

A Critical Analysis of Joint Board Policy at the Federal Energy Regulatory Commission

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I. INTRODUCTION

A proposal to create regional planning boards for electric utility holding companies is a recent example of state and industry desires for increased federal-state coordination.¹ Under this proposal, public utilities commissions in states served by a multistate electric holding company could propose an integrated resource plan that considers the existing facilities, the construction of new ones, and the alternatives available through conservation or renewable energy sources.² The Senate has conducted hearings into a revised version of the proposal.³ Likewise, the Federal Energy Regulatory Commission (Commission) has requested comment on the similar use of regional state-federal boards.⁴

States have presented similar proposals since the 1920s, when the United States Supreme Court decided that the states lacked the authority to regulate the sale or transmission of power in interstate

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1. *Agreement on Regional Regulation Reached by Energy Regulators*, ELECTRIC UTIL. WK., Sept. 16, 1991, at 10; *Arkansas, Energy Air Regional Integrated Resource-Planning Scheme*, INSIDE F.E.R.C., Sept. 16, 1991, at 9. The proposal is substantially contained in S. 2607, 102d Cong., 2d Sess. (1992).

2. Arkansas Public Service Commission, *Restoring State Regulation: A Legislative Proposal For Resource Planning By Registered Holding Companies*, at 4 (undated press release).

3. The Senate Committee on Energy and Natural Resources conducted hearings on S. 2607, 102d Cong., 2d Sess. (1992) in May 1992.

4. Notice of Public Conference and Request for Comments on Electricity Issues, 55 F.E.R.C. ¶ 61,069, 61,200 (1991) (Trabandt, Comm'r, concurring).

commerce.⁵ Apart from the regulatory problems that decision created (which were largely solved by the 1935 amendments to the Federal Power Act⁶), the planning aspects remain. Both in 1967⁷ and 1980,⁸ federal authorities noted the need for additional regional coordination. Likewise, the states have requested federal-state coordination for nearly every major issue that was raised in the turbulent 1970s and 1980s.⁹ Despite the seeming congruence between federal and state views on the need for regional regulation, little sustained effort toward that goal has occurred.¹⁰

A partial explanation for the lack of regional regulation stems from jurisdictional limitations on state and federal authority. The states alone may not regulate the sale and transmission of electricity on a regional basis,¹¹ and their authority to coordinate construction and price electricity purchased in interstate transactions is highly circumscribed.¹² Likewise, the Commission lacks the key powers over transmission and siting that would be necessary to coordinate fully

5. Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). One of the more significant proposals emerged from the National Governors' Association and called for a restructuring of Commission jurisdiction and more regional control through compacts. National Governors' Ass'n, Comm. on Energy and Env't., An Analysis of Options for Structural Reform in Electric Utility Regulation (1983). For a summary of the report and the congressional response to it, see DOUGLAS N. JONES ET AL., REGIONAL REGULATION OF PUBLIC UTILITIES: OPPORTUNITIES AND OBSTACLES 170-79 (1992).

6. 16 U.S.C. §§ 824-824k (1988). The authority was transferred to the Federal Energy Regulatory Commission in 1978. 42 U.S.C. §§ 7172(a)(1)(B), 7293 (1988).

7. STEPHEN G. BREYER & PAUL W. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 89-121 (1974) (summary of findings of the 1967 National Power Survey).

8. UNITED STATES DEPT. OF ENERGY, THE NATIONAL POWER GRID STUDY 71 (1980).

9. See *infra* notes 66-68 and accompanying text.

10. The significant exceptions on a national scale, and essentially voluntary on the industry's part, are the electric reliability councils. The councils provide for the regional coordination of plants in service so as to maintain the electric grid and avoid the prospects of major cascading outages such as that which occurred in New York in 1965. CHARLES F. PHILLIPS, THE REGULATION OF PUBLIC UTILITIES 585-86 (2d ed. 1988). Another significant regional planning process that has served as a model for others is the Pacific Northwest Electric Power and Conservation Planning Council. The agency is created by a federal-state compact and prepares a regional power and conservation plan. 16 U.S.C. §§ 839-839h (1988). See *Seattle Master Builders Assoc. v. Pacific Nw. Elec. Power and Conserv. Council*, 786 F.2d 1359 (9th Cir. 1986) (upholding constitutionality of the Council and approving the conservation plan). See generally David L. Shapiro, *Policy and Legal Conflicts in Pacific Northwest Power*, PUB. UTIL. FORT., Nov. 14, 1985, at 19-25.

11. Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

12. *Mississippi Power and Light Co. v. Mississippi, ex rel. Moore*, 487 U.S. 354 (1988) (state may not review the prudence of the decision to continue construction of nuclear power plant owned by member of interstate holding company); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986) (state commission may not reallocate the power sales ordered by the Commission).

the regional activities of a holding company.¹³ Thus, coordinated efforts have resulted only from extraordinary measures such as interstate compacts.¹⁴

But even if Congress broadened the Commission's authority, some significant institutional biases would remain because the Commission refuses to use its existing authority to create regional boards.¹⁵ Although Congress provided for several cooperative devices, such as joint boards, conferences, and hearings,¹⁶ to deal with the divisions of federal and state authority in the Federal Power Act, through its rules and practice the Commission has refused to use the cooperative procedures. The reasons for denying their use range from supposed jurisdictional limitations to assertions of administrative discretion.¹⁷

The Commission's refusal to incorporate regional boards in decision making may be criticized on several different levels. First, interpretive criticism suggests that the policy is not consistent with the Commission's legislative mandate.¹⁸ Second, the rationales justifying its position are not convincing when tested against traditional or representational models of agency decision making.¹⁹ Even though the failure of the Commission to use regional boards may reflect some legitimate concerns about the political limits of regional decision making, the Commission's jury-rigged response hardly comports with the perceived problems.²⁰ A better approach would be for the Commission to accommodate state desires for participation in those matters in which the balance of political needs favors coordinated action. A refusal to coordinate would be appropriate only if the prospect of interstate rivalry would prevent successful accommodation.²¹

To investigate these conclusions, this Article is divided into several

13. 16 U.S.C. §§ 824(b)(1), 824a (1988). The Commission's authority to order interconnection is highly circumscribed. *Id.* § 824i. See *infra* note 30 and accompanying text.

14. Interstate compacts are authorized when approved by Congress. U.S. CONST. art. I, § 10, cl. 3. The Pacific Northwest Electric Power and Conservation Planning Council is an example of a compact agency. See *supra* note 10.

15. See *infra* notes 66-67 and accompanying text.

16. See *infra* notes 44-49 and accompanying text. The provision of joint federal-state proceedings is apparent in other federal statutes. See, e.g., 47 U.S.C. § 410 (1988) (joint proceedings under the Federal Communications Act of 1934). Section 410 was modeled on a similar provision contained in the Interstate Commerce Act. H.R. REP. NO. 1850, 73d Cong., 2d Sess. 8 (1934). See TYLER BERRY, COMMUNICATIONS BY WIRE AND RADIO 244-46 (1937).

17. See *infra* note 50 and accompanying text.

18. *Id.*

19. See *infra* notes 104-18 and accompanying text.

20. See *infra* notes 119-25 and accompanying text.

21. See *infra* notes 126-29 and accompanying text.

parts. As Part I suggests, the Federal Power Act authorizes the use of joint boards to solve federal-state coordination problems. Part II demonstrates that the Commission has devised numerous suspect reasons for avoiding the use of joint boards, hearings, or conferences. Part III critiques the rationales offered by the Commission in light of traditional and representational models of agency decision making. In both regards, the Commission's decisions are found wanting. Parts IV and V discuss a more legitimate concern about the politics associated with regional decision making and offer a proposal for addressing those concerns.

II. THE JOINT BOARD IN THE FEDERAL LEGAL STRUCTURE

A. *The Need for Federal Regulation*

Title II of the Federal Power Act primarily concerns the regulation of interstate transmission and transfers of power by wholesale.²² The 1935 amendments creating Title II responded to the gap in regulation caused by the Supreme Court's *Attleboro* decision.²³ In that 1927 case, the Rhode Island commission sought to set wholesale rates of electricity sold by a Rhode Island generating company to a Massachusetts distribution company.²⁴ The Court concluded that the transaction was in interstate commerce even though title to the electricity transferred at the state line.²⁵ This determination precluded state regulation. Thus, "if such regulation [was] required it [could] only be attained by the exercise of power vested in Congress."²⁶

At the same time that the states lost their regulatory authority, the perceived need for regulation of interstate sales increased. The committee reports for both the Senate and the House noted an increase in interstate sales from 10.7% in 1928 to 17.8% in 1933.²⁷ Additionally, Congress' decision to enact the Public Utilities Holding Company Act (the Act)²⁸ did not check the potential for unregulated transactions. Reacting to the perceived ills created by the national holding companies, Congress required that the companies divest into smaller, regionally and economically related entities.²⁹

22. 16 U.S.C. §§ 824-824k (1988).

23. See *supra* note 5 and accompanying text.

24. Public Util. Comm'n of R.I. v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 84 (1927).

25. *Id.* at 86.

26. *Id.*

27. S. REP. NO. 621, 74th Cong., 1st Sess. 17 (1935); H.R. REP. NO. 1318, 74th Cong., 1st Sess. 7 (1935).

28. The Public Utilities Holding Company Act was Title I of the Public Utility Act of 1935.

29. 15 U.S.C. § 79k(b) (1988).

The companies required to be divested by the Act could sell in interstate commerce. Likewise, the remaining holding companies would be regional entities whose transactions were in interstate commerce. Each was outside state regulation after the *Attleboro* decision.

B. Title II Regulation

To regulate this growing interstate market, Title II of the Federal Power Act was a compromise based on strong notions of federal-state cooperation. First, the provisions created a federal structure to regulate interstate transmission and sales for resale of electricity. Second, they provided a forum to encourage voluntary regionalization of the electric grid.³⁰ These potentially conflicting goals naturally lead to confusion as to the jurisdictional limits of state and federal authority. The Act resolved the federal-state tension in part by providing for state involvement in federal decision making.

First, Title II filled the regulatory gap, but assumed bifurcated regulatory authority. Subsection 201(a) of the Federal Power Act provides that "[f]ederal regulation . . . extend[s] only to those matters which are not subject to regulation by the States."³¹ Subsection 201(b)(1) states much the same thing: "The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electrical energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."³² Thus, the operative language of the statute separated state and federal jurisdiction, leaving to the states the obligation to set local or retail rates.

The legislative history of the Federal Power Act reinforced the congressional goal to continue local control of retail rates. The Senate Report, for example, stated that the purpose of the Act was to regulate the increasingly large and important interstate market that the states could not regulate constitutionally.³³ The House agreed

30. In the Public Utilities Regulatory Policy Act, Congress gave the Commission limited authority to order wheeling in 1978. See Megan A. Wallace, *A Negotiated Alternative to Mandatory wheeling*, 10 ENERGY L.J. 99, 100-03 (1989). That power was enhanced by amendments in 1992. See National Energy Policy Act, Pub. L. 102-486, §§ 721-22, 106 Stat. 2776 (1992).

31. Federal Power Act § 201(a), 16 U.S.C. § 824(a) (1988).

32. Federal Power Act § 201(b)(1), 16 U.S.C. § 824(b)(1) (1988).

33. S. REP. NO. 621, *supra* note 27, at 17.

and reinforced this message.³⁴ The section-by-section analysis of the House committee report stated, "As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State."³⁵

The bifurcated structure complicates the second goal of the act, the encouragement of interconnection. Section 202 authorizes the Commission to coordinate (but not mandate) interstate sales and transmission.³⁶ The Senate Report gave an interesting policy justification for structuring the provision this way:

Under this subsection the Commission would have 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 this subject.³⁷

After a statement of legislative purpose consistent with the Senate Report's policy statement, the section directed the Commission "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."³⁸

Once interconnected, utilities are subject to numerous provisions for the calculation and implementation of rates that the Commission controls. The primary provisions concern the determination of rates. Section 205 provides that rates must be just and reasonable, that there be no undue preferences, and that rates be filed before they

34. H.R. REP. NO. 1318, *supra* note 27, at 8, states:

[T]he Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce. . . . The bill takes no authority from State commissions. . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does Title II of this bill.

35. *Id.* at 27; S. REP. NO. 621, *supra* note 27, at 48.

36. Federal Power Act § 202, 16 U.S.C. § 824a (1988).

37. S. REP. NO. 621, *supra* note 27, at 49.

38. Federal Power Act § 202(a), 16 U.S.C. § 824a(a) (1988). The section continues:

It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

may be charged to customers.³⁹ Section 206 then provides a mechanism for adjusting rates determined to be unjust or discriminatory.⁴⁰

Despite the significant federal powers created by the Act, Congress repeatedly required federal-state coordination. First, the states were given an advisory role in the process of setting the regions for interconnection. The legislative history again was clear: "In this subsection, as elsewhere throughout the title, the Commission is directed to secure and consider the views and recommendations of State commissions before establishing regional districts."⁴¹ Second, Congress directed the Commission to provide assistance to the states for their determination of rates subject to state jurisdiction.⁴² As the Senate Report explained, the section was included to assist the states in making rate determinations in cases in which the property may be in several states.⁴³ Thus, Congress intended to coordinate effective state rate making with federal assistance.

The most dramatic concession to the states was the provision for joint proceedings. The Act recognized three forms of cooperation. In subsection 209(a), the Commission could delegate its authority to one or more states that are or might be affected by any matter.⁴⁴

39. Federal Power Act § 205, 16 U.S.C. § 824d (1988).

40. Federal Power Act § 206, 16 U.S.C. § 824e (1988).

41. H.R. REP. NO. 1318, *supra* note 27, at 27. *See also* S. REP. NO. 621, *supra* note 27, at 49.

42. Federal Power Act § 206(d), 16 U.S.C. § 824e(d) (1988), provides: The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

43. S. REP. NO. 621, *supra* note 27, at 51, states:

Since the rate-making powers granted to the Commission apply only to the wholesale rates of energy sold in interstate commerce, this last subsection should be of great benefit in removing the practical difficulty which the States may encounter in regulating the interstate distribution rates which are left under their control. Such rate regulation involves the examination and valuation of property outside the State. The task is one requiring an agency with a jurisdiction broader than that of a single State. The authority of the Federal Commission is to render assistance to the State commissions in a way which would preserve and make more effective the jurisdiction which is thus left to the States.

44. Federal Power Act § 209(a), 16 U.S.C. § 824h(a) (1988), provides: The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of

Under this provision, the board would operate as though it were the federal authority. The alternative forms for federal-state cooperation were joint conferences or hearings. Under subsection 209(b), the Commission could confer with the affected states or "hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act."⁴⁶

The legislative history again provided an explanation for these provisions. In the case of subsection 209(a), the Senate Report stated, "This subsection is designed to permit decentralized administration under the general supervision of the Commission by individuals who are acquainted with the situation and the problems of the locality affected by the particular proceeding."⁴⁶ Likewise, Congress directed in subsection (b) that the Commission avail itself of the cooperation offered by the states.⁴⁷

Joint proceedings thus present a means of coordinating federal and state action since they place the parties in direct authoritative relationships with one another. Under a delegation of authority, the state board would act as an agent of the Commission.⁴⁸ Alternatively, joint hearings would provide a forum for coordinated receipt of evidence and the opportunity for coordinated decision making.⁴⁹

the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

45. Federal Power Act § 209(b), 16 U.S.C. § 824h(b) (1988). The full section provides:

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

Id.

46. S. REP. NO. 621, *supra* note 27, at 52.

47. H.R. REP. NO. 1318, *supra* note 27, at 30.

48. The Commission may terminate the delegation as a matter within its own discretion. Federal Power Act § 209(a), 16 U.S.C. § 824h(a) (1988) (last sentence).

49. The possibility of parties telling different stories to different regulators obviously would be impossible under this scenario.

C. Commission Rules and Practice

Despite the apparent benefits each approach suggests and the clear legislative encouragement for federal-state coordination, the Commission and its predecessor, the Federal Power Commission, adopted rules and practices that make the use of these devices impossible. First, the rules provide significant qualifications on the use of the joint proceedings. Second, the Commission has refused to use federal-state cooperation on the many occasions on which states have requested it. As a result, the use of authoritative joint boards⁵⁰ is nonexistent.

1. Commission Rules

The Commission has several rules defining its intended cooperation with the state commissions.⁵¹ In rule 1301,⁵² the Commission recognizes the three statutory forms of joint activity: reference to the states, conferences, and joint hearings. The subject matter for these activities could be quite extensive. According to the rule, "It is understood . . . that the Commission or any State commission will freely suggest cooperation with respect to any proceeding or matter affecting any public utility or natural gas company subject to the jurisdiction of the Commission and of a State commission, and concerning which it is believed that cooperation will be in the public interest."⁵³ With this broad purpose stated, the rules then set out some straightforward notice requirements to initiate a joint proceeding.⁵⁴

From these statements, apparently consistent with the legislation, the rules take a quick turn to stating that authoritative uses are limited. Various sections provide the Commission's preference for informal conferences⁵⁵ and intervention.⁵⁶ In a policy statement within

50. The term "authoritative" to qualify this statement is used because the Commission prefers advisory boards and conferences. *See infra* notes 55-56 and accompanying text.

51. The rules concerning cooperation with the states were adopted without substantive change from the prior rules of the Commission. FERC Order No. 225, [1981-1982 Transfer Binder] Util. L. Rep. (CCH) ¶ 5944 (Apr. 28, 1982).

52. 18 C.F.R. § 385.1301 (1991).

53. 18 C.F.R. § 385.1301(b) (1991).

54. 18 C.F.R. § 385.1302 (1991).

55. 18 C.F.R. § 385.1303 (1991).

56. In rule 1306, the Commission reminds the states of their right to intervene in Commission proceedings. 18 C.F.R. § 385.1306 (1991). Second, a state may not serve on a joint board and act as an intervenor to a proceeding even though the apparent jurisdiction of the agencies is separate. 18 C.F.R. § 385.1305(g) (1991). *See Kansas Gas*

the rules, the Commission further opines that its experience with informal conferences suggested the benefits of such an approach.⁵⁷ Then, the Commission in rule 1304 states that joint state boards are extraordinary proceedings. According to the Commission, "It is believed that the statutory provisions . . . of the Federal Power and Natural Gas Acts, for the reference of a proceeding to a board constituted as therein provided, were designed for use in unusual cases, and as a means of relief to the Commission when it might find itself unable to hear and determine cases before it, in the usual course, without undue delay."⁵⁸ The Commission also retains complete control of the proceedings, their subject matter, and their legal effect.⁵⁹ Finally, rule 1305 provides for joint hearings in which the commissions might sit to hear the cases concurrently. Each commission in the concurrent hearing, however, retains jurisdiction over the matters individually or in an advisory capacity.⁶⁰ Procedurally, each commission retains complete control of its proceeding and the evidence that it will consider in reaching a decision.⁶¹ In one concession to coordination, the Commission affords commissions the opportunity to confer before issuing any orders.⁶² Despite this last suggestion of comity between state and federal regulators, the Commission rules appear to be skewed against formal joint proceedings.

2. *Commission Practice*

Despite the apparent bias against the use of cooperative procedures, many political actors have suggested joint proceedings. Courts have promoted their use to deal with antitrust problems resulting from competing state and federal pricing schemes.⁶³ Likewise, individual commissioners (and Federal Power commissioners)⁶⁴ and administrative law judges⁶⁵ have suggested the use of joint boards. Most of the requests come from the states on a variety of significant

& Elec. Co., 31 F.E.R.C. ¶ 61,379, 61,846 (1985); *Attorney General of Mass. v. New England Power Co.*, 27 F.E.R.C. ¶ 61029, 61051 (1984).

57. 18 C.F.R. § 385.1303 (1991).

58. 18 C.F.R. § 385.1304(a) (1991).

59. 18 C.F.R. § 385.1304(b) (1991).

60. 18 C.F.R. § 385.1305(a),(b) (1991).

61. 18 C.F.R. § 385.1305(d)(2) (1991). Likewise, records of the hearing are distinct. 18 C.F.R. § 385.1305(d)(4) (1991).

62. 18 C.F.R. § 385.1305(e) (1991).

63. *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 992 (7th Cir. 1980). See the related discussion of the court of appeals in *Conway Corp. v. FPC*, 510 F.2d 1264, 1272-73 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976).

64. Notice of Pub. Conference and Request for Comments on Elec. Issues, 55 F.E.R.C. ¶ 61,069, 61,200 (1991) (Trabandt, Comm'r, concurring); *American Elec. Power Serv. Corp.*, 8 F.E.R.C. ¶ 61,068 (1979) (Holden, Comm'r, concurring).

65. *Virginia Elec. and Power Co.*, 11 F.E.R.C. ¶ 63,028, 65,196 (1980) (Benkin, Administrative Law Judge).

and unusual matters.⁶⁶ In practice, however, the Commission has taken an even narrower view of the role of the states in regional matters than that suggested by the rules.⁶⁷

A survey of the cases indicates four rationales for not initiating joint board procedures. First, the Commission has stated that jurisdictional requirements prevent its approval. Second, the Commission has stated that cases were not unusual enough to justify appointment of a joint board. Third, the Commission has argued that its denial is an appropriate use of its administrative discretion. Finally, it has denied requests based on procedural errors by the applicants. Judged by the usual legal arguments of statutory interpretation and consistency with legislative purpose, the reasons offered by the Commission to deny the requests appear questionable.

a. Jurisdictional Barriers

The claim that the jurisdictional provisions prevent joint boards is one of the more common rationales for a denial. The Commission's basic position is that it has sole jurisdiction over a matter under either the Federal Power Act or an identical provision in the Natural Gas Act,⁶⁸ and this authority precludes state involvement. In a pair of 1974 decisions,⁶⁹ for example, a state commission asked for a thorough review of Eastern Utilities Associates, a multistate holding company. The Commission noted that the applications concerned rates for wholesales from the generating utility, a matter solely within federal authority, and concluded, "The joint board procedure could in no way alter the existing federal-state jurisdictional status."⁷⁰ The Commission has used the same argument to deny state

66. Texas Gas Transmission Corp., 49 F.E.R.C. ¶ 61,134 (1989) (authorization for pipeline construction); Kansas Gas and Elec. Co., 31 F.E.R.C. ¶ 61,379 (1985) (accounting treatment of nuclear plant construction costs); Stowers Oil and Gas Co. et al., 33 F.E.R.C. ¶ 61,207 (1985) (violations of gas pricing rules); Attorney General of Mass. v. New England Power Co., 27 F.E.R.C. ¶ 61,029 (1984) (treatment of plant outage costs); Kansas State Corp. Comm'n, 25 F.E.R.C. ¶ 61,400 (1983) (take-or-pay contract problems); Northern States Power Co., 10 F.E.R.C. ¶ 61,167 (1980) (treatment of plant cancellation costs); Gas Curtailments and Allocations, 54 F.P.C. 1240, *reh'g denied*, 54 F.P.C. 2170 (1975) (gas curtailment plans).

67. There were three orders setting joint hearings prior to World War II. Memphis Natural Gas Co., 2 F.P.C. 917 (1941); Western Natural Gas Co., 2 F.P.C. 802 (1940); Independent Natural Gas Co., 2 F.P.C. 803 (1940). In each case, a joint hearing was approved as an alternative to a joint board.

68. 15 U.S.C. § 717p (1988).

69. New England Power Co., 52 F.P.C. 855 (1974); Montaup Elec. Co., 52 F.P.C. 853 (1974).

70. New England Power Co., 52 F.P.C. at 856; *Montaup*, 52 F.P.C. at 854.

requests for joint boards to investigate gas curtailment plans,⁷¹ construction of portions of interstate pipelines,⁷² and the allocation of costs due to plant outages by wholesalers.⁷³

The jurisdictional rationale suffers from some obvious flaws. First, the statute authorizing joint boards permits the Commission to delegate its authority over a matter to the states. The regulations contemplate the same result. Clearly, therefore, the Commission has the authority to allow the states to consider a matter. Alternatively, the creation of joint conferences or hearings do not contemplate the transfer of any federal authority to the states. Thus, in the latter two instances, there is no jurisdictional issue raised. In short, the assertion that there is a jurisdictional barrier to state participation is either wrong or irrelevant.

b. The "Unusual Case" Rationale

The second frequently cited rationale for denying the use of a joint proceeding is that the case is not "unusual" enough to justify the special procedure. Relying on what is now rule 1304, the Commission in a 1975 gas curtailment case concluded that use of a joint board was intended for unusual cases that the Commission could not hear and determine in the usual course.⁷⁴ Thus, the Commission confined the use of the board to situations in which it could not make timely resolution of a case and left the states to their right to intervene.

This interpretive spin is not supported by the statute or the legislative history.⁷⁵ Rather, a more consistent reading of the statute and the congressional reports suggests a congressional desire to keep the process open to the states and to involve them when their interests were at stake. Importantly, more was intended than intervention alone. Had that been the goal, the provision for joint boards is absurd. Likewise, more than service as a spill tank for federal overload must have been intended; such a limited approach would have been stated in the legislation. Instead, the scope of the subject matter both in section 209 and the rules encompasses any matter concerning a

71. Gas Curtailments and Allocations, 54 F.P.C. 1240, 1242, *reh'g denied*, 54 F.P.C. 2170, 2171 (1975).

72. Texas Gas Transmission Corp., 49 F.E.R.C. ¶ 61,134 (1989).

73. Attorney General of Mass. v. New England Power Co., 27 F.E.R.C. ¶ 61,029, 61,051 (1984).

74. Investigation of Revised Curtailment Level on the System of Tennessee Gas Pipeline Co., 53 F.P.C. 657, 658-59 (1975). *See also* Kansas Gas and Elec. Co., 31 F.E.R.C. ¶ 61,379, 61,845 (1985) (the procedure is intended "as a means of relief to the Commission when it might find itself unable to hear and determine cases before it, in the usual course, without undue delay.")

75. *See supra* notes 41-49 and accompanying text.

regulated utility.⁷⁶

This rationale is especially suspect in what might be considered the ultimate unusual matter. In *Kansas State Corporation Commission*,⁷⁷ the state commission asked for the creation of a joint body to investigate the problems associated with take-or-pay contracts.⁷⁸ The Commission rejected the request on the ground that the case was not sufficiently unique and could be handled in pending rate cases.⁷⁹ Any familiarity with the area, however, suggests that this was not a matter that could be handled in the usual course. Since 1985, the Commission has issued two rule makings⁸⁰ and suffered repeated defeats in the court of appeals.⁸¹ Indeed, the complaint from the Court of Appeals for the District of Columbia is that the Commission has failed to address the take-or-pay problems in a coherent manner.⁸² Given the complex issues and the delay in resolution, take-or-pay litigation has been an unusual case in any normal sense of the term. To suggest otherwise simply ignores the obvious.

c. An Exercise of Board Discretion

Although the Commission has sought to justify its decisions within the previous two reasons, several cases also resort to the argument of administrative discretion or convenience. In *Stowers Oil and Gas Co.*, for example, the Commission noted that the statute provided the Commission with the discretion to authorize a hearing, but it declined to exercise its discretion because of the "immediate need to correct the ongoing violations. . . ."⁸³ Likewise, the Commission noted the unwieldiness of a joint board to prosecute a hearing on

76. See *supra* notes 44-53 and accompanying text.

77. *Kansas State Corp. Comm'n*, 25 F.E.R.C. ¶ 61,400 (1983).

78. In a take-or-pay contract, a buyer is required to pay for a base amount of the product without regard to delivery. During the natural gas shortages, many gas pipelines contracted under multiyear take-or-pay contracts to purchase gas. The contracts, however, became very expensive when gas gluts and low sales resulted in reduced revenues. One pipeline, Columbia Transmission, has filed for bankruptcy protection as a result of take-or-pay contracts. Suein L. Hwang, *Columbia Gas and its Pipeline Unit File for Chapter 11 after Credit Talks Fail*, WALL ST. J., Aug. 1, 1991, at A3.

79. *Kansas State Corp. Comm'n*, 25 F.E.R.C. at 61,905 (1983).

80. Order No. 436, 50 Fed. Reg. 42,408 (1985); Order No. 500, 52 Fed. Reg. 30,334 (1987).

81. *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied sub nom.*, *City of Willcox, Arizona v. FERC*, 111 S. Ct. 957 (1991); *Associated Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom.*, *Interstate Natural Gas Ass'n v. FERC*, 485 U.S. 1006 (1988).

82. *Id.*

83. *Stowers Oil and Gas Co.*, 33 F.E.R.C. ¶ 61,207, 61422 (1985).

curtailment⁸⁴ and concluded that the process would be “probably ineffectual.”⁸⁵ The Commission has also suggested that the use of joint proceedings would create confusion and duplication.⁸⁶

On the surface, these rationales are a little more difficult to penetrate. The Commission is correct in saying the statute gives it the discretion to choose the form of the hearing and the level of state participation. This rationale, however, begins to suffer when the Commission asserts the specific problems that it thinks will occur. First, none of the concerns about process is unique to a joint board proceeding. A proceeding that affects all the states, such as curtailment, will be unwieldy no matter who is directing the review. Confusion, on the other hand, may be even greater without joint proceedings since the alternative is multiple state proceedings on the related state matters with further attempts to integrate the federal and state decisions.

Second, the complaint concerning ineffectual results is also suspect since the process has not been attempted in any regular way. Because extensive experience with the joint boards is lacking, the Commission’s assertion that cooperation will be ineffective is a guess at best. What makes the Commission’s policy all the more disconcerting is its use of the mandated boards under the Pacific Northwest Electric Power Planning and Conservation Act.⁸⁷ This Act is a congressionally-approved compact of several northwestern states for the regional development and distribution of power from public and private utilities.⁸⁸ Under the Act, the Commission approves rates suggested to it by the Bonneville Power Administration, the public power authority in the Northwest.⁸⁹ Congress, however, required the creation of joint boards as authorized by the Federal Power Act to “assist the Commission in its review of such rates.”⁹⁰ Under this legislative direction, the Commission established a joint board of the

84. Gas Curtailments and Allocations, 54 F.P.C. 2170, 2171 (1975) (denial of request for rehearing).

85. Investigation of Revised Curtailment Level on the system of Tennessee Gas Pipeline Co., 53 F.P.C. 657, 659 (1975). *See also* Gas Curtailments and Allocations, 54 F.P.C. 1240, 1242 (1975) (initial decision) (motion for states to sit in an advisory role rejected as “unwieldy, procedurally inefficient and therefore, inexpedient. . .”).

86. New England Elec. Power Co., 52 F.P.C. 855, 856 (1974); Montaup Elec. Co., 52 F.P.C. 853, 854 (1974).

87. Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. §§ 839-839h (1988)). These comments are not a suggestion that the Commission has implemented the congressional directive in its application of the joint hearing requirement to the extent that it might. It has not. The Commission has circumscribed the issues and reduced the joint board’s role to an advisory one used at the convenience of the Commission. JONES ET AL., *supra* note 5 (manuscript at 144-51).

88. H.R. REP. NO. 976 (Part I), 96 Cong., 2d Sess., pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5989, 5982.

89. 16 U.S.C. §§ 839e(a)(2), 839e(i)(6) (1988).

90. 16 U.S.C. § 839f(g) (1988) provides:

affected states with a federal administrative law judge as the presiding officer.⁹¹ The Commission has placed the board in an essentially advisory role to provide comments concerning rate proposals submitted to the Commission for approval.⁹² In practice, the board's role appears to be flexible;⁹³ and the Commission, in its order creating the board, has limited the delays that might result from the creation of an additional layer of review.⁹⁴

Two important points are evident in the creation of this joint board. First, the Commission can adopt a flexible procedure. In particular, the Commission need not cede its authority in the process of providing the states a mandated voice. Second, the process need not be cumbersome. The Commission can structure the proceedings in such a way as to avoid delay while providing for higher levels of state participation. Thus, it is difficult to conclude that the Commission's routine dismissals of joint board and hearing requests are justified by administrative discretion.

d. Procedural Errors

Finally, the Commission has denied requests for joint proceedings on the basis of procedural flaws in the applications. In *Texas Gas Transmission Corporation*,⁹⁵ the Commission found that the request failed to raise an issue of fact justifying appointment of a joint board. In *Montaup Electric Co.* and *New England Power Co.*,⁹⁶ the Commission concluded that the applicant failed to state the issues for review and desired relief with sufficient specificity.

Neither of the procedural questions proves fatal to state involvement. The first rationale concerning the lack of factual issues simply

When reviewing rates for the sale of power to the Administrator by an investor-owned utility customer under section 839c(c) or 839d of this title, the Federal Energy Regulatory Commission shall, in accordance with section 824h of this title—

(1) convene a joint State board, and

(2) invest such board with such duties and authority as will assist the Commission in its review of such rates.

91. Pacific Northwest Electric Power Planning and Conservation Act, 17 F.E.R.C. ¶ 61,005 (1981).

92. *Id.* ¶ 61,011.

93. See, e.g., Puget Sound Power and Light Co., 26 F.E.R.C. ¶ 61,172 (1984).

94. Pacific Power and Light Co., 28 F.E.R.C. ¶ 61,143, 61,258, 61,260 n.16 (1984) (the board reviews the initial decision of the administrative law judge and must make its recommendations within ninety days of receipt of the initial decision).

95. Texas Gas Transmission Corp., 49 F.E.R.C. ¶ 61,134 (1989).

96. Montaup Elec. Co., 52 F.P.C. 853, 854 (1974); New England Power Co., 52 F.P.C. 855, 856 (1974).

does not make sense. Whether the role of the board is advisory or adjudicative, the board members review facts, disputed or otherwise, and apply the law. The state can serve in that function even if there is no factual issue presented by the pleadings. The second issue is also insignificant and can be remedied by better pleading or amendments to a defective pleading. Thus, these concerns need not be controlling if they are not a screen to hide the Commission's distaste for sharing its authority.

3. *Informal Conferences*

In its rules, the Commission suggests that it favors the use of informal conferences as a cooperative device.⁹⁷ At least in theory, the use of informal conferences would be consistent with lower levels of regional cooperation. On the other hand, the practice obviously would not have the same import as a joint hearing or a referral to the states. Thus, some question exists about the efficacy of the approach even at this level.

In practice, moreover, the Commission does not appear to use the informal conference as a device to involve the states in the regional decision-making process. While there are literally hundreds of cases in which the Commission has ordered or considered the use of an informal conference,⁹⁸ a review of the decisions from January 1986 to April 1992 did not reveal any case in which the Commission used an informal conference as a method of regional cooperation.⁹⁹ Rather, the Commission normally uses the informal conference as a form of alternative dispute resolution. Cases concern the use of conferences to identify issues in filings,¹⁰⁰ to identify issues for hearing,¹⁰¹ as a settlement device,¹⁰² or to assist in discovery.¹⁰³

97. See *supra* notes 45-46 and accompanying text.

98. A Lexis search using the term "informal conference" located 460 commission decisions which discussed the term. Search of LEXIS, Energy library, FERC file (Apr., 1991).

99. Approximately 140 cases identified in the search noted in the prior note were reviewed. Search of LEXIS, Energy library, FERC file (Apr., 1991). A second search using the statement contained in the Rule 1303 suggesting the Commission's preference for informal conferences did not locate a single case. Search of LEXIS, Energy library, FERC file (Apr., 1991).

100. Paiute Pipeline Co., 55 F.E.R.C. ¶ 61,462 (1991); Transcontinental Gas Pipe Line Corp., 53 F.E.R.C. ¶ 63,006 (1990); City of Seattle, Wash., 48 F.E.R.C. ¶ 61,333 (1989); Southern Natural Gas Co., 45 F.E.R.C. ¶ 61,218 (1988); Northern Natural Gas Co., 37 F.E.R.C. ¶ 61,343 (1986).

101. Tennessee Gas Pipeline Co., 50 F.E.R.C. ¶ 61,395 (1990); Panhandle E. Pipe Line Co., 48 F.E.R.C. ¶ 63,021 (1989); Pacific Gas and Elec. Co., 40 F.E.R.C. ¶ 61,068 (1987); ARCO Pipe Line Co., 36 F.E.R.C. ¶ 62,212 (1986); Northwest Pipeline Co., 35 F.E.R.C. ¶ 61,049 (1986); ANR Pipeline Co., 34 F.E.R.C. ¶ 61,114 (1986); Columbia Gas Transmission Co., 34 F.E.R.C. ¶ 61,002 (1986).

102. ANR Pipeline Co., 47 F.E.R.C. ¶ 61,113 (1989); Panhandle E. Pipe Line Co., 46 F.E.R.C. ¶ 61,183 (1989); Tennessee Gas Pipeline Co., 45 F.E.R.C. ¶ 61,523

D. Summary

In summary, the Commission's repeated refusals to initiate a joint board or hearing are problematic. The jurisdictional claim is plainly wrong. The limitation to unusual cases appears at odds with the legislative intent. The rationales used to justify the exercises of administrative discretion are illogical or at best untested. The Commission's own successful performance with the Northwest Pacific Power Council suggests that the procedure can work effectively. The informal conference does not appear to operate as a mechanism for regional issues or federal-state cooperation. Once again, the Commission's basic disposition against cooperative regulation is reinforced.

III. MODELS OF ADMINISTRATIVE LAW AND THE COMMISSION'S JOINT BOARD POLICY

Apart from the essentially interpretive criticisms of the Commission's policy so far advanced, it may also be criticized for its failure to comport with a rational model of administrative law. Inherent in administrative law is a tension between the technical requirements of reasoned decision making and the political demands within a democracy for participation and expression of popular will in the outcomes of that process.¹⁰⁴ Two models of administrative law are often advanced to deal with that tension.¹⁰⁵ One, the traditional-incremental model, places a high premium on narrowly defined decisions within a

(1988); Great Lakes Transmission Co., 45 F.E.R.C. ¶ 61,017 (1988); Equitable Gas Co., 42 F.E.R.C. ¶ 61,023 (1988); Great Lakes Transmission Co., 41 F.E.R.C. ¶ 61,094 (1988); Algonquin Gas Transmission Co., 35 F.E.R.C. ¶ 61,273 (1986).

103. Trunkline Gas Co., 40 F.E.R.C. ¶ 61,203 (1987).

104. See generally BRUCE A. ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* 1-3 (1974). In a recent book, Christopher Edley divides the issue into expertise, fairness, and politics. CHRISTOPHER EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* *passim* (1990).

105. The models advanced here are drawn from the work of Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). Numerous models of administrative law may be advanced that offer both descriptive and normative views, or some combination thereof. Colin Diver, for example, offers a comparative approach that stresses the technical versus the political nature of the process that echoes the work of Stewart. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981). Robert Reich also sees that dichotomy but finds a prescriptive need for a model based on public deliberation. Robert Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617 (1985). The tension between the technical requirements of reasoned decision making and the political requirements of democracy also finds its way into the literature concerning regional regulation. For a detailed study of the matter, see ACKERMAN ET AL., *supra* note 104; MARIAN E. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* (1971).

tightly constrained regulatory framework. A second, the representational model, emphasizes high levels of participation and political accommodation. While the traditional model might initially be argued to support the result of the Commission's policy, it is inconsistent with the broad representational and decisional intent suggested by the operative statutes and legislative history. On the other hand, the representational model comports with the legislative structure and history, but not with the Commission's rules and practice. In substance, then, the Commission's policy stands as neither fish nor fowl.

A. Traditional-Incremental and Representational Models

The traditional-incremental model resolves the tension between administrative discretion and political demands by defining the task of the agency within narrow statutory guides. Three principles are important. First, the action of the agency is benchmarked against its statutory authority, and actions outside that authority are not permissible.¹⁰⁶ Second, the agency's procedures must be designed to assure that the agency complies with its substantive mandate. In this regard, basic due process rights assure that the agency does not interfere with personal or property rights unless supported by substantial evidence determined by an impartial fact finder, after a hearing, and based on a record.¹⁰⁷ Finally, the process must afford an opportunity for judicial review as a final check on administrative discretion.¹⁰⁸ Under this constrained model, the agency operates "as a mere transmission belt for implementing legislative directives in particular cases."¹⁰⁹

In contrast, two important principles ground the representational model. First, the agency serves as a forum for affected parties to advance their views. Thus, the model assumes broad rights to initiate and intervene, to participate in hearings, and to appeal based on minimal standing requirements.¹¹⁰ Second, it assumes that the agency will consider and accommodate multiple views in its decision-making process.¹¹¹ As Richard Stewart summarizes the model, "[T]he problem of administrative procedure is to provide representation for all affected interests; the problem of substantive policy is to reach equitable accommodations. . . ; and the problem of judicial review is to ensure that agencies provide fair procedures for representation and reach fair accommodations."¹¹²

106. Stewart, *supra* note 105, at 1672-73.

107. *Id.* at 1673-74.

108. *Id.* at 1674-76.

109. *Id.* at 1675 (footnote omitted).

110. *Id.* at 1723-56.

111. *Id.* at 1756-60.

112. *Id.* at 1759.

B. Application of the Models

On one level, the traditional-incremental model does not apply to Title II of the Federal Power Act. The traditional view would place decision making in the hands of the impartial federal arbiter who would apply narrowly tailored statutes. In contrast, the substantive provisions for determining reasonable rates are hardly an example of congressional constraint on agency decision making.¹¹³ Moreover, the procedural requirements for state involvement suggest an essentially political resolution for setting the agency's scope of authority. Several of the provisions direct broad participation. The Commission is to consult with the states and provide an opportunity for state involvement either by intervention or direct participation. The latter element of direct participation is especially telling. The creation of the joint boards moves the decision-making process from the federal agency into the hands of the states and thus forces the decision down to politically more sensitive arenas such as state executive agencies. These are not examples of a transmission belt approach to regulation.

Even if one assumed that the Federal Power Act carefully constrained the agency (and thus was based on the traditional model), the agency has failed to abide with the dictates to create a politically open process. In interpreting the Act's provisions concerning joint boards, the Commission has adopted rules that extend the opportunity for joint hearings only in unusual cases. Additionally, the Commission has found several other reasons to deny applications for joint proceedings that further restrain coordination. In taking this position, the Commission has ignored its legislative mandate, and the traditional theory then fails to justify the Commission's action.

It follows that if the policy is representational, the Commission's policy fails to conform with that model as well. The process for accommodation included state involvement. At several points, Congress directed federal-state cooperation and authorized the Commission to create state boards in the affected regions to make binding decisions. The political aspect of the latter power is significant. If the issue Congress sought to address was a fear of interstate rivalry, then the allocation of authority to the states is not understandable. What the Supreme Court took away with *Attleboro*, Congress gave back.¹¹⁴

113. See Richard J. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 478-79 (1985).

114. Public Util. Comm'n of R.I. v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); see *supra* notes 5 and 23-24 and accompanying text.

On the other hand, if the states have a protected interest, then the joint board provisions reflect the very premises of the representational model. Congress meant for the Commission to involve the states in the decision-making process, and in some cases to have the states that are affected make the decisions themselves.

IV. THE COMMISSION DECISIONS AS FAILED POLICY

The Commission's decisions are not explained by either of the models discussed above. As a result, the decisions are susceptible to criticism not only for their legal deficiencies,¹¹⁵ but also in light of the policy concerns that the models are intended to address. As noted previously, each of the models attempts to correct for the political concerns inherent in agency decision making. The traditional-incremental model attempts to do so by tight governance of the agency's action.¹¹⁶ However, those checks fail if the agency exercises its discretion in a way inconsistent with the apparent legislative intent.¹¹⁷ Alternatively, the representational model corrects for the political failures by expanding the range of actors and incorporating a policy of accommodation.¹¹⁸ The Commission frustrates that policy, however, when it fails to incorporate as decision makers the affected parties Congress anticipated could and should make policy judgments about regional matters.

The alternative offered to the states is intervention. At best, this alternative dilutes the voice of the states. A state is one of many interested parties including customers and competitors, all demanding the attention of the Commission. It also reduces the accountability for decision making by reserving it to federal decision makers. Those closest to the parties to be affected by regional decisions are the state governments. Yet, the political authority is reserved to federal commissioners with less apparent stake in the outcome.

A. An Alternative Basis for Justifying the Commission Policy

The political problem of the Commission's decisions, nonetheless, is a two-edged sword. By regionalizing decision making through the use of joint boards, hearings, or conferences, the state and federal actors may introduce so much politics into the process as to defeat a rational regional decision. A study of one regional agency that joined federal and state officials for environmental planning offers an antidote to an unqualified demand for greater political participation by states in the decision-making process.

115. See *supra* notes 50-96 and accompanying text.

116. Stewart, *supra* note 105, at 1679-81.

117. *Id.* at 1682.

118. See *supra* notes 110-12 and accompanying text.

An analysis of the Delaware River Basin Commission, an interstate compact with the Department of Interior as a voting member, showed that the state and federal actors did not avoid taking what were essentially parochial views based on their federal or state positions.¹¹⁹ The Commission considered five options developed by a team of federal experts.¹²⁰ Despite the extensive empirical work that showed one clean-up proposal superior to the others, the state and federal members voted to adopt a more expensive, but questionably more effective, approach based on political factors.¹²¹ In doing so, the actors looked for advice from their own advisors and ignored that offered by the experts hired to present regional views.¹²² In the end, the institutional incentives to secure authority and the resulting political credit frustrated the attempt at regional decision making.¹²³

It does not take overly sophisticated analysis to suggest that the problems associated with the Delaware River Basin Commission also could affect regional electric regulation. The recent experience with the allocation of costs of completed nuclear plant construction raises the specter of states attempting to shift costs to their neighbors.¹²⁴ When the stakes are so large and politically dangerous, one might expect that state officials will protect their own political well-being.¹²⁵ The Commission's decision then can be perceived as an appropriate barrier to the balkanization that might otherwise occur if the states were authorized to plan and price the sale and transmission of electricity within regions.

By itself that concern does not justify the Commission's actions. If the Commission's policy is grounded in this political concern, then the federal agency has taken a policy position that is not supported by the legislation, its legislative history, or the political model that accounts for both. Congress anticipated a representational model

119. ACKERMAN ET AL., *supra* note 104, at 165-207.

120. *Id.* at 14.

121. *Id.* at 193-200.

122. *Id.* at 168.

123. *Id.* at 188-89.

124. A clever example of this is the New Orleans City Council decision concerning the costs of Grand Gulf I construction. After failing to secure the reduction it desired from the Commission, the Council disallowed a portion of the costs on the basis that the utility should have mitigated its expenses by selling a portion of its allocation to another utility. In no small irony, the amount of the disallowance was equivalent to that sought by the Council at the Commission. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1617 (1991), and *cert. denied*, 112 S. Ct. 411 (1991).

125. See Frank P. Darr, Book Review, 10 ENERGY L.J. 337 (1989) (reviewing MILTON A. CHASE, *ELECTRIC POWER: AN INDUSTRY AT A CROSSROADS* (1988)).

with the states acting for their own regional interests. That policy is usurped by the Commission's action. At the very least, the Commission could strike a better balance than the current policy of uniform denial.

B. Implications of the Criticisms

Based on the representational model, the Commission's policy should be modified in two respects. First, the Commission should amend its rules to expand the conditions under which it will authorize the use of joint boards. The Commission should consider their use in two situations. Initially, the boards would be appropriate in those situations in which the Commission needs assistance because its current work load is too large. There is nothing inconsistent with the states' assistance, but it is hardly the sole reason as suggested by the Commission's current interpretation. Additionally, the Commission should consider using a joint board or hearing in those circumstances that are associated with essentially planning activities, such as those for interconnection.¹²⁶ At this stage in the development, the parties most directly affected could raise and decide issues of local interest. As the process moves toward determination of the costs of final construction, the Commission may well be best suited for the decision. Past experience suggests that the political interests of the states can be especially difficult to corral, and the representational interests may well need to be diluted through a federal arbiter acting alone.

Second, the Commission should discard the almost whimsical justifications for its current policy of denying requests for joint boards or hearings. On one level, most are logical nonsense and therefore not worth retaining.¹²⁷ At another level, they distort the important

126. The scope of the Commission's jurisdictional authority presents something of a problem here. Because the Commission lacks siting authority, there are some practical limits to what it and the states might do under § 209. On the other hand, the Commission's authority has broadened apparently from recent Supreme Court decisions to include important powers to allocate costs of construction. *See supra* note 12 and accompanying text.

The model offered by the Pacific Northwest Electric Power Planning and Conservation Act is particularly compelling at this stage of the process. The act provides for the states' council to prepare a plan for the development of new facilities and alternatives. *See supra* notes 87-94 and accompanying text. Unlike the Planning and Conservation Act, the Federal Power Act does not require joint action. Additionally, there is a potential conflict between 16 U.S.C. § 824b and § 824h. The former directs that the states must have the right to present their views if affected by an interconnection plan, primarily a right to intervene. The latter section gives the states the right to sit on a board with the authority to decide the adequacy of such a plan. Presumably, if a state were appointed to such a board, it would lose its right to intervene. 18 C.F.R. § 385.1305(g) (1992). The problem could be solved by the creation of joint hearings or conferences or amendment of the statute to clear up the latent ambiguity.

127. *See supra* notes 67-96 and accompanying text.

policy considerations that should and can be reflected in the Commission's determinations.¹²⁸ Fairly presented, more realistic rationales concerning the political constraints on cooperative action should withstand judicial review since they comport with the interests that the Commission should consider under the statute.¹²⁹

V. CONCLUSION

The changes suggested by this critique are not great. Likewise, they do not present significant costs to an administrative process. That process currently places a premium on intervention by the states and every other party that might have an interest in the proceeding. While marginally satisfying the representational interest, intervention comes with the political costs of perceived intransigence and insensitivity to local concerns. Much of that political cost can be avoided by greater regional participation, and one benefit might be better decision making.

128. See EDLEY, *supra* note 104, at 169-212.

129. Whether the administrative law model is traditional or representational, the revised policy would withstand review. Under the former, the decision comports with the legislative directive to involve the states in decisions which affect them. Under the latter, the representational interest is clearly satisfied by direct participation. Stewart, *supra* note 105, at 1674-76, 1757.

