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Comment

THE NATIONAL ENERGY ACT AND STATE COMMISSION REGULATION

*Douglas N. Jones**

The passage of the National Energy Act by Congress in 1978 marked a new era of federal involvement in the area of utilities regulation. Although the purpose of the Act is timely in light of the current energy situation, implementation of its provisions may have profound ramifications on state public utility commissions. In this Comment, the author draws upon his experience in the area to offer his interpretation of the Act's basic provisions. In addition, he examines the current status of implementation by focusing on the Public Utilities Commission of Ohio. Finally, the author presents what he predicts to be pitfalls and prospects surrounding the Act.

INTRODUCTION

WITH A FEW dramatic exceptions,¹ Congress has historically paid little attention to public utilities. Until recently, there was slight impetus for congressional action—state public utility commissions appeared to adequately regulate the industry; the field was highly technical; and in “good” times—periods of declining costs—there was little economic need for federal intervention. The effect of the 1974 oil embargo on national energy affairs, and the resulting heightened focus on related energy issues,² led Congress to exercise more regulatory control in the energy field, particularly in the electric and gas utility sectors. The post-embargo congressional activity in the energy area probably rivals the public utility legislation of the 1930's.³ Moreover, the legisla-

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1. *E.g.*, Telecommunications Competition and Deregulation Act of 1979, S. 622, 96th Cong., 1st Sess. (1979); Communications Act of 1979, H.R. 3333, 96th Cong., 1st Sess. (1979); Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w (1976); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1976).

2. Post-embargo factors contributing to the increase in congressional action in the energy field include: the quest for energy conservation; the earnings squeeze on utilities coupled with the resulting problem of attracting capital to the utility industry; the growing public suspicion that regulation was a contributor to price level inflation; the amplification of the consumer movement; the publicly perceived need for an energy policy; and the unusual profitability of the fuel industries.

3. The upturn in congressional attention to the energy industry after the oil embargo

tion has become more specific—the bills have become better-researched and increasingly particular in nature.⁴ At the same time, certain ideological inhibitions surrounding federal regulation have fallen by the wayside—liberal proposals would have changed the basic market structure itself,⁵ and even members traditionally protective of states' rights have supported bills which bring the federal hand to bear upon areas previously regulated by the states.⁶ The National Energy Act of 1978 (NEA)⁷ stands as the highwater mark of federal utility legislation during the past decade in terms of specificity, degree of adjustment of federal and state rules, and long term regulatory implications.⁸

Although NEA has been in effect only a short time, and it is clearly too early to render conclusions about the success of its implementation in meeting its stated goals, a preliminary assessment

is demonstrated by a comparison of the legislation introduced during that period. Prior to the winter of 1973–74, there were fewer than 60 utility regulation bills introduced. During the 93rd Congress (1973–74), 127 energy-related bills were introduced with 5 pertaining only to electric utilities. During the 94th Congress (1975–76), 201 energy-related bills were introduced; 84 of the bills pertained to electric utilities. During the 95th Congress (1977–78), 111 energy-related bills were introduced; 51 of the bills pertained to electric utilities. Despite the diverse subject matter covered by those bills, the legislators appeared to be focusing primarily on uniform state regulation rather than on establishing stronger federal regulation through such arms as the Federal Energy Regulatory Commission (FERC).

4. Congress has spoken out on such specifics as automatic adjustment clauses, advertising expenses, and the design of electric utility rate schedules, Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95–617, 92 Stat. 3117 (1978) (codified in scattered sections of 15, 16, 30, 42, 43, 47 U.S.C.); accounting for investment tax credits, for utilities, Long, Report of the Comm. on Finance, S. REP. NO. 437, 92d Cong., 1st Sess. 37–39 (1971); and accelerated depreciation for utilities, Reed, Report of the Comm. on Ways and Means, H. R. REP. NO. 1337, 93d Cong., 2d Sess. 12–25 (1954).

5. See, e.g., Petroleum Industry Competition Act of 1975, S. 2387, 95th Cong., 1st Sess., 121 CONG. REC. 29645 (1975).

6. Note, for example, the broad-based support in the House for its version of the National Energy Act which imposed so many mandatory provisions on state commission regulation of electric power. See text accompanying notes 12–20 *infra*.

7. The National Energy Act of 1978 cumulatively refers to five statutes which were enacted on November 9, 1978: the Energy Tax Act of 1978 (ETA), Pub. L. No. 95–618, 92 Stat. 3174 (1978) (codified in scattered sections of 19, 23, 26 U.S.C.); National Energy Conservation Policy Act (NECPA), Pub. L. No. 95–619, 92 Stat. 3206 (1978) (codified in scattered sections of 12, 15, 42 U.S.C.); Natural Gas Policy Act of 1978 (NGPA), Pub. L. No. 95–621, 92 Stat. 3350 (1978) (codified in scattered sections of 15, 42 U.S.C.); Powerplant and Industrial Fuel Use Act of 1978 (FUA), Pub. L. No. 95–620, 92 Stat. 3289 (1978) (codified in scattered sections of 15, 16, 30 U.S.C.); Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95–617, 92 Stat. 3117 (1978) (codified in scattered sections of 15, 16, 30, 42, 43, 47 U.S.C.).

8. Since NEA, the number of federal bills introduced has sharply declined, perhaps indicating the adoption of a "wait and see" attitude until the "returns are in" on the workings of NEA.

of its uneven progress can now be made. This Comment considers NEA in its five principal parts as its implementation bears on the policy and public administration aspects of electric and gas utility regulation.

The Comment briefly traces the legislative history of NEA; particular attention is then given to the reactions of state regulatory commissions as reflected in the Public Utilities Commission of Ohio (PUCO). Finally, some commentary on the potential pitfalls and prospects for NEA implementation is presented.

I. THE NATIONAL ENERGY ACT

A. *Legislative History*

The legislation that became the National Energy Act of 1978 evolved from the National Energy Plan introduced to the nation by President Carter on April 20, 1977.⁹ The President's plan for utility reform concentrated on three areas: altering utility rate structures, changing the measuring and recording of consumption, and regulating the transmission and distribution of electric power. Specifically, the goals of the plan regarding electric utilities were to (1) "require" the phase out of declining block rate schedules; (2) "require" utilities to offer off-peak rates; (3) "require" greater reliance on interruptible power; (4) "prohibit" master metering in favor of individual metering; and (5) "authorize" the Federal Energy Regulatory Commission (FERC) to require expansion of utility interties and wheeling arrangements.¹⁰

The Administration's utility reform proposals were basically enacted, albeit in a less mandatory form and with implementation emphasis on state rather than federal commissions.¹¹ Congress also entered the debate over rate reform, particularly the declining block rate issue and the time-of-day pricing question. The House bill established "minimum standards respecting the rates at which

9. The National Energy Plan was introduced during an address to a joint session of Congress. 13 WEEKLY COMP. OF PRES. DOC. 566 (Apr. 20, 1977). The National Energy Act was introduced as a single plan to the House of Representatives on May 2, 1977. H.R. 6831, 95th Cong., 1st Sess., 123 CONG. REC. H3905 (1977). It was introduced as a single plan in the Senate on May 5, 1977. S. 1469, 95th Cong., 1st Sess., 123 CONG. REC. S7097 (1977).

10. S. REP. NO. 442, 95th Cong., 2d Sess. 22, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7903, 7919. In the case of gas utilities, the wording was "authorized to adopt, and require implementation, of similar policies applicable to gas utilities." *Id.*

11. Many of the enacted provisions of the National Energy Plan that concern public utilities are found in Title I of the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified in scattered sections of 15, 16, 30, 42, 43, 47 U.S.C.).

[electric] energy is sold. . . ."¹² These rate design standards included requirements that rates be "cost based" and that a rate schedule not show declining consumption rates unless the "utility shows in an evidentiary hearing that [the] decrease reflects the decrease in [the] cost of providing electric service. . . ."¹³ There were two exceptions to this strict approach. First, lower rates would be permitted for essential needs of residential consumers.¹⁴ Second, lower rates would be permitted where the purpose is to avoid significant economic hardship to residential consumers.¹⁵ Under the House version, electric rates for all classes of customers would be computed on a time-of-day basis which reflects cost-of-service "unless those rates have been determined not to be cost-effective" by the regulatory authority.¹⁶ The House Committee also discussed marginal cost pricing concepts for the peakload; however, such provisions were not included in the final House bill.¹⁷ Selection of the method for prescribing rates was delegated to state rather than federal authorities, with the restriction that the outcome must meet "minimum standards for rates."¹⁸ Further, consumer rates must reflect the cost of service on a seasonal basis unless such rates are not cost-effective.¹⁹ The FERC was granted the opportunity to provide voluntary price guidelines for rate determination for peakload, seasonal, and interruptible power.²⁰

In December 1977, the House and Senate conference committee reached agreement on retail electric ratemaking. The compromise in general contained the detailed utility subject matter of the House bill, but adopted alternative Senate language providing for milder federal prescriptions on ratemaking and placing the bur-

12. H.R. 8444, 95th Cong., 1st Sess. § 511(a).

13. *Id.* § 511(a)(1).

14. *Id.* § 511(b)(2)(B).

15. *Id.*

16. *Id.* § 511(a)(2)(A). The bill provided that cost-effectiveness exists when "the long-run benefits are likely to exceed the metering costs associated with the implementation of" the time-of-day rates. *Id.* § 511(a)(2)(C).

17. The House Committee stated that when "the increment in total costs to a utility caused by the requirement to supply additional energy during peak hours is different from the increment in costs if that energy were supplied during off-peak hours, then that difference should be reflected in rates." H. REP. NO. 496, 95th Cong., 1st Sess. 137, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 8247, 8580.

18. H.R. 8444, 95th Cong., 1st Sess. § 532(a).

19. *Id.* § 511(a)(2)(B). The cost-effectiveness requirement in this section refers to the effect that seasonal rates have on the consumption patterns of each class of electric consumers. *Id.* The bill also required that interruptible power rates be offered to consumers. *Id.* § 511(a)(2)(E).

20. *Id.* § 511(a)(3).

den of implementation on the states rather than on the federal government.²¹

This compromise on attitudes is amply demonstrated by a review of the final provisions. The retail rate provisions adopted only allow the Secretary of Energy the right to enter state rate cases and present evidence on rate design that would encourage conservation and more efficient use of resources.²² Additionally, state commissions would be required to hold hearings and issue findings within three years on the "appropriateness" of implementing five "ratemaking standards:" time-of-day rates, seasonal rates, cost-of-service pricing, interruptible rates, and load management techniques; declining block rates were prohibited unless cost-justified.²³ The Secretary of Energy was granted the right to seek judicial review of a state commission decision on these ratemaking concepts if the Department of Energy (DOE) had participated in the original state commission proceeding.²⁴ The state commissions were also required to hold hearings within two years, and to the extent they determined "appropriate," to adopt prohibitions on master metering; procedures for reviewing automatic adjustment clauses; procedures prohibiting rate discrimination against solar, wind, and other small systems; procedures to provide adequate information to consumers; prohibitions on charging ratepayers for certain advertising; and procedures to protect ratepayers against abrupt termination of service.²⁵

The controversial issue of automatic adjustment clauses (AAC) led to disparity between the Committee statement and the enacted legislation. The Committee statement seemingly condones discretionary review by state commissions,²⁶ yet the NEA

21. JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONG., H. CONF. R. NO. 1750, 95th Cong., 1st Sess. 63 *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7797 [hereinafter cited as JOINT EXPLANATORY STATEMENT].

22. *Id.* at 81, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7815.

23. 92 Stat. 3122 (codified at 16 U.S.C.A. § 2621(d) (West Supp. 1979)).

24. JOINT EXPLANATORY STATEMENT, *supra* note 21, at 82, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7816. This conforms to the House version of the bill, as the Senate version permitted the Department of Energy (DOE) to appeal only if "invited" to do so by a party to the appeal. S. 2114, 95th Cong. 1st Sess. § 6(c) (1977).

25. 92 Stat. 3123 (codified at 16 U.S.C.A. § 2623 (West Supp. 1979)).

26. The Committee expressed its position that state commissions should review AAC's to ensure that they were providing incentives for efficient use of energy resources and that state commissions could allow AAC's to cover operating expenses as well as fuel costs. The Committee took no position on the amount state commissions may allow to be passed through to the customers, thus preserving full state discretion. JOINT EXPLANATORY STATEMENT, *supra* note 21, at 79-80, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7813-14. Additionally, increases in operating costs due to increased taxes could not be

contains a prohibition against AAC's without a prior evidentiary hearing, regardless of any finding that efficiency incentives are built in or that AAC's are necessitated by the immediate short-term financial obligations of the utility.²⁷ The Committee statement requires that every AAC be reviewed at least every four years by the state regulatory authority to determine if the clause encourages efficient use of resources and at least biennially to insure maximum economies in purchases and operations affecting the utility's rates.²⁸

The differences on wholesale power were generally resolved in favor of the House bill on interconnections, wheeling, and pooling.²⁹ It was agreed to let FERC order interconnections "on its own motion,"³⁰ the original Senate language would have allowed FERC to do this only on the request of an affected party.³¹

Consumer representation and financial assistance to state regulatory authorities were also provided for in the conference agreement. The Administrator of the Federal Energy Administration (FEA) was authorized to make grants for additional staffing for state commissions, to facilitate public participation in commission proceedings, and to encourage the development of experimental rate structures for electric utilities.³²

The remaining non-tax features of the Energy Bill that are important in this area are the fuel conservation program and the utility home weatherization program. The first of these basically follows the thrust of the President's plan to force new and existing

recovered through an AAC where such taxes were imposed as inducement for the utility to convert from oil and natural gas. *Id.*

27. 92 Stat. 3126 (codified at 16 U.S.C.A. § 2625(e) (West Supp. 1979)). Increases which would reflect a rise in the cost of centrally purchased power would also be permitted. *Id.*

28. JOINT EXPLANATORY STATEMENT, *supra* note 21, at 79-80, 96, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7813-14, 7830.

29. *Id.* at 90-95, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7824-29.

30. *Id.* at 90, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7824.

31. S. 2114, 95th Cong., 1st Sess.

The compromise reached allows FERC to order wheeling if certain protections of competition are written into the law. JOINT EXPLANATORY STATEMENT, *supra* note 21, at 91, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7825. The issue of order pooling was resolved by language allowing "cooperative" dispatch of power. *Id.* at 95, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7829.

32. The Energy Conservation and Resource Renewal Act, 42 U.S.C.A. § 6808 (West Supp. 1979) [Pub. L. No. 95-617, Title I, § 142, 92 Stat. 3134]. Those duties of the Administrator of FEA were later transferred to the Secretary of Energy. JOINT EXPLANATORY STATEMENT, *supra* note 21, at 87-88, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7821-22.

power plants, and certain industrial plants, to switch from oil and natural gas to coal and nuclear fuels. Some waivers and exemptions would be allowed, both temporary and permanent, and FEA would be granted the additional and expanded authority.³³ The second of these took the form of a requirement that state utility regulatory agencies oversee a utility home weatherization program allowing utilities to install energy conservation equipment for customers and make loans for that purpose.³⁴ Utilities would also have to offer to conduct energy audits in customers' homes and provide customers with lists of other installers and lenders.³⁵

B. Coverage

Of the five pieces of legislation which comprise NEA,³⁶ all but the Energy Tax Act will have a direct and substantial impact on the responsibilities and agendas of state public utility commissions.

1. *Public Utility Regulatory Policies Act*

The Public Utility Regulatory Policies Act (PURPA) covers electric utilities selling more than 500 million kilowatt-hours annually (other than for resale) and gas utilities selling 10 billion cubic feet annually (other than for resale).³⁷

PURPA's stated purposes are: (a) conservation of the energy supplied by utilities; (b) optimally efficient use of utility fuel resources and capital facilities; and (c) equitable rates to electric and gas consumers.³⁸

In order to meet these purposes, eleven federal policy standards were adopted. Six of the eleven are ratemaking standards, covering cost-of-service,³⁹ declining block rates,⁴⁰ time-of-use rates,⁴¹ seasonal rates,⁴² interruptible rates⁴³ and load-management techniques.⁴⁴ The remaining five policy standards cover

33. H. REP. NO. 543, 95th Cong., 2d Sess. 22, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7673, 7691.

34. *Id.* at 11-16, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 7680-85.

35. *Id.* at 12, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 7681.

36. See note 7 *supra*.

37. 92 Stat. 3121 (codified at 16 U.S.C.A. § 2612(a) (West Supp. 1979)).

38. *Id.* at 3120 (codified at 16 U.S.C.A. § 2611 (West Supp. 1979)).

39. *Id.* at 3122 (codified at 16 U.S.C.A. § 2621(d)(1) (West Supp. 1979)).

40. *Id.* (codified at 16 U.S.C.A. § 2621(d)(2) (West Supp. 1979)).

41. *Id.* (codified at 16 U.S.C.A. § 2621(d)(3) (West Supp. 1979)).

42. *Id.* (codified at 16 U.S.C.A. § 2621(d)(4) (West Supp. 1979)).

43. *Id.* (codified at 16 U.S.C.A. § 2621(d)(5) (West Supp. 1979)).

44. *Id.* (codified at 16 U.S.C.A. § 2621(d)(6) (West Supp. 1979)).

master metering,⁴⁵ automatic adjustment clauses,⁴⁶ consumer information,⁴⁷ procedures for termination of electric service,⁴⁸ and advertising.⁴⁹

PURPA requires state commissions to consider the six ratemaking standards.⁵⁰ After such consideration, there is no obligation to adopt such standards unless applicable state law requires adoption where the evidence is persuasive.⁵¹ For this reason, state public utility commission decisions on these standards must be reached in public, be in writing, and be reviewable in state court.⁵² However, there is a legal obligation to adopt the five nonratemaking standards provided the state commission determines them to be appropriate and consistent with state law.⁵³ Consequently, while PURPA is mostly discretionary as to the *outcome* of state public utility commission deliberations on these eleven matters, it is compulsory as to what must be considered.

The Act, however, does impose certain mandatory requirements on state commissions. For example, each state commission must: (a) officially acknowledge to DOE its ratemaking authority with respect to the utilities listed by DOE as being covered by the act;⁵⁴ (b) complete its consideration process for the ratemaking standards within 3 years,⁵⁵ and for the additional regulatory standards within 2 years;⁵⁶ (c) include public notice and public hearings in its consideration process,⁵⁷ and allow consumer and federal participation;⁵⁸ (d) render a written determination which is based upon its findings and the evidence presented at hearings, and which is made available to the public;⁵⁹ (e) determine to the maximum extent practicable, cost-of-service on the basis of a method that identifies cost differences by both time-of-use and

45. *Id.* at 3124 (codified at 16 U.S.C.A. § 2623(b)(1) (West Supp. 1979)).

46. *Id.* (codified at 16 U.S.C.A. § 2623(b)(2) (West Supp. 1979)).

47. *Id.* (codified at 16 U.S.C.A. § 2623(b)(3) (West Supp. 1979)).

48. *Id.* (codified at 16 U.S.C.A. § 2623(b)(4) (West Supp. 1979)).

49. *Id.* (codified at 16 U.S.C.A. § 2623(b)(5) (West Supp. 1979)).

50. *Id.* at 3121 (codified at 16 U.S.C.A. § 2621(a) (West Supp. 1979)).

51. *Id.* This lack of compulsion is in keeping with the goal of PURPA to supplement otherwise applicable state law. *Id.* In other terms, adoption would only be required where failure to adopt the standards would be arbitrary and capricious.

52. *Id.* (codified at 16 U.S.C.A. § 2621(b)(1) (West Supp. 1979)).

53. *Id.* at 3124 (codified at 16 U.S.C.A. §§ 2623(a)(1)–(2) (West Supp. 1979)).

54. *Id.* at 3121 (codified at 16 U.S.C.A. § 2612(c) (West Supp. 1979)).

55. *Id.* at 3123 (codified at 16 U.S.C.A. § 2622(b)(2) (West Supp. 1979)).

56. *Id.* (codified at 16 U.S.C.A. § 2622(b)(1) (West Supp. 1979)).

57. *Id.* (codified at 16 U.S.C.A. § 2623(a) (West Supp. 1979)).

58. *Id.* at 3128 (codified at 16 U.S.C.A. §§ 2631(a)–(b) (West Supp. 1979)).

59. *Id.* (codified at 16 U.S.C.A. §§ 2621(c)(2), 2623(c) (West Supp. 1979)).

major cost category (in prescribing such a method, the commission must take marginal costs into account);⁶⁰ (f) report annually to DOE, in such manner as DOE may prescribe, on its progress in carrying out the act, including its rationale for "grandfathering" any prior proceedings.⁶¹

Although PURPA was designed to apply predominantly to electric utilities, it has limited application to gas utilities as well.⁶² Rate regulations of natural gas utilities, however, has been deferred.⁶³

2. *National Energy Conservation Policy Act*

The National Energy Conservation Policy Act (NECPA) requires, *inter alia*, large electric and gas utilities,⁶⁴ and therefore state commissions, to play a central role in carrying out the federal policy of encouraging residential energy conservation.⁶⁵ NECPA requires each covered utility to: (a) inform all its residential customers of suggested conservation measures, including costs and savings; (b) distribute a list of qualified suppliers, installers and financiers; (c) offer to conduct on-site home energy audits; (d) offer to arrange the installation and financing of conservation measures selected by its customers; (e) offer to allow repayment of the conservation loans through its regular periodic billing procedures.⁶⁶

One of the key provisions of NECPA is the development of a "residential conservation service" (RCS).⁶⁷ Although the legal requirements to offer the RCS are imposed directly upon the cov-

60. *Id.* at 3125 (codified at 16 U.S.C.A. § 2625(a) (West Supp. 1979)).

61. *Id.* at 3128 (codified at 16 U.S.C.A. § 2626(a) (West Supp. 1979)).

62. *Id.* at 3149 (codified at 15 U.S.C.A. § 3201 (West Supp. 1979)). PURPA was intended to serve as a comprehensive national energy policy. H.R. 95-543, 95th Cong., 1st Sess. 3, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7673. The specific titles of PURPA reflect the areas covered: electric utilities (Title I), natural gas utilities (Title III), small hydroelectric power projects (Title IV) and crude oil transportation systems (Title V). 92 Stat. 3117 (codified at 16 U.S.C.A. § 2601 (West Supp. 1979)).

63. *Id.* at 3152 (codified at 15 U.S.C.A. § 3206 (West Supp. 1979)).

64. Provisions of NECPA are applicable to electric utilities selling more than 750 million kilowatt-hours annually (other than resale) and gas utilities selling more than 10 billion cubic feet annually to residential customers. *Id.* at 1132 (codified at 42 U.S.C.A. § 3812 (West Supp. 1979)).

65. *Id.* at 3212 (codified at 42 U.S.C.A. § 8213(c) (West Supp. 1979)). For a discussion of state public utility commissions' role in carrying out this policy, see H.R. CONF. REP. NO. 1751, 95th Cong., 2d Sess. 91 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 8134, 8134-35.

66. 92 Stat. 3215-16 (codified at 42 U.S.C.A. § 8216 (West Supp. 1979)).

67. *Id.* at 3210 (codified at 42 U.S.C.A. § 8211 (West Supp. 1979)). The RCS covers such conservation measures as caulking, weather-stripping, storm doors, and clock thermostats. *Id.*

ered utilities, the governor of each state, or any state agency specifically authorized under state law to do so, is given the option of developing and administering a statewide RCS program subject to rules prescribed by DOE.⁶⁸ No matter what form these programs take, the public utility commissions will necessarily be affected because all costs incurred by regulated utilities in complying with this conservation program are ultimately subject to public utility commission approval.⁶⁹

Finally, NECPA requires DOE to assume direct responsibility for the conservation programs of all covered utilities in any state which does not have an approved plan, decides not to participate, or inadequately carries out an approved plan.⁷⁰

3. *Powerplant and Industrial Fuel Use Act*

The Fuel Use Act (FUA) is designed to encourage utilities to switch from oil and natural gas generation to coal and nuclear generation by prohibiting the use of natural gas or oil in new electric powerplants, as well as the use of natural gas in existing power plants.⁷¹ The primary impact of FUA on state utility regulation is derived from the fact that compliance costs incurred by regulated utilities are subject to public utility commission review and approval.⁷² Because of its focus, FUA has uneven impact among states.⁷³

68. *Id.* at 3212 (codified at 42 U.S.C.A. § 8213(c) (West Supp. 1979)). All regulated utilities must be included in such state plans and nonregulated utilities, such as municipalities and co-ops, may be included. *Id.* at 3214 (codified at 42 U.S.C.A. § 8215(a) (West Supp. 1979)). Either the state governor or an authorized state agency may devise and manage the program. *Id.* at 3212 (codified at 42 U.S.C.A. § 8213(c) (West Supp. 1979)).

69. *Id.* at 3213 (codified at 42 U.S.C.A. § 8214(a)(4) (West Supp. 1979)). As a result, NECPA provides accounting provisions to deal with these compliance costs. *Id.* at 3216 (codified at 42 U.S.C.A. § 8216(c) (West Supp. 1979)).

70. *Id.* at 3220 (codified at 42 U.S.C.A. § 8220 (West Supp. 1979)).

71. *Id.* at 3291-92 (codified at 42 U.S.C.A. § 8301(b) (West Supp. 1979)). Exemptions are allowed on numerous grounds, but each exemption must be specifically requested and approved by DOE. *Id.* at 3299 (codified at 42 U.S.C.A. § 8321 (West Supp. 1979)). Specified grounds for permanent and temporary exemptions are contained within FUA. *See id.* at 3299-305 (codified at 42 U.S.C.A. §§ 8321-8324 (West Supp. 1979)). Any exemptions granted to an electric utility by DOE may be conditioned upon the use of "such fuel conservation measures" as will reduce the amount of prohibited fuel consumed as a result of the exemption. *Id.* at 3304 (codified at 42 U.S.C.A. § 8324 (West Supp. 1979)).

72. *Id.* at 3330 (codified at 42 U.S.C.A. § 8411(c)(2) (West Supp. 1979)).

73. For example, in a state like Texas, a large portion of the generating facilities is fueled by oil and natural gas. The proper policy and accounting method for handling the massive obsolescence of these plants contrived by a forced changeover to coal and nuclear energy is an important and unresolved issue.

4. *Natural Gas Policy Act*

The Natural Gas Policy Act (NGPA) extends federal regulation of natural gas pricing to the intrastate market,⁷⁴ previously subject only to state regulation and provides for the gradual removal of all federal price regulation by 1985.⁷⁵

The Act further requires that state-determined distribution company rates for ultimate consumers be fully consistent with the incremental pricing aspects of the federally-determined pipeline price.⁷⁶

While it is assumed that incremental pricing for pipeline transactions can be handled within the prevailing institutional arrangements—that is, among the pipeline, the distribution company, and the federal government—the pass-through provision requires a federal role in the area previously reserved to the states—establishing distribution company rates for ultimate consumers.⁷⁷ This new federal role in gas distribution ratemaking will necessarily affect state utility commissions, which may also be affected by the Secretary of Energy's new authority to prohibit certain pipeline curtailments,⁷⁸ and by the President's emergency authority to allocate gas supplies and allow extraordinary gas purchases.⁷⁹

5. *Energy Tax Act*

The purpose of the Energy Tax Act (ETA) is to provide tax incentives for the production and conservation of energy.⁸⁰ This purpose is implemented in three general areas: tax credits for residential conservation measures,⁸¹ transportation, including a gas guzzler tax,⁸² credits for van pooling,⁸³ and removal of excise tax on buses,⁸⁴ and changes in business investment credit to encourage conservation of oil and gas or to encourage new energy

74. 92 Stat. 3363 (codified at 15 U.S.C.A. § 3315 (West Supp. 1979)).

75. *Id.* at 3369 (codified at 15 U.S.C.A. § 3331 (West Supp. 1979)).

76. *Id.* at 3378 (codified at 15 U.S.C.A. § 3345(a) (West Supp. 1979)).

77. Federal involvement is accomplished by a provision authorizing the U.S. Attorney General to enforce the pass-through provision. *Id.* at 3402 (codified at 15 U.S.C.A. § 3414(b)(5) (West Supp. 1979)).

78. *Id.* at 3395 (codified at 15 U.S.C.A. § 3392(a) (West Supp. 1979)).

79. *Id.* at 3381–88 (codified at 15 U.S.C.A. §§ 3361–63 (West Supp. 1979)).

80. *Id.* at 3174.

81. *Id.* at 3175–80 (codified at I.R.C. § 44C).

82. *Id.* at 3180–94 (codified at I.R.C. § 4064).

83. *Id.* (codified at I.R.C. § 46(c)(6)).

84. *Id.* (codified at I.R.C. § 4483(c)).

85. *Id.* at 3194–3201 (codified at I.R.C. §§ 46(a)(2), 48(J)).

technology.⁸⁵ Of special note are the additions to the Investment Tax credits for utilities.⁸⁶

C. *Attitudes and Administration*

Not surprisingly, many of the concerns and attitudes expressed during the course of passage of the NEA continue in its implementation.⁸⁷ It seems fair to summarize the stance of the several parties to the issue in the following fashion.⁸⁸

Congress, under substantial and sustained criticism for its failure to produce an energy policy, felt the need for constructive action. It is likely that designing and passing legislation in the

86. *Id.* at 3195 (codified at I.R.C. § 46(c)(3)).

87. Three offices of DOE are primarily responsible for NEA implementation. Under PURPA, FERC is responsible for rulemaking on electric cost-of-service reporting, 16 U.S.C.A. § 2643 (West Supp. 1979), and for various bulk power authorities. *Id.* § 824j. Also under PURPA, the Economic Regulatory Administration (ERA) is responsible for title I (except for section 133) title III, and portions of title VI. Specific responsibilities of ERA include promulgating lists of covered utilities and identifying the responsible state commissions, *id.* § 2612(c), 15 U.S.C.A. § 3201(d) (West Supp. 1979); establishing requirements for annual state commission reports and reporting to Congress, 16 U.S.C.A. § 2626(a) (West Supp. 1979), 15 U.S.C.A. § 3201(d) (West Supp. 1979); intervening in state commission proceedings, 16 U.S.C.A. §§ 2631, 2633 (West Supp. 1979), 15 U.S.C.A. § 3205 (West Supp. 1979); promulgating voluntary guidelines and technical assistance materials, 16 U.S.C.A. §§ 2641, 2642 (West Supp. 1979); providing financial assistance to commissions, nonregulated utilities, and consumer offices, 42 U.S.C.A. §§ 6807-6808 (West Supp. 1979); reporting to Congress on gas rate design proposals, 15 U.S.C.A. § 3206 (West Supp. 1979); and funding the National Regulatory Research Institute at the Ohio State University. 16 U.S.C.A. § 2645 (West Supp. 1979).

Under NECPA, the Assistant Secretary for Conservation and Solar Applications has overall responsibility for program administration, including promulgation of rules, 42 U.S.C.A. § 8213 (West Supp. 1979), and review of state plans. 42 U.S.C.A. § 8214 (West Supp. 1979). Under this act, ERA is given the supportive responsibilities of serving as liaison with state commissions and utilities. 42 U.S.C.A. § 8214(a)(6) (West Supp. 1979). Finally, ERA is responsible for those portions of the rules relating to cost accounting, 42 U.S.C.A. § 8216(c)(1) (West Supp. 1979), service termination, 42 U.S.C.A. § 8216(e) (West Supp. 1979), billing, 42 U.S.C.A. § 8216(c)(2) (West Supp. 1979), and utility financing of residential conservation improvements. 42 U.S.C.A. § 8216(f) (West Supp. 1979).

Under FUA, ERA is responsible for the entire program. 42 U.S.C.A. § 8342 (West Supp. 1979).

Under NGPA, FERC is responsible for the price regulation and deregulation, 15 U.S.C.A. §§ 3311-33 (West Supp. 1979), including incremental pricing and the associated pass-through requirements. *Id.* §§ 3341-48. Also under this act, ERA is responsible for emergency allocation authorities, *id.* §§ 3361-75 and gas curtailment policies. *Id.* §§ 3391-94.

88. The assessments contained herein were drawn from the author's experiences serving Congress as a Specialist in Public Utility Economics at the Congressional Research Service during introduction and consideration of NEA, and from subsequent experiences as Director of the National Regulatory Research Institute, which is assisting state commissions in implementing NEA.

relatively arcane public utility field appeared to be a more workable alternative than tax or oil targets. The dual forces of recentralization and standardization also were operative in the decision. After a decade and a half of decentralizing programs and authorities Congress seemed to be reasserting federal dominance, and NEA may be viewed in that light. Further, the wide diversity and unevenness in public policy that characterized ninety years of state public utility commission regulation made this area a tempting candidate for national reform. Reform seemed even more urgent because existing institutional arrangements and current practices were perceived as not only uneven but inadequate. Another immeasurable, but no less real, impetus for action probably came from the national and state policy disarray that characterized the country's response to the sequence of oil shortages in 1974-75, natural gas shortages in 1975-76, and coal shortages in 1977-78.

From the point of view of the state regulatory community, NEA legislation was viewed variously as another encroachment on traditional state prerogatives, as unnecessary and dated in that many state commissions were "well ahead" in employing the concepts and practices proposed therein, and as introducing an enormous and burdensome levy on already stretched state commission resources.

To the utilities themselves, the unfamiliar prospect of national legislation of a stringent regulatory policy nature appeared disruptive. Longstanding, ongoing relationships and business practices would be disturbed; additional and burdensome reporting requirements for corporate financial and operating data seemed likely, and a concerted and cohesive national regulatory effort would be a much more formidable rival than many separate state regulatory entities. In this sense there may have been the potential for an unusual alliance between the regulated utilities and their state regulators with respect to the NEA legislation, though no such alliance eventuated in the course of the bill's passage.

After the signing of NEA in late 1978, movement began in the federal and state sectors. Various divisions of DOE set in motion numerous actions toward implementing the new law; FERC began to establish reporting requirements for utilities as contemplated under section 133 of PURPA.⁸⁹ A counterpart committee

89. 92 Stat. 3123 (codified at 16 U.S.C.A. § 2623 (West Supp. 1979)).

of the National Association of Regulatory Utility Commissioners (NARUC) was formed and sat jointly with FERC.

DOE published a month-by-month schedule of planned implementation activities for 1979.⁹⁰ Again, formal NARUC committee participation was sought and offered, and the working relationships here, as with FERC, have been generally amicable. The pace has been quick and the time for reasoned reflection short, but most state commissions seem to feel that—so far, at least—they have adequate access to the process and have been fairly heard.

Part of this access and hearing opportunity emerged from an early action by DOE in providing for a series of five identical “NEA Workshops” throughout the country during January, 1979. The sessions were open only to state commission staff and commissioners, state energy offices, and offices of state attorneys general. They were designed and presented by the research and assistance arm of NARUC, the National Regulatory Research Institute (NRRI), in conjunction with the five state public utility commissions of the workshop locations—Ohio, Colorado, Georgia, Rhode Island, and California. The purpose was to provide a forum for an informal exchange of views on what NEA involved, how it might be interpreted, expected difficulties of implementation and compliance, and ways to make implementation and compliance minimally disruptive to state commission regulation.⁹¹ While discussions were “off the record” and no transcripts were made, notes were kept in order to recount and synthesize the proceedings.⁹²

From a stance that could be characterized as grudging acceptance of NEA, state commission postures have gradually changed so that now the commissions generally feel NEA was more or less necessary, and a logical step in the progression of utility regulation. Few—if any—yet see NEA as an opportunity to accomplish

90. Included in the schedule were notice of rulemaking, proposed rules, conduct of public hearings on such rules, and final rules for the several provisions of PURPA, NECPA, NGPA, and FUA.

91. Attendance at the five conferences totaled 408, excluding DOE and NRRI participants, and included regulators from 48 states and the District of Columbia. The interests and backgrounds represented were predominantly law, economics, engineering, accounting, and financial analysis.

92. For a listing of questions and observations frequently discussed during the workshops, see NAT'L REG. RESEARCH INST., REPORT ON THE CONFERENCES ON NAT'L ENERGY ACT AND ITS IMPACT ON STATE UTIL. REG., Contract No. EC-77-C-01-8683, 7-11 (1979).

what might otherwise not be done, or only be accomplished at a much later time. As with most actions affecting state regulatory commissions, individual commission response varies with commission history, size, structure, statutory authority, staff skills, and membership.

Not surprisingly, those state public utility commissions least wary of NEA are those that have been most progressive in consideration of many of the standards and guidelines that appear in the legislation. Compliance could be fairly simple for about seventeen state commissions which have already held "generic hearings", almost all of which encompassed the ratemaking standards in NEA. Ideally, it would be merely a matter of certifying the record on particular standards for those commissions to be declared in compliance with important portions of the legislation.⁹³ Further, a number of commissions which had generic (or other) proceedings underway but not finished on the date of enactment of NEA have wisely taken advantage of the PURPA provision which allows commissions to incorporate consideration of the standards in the course of completing such hearings.⁹⁴ For example, the Colorado Public Utilities Commission, which had begun generic hearings over two years before NEA passage, was able to shape its investigation and final order to maximize the chances of being in compliance with as many PURPA considerations as possible.⁹⁵ In its order, that commission wrote:

It is interesting to note that the purposes of Title I of PURPA resemble strikingly this Commission's goals of regulation. Moreover, the ratemaking standards outlined in the Act are virtually identical to the issues considered in the generic proceedings. This section of the Decision spells out the provisions of PURPA and the extent of the Commission's compliance therewith.⁹⁶

To briefly capsule state commission activity in areas of PURPA other than rate design, some nine states now have tariffs

93. This "grandfathering" is possible through use of a PURPA provision that allows commission proceedings prior to the date of NEA passage to be "treated as complying with the [standards] if such proceedings and actions substantially conform to such requirements." PUB. L. No. 95-617, § 124, 92 Stat. 3131 (1978) (codified at 16 U.S.C.A. § 2632 (West Supp. 1979)).

94. Since the course of the energy legislation leading to passage covered approximately an 18-month period, there was ample time and occasion for state regulatory commissions to shape some of their activities in anticipation of the new legislation and the likely need for compliance with its final provisions.

95. PUB. UTIL. COMMISSION OF COLO., SUMMARY OF DECISION No. C79-1111, GENERIC RATE PROCEEDING, Case No. 5893 (July 27, 1979).

96. *Id.* at 2.

published for solar power—presumably with rates that neither subsidize nor penalize that form of energy. Most promotional advertising by utilities is now prohibited and service cut-offs reduced or their standards made more lenient. There has been a marked tightening up of fuel adjustment clauses both as to verification, monitoring, and commission surveillance and as to design, which provide incentives for efficiency, scope, and applicability. Master metering and load management are among the PURPA items least far along in state commission consideration.

Focusing on the crucial matter of rate design, twenty-three commissions have instituted time-of-use rate experiments, and seasonal and interruptible rates are not uncommon in certain utility systems. There has for some time been a move away from at least sharply declining block rates in utility company tariffs and toward flatter rate schedules. So-called lifeline rates have recently been considered by over twenty commissions (although this is the one consideration that is not “grandfatherable” under PURPA).

Regarding NECPA, it appears that state commissions have been active in the home insulation field. More than ten commissions now have such programs in existence; a dozen more are studying them for implementation. When asked whether they had encountered new regulatory difficulties arising from the utilities’ foray into the insulation business, seventeen commissions recently answered in the affirmative and eighteen in the negative.⁹⁷

There are two basic problems confronting commissions in the home insulation field. One involves cluttering up electric and gas utility regulation with ancillary activities. After spending years getting the utilities out of the business of selling appliances and concentrating instead on the production and distribution of power, it may be a step backwards to again involve them in the insulation and lending businesses.

The second is the specific problem of whether a user-charge philosophy or a collective-benefit philosophy is most desirable in allocating the expenses of energy audits and residential insulation projects. The former approach would simply require that those who use the service and who presumably benefit by it pay for it; the latter would require that since system savings from the energy

97. R. PROFOZICH AND D. JONES, *ELECTRIC AND GAS UTILITY RATE AND FUEL ADJUSTMENT CLAUSE INCREASES*, Subcomm. on Intergovernmental Rel. and on Energy, Nuclear Proliferation and Federal Services of Senate Comm. on Governmental Affairs, App. Table B-XI (U.S. Govt. Printing Office, Sept. 1978).

conservation activities of individual subscribers will accrue to all subscribers, the costs should be system-averaged.

Two other provisions of NEA whose implementation is not very far advanced are power pooling and cogeneration. Despite the 1936 mandate of the Federal Power Commission "to promote and encourage" interties among the electric utilities it regulates "for the purpose of insuring an abundant supply of electric energy throughout the United States with the greatest possible economy,"⁹⁸ arrangements for power pooling through physical interconnection of independent electric companies have been essentially left to the utilities for forty years. NEA gave FERC authority on its own motion,⁹⁹ upon application of any state commission,¹⁰⁰ or upon application of an electric utility or qualifying cogeneration facility¹⁰¹ to order interconnection and sale, delivery, or exchange of energy between utilities. Also, FERC can encourage utilities to pool with¹⁰² or order utilities to wheel for¹⁰³ other utilities or cogeneration facilities. Finally, the legislation makes clear that FERC can order any electric utility system owning or operating a bulk power transmission facility to add capacity in order to carry out FERC interconnect¹⁰⁴ and wheeling¹⁰⁵ orders.

The assumption behind all of this is that further economies and improved operating efficiencies may be realized through additional combinations of companies.¹⁰⁶ Two principal characteristics of utility operations that have allowed efficiencies through interties are time zone diversity and seasonal diversity. The problem with time zone diversity is that with the national shift in peak load from winter to summer, the opportunities for making better use of interconnected systems declines. Summer peak load is less diverse than winter peak load because air conditioning tends to run around the clock (as does irrigation demand), resulting in a

98. 16 U.S.C. § 824a(a) (1976).

99. *Id.* § 824i(d).

100. *Id.* § 824i(a)(2).

101. *Id.* § 824i(a)(1).

102. *Id.* § 824a-1(b); *see also id.* § 824-1(a).

103. *Id.* § 824j.

104. *Id.* § 824i(a)(1)(D).

105. *Id.* § 824j.

106. Perhaps the best recent treatment of the issue of further interties is contained in CONGRESSIONAL RESEARCH SERVICE, NATIONAL POWER GRID STUDY — AN OVERVIEW OF ECONOMICS, REGULATORY AND ENGINEERING ASPECTS (1976). A new study on the same subject is being conducted at the U.S. Department of Energy.

relatively long flat load which does not lend itself to power supply manipulation.

Seasonal diversity between Northern and Southern regions offers more promise for improved load factors. Diversity within the West Coast is considerable; there is a definite winter peak on the Pacific Northwest and a definite summer peak in California. There are similar diversity opportunities in the Midwest, for example, between Nebraska and Manitoba, Canada. Here, as elsewhere, before seasonal diversity can be exploited the benefits of additional inerties must demonstrably outweigh the monetary and environmental costs and the energy losses in long-distance transmission.

The legislative requirement of interconnects between utilities as the public interest dictates seems to include the unique case of the Electric Reliability Council of Texas, the only regional grouping of utilities not intertied with any other part of the United States.¹⁰⁷ This possibility might explain the opposition of certain conferees to this provision.

Another possibility is the use of dual-purpose power plants. There is little question that a resurgence of the use of dual-purpose power plants could be a force for increased competition in the utility sector. Just how influential it could be would depend on the extent and nature of the resurgence. Competition might take the form of a local existing utility feeling the pressure from a locally sited dual-purpose power plant through invidious comparisons of price, cost, efficiencies, and performance. On the other hand, an existing utility might run the risk of losing major industrial customers who decide to generate their own power as a joint product to process steam. Finally, an existing utility might experience direct competition from a dual-purpose industrial plant in its sale of wholesale power to existing distribution systems.

Understandably, there is disagreement whether the introduction of widespread competition in the electric power industry would be beneficial. One reason that cogeneration has not flourished as a concept is that an industry which operates as a natural monopoly within a particular service area is understandably reluctant to admit competitors who are not fully in the electric power

107. For a treatment of the legal, economic, and public policy aspects of the Texas situation see A. KAUFMAN, D. JONES, AND R. POLING, *THE ELECTRIC RELIABILITY COUNCIL OF TEXAS INTERTIE SITUATION* (Comm. Print 1976).

business, especially if they do not operate within the same regulatory framework.

It would be expected in the dual-purpose plant situation that most transmission would be wheeled over someone else's system because construction of elaborate lines from cogenerating plants would prohibit capital saving. The problem of arriving at a fair cost-based rate under cogeneration arrangements in the wheeling tariff situation is not significantly different from the general problem already posed by wheeling.

While it would seem fair to reduce stand-by demand charges to industry in exchange for industrial assumption of a portion of the burden of providing electric power, at least two difficulties arise. One is to determine a basis for the amount of the reduction—presumably a cost-avoidance rationale. A second is how to achieve equity if, as is likely, the particular firm occasioning the reduction by having cogeneration facilities would not be the beneficiary, or not the only beneficiary, of that reduction.

If the regulatory authority granted an industrial cogenerator a priority use status at a time of national allocation of fuels, this might have a notable effect on the competitive position of the firm in its industrial lines (as opposed to competitors who did not go to cogeneration in their manufacturing process). Also, if rulemaking required that when a dual-purpose industrial plant was temporarily shut down its electric power generation would still continue, this would imply that such generation would be more closely akin to providing firm power than interruptible power. Tariff rates could be expected to be higher in the former case than the latter, and from the point of view of cost allocation (hence, charges for electricity generated), it could be argued that during industrial plant shutdown periods all of the cost incurred for continued operation of the plant should be charged to the electric portion of the enterprise, thus, periodically raising rates.

The question of pricing power from cogeneration facilities raises more general difficulties and most of these turn on the question of cost allocation. Some of the costs of a dual-purpose plant would be readily allocated to the industrial process steam portion of the enterprise and some clearly associated with the electric cogeneration. But others—both capital costs and operating costs—that are jointly incurred present the familiar problem of how much cost should be assigned to generation and how much to the line of business in which the firm is primarily engaged. This is particularly complicated where the electric portion is under public

utility regulation and the other line of business is in the nonregulated sector. This situation allows subsidization of one activity by the other and perhaps unfair pricing practices through either undercharging or overcharging.

All in all, the usefulness of and opportunity for cogeneration are likely to depend upon locality and existing generating capacity and configuration. Thus, very particular circumstances will have to be present for a cogenerating enterprise to be feasible—even in the absence of institutional and attitudinal obstacles.

Also in the very earliest stages of implementation is the standard of so-called load management techniques.¹⁰⁸ Load management can be accomplished either directly by the utility or through the action of the customer. Many feel that over the long term, load controls may be a more effective strategy to match system needs and customer demands than time-of-use rates.

To utility companies, to most economists, and, it seems fair to say, to most regulators, lifeline rates are inimical to sound economics and good public utility regulation.¹⁰⁹ On the other hand, the political attraction of lifeline rates appears almost irresistible to some consumer groups, to state legislatures, and to Congress. Including lifeline rates in PURPA was especially awkward in that the rest of the Act is predicated on "rates that track costs."¹¹⁰ Lifeline is the one glaring departure from the norm, and a subsidy by other ratepayers is clearly implied.

While horror stories abound concerning the difficulties and failures of most lifeline schemes previously instituted, the main objections to the schemes are that generally (1) they become subsidies to consumers who use small quantities of electricity, for example, affluent second home owners and people who travel

108. These may include the introduction of hardware which allows the reduction of maximum kilowatt demand on an electric utility through radio control mechanisms, energy storage devices, and other load-limiting devices. Some involve signaling the customer that consumption of power at that particular time will be at high rates because it is peak usage; others involve intermittent cut-offs of power to particular customers for agreed periods of time.

109. Lifeline — essentially a type of income maintenance — is a pricing method intended to give relief to the poor as they face increasingly high utility bills. It is based on the assumption that a certain subsistence amount of electricity is essential to maintain an adequate standard of living. In practice, a lifeline rate typically prices the first several hundred kilowatt hours consumed monthly by each low-volume residential customer at a rate no higher than the rate per kilowatt hour (exclusive of demand and customer charges) charged any other customer in any other block of usage during the same period.

110. See, e.g., Pub. L. No. 95-617, § 111(d)(1), 92 Stat. 3122 (codified at 16 U.S.C.A. § 2621(d)(1) (West Supp. 1979)).

frequently, rather than to lower income people; (2) lower income people, for example, those living in poorly insulated homes are not necessarily lower consumers of power; (3) low income apartment dwellers whose electric costs are included in the monthly rental, for which the apartment owner is presumably billed at a commercial rate, are not benefitted and could even end up paying more if the commercial class of customers is the class subsidizing the lifeline rate beneficiaries in the residential class; (4) there is a misallocation of resources because of the abandonment of pricing according to cost-based rates; and (5) the problem of income maintenance is more appropriately and more efficiently handled through the public welfare system.

Unfortunately, the discrediting of a concept does not assure its demise where major forces point in another direction. What is required instead is the creation of more cost-effective ways of achieving the same laudable goal. In any event, the fact that PURPA provides that commissions must consider the adoption of lifeline rates within two years will itself keep the matter in the forefront of regulatory attention.¹¹¹

Perhaps the initial "sleeper" in NEA involving state commission regulation was the PURPA section 133 collection and reporting requirements for cost-of-service information for every electric utility with over 500 million kilowatt hours of retail sales.¹¹² On the surface, the provision could be viewed as involving the utilities on the one hand and FERC on the other. However, as the rules for implementation of section 133 have evolved, there has been active state commission participation and a very significant role in the future for state regulators is apparent.

Section 133 rules require the utilities to file detailed economic, accounting, financial, and engineering information going to cost-of-service by November 1, 1980, and biennially thereafter.¹¹³ Under rules published in June, 1979, all utilities must make their

111. Only where commissions have already considered lifeline, instituted some alternate scheme, or where the state supreme courts have ruled that authority to prescribe preferential and discriminatory rates for a particular group is lacking will the burden of complying with this standard be somewhat eased. *See, e.g.*, *Mountain States Legal Foundation v. Pub. Util. Comm'n.* 590 P.2d 495 (Colo. 1979).

112. 92 Stat. 3132 (codified at 16 U.S.C.A. § 2643 (West Supp. 1979)).

113. *Id.* Large portions of the information required by the rules have either gone uncollected in the past or, if collected, were not available to the public. A major purpose behind section 133 was to fill the data gaps and to allow everyone access to the same set of information — utilities, regulators, customers, intervenors, and policymakers. JOINT EXPLANATORY STATEMENT, *supra* note 21, at 86, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 7820.

filings with both FERC and the appropriate state commission.¹¹⁴ They must collect and report their cost-of-service data both in "raw" (accounting) form and in "calculated" form on both a traditional fully-distributed cost basis and on a marginal cost basis.¹¹⁵

In performing these calculations, the rule now states that state commissions can prescribe a methodology for both (or either) the accounting cost and marginal cost submissions.¹¹⁶ In the absence of such prescription, a utility is free to choose whatever cost-of-service methodologies it prefers in presenting these calculations. Many commissions are learning the importance of specifying a preference—so that the wealth of data to be filed in the future will be consistent with earlier decisions or present intentions on the matter of cost methodologies employed.¹¹⁷

Under the rules, state commissions also have a role in reviewing utility applications for extension of compliance past November 1980, and for exemptions from compliance. Such applications will go simultaneously to FERC and the appropriate state commission, and the latter can concur with or oppose the application upon review.¹¹⁸ Further, a state commission can request a blanket extension or exemption for all utilities under its jurisdiction.¹¹⁹

Although there is little tangible evidence on the current status of state implementation of PURPA, from studies made,¹²⁰ the majority of state commissions feel that few or only some of the PURPA standards can be met through grandfathering. Also, a majority of the commissions have adopted a plan, or are currently formulating a plan, to comply with the standards. The Economic Regulatory Administration (ERA) published final rules in August

114. Rules and Regulations for Part 290 — Collection of Cost of Service Information Under Section 133 of the Public Utility Regulatory Policies Act of 1978, 44 Fed. Reg. 33868 (1979).

115. *Id.* at 33875. The data will cover rate base and operating cost information; will be for generation, transmission, and distribution activities for each utility; and will be shown for both peak and off-peak hours. *Id.* at 33869-73.

116. *Id.* at 33875.

117. For example, if a commission has already agreed on a particular marginal costing method, it presumably would want to ensure that jurisdictional utilities use that method for their reporting requirements under section 133.

118. *Id.* at 33876.

119. *Id.*

120. Two of the surveys relied upon for these conclusions are NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., *Summary of State Regulatory Commissions' Activities Relating to Title I of the Public Utility Regulatory Policies Act* (1979) and *PURPA Score Card*, ELECTRICAL WEEK, 3-4 (Aug. 27, 1979).

1979 for the reporting by state regulatory authorities of progress on consideration of the ratemaking and other standards in PURPA.¹²¹ In publishing the rules, ERA refused to limit the annual report to a mere summary of actions and instead required completion of a detailed questionnaire and a summary thereof.¹²² In doing so, it emphasized that Congress viewed the annual reports as "a vehicle for accurately measuring the progress of the States in order to provide a basis for legislative oversight by the Congress."¹²³ Presumably this will be a special spur to state action on implementation.

II. OHIO IMPLEMENTATION

The Public Utilities Commission of Ohio (PUCO) offers an excellent case study to illustrate the problems surrounding NEA implementation.¹²⁴ The task here is to describe the attitudes and approaches of this important commission, to compare them with the foregoing analysis, and to ascertain the extent of NEA implementation in Ohio.

PUCO is properly considered one of the major state regulatory commissions. It is relatively large, with approximately three hundred employees; it is rather well funded, with a total budget of \$9.5 million for fiscal year 1980;¹²⁵ and it is very active in its case load. Thus, it is not surprising that PUCO is well advanced toward meeting many of the NEA requirements and is confident of its capacity to fully comply in a timely fashion. For purposes of PURPA, the Commission's major responsibility is overseeing seven investor-owned utilities: Cincinnati Gas & Electric Co., Cleveland Electric Illuminating Co., Columbus & Southern Co., Dayton Power & Light Co., Ohio Edison Co., Ohio Power Co., and Toledo Edison Co.¹²⁶

At the time NEA was passed, PUCO's attitude was perhaps

121. 44 Fed. Reg. 47264-66 (1979) (to be codified at 10 C.F.R. § 463).

122. *Id.*

123. *Id.* at 47264.

124. This discussion draws from, among other sources, information gathered from interviews with the Honorable C. Luther Heckman, Chairman, PUCO (Aug. 31, 1979); John D. Borrows, Director of Utilities, PUCO (Aug. 20, 1979); and Douglas Maag, Electric Rate Analysis Section, PUCO (Aug. 28, 1979).

125. About \$5.1 million of this budget is for the regulation of electric and gas utilities.

126. See PUCO, ANNUAL REPORT, FISCAL YEAR 1979. While PUCO has jurisdiction over Monongahela Power Company operations within Ohio, the company's sales in Ohio are not large enough to qualify it as a "covered utility" under PURPA. PUCO anticipates that the West Virginia Public Service Commission, the commission primarily responsible for Monongahela, will share its filings with them.

similar to that of most state utility commissions. It could be characterized as substantial concern about the magnitude of the burden of new levies in the course of compliance, concern about the tight time schedule imposed, apprehension about access to and impact on the rulemaking that would be necessary, worry that the widely-touted "voluntariness" of the legislation was, or would become, in practical effect mandatory in nature, concern that federal implementation would involve active intervention in state commission proceedings, and apprehension that the legislation might mark the beginning of an assault on state regulation that would further erode state commission prerogatives. On the other hand, PUCO viewed itself as well ahead of the PURPA legislation because it had previously entertained or treated most of the substantive topics in the Act.

By June 1979, PUCO was able to take stock of where it stood in PURPA implementation and to enunciate an approach to compliance. The various issues were separated into two procedural categories—generic and case-specific.¹²⁷ By August 1979, Commission staff had developed for promulgation a uniform tariff applicable to both gas and electric utilities. The effect of the tariff would be to grandfather master metering to current locations and require a cost-benefit analysis before such service could prospectively be offered.¹²⁸ Staff also prepared a uniform customer billing format and related customer information for both gas and electric utilities with the hope that they would satisfy the PURPA requirement covering information to consumers.¹²⁹ PUCO staff believes current procedures for reviewing Ohio utilities' fuel adjustment clauses comply with PURPA requirements.

As to the lifeline standard, PUCO staff reports that in every recent rate-related proceeding, PUCO has considered a lifeline-type structure and determined charges and revenue impacts. From as early as 1976, PUCO has documentation adequate to

127. In the former category were prohibitions on master metering, procedures for providing adequate information to consumers, protection of ratepayers from abrupt termination of service, and consideration of lifeline rates. In the latter category fell recommendations regarding advertising expense, cost-of-service, declining block rates, time-of-day rates, seasonal rates, interruptible rates, and load management techniques.

128. The tariff was ordered by the Commission. Case No. 79-633-GE-UNC (Aug. 8, 1979).

129. The billing format was also ordered by the Commission. Case No. 79-569-GE-UNC (Aug. 8, 1979). The same order established procedures for termination of gas and electric service in compliance with PURPA. Case No. 79-632-GE-UNC (Aug. 8, 1979).

form the necessary groundwork for the planned generic proceeding which will address the lifeline standard.¹³⁰

With respect to PURPA's section 133 cost-of-service reporting provisions, the PUCO staff and Chairman worked closely with counterpart NARUC and FERC officials toward a mutually acceptable compliance plan. Concurrently, PUCO staff has developed Standard Filing Requirements which would dovetail with PURPA requirements in filling in any data deficiencies perceived by the staff. Thus, PUCO is well on its way toward meeting PURPA requirements in the generic situations.

Although PUCO is not yet in compliance with PURPA in the specific case area, significant progress has been made. Figure 1¹³¹

130. In this connection it should be noted that the State of Ohio has in operation an "Energy Credits Program" funded out of general revenue and designed to assist elderly and disabled persons with low incomes in paying their heating bills. While not a lifeline program as such, it provides similar benefits.

131. FIGURE 1: PURPA ISSUES ADDRESSED BY PUCO STAFF
SEPTEMBER 1, 1979

UTILITY/CASE	COST- OF- SERV.	DEC. BLK. RATE	SEAS. RATE	TIME- OF- DAY	INTER. RATE	LOAD MGMT.
CINCINNATI GAS & ELEC.						
76-302-EL-AIR	NO	YES	YES	YES	YES	YES
74-845/70-EL-AIR	YES	YES	YES	YES		YES
CLEVELAND ELECTRIC ILL.						
74-571-Y	NO	YES	YES	NO	YES	NO
78-677-EL-AIR	NO	YES	YES	YES	YES	YES
COLUMBUS & SOUTHERN						
74-760-EL-AIR	NO	YES	YES	YES	YES	YES
77-545-EL-AIR	YES	YES	YES	YES	NO	YES
78-1438-EL-AIR	YES	YES	YES	YES	YES	YES
DAYTON POWER & LIGHT						
76-823-EL-AIR	NO	YES	YES	YES	NO	YES
78-92-EL-AIR	YES	YES	YES	YES	NO	YES
OHIO EDISON						
75-131-EL-AIR	YES	YES	*	YES	NO	YES
77-554-EL-AIR	NO	YES	*	YES	NO	YES
77-1249-EL-AIR	YES	YES	*	YES	NO	YES
OHIO POWER						
78-676-EL-AIR	NO	YES	*	YES	YES	YES
TOLEDO EDISON						
75-758-EL-AIR	YES	YES	YES	YES	NO	NO
76-1174-EL-AIR	YES	YES	YES	YES	YES	YES

*NOT APPLICABLE (DUAL PEAKING COMPANY).

SOURCE: DOUGLAS MAAG, ELECTRIC RATE ANALYSIS SECTION, OHIO PUBLIC UTILITIES COMMISSION.

contains the six PURPA guideline issues as addressed by PUCO staff utility-by-utility for the past five years. These entries demonstrate that PUCO is indeed advanced in its consideration of the standards, though this is not to say conclusively that these considerations comprise satisfactory compliance with the new legislation. It should be noted that of the seven power companies under PUCO jurisdiction, all but two have had a cost-of-service case over the period, all have had declining block rates considered, all but two have had seasonal rates considered, all have had time-of-day rates considered, all but two have had interruptible rates considered, and all have had load management techniques considered. Because PUCO has already devoted substantial staff resources to so many PURPA standards—particularly rate design reform—the Commission now feels that implementation will involve a “slight redirection at most—and not a very sharp turn at that.”¹³²

On August 15, 1979, applications were due at the ERA for those states requesting federal financial assistance under either the PURPA Grant Program or the Innovative Rates Program. PUCO submitted one of each in the amount of \$225,000 for the former program and \$300,000 for the latter.¹³³ The proposal under the PURPA Grant Program is directed at two subjects—a lifeline rate study and the enhancement of PUCO staff analytical capability. The proposal points out that the Ohio case with respect to lifeline is unusual because of the existence of the state’s Energy Credits Program.¹³⁴ Therefore, the Ohio proposal calls for the design of an analytical technique that allows any lifeline rate benefits to be measured as incremental benefits over the existing Energy Credits Program. The objective would be to find the optimal mix between the energy credits strategy and the lifeline strategy. The second subject—strengthening staff analytical capability—is pointed toward identifying specific, needed improvements in financial analysis model building; data collection, storage, and retrieval

132. Borrows interview, *supra* note 124.

133. PUCO, PROPOSAL FOR THE PURPA GRANT PROGRAM 4, submitted to the Office of Utility Systems, Economic Regulatory Administration, Department of Energy (Aug. 10, 1979) and PUCO, PROPOSAL FOR THE INNOVATIVE RATES PROGRAM, submitted to the Office of Utility Systems, Economic Regulatory Administration, Department of Energy (Aug. 10, 1979).

134. See note 130 *supra*.

capacity; and documentation and development of regulatory user guides.

The PUCO proposal under the Innovative Rates Program is especially noteworthy for its emphasis and assumptions. Its primary focus is on the utilities under PUCO jurisdiction and only secondarily on the Commission itself. It presumes that each Ohio utility should have an adequate in-house PURPA implementation program and that those programs should accomplish a good deal more than simply responding to the specific data requirements levied by various regulatory authorities pursuant to PURPA. Accordingly, it envisions that each utility have some system to identify opportunities for rate reform and project development, data collection and cost analysis, risk assessment, customer involvement, and implementation management. For the Commission's part, a program of performance monitoring would be devised to assure satisfactory ongoing rate reforms by each regulated utility.

In conclusion, PUCO attitudes and approaches to NEA seem to be optimistic. The Commission feels that the federal rulemaking process has gone smoothly, that state access has been good, and that FERC has been more accessible than DOE. PUCO sees the federal government as less active in its intervention program regarding state proceedings and less active in pursuing the marginal cost approach than had been feared. PUCO is more hopeful that its actions on many of the PURPA standards and guidelines can be grandfathered for compliance purposes, and is inclined to believe that an inordinate amount of intervenor activity will not characterize the course of PURPA implementation in Ohio. Finally, it believes that the development and use of load management techniques will be the key to achieving the main objectives of the NEA legislation.

The Commission believes that PURPA's section 133 reporting requirements will be the toughest provisions for all parties to satisfy, yet also feels that when properly functioning, the system will provide useful data for many regulatory purposes. PUCO is confident that Ohio utilities presently have the capability to gather and process the data required under the Acts (with perhaps Dayton Power and Light Co. the lead utility in this regard). PUCO anticipates being restrictive in the area of utility requests for extensions or exemptions from reporting requirements.

As this discussion seems to indicate the PURPA portion of NEA has received by far the most PUCO attention. In the case of NECPA implementation, primary responsibility was vested in the

Ohio Department of Energy by the Governor. This arrangement has been amicable and PUCO personnel serve on an interagency task force on the matter. The central issue of who should bear the financial burden of energy audits and other conservation activities under NECPA has not yet been faced, nor has the question of how to account for these costs—whether they should be expensed or be allowed into the rate base of participating utilities.

The plant fuel conversion provisions of FUA are also being considered at the Ohio Department of Energy rather than at PUCO. Interim rules for FUA implementation were issued by DOE on August 20, 1979.¹³⁵

The Commission sees NGPA as by far the most complicated and least understood of the five Acts which comprise NEA. PUCO knows that it will have to address the incremental pricing issues contained therein, but it has so far chosen to watch the course of events of FERC-mandated natural gas incremental pricing in California, Michigan, and Wisconsin, and of hearings now going on before FERC, before it acts.

While ETA impacts most directly on the U.S. Treasury as an entitlement under the Investment Tax Credits sections of the Internal Revenue Code,¹³⁶ it has secondary implications for PUCO. All seven of Ohio's investor-owned utilities made substantial use of investment tax credits to the tune of some \$46 million in 1978 and \$78 million in 1977.¹³⁷ These monies and their subsequent handling are of obvious import at the time of formal rate cases.

III. PITFALLS AND PROSPECTS

A fair assessment of the ongoing implementation of NEA is that the prospects are good but the pitfalls are many. This assertion is based on what has been developed in earlier sections, and what is to be discussed here. The several vantage points treated in this summary appraisal and outlook are those of Congress, the Federal Department of Energy, the jurisdictional utilities, consumers, and the state regulatory commissions.

The potential pitfall for Congress is the traditional one of launching a major piece of legislation and failing to exercise its oversight function in the course of implementation. Congress has

135. 44 Fed. Reg. 43176 (1979) (to be codified at 10 C.F.R. §§ 500-501, 503-506).

136. I.R.C. §§ 30-50B.

137. Standard Filing Requirement Forms, Public Utilities Commission of Ohio, September, 1979.

moved on to other issues and may not return to NEA, even to follow up with gas utility pricing legislation. While some parties might be pleased at the prospect of congressional inattention, new programs suffer in effectiveness when this happens.

In another congressional role, that of provider of appropriations, a danger is that in a tight budget period like the present insufficient funds may be made available to the Department of Energy and to the states for orderly and effective implementation of this wide-ranging and technically complex legislation. While it is certainly true that after decades of practice in obtaining federal grants the states are quite skilled at tapping the Treasury, cutting too deeply into the authorization amounts contemplated for state NEA implementation would be to encourage failure. It would be extremely unfortunate and unfair if Congress were to place major additional levies on states and then fund implementation at a level just low enough to ensure an inadequate outcome.

Style and tone are difficult characteristics to ascribe to an agency, but it is almost certain that they will be crucial to the Department of Energy's success in implementing NEA. DOE has so far avoided the pitfalls of heavy-handedness in its rulemaking and in use of its intervention powers.¹³⁸ It has avoided directly forcing federal choices on the states by consistently encouraging the states to make their own decisions under applicable state law. Also, there is no indication that the grant program will be administered in a reward-and-punishment fashion with respect to state compliance.

As is usually required for good public administration, a series of balances needs to be struck. Uniformity and standardization are inherent in any national policy, but the diversity and ingenuity of response that characterizes state regulatory behavior should not be stifled. Inertia of the status quo in utility regulation needs to be disrupted where it is outdated, but areas of legitimate constancy should remain untouched. A flexible interpretation of the grandfathering clause to ease compliance with PURPA standards where commissions have done a conscientious job is desirable, but

138. In September 1979, the Economic Regulatory Administration said there would be no change in its method of selecting cases for intervention. Factors to be weighed would continue to include the opportunity for precedential decision, consonance with PURPA and energy policy objectives, the regulatory climate in the state, and the potential receptivity to ERA participation. For an early and readable treatment of issues surrounding PURPA, see Toll, *Some Legal and Policy Questions Presented by the Public Utility Regulatory Policies Act*, PUB. UTIL. FORT. 46 (Mar. 1, 1979).

should stop short of allowing commissions to avoid implementation of the Act.

When FERC exercises its new wheeling and interconnect authorities, it should not accept the predisposition of the utilities that virtually all useful interties have already been accomplished and that any further wheeling orders would be unreasonably harmful to existing competitive positions. On the other hand, adopting too aggressive a stance could mean endless and massive litigation that serves no one's interest. Encouraging the development of supplemental power sources, such as cogeneration and solar facilities, can properly mean lowering the institutional and attitudinal barriers to joining these kinds of power to existing utility systems, but should not involve subsidizing supplemental power through the ratemaking process. This would counter the cost-tracking and equity goals of the legislation itself. Finally, while it is obviously important for DOE in administering NEA to ensure that state commissions meet each and every requirement, it should not adopt a static checklist mentality in its execution but rather a longer term, dynamic view of what the legislation ultimately intends and allows.

The goals for the utilities under NEA legislation should be more stringent, yet more reasoned, regulation. The general inertia and lethargy that are endemic to monopoly positions will be moderately shaken. The utilities' behavior is likely to be acquiescent, well short of enthusiastic, on those provisions of NEA having to do with utility operations (for example, fuel conversion) and practices (for example, rate design matters) where only money is involved. In a sector where expenses are fully recoverable, this is neither a surprising nor illogical stance to take.

Predicting the utilities' response to the implementation of the reporting requirements of PURPA section 133 is a good deal more uncertain. Here the interest of the utilities in being left alone is compelling. The understandable fear is that information is power, and that life will never be the same for a utility when all costs—raw and calculated—are made public, especially in the detail and on the subjects PURPA calls for. Intervenors, regulators, academics, shareholders, investors, and other utilities will have for their own purposes information never before available. In the near future, this may be of relatively little use because the task of accessing, sorting, digesting, and analyzing the data will be enormous. But over time, perhaps in five to ten years, basic cost data and operating information will be invaluable to good commission

regulation and enlightened public policy. A pitfall for the utilities would be to try to withhold information from the state and federal commissions, knowing that they are the only source of the data. Arguments of proprietariness, interpretation, unavailability, undue costliness, and unwillingness are likely, but carried to the extreme would not seem to be in anyone's interest.

The prospects that await consumers under NEA are obscured by the fact that the impact on consumers is dependent upon the direction taken by the states in implementing the national program. One can hope that consumers will benefit from better service by the regulatory bodies and greater confidence that regulatory activities surrounding the power utilities have a more rational, more evidential, more reasoned basis than they have in the past. Whether these generalized goals will be realized is a question whose answer must await the passage of time.

The most important vantage point against which to assess the pitfalls and prospects of NEA implementation is that of the state public utility commissions. As mentioned earlier, the unevenness of state commission resources, statutory underpinnings, and regulatory inclination is such that generalizations about the course of implementation are especially hazardous. Despite this, some predictions can be ventured.

One pitfall is that state commissions might miss the opportunity presented by NEA. There is the opportunity for at least the average commission to go through a reflective and systematic goal-setting exercise for itself. There is also incentive for commissions to become interested and skilled in handling empirical questions, in making economic and statistical analyses, in making independent assessments and designing alternative forms of regulation. There is an opportunity for a commission to reinforce or strengthen its programs by using both the letter and spirit of the NEA legislation and its accompanying grant monies. Commissions should learn to make full informational and analytical use of the data forthcoming under PURPA by researching and preparing before holding hearings and making decisions. Presently, many commissions may not see the opportunity in PURPA for them to set standards, to require particular submissions of work detail and logic behind utility proposals, or to advance from a verification and monitorship role to an independent and creative role.

In addition, there is the danger that state commissions either will tend to see NEA implementation as a one-shot affair or will become impatient for results and stop trying when they find a

quick panacea. Either case would be unfortunate, as a more useful view of the legislation is one of continued reexamination and reform over a longer period of time.

Another pitfall facing NEA is a challenge of unconstitutionality by the states. As previously mentioned, regulation of the utilities has traditionally been left to the states.¹³⁹ Thus, a federal intrusion into this area might be viewed as an unconstitutional invasion of the police power of a state.¹⁴⁰ Such an action seems feasible in this situation when one views the position of the state utility commissions. To many such commissions, the provisions of NEA seem outdated and superfluous when compared to state regulation currently being administered. Furthermore, the costs of implementing NEA place an enormous burden on already overextended state commission resources.

On May 7, 1979, the State of Mississippi filed an action for a declaratory judgment in the federal courts.¹⁴¹ The complaint alleges that enforcement of PURPA is unconstitutional as an invasion of state sovereignty and intergovernmental immunity;¹⁴² as an attempt to misuse the commerce power to regulate utilities exclusively within the state;¹⁴³ and as placing an intolerable burden of time and money on the state, especially by requiring consideration of extremely complex federal regulatory policies as a part of every rate case under federal procedural rules which repeal any conflicting state procedural rules.¹⁴⁴

Despite these reservations and contingencies, the overall prospect for implementation is promising. Many attentive public officials are working on successful implementation of these laws, and a greater amount of good-will has surrounded these actions than

139. It is of interest that during NEA's enactment the traditional roles of the House and Senate were reversed. Rather than jealously preserving local authority the House pushed for an all-encompassing mandatory bill. The Senate urged a maximum of state leadership on the issues with the federal role limited to guidelines and suggested considerations. This role reversal can be partly explained by the fact that the House acted first on the legislation. Also to be taken into consideration is the intensive and effective lobbying effort targeted on the Senate, as well as the fact that the House Committee members and staff seemed convinced that the states would not or could not handle the situation without federal intervention.

140. For a recent Supreme Court decision supporting the sovereignty of the states, see *National League of Cities v. Usery*, 426 U.S. 833 (1976).

141. *Mississippi v. Federal Energy Regulatory Comm'n*, No. J79-0212(c) (D. Miss., complaint filed May 7, 1979).

142. *Id.* at 9.

143. *Id.*

144. *Id.* at 9-10.

earlier would have been expected. There is no reason to believe that implementation will not continue to proceed successfully, although more problems may arise as the more complex parts of implementation are tackled. The state commissioner who predicted that NEA would be "the end of state regulation as we have known it for the last fifty or sixty years"¹⁴⁵ appears to have been proven wrong. It is the continued full participation of state regulators in the implementation process that will assure a constructive outcome. And in all events, even if NEA does not fully achieve its three-fold national goals of energy conservation, efficiency, and equity, it will almost certainly result in a healthy strengthening of public utility regulation in the United States.

145. Address by the Honorable Charles J. Cicchetti, Chairman of the Wisconsin Public Service Commission, before the 90th NARUC Annual Convention, Las Vegas, Nevada (Nov. 16, 1978).