow wheeling power on the Commission to order wheeling, it knew how to do it.

The legislative history of Part II of the FPA supports the conclusion that the Commission cannot order wheeling under FPA Sections 205 and 206. When the Supreme Court decided Otter

---

20 Natural Resources Defense Council v. United States Envt'l Protection Agency, 822 F.2d 104, 113 (D.C. Cir. 1987) ("If there were any doubt that statutes must be read as a whole, and we cannot fathom how there would be, we will reaffirm that settled method of reading statutes.") (citations omitted).
Tail, it was fully aware of Part II's legislative history, which centers on the so-called Wheeler-Rayburn bill (the bill that led to Part II of the FPA), as well as succeeding legislative initiatives (prior to the PURPA) that would have given the Commission authority within Part II of the FPA to order wheeling had the initiatives not been defeated. In a partially dissenting opinion, Justice Stewart reviewed this history, including consideration of the provisions Congress rejected that would have granted the Commission broad authority to order wheeling:

Had these provisions been enacted, the Commission would clearly have had the power to order interconnections and wheeling for the purpose of making available to local power companies wholesale power obtained from or through companies with subtransmission systems. The latter companies would equally clearly have had an obligation to provide such services upon request. Yet, after substantial debate, the Congress declined to follow this path.

Justice Stewart concluded that

[1]his legislative history, especially when viewed in the light of repeated subsequent congressional refusals to impose common carrier obligations in this area, indicates a clear congressional purpose to allow electric utilities to decide for themselves whether to wheel or sell at wholesale as they see fit. This freedom is qualified by a grant of authority to the Commission to order interconnection (but not wheeling) in certain circumstances.

During the "substantial debate" cited by Justice Stewart, then-Commissioner Clyde L. Seavey of the Federal Power Commission ("FPC") stated that proposed Section 202 of the Wheeler-Rayburn bill would have required every operating company subject to the FPC's

---

23 Id. at 386-87 (footnote omitted).
jurisdiction under Part II to "transmit energy upon reasonable request." As indicated by Justice Stewart, this proposed language did not survive the legislative process.

It is clear, moreover, that the mandatory wheeling language was not dropped inadvertently. The language was left out of several succeeding bill drafts, and the Senate committee eventually reported out (May 7, 1935) a substitute bill (S.2796) that also left out any requirement that jurisdictional public utilities transmit energy upon request. The committee expressly stated that while imposition of a duty to transmit (as well as other duties to furnish and exchange energy) "may ultimately be found to be desirable, the committee does not think that they [referring to the omitted duties] should be included in this first exercise of Federal power over electric companies." Instead, the committee expressly decided to rely upon the provision for the "voluntary coordination of electric facilities in regional districts contained in new Section 202(a) for the first Federal effort in this direction." S. Rep. No. 621, 74th Cong., 1st Sess. (May 7, 1935), at 19.

Although this "first Federal effort" occurred in 1935, the resulting FPA Sections 205 and 206 have not been modified in any relevant respect since that time. Therefore, the range of authority conveyed to the Commission in such sections remains the same today as it did then. Based on this legislative history, the Commission lacks the power under Sections 205 and 206 to impose a broad-based wheeling requirement.

---

2. The Commission Has Glossed Over Precedent That Undercuts its Claim that Sections 205 and 206 Provide the Commission With the Authority to Mandate Industry-Wide Wheeling

In its legal analysis in Order Nos. 888 and 888-A, the Commission relied heavily on the court's decision in Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) ("AGD"). There, the court upheld the Commission's authority under NGA Sections 4 and 5 (analogous to FPA Sections 205 and 206) to require interstate pipelines that voluntarily sought blanket transportation certificates pursuant to NGA Section 7 (or alternatively, the authority to provide transportation on behalf of local distribution companies or intrastate pipelines pursuant to NGPA Section 311) to commit to a non-discriminatory, open-access condition. AGD 824 F.2d at 997, 999, 1001-1002.

The exercise of the Commission's authority under NGA Sections 4 and 5 to eradicate undue discrimination, in other words, is predicated on voluntary actions by the affected pipelines -- namely, voluntarily seeking authorization from the Commission to provide special types of transportation services. Because the Commission's authority to impose the open access condition on pipelines depended on "voluntary transactions" by the pipelines, the AGD court relied heavily on its earlier decision in Central Iowa Power Coop. v. FERC, 606 F.2d 1156 (D.C. Cir. 1979) ("Central Iowa"). In AGD, the court explained that Central Iowa was important because "[t]he case upholds the power of the Commission to subject approval of a set of voluntary transactions to a condition that providers open up the class of permissible users." 824 F.2d at 999. (emphasis added).

Moreover, in Central Iowa, the court rejected an intervenor's claim that the Commission should have further conditioned approval of the power pooling agreement on the parties' willingness "to wheel for nongenerating electrical systems. See 606 F.2d at 1169." 824 F.2d at
In AGD, the court stated than in Central Iowa, it had "brushed the [wheeling] request aside in fairly sweeping language" because such a condition "would in effect have forced on the participants a broad extension of their agreement to wheel for each other. See id. at 1160 n. 7." 824 F.2d at 999.

Order Nos. 888 and 888-A identify the four major court decisions that address the Commission's lack of authority to order mandatory wheeling under the pre-PURPA provisions of Part II of the FPA, Richmond Power & Light v. FERC, 574 F.2d 610 (D.C. Cir. 1978) ("Richmond"); Central Iowa, supra; Florida Power & Light Company v. FERC, 660 F.2d 668 (5th Cir. 1981), cert. denied sub nom. Fort Pierce Utilities Authority v. FERC, 459 U.S. 1156 (1983) ("Florida"); and New York State Electric & Gas Corp. v. FERC, 638 F.2d 388 (2d Cir. 1980), cert. denied sub nom. Penn Yan v. New York State Gas & Electric Corp., 454 U.S. 821 (1981) ("NYSEG").25 Contrary to the Commission's interpretation, these decisions establish that the Commission may not directly or indirectly order a public utility to wheel or transmit energy for another entity under FPA Sections 205 and 206, notwithstanding the Commission's circumscribed ability to order wheeling under Sections 211 and 212.

AGD did not overrule these decisions. The court's rationale in Florida -- based on the FPA, not the NGA -- remains both relevant and dispositive of the issue at hand. There, the court found that the "legislative history of the FPA makes clear that Congress did not intend the Commission to have power [outside FPA Sections 211 and 212] to compel wheeling." 660 F.2d at 672-673. Further, the court stated:

While the Commission may not compel the transmission of electricity, it does possess the authority to review transmission contracts under § 206(a) and to make modifications of those contracts.

---

25 See Order No. 888 at pp. 31,670-73.
contracts upon a determination that the terms of such a contract are unjust, unreasonable, unduly discriminatory, or preferential. New York State Electric & Gas Corp. v. FERC, supra; Richmond Power & Light of Richmond, Indiana v. FERC, 574 F.2d at 620. It also has the authority to review any change in such a contract under § 205. In performing these functions with respect to a wheeling contract, though, the Commission must be especially careful not to overstep its authority and require the involuntary wheeling of electricity, absent compliance with the new §§ 211 and 212 of the FPA.

Florida, 660 F.2d at 673.

The holding of the Florida decision further undercuts the Commission's position in Order No. 888. In the underlying FPA Sections 205 and 206 proceedings, the Commission had ordered Florida Power & Light Company ("FP&L") to file a transmission tariff in substitution for 18 separate transmission agreements that FP&L had previously filed. Id. at 671. The court summarized FP&L's objection to the order to the effect that it would "have imposed upon it [FP&L] an obligation to provide transmission service beyond that which it has voluntarily assumed . . . that it has now been made a common carrier." Id. at 674. Despite much polemical argument by the Commission, the court ruled that "[w]e agree with FP&L that the Commission's order does in effect impose common carrier status upon FP&L" and "[a]ccordingly, we conclude that the Commission lacked statutory authority to issue the orders in question." Id. at 676.

In NYSEG, the court specifically held that "the purpose and history of the Commission's statutory powers to compel wheeling persuade us that §§ 211 and 212 apply to orders that would expand a voluntary commitment to wheel." NYSEG, 638 F.2d at 401. The court elaborated:

If after a hearing as required by § 206, the Commission determines that a particular rate, charge or condition is unreasonable, it can order a modification. But where, as here, the modification amounts to an order requiring wheeling, it must be preceded also by determinations in accordance with §§ 211 and 212. Simply put, we will not allow the Commission to do indirectly without compliance.
with the statutory prerequisites, what it could not do directly without such compliance.

Id. at 403.

The Commission itself, prior to the issuance of the final rules, with a full appreciation of the legislative history behind Part II of the FPA, consistently held that it lacks the authority to order wheeling under FPA Part II. In City of Paris, Kentucky v. Kentucky Utilities Company, 41 FPC 45, 48-49 (1969) ("City of Paris"), the Commission recognized that it lacks the authority to order wheeling under FPA Section 202(b), unlike its authority under Part I, because Part II of the Act does not contain language permitting wheeling and "Congress considered and affirmatively rejected a provision which would have made it the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor *

* * [Sec. 202(a) of S. 1725 and H.R. 5423, 74th Congress, 1st Sess. (emphasis added.)]"" City of Paris, 41 FPC at 49 (footnotes omitted). See also Village of Elbow Lake, Minnesota v. Otter Tail Power Company, 46 FPC 675, 679 (1971) (citing City of Paris, supra). It also expressly found, following the Supreme Court's decision in Otter Tail, that "[i]f this Commission does not have authority to order wheeling under Section 202 of the Federal Power Act, we fail to see how we can order wheeling, as a remedy for violation of the antitrust laws, under Section 205 of the Federal Power Act." Southern California Edison Company, 50 FPC 1479, 1481 (1973).26

26 Indeed, while the Commission has the clear authority under FPA §§ 205 and 206 to eliminate unduly discriminatory rates or terms of service, the Commission has stated that even where a public utility is providing transmission service to one customer, but refuses to provide transmission service to another similarly situated customer, the Commission may not order additional, involuntary transmission. See New England Power Pool Participants, 54 FPC 1375, 1385 (1975) (citing Otter Tail and City of Paris) (stating that "we do not conclude that transmission service withheld from one party while being offered to other electric systems is in itself a difference which as a matter of law should constitute undue discrimination. Since the Act does not require such voluntary transmission service (continued...)

WAGREG01: 190196_1.WPD
In addition, the Commission distinguished its power to condition a merger on open-access wheeling with its inability to require open-access wheeling generally, recognizing that

a Commission order requiring wheeling, without more, is impermissible since it would impose common-carrier status on the wheeling utility. In this case, however, the requirement that the merged company wheel power is based on our finding of likely anti-competitive effects of the merger. Accordingly (and as distinguished from the Richmond case), a requirement that it wheel power for competitors in order to ameliorate the likely anti-competitive effects of the merger would not serve to make the merged company a common-carrier. Thus, the Commission is not doing indirectly (making the merged company a common carrier) what it is prohibited from doing directly.


3. Contrary to the FPA's Statutory Scheme, the Commission Has Supplanted the Individual Decision-Making Reserved for Public Utilities.

As part of its industry-wide open access requirement, the Commission required every utility that had not yet submitted an open access tariff to "make section 205 filings to propose rates for the services provided for in the tariff, including ancillary services. . . ."27 These Commission-ordered Section 205 filings are, by their very nature, involuntary.

This requirement is contrary to the voluntary filing scheme inherent in FPA Section 205.

The Commission's authority under Section 205 extends no farther than its responsibility to review rates, charges, terms and conditions of service that have been voluntarily filed by a public utility.

26(...continued)
in the first instance, what may or may not be unduly discriminatory treatment must reflect that reality "); see also New England Power Pool Agreement, 56 FPC 1562, 1585 (1976) ("assuming arguendo the Commission found discrimination in the wheeling provision [of the NEPOOL agreement], it could not as a remedy order additional wheeling, but it could order that the discrimination be eliminated").

27 Order No. 888 at 31,769. The only alternative to making these involuntary filings is the narrow possibility of obtaining a waiver. See id.
The Commission itself has acknowledged this voluntary-only criterion for Section 205 filings and on that basis has rejected a filing made by a public utility under FPA Section 205 that was not made voluntarily. In *Western Massachusetts Electric Company*, 23 FERC ¶ 61,025, reh'g denied, 23 FERC ¶ 61,345 (1983), Western Massachusetts Electric Company ("WMECO") filed an amendment to a generation and transmission agreement to which WMECO and other affiliated public utilities were parties. It was agreed by WMECO and the Massachusetts Department of Public Utilities ("Massachusetts DPU") "that this filing was made only because the Massachusetts DPU ordered that it be made." *Id.* at 61,063. The Commission rejected WMECO's involuntary Section 205 filing, reasoning that such a filing altered the "statutory scheme of the Federal Power Act," which envisions that under FPA Sections 205 and 206, "the utilities continue under the FPA to establish and change their rates, subject only to review by this Commission." *Id.* at 61,063. The Commission thus deemed WMECO's involuntary filing to be a "legal nullity" that had been made "under duress." *Id.* at 61,064.

The Court of Appeals has affirmed this view. The 1986 *Sea Robin* case\(^\text{28}\) concerned filings under NGA Section 4(e) -- analogous to FPA Section 205(e). The court there held that

Section 4(e) . . . cannot be used by the Commission to institute any change in a ratemaking component, such as cost allocation, that does not represent at least partial approval of the change for which the enterprise had petitioned in its filing. Such a Commission-initiated change in either the "rates or their method of calculation" can be accomplished only upon the agency's compliance with the strictures of section 5 [analogous to FPA Section 206(a)].\(^\text{29}\)

\(^{28}\) *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986).

The involuntary filings required by the Commission in Order No. 888 violates these principles. Like the involuntary Section 205 filing the Commission rejected in the WMECO case, the mandatory filings in Order No. 888 were necessarily made "under duress." This requirement exceeds the limitations on the Commission's Section 205 authority.

V. SO WHAT?

These ante-diluvian views of the meaning of the Federal Power Act are not idiosyncratic. Interestingly enough, in 1993, when discussing the sea of change brought by the Energy Policy Act of 1992, two lawyers then with the Powell Goldstein law firm in Washington, and writing in the Yale Journal on Regulation, were clear that:

In contrast to the FPA's plenary federal authority over rates and charges for wholesale electricity sales and transmission service, the 1935 FPA provided no federal authority to require transmission owning utilities to wheel power.

In discussing the new authority granted the FERC under the Energy Policy Act of 1992 to require transmitting utilities to provide wheeling service in response to an application filed by another electric utility, the authors continued:

The EPAct authorizes FERC to order a transmitting utility to provide wheeling service to an applicant. In addition to providing access to existing capacity, FERC may compel the transmitting utility to enlarge its transmitting capacity where existing capacity is inadequate to provide the requested service . . . A transmission order applies only to applicants -- FERC is not empowered to require utilities to adopt transmission tariffs of general applicability.\(^{30}\)

---

One author of this article was Jeffrey D. Watkiss, a fine lawyer who specializes in representing new market entrants such as Enron. The other author, Douglas W. Smith, is now the general counsel of the FERC.

Of course, the ultimate question is whether any of this matters. Without seeming to be unkind or unduly critical, it is fair to say that in recent years the FERC has been a lawless agency that has time and again exceeded its statutory authority in pursuit of what it believed to be laudable objectives. The FERC's practice has been to assert authority where none really exists, but then to offer the industry under regulation candy in the form of regulatory policies that are more acceptable than they might otherwise be in hopes that the treats offered the industry will be sufficient to still any inclination by utility managements to question the Commission's dubious authority in court. If requests for rehearing question the Commission's jurisdiction, it responds by sitting on them for months on end and then issuing amendatory orders on other points thus delaying the issuance of a final order. If judicial review is sought after a final FERC order is issued, the Commission urges the court to delay consideration of the case while it works on related matters. Obviously, the Commission's strategy is to postpone judicial review for long enough that the Commission's exertion of authority to restructure an industry becomes a fait accomplis that cannot easily be undone and the petitions for judicial review are withdrawn as industry participants come to recognize the futility in proceeding further.

Whether or not this approach to administrative law is justified by the ends sought, it is the reality of the FERC's management strategy. Therefore, assuming that any attempt to challenge the Commission's jurisdiction will be futile, what then to do?

Of the arguments that have been made regarding the FERC's jurisdiction with respect to independent system operators, the argument put forth by Cinergy seems to have the most appeal.
Cinergy argues that Section 202(a) does plainly authorize the Commission to divide the country into reliability districts. The language of 202(a) is clearly broad enough for the Commission, after compiling substantial evidence, to dictate the areas in which a single ISO will operate.

If there are to be ISOs, then their scope should not be narrow. Their principal purposes should be to (a) assure that a transmission owner with an interest in the market does not manipulate switching or loading of transmission lines or generating facilities that affect transmission loadings; and (b) avoid pancaked rates that limit the reach of competitive generators. The second of these two objectives is best furthered if the scope of each ISO is large enough to encompass as wide a market area as existing transmission limitations make possible. Thus, for example, the FERC might find that an ISO that covers all of the Eastern Interconnection with the possible exceptions of NEPOOL and the New York Power Pool would make sense.

NEPOOL and the New York Power Pool have traditionally been islands unto themselves and perhaps could operate together as an ISO even if transmission limitations prevent their inclusion in an Eastern Interconnection ISO. There may be other segments of the Eastern Interconnection that cannot be included because of transmission limitations. That would be for the Commission to decide after proper study.

One of the most important efforts of the Commission in its entire history was the compilation of a study entitled Power Pooling in the United States published in December 1981. The study was made in response to a provision of the National Energy Legislation of 1978, and was clearly a response to problems of energy supply and delivery that had occurred in the previous decade. That study offered the Commission and other interested parties a complete understanding of the manner in which the electric utility industry had evolved and how it was operating.
The electric utility industry stands at a new turning point today. A similar effort would be warranted, in our opinion, to determine the optimal scope of coverage of ISO organizations (and ultimately, of course, the private transmission companies that are clearly likely to succeed to the ISO management role).

In our opinion, public policy would be clearly furthered if the FERC were to seek the funds needed to conduct such a study, rather than simply reacting to the arguments of competing forces in the battle for restructuring. Once the ISO districts are drawn, then the Commission could reject proposals to create smaller or inconsistent ISO areas. Once large ISOs are created and the benefits of participating in ISOs are made clear, then perhaps those utilities who do not find ISO membership in their interest today will begin to see the light.