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J O U R N A L

## *Remapping Jurisdiction*

Corporate Structure  
Events Involving Regulated  
Utilities: The Need for  
a Multidisciplinary,  
Multijurisdictional  
Approach

*Scott Hempling*

Green Means 'Go?' — A  
Colorful Approach to a  
U.S. National Renewable  
Portfolio Standard

*Benjamin K. Sovacool and  
Christopher Cooper*

Incentive Regulation for  
German Energy Network  
Operators

*Michael Kraus*

Transmission Management in  
the Aftermath of Electricity  
Restructuring in Turkey

*Osman Bulent Tor and  
Mohammad Shahidipour*

Forecasting Long-Run  
Electricity Prices

*Gregory Hamm and Adam Borison*

The Compatibility of  
Economic Theory and  
Proactive Energy  
Efficiency Policy

*Keith Dennis*

Betting Big on Baseload

*Daniel Gabrielson, Eric Spiegel and  
Joe Van den Berg*

Electric Transmission One  
Year after the Energy Bill

*Ed Gray*

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# Corporate Structure Events Involving Regulated Utilities: The Need for a Multidisciplinary, Multijurisdictional Approach

*The repeal of PUHCA has occasioned important questions on the appropriate role for regulation in the area of utility corporate structure, including complex process and jurisdictional issues. There is a disproportionality between the importance of these questions and the lack of attention that has been given them by our regulatory and political communities.*

Scott Hempling

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## I. Overview: The Role and Repeal of the Public Utility Holding Company Act of 1935

For 70 years, the federal Public Utility Holding Company Act of 1935 (PUHCA 1935<sup>1</sup>) limited the structural options for electric utilities. Structural options involve five questions:

1. Who can acquire and own electric utilities?

2. What business activities may exist within the utility's corporate family?

3. What corporate structure may these corporate families have?

4. What financial structure may these corporate families have?

5. What interactions may occur among the members of the corporate family?

PUHCA 1935, administered by the Securities and Exchange

Commission (SEC), facilitated effective state utility regulation by limiting the complexity of corporate structure. Congress has repealed the statute,<sup>2</sup> while adding new structural provisions to the Federal Power Act,<sup>3</sup> and providing for regulatory access to books and records and review of certain interaffiliate transactions and cost allocation practices.<sup>4</sup> The net effect of these provisions is to diminish the federal role in the regulation of utility corporate structure. That diminution increases the likelihood of structural complexity. Gone are the geographic and type-of-business limits on utility mergers and acquisitions, along with reviews of and limits on leveraged financing and interaffiliate transactions.<sup>5</sup>

**S**tructural complexity makes state regulation more challenging. Because PUHCA 1935 promoted conservatism in corporate restructuring, states had less need to create their own policies. Of the dozens of mergers of the past 20 years, most involved the joining of adjacent utilities, where the main issues were identifying and allocating costs and benefits associated with a merger expected to produce savings through economies of scale and scope; and ensuring that the larger company gave sufficient attention to local quality of service. These mergers, for the most part, did not involve the joining of remote electric facilities, or the intermixing of utility and non-utility businesses. States thus deemed their traditional tools of

ratemaking and quality of service review sufficient to regulate the corporate structures that appeared.

The repeal of PUHCA 1935 changes the market for corporate restructuring, by removing limits on geographical, type-of-business or financial arrangements. States thus face questions unaddressed, systematically at least, for 70 years: Should they impose limits on the types of companies and

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*Structural complexity makes state regulation more challenging. Under PUHCA 1935, states had less need to create their own policies.*

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corporate structures that provide retail monopoly service to electricity and gas customers? Or should they welcome new structural options without limit? With respect to these questions, there is no expert consensus, no political consensus, and no systematic process for arriving at either.

The challenges posed by repeal illustrate several dimensions of utility regulation:

1. its multidisciplinary nature, because a careful examination of the corporate structure question requires input from at least six professional fields – economics, engineering, business management, finance and accounting,

public agency management, and law, particularly constitutional law;

2. its political nature, because the debate involves bilateral and multilateral conflicts between or among such interests as regulators and regulated; incumbents and newcomers; U.S. and foreign companies; in-state and out-of-state companies; shareholders, creditors, and consumers; and those who favor “government regulation” and those who disfavor it; and

3. its institutional vulnerabilities, because (a) most state commissions have staffing gaps in one or more of these professional disciplines; (b) state legislatures also have staffing gaps (unlike traditional state legislative issues like budget and taxation, education, welfare, crime, and transportation, utility corporate structure issues arise infrequently) and (c) in light of the large financial interests at stake, it is hard to ensure that the political dialogue is bounded by factual and technical findings.

This article seeks to assist regulators in meeting these challenges. It covers four topics:

1. The regulatory infrastructure eliminated by PUHCA repeal.

2. State options for replacing the regulatory infrastructure.

3. Choosing among the options: regulatory purpose and multidisciplinary analysis.

4. One further complication: are states the correct fora for regulating corporate structure events?

**A** note on author intent: As with any high-stakes issue in a highly charged political world, any analyst risks being categorized, simplistically, as “for” or “against.” This article intends to provide no basis for such categorization. Its purpose is not to evaluate the appropriateness of PUHCA 1935 repeal, to predict the results (other than to assert that corporate complexity and regulatory challenges will grow), or to recommend a particular substantive regulatory response. The article does argue for alertness, and for four types of anticipatory actions: (a) identifying the types of transactions that trigger regulatory concern, (b) establishing principles to guide those who fashion such transactions, (c) recognizing the multidisciplinary ingredients to effective regulatory review, and (d) revisiting the federal-state relationship to ensure that national concerns are addressed by a national regulator and local concerns are addressed by a state regulator.

## II. The Regulatory Infrastructure Eliminated by PUHCA Repeal

PUHCA 1935’s central policy goal was utility accountability. Its central technique was corporate simplification. Utility accountability refers to accountability to customers, investors, regulators, and legislators.<sup>6</sup> Corporate simplification refers to an

alignment of corporate form with public service obligation.

**T**o align corporate form with public service obligation, PUHCA 1935 established the principle of the “integrated public-utility system”: that a utility holding company should limit its assets and activities to those necessary to providing electric or gas service to the public.<sup>7</sup> PUHCA 1935 applied this principle by running corporate

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*PUHCA 1935’s central policy goal was utility accountability. Its central technique was corporate simplification.*

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structure proposals through a series of tests, restrictions, and reviews in four major areas: mergers and acquisitions, mixing of utility and non-utility businesses, issuances of debt or equity, and interaffiliate transactions. An understanding of these tests assists the analysis of how the regulatory infrastructure has changed.

### A. Mergers and acquisitions

Under Section 10 of PUHCA 1935, the acquisition of a public utility, through the holding company form, had to satisfy six tests.<sup>8</sup> Specifically, the acquisition –

1. must not “tend[] towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors, or consumers,” Section 10(b)(1);

2. must bear a “fair relation to the sums invested in or the earning capacity of” the property acquired, Section 10(b)(2);

3. must not “unduly complicate the capital structure of the holding company system,” Section 10(b)(3);

4. must not be “detrimental to the public interest or the interest of investors or consumers or the proper functioning of” the holding company system, Section 10(b)(3);

5. must not be “detrimental to the carrying out of the provisions of” Section 11 (relating to simplification of holding company systems, Section 10(c)(1); and

6. must “serve the public interest by tending towards the economical and efficient development of an integrated public-utility system,” Section 10(c)(2).

### B. Mixing of utility and non-utility businesses

For “registered” holding companies (usually the multi-state systems), the Act limited operations to “a single integrated public-utility system.” The only exception was for “such other businesses [i.e., other than the business of a public-utility

company] as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system. ...” Section 11(b)(1).

Example: If a utility owned coal-burning plants, its holding company could own a coal mine to service those plants; but it could not own hotels and restaurants to house and feed coal miners.

For all “exempt” holding companies (usually the intrastate systems), the Act allowed ownership of nonutility businesses, but only to the extent not “detrimental to the public interest, or the interest of investors or consumers.” Section 3(a).

### C. Issuances of debt or equity

For the registered holding companies, Section 7(d)(1) prohibited any issuance of securities if the issuance triggered one or more of six negative findings:

1. “the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system”;

2. “the security is not reasonably adapted to the earning power of the declarant”;

3. “financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest”;

4. “the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in

connection with the issue, sale, or distribution of the security are not reasonable”;

5. “in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant”;

6. “the terms and conditions of the issue or sale of the security are

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*The goal is not necessarily to replicate every aspect of the prior federal regime but to undertake a systematic inquiry.*

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detrimental to the public interest or the interest of investors or consumers.”

### D. Interaffiliate transactions

Sections 12 and 13 of PUHCA 1935 applied to registered holding companies a set of prohibitions and conditions relating to interaffiliate transactions in two major categories: financial transactions (e.g., loans, guarantees of indebtedness, extension of collateral), and sales of goods and services (other than electric power). Prohibited transactions included any loaning of money, or guarantee-

ing of indebtedness, by a utility subsidiary in favor of its holding company or any affiliate. See Section 12(a). Other interaffiliate transactions had to heed SEC rules, which generally required interaffiliate pricing to be “at cost,” to prevent utility subsidiaries from being forced to subsidize nonutility businesses. See, e.g., Section 13(d).

## III. State Options for Replacing the Regulatory Infrastructure

With the elimination of the federal prohibitions and limits, state commissions and legislators face corporate structure transactions not permitted, or not permitted without review, for 70 years. This change in circumstances warrants revisitation of state policies. The goal is not necessarily to replicate every aspect of the prior federal regime, but to inquire systematically into the nature of the new transactions and to determine the appropriate regulatory response, if any.

**Table 1** displays categories for state decision-making. Listed on the left are corporate structure events: seven categories and 21 subcategories. Listed across the top are the three categories of regulatory options – prohibition, permission without review, and permission subject to reviews, limits and conditions. By completing this table, a state determines the types of companies and corporate

**Table 1: Corporate Restructuring by Public Utilities: How Should Regulators Prepare and Respond?**

Corporate Event	Regulatory Action		
	Prohibition?	Reviews, Limits and Conditions?	Permission w/o Review?
<b>1. Utility merger with another utility</b>			
a. operationally integrated			
b. not operationally integrated			
<b>2. Utility acquisition of nonutility</b>			
a. for utility purpose			
b. not for utility purpose			
<b>3. Nonutility acquisition of utility</b>			
a. acquirer has operational relationship to utility			
b. acquirer has no operational relationship to utility			
<b>4. Interaffiliate transactions</b>			
a. goods and services: sale to utility			
b. goods and services: sale by utility to nonutility			
c. financing: loan or guarantee to utility			
d. financing: loan or guarantee from utility to nonutility			
<b>5. Issuance of debt or equity</b>			
a. at the holding company level, for utility purposes			
b. at the holding company level, for nonutility purposes			
c. at the utility level, for utility purposes			
d. at the utility level, for nonutility purposes			
e. at the nonutility level, for utility purposes			
f. at the nonutility level, for nonutility purposes			
<b>6. Divestiture or spin-off</b>			
a. of utility assets serving your state			
b. of utility assets serving other states			
c. of nonutility assets or businesses			
<b>7. Use of utility assets for non-utility business</b>			
a. utility assets in your state			
b. utility assets in other states			

structures permitted to provide utility service. For each of these 63 cells, PUHCA gave an answer. With PUHCA eliminated, the answers now must come from the states.

This section of the article introduces the type of analysis that a state might conduct on four of these subjects: expansion of utility business, mixing of utility and nonutility businesses, interaffiliate transactions and issuance of debt or equity. First, the state must define the types of transactions that trigger regulatory concern. Then the state must determine the response: prohibition, permission without review, or permission subject to standards and review. The concepts below are examples for consideration. Some overlap. There is no intent that all should be enacted. Rather, regulators and legislators should consider the full array and select those that suit their preferences.

### A. Expansion of utility business

The regulatory concern here relates to diseconomies of scale, management distraction, and business risk: Will a utility become part of a system so large that quality and efficiency of local service will suffer? A regulatory policy must begin with identifying the transaction forms which trigger concern; and then examining the regulatory options. To reiterate: The purpose of this article is not to recommend outcomes, but to illustrate the analysis.

**1. Types of transactions:** At least three categories come to mind:

a. any change in the entity providing in-state utility service and any change in the control of the entity providing in-state utility service or of any asset providing in-state utility service, including without limitation the following

transactions: (i) merger or consolidation of an in-state and a second utility into a single utility; (ii) acquisition of an in-state utility by another utility; (iii) merger or consolidation of utility holding companies, one of which owns an in-state utility; or (iv) transfer of nuclear operating license for a plant serving in-state;

b. acquisition by an in-state utility of another utility; and

c. acquisition by a holding company owning an in-state utility of another utility.

Such transactions warrant attention whether structured as an acquisition, pooling of interests, transfer of assets or other form of restructuring; or whether the certificate to serve is transferred or remains in the original hands.

**2. Regulatory options:** As with all the subject areas discussed here, the options include prohibitions, permission without review, and permissions subject to conditions and reviews.

Examples of conditions include:

a. **Advance approval standards,** such as (i) necessary to increase the efficiency of the in-state utility business, i.e., efficiencies cannot be increased by other means; (ii) no net cost increases; (iii) no adverse effect on competition in any in-state market; (iv) utility is engaging in best practices in all areas of the business; (v) purchase price of any utility should show no premium unless the premium is exceeded by expected cost reductions attributable to new efficiencies; (vi) no utility debt used for the acquisition unless the acquisition will increase

economies for the utility; and (vii) no holding company debt used for the acquisition unless the value of the acquired business or assets exceeds the debt.

**b. Structural conditions**, such as (i) in-state utility must be in its own corporation separate from other corporate affiliates; (ii) in-state utility must keep separate accounts, subject to Commission-directed overhead allocations; (iii) in-state utility must have its own bond and preferred-stock ratings; and (iv) each in-state utility must obtain, file, maintain, and update annually a third party's nonconsolidation opinion, i.e., an opinion that regulatory provisions are sufficient to prevent utility from being forced into bankruptcy should holding company or other affiliate fail.

**c. Operational conditions**, such as requirements that the merged entities be operationally integrated, commit to specified operational cost reductions, use best practices in all areas, satisfy quality of service standards, and bring no new cost or risk unless exceeded by measurable benefits.

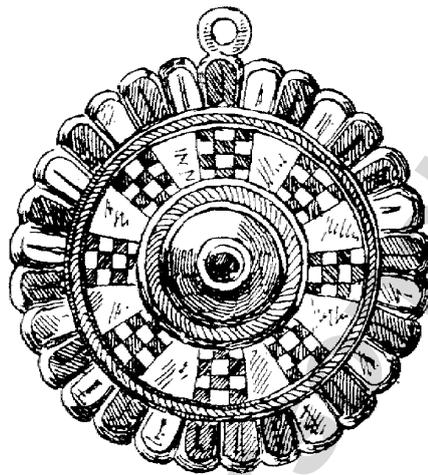
**d. Ratemaking conditions**, such as (i) requiring full rate case simultaneously with merger approval transaction; (ii) prohibiting any acquisition premium from rate recovery, except to the extent of demonstrated savings, with limit on the number of post-merger years over which the savings can be calculated; and (iii) requiring utility cost allocation methodology demonstrating that each cost allocated to utility is necessary and not duplicative.

## B. Mixing of utility and nonutility businesses

### 1. Types of transactions:

Consider six types of transactions:

a. in-state utility acquires nonutility (as subsidiary or division) for in-state utility purposes (e.g., coal-burning utility buys coal mine)



b. in-state utility acquires nonutility (as subsidiary or division), for purposes other than in-state utility purposes (e.g., utility buys Boston Red Sox)

c. holding company owning in-state utility acquires nonutility for in-state utility purposes

d. holding company owning in-state utility acquires nonutility for purposes other than in-state utility purposes

e. nonutility business acquires in-state utility

f. nonutility business acquires holding company owning in-state utility

**2. Regulatory options:** Along with the options of prohibition, and permission without review, the following examples of limits

and conditions exist: (a) limits on the percentage of total holding company assets, revenues, or net income that can be attributable to nonutility businesses; (b) limits on holding company or utility financing of any acquisition of nonutility businesses; (c) limits on the utility's ability to file for bankruptcy based on affiliate difficulties; and (d) forms of separation between utility and nonutility businesses, such as separate affiliates, accounting, financing and financial statements.

## C. Interaffiliate transactions

### 1. Types of transactions:

Affiliate transactions fall into three major categories: sales of utility services, sales of nonutility goods and services, and financial transactions. And affiliate transactions move in both directions: to and from the utility, and from and to the holding company or other affiliates.

**2. Regulatory options:** Here are some options for a policy on interaffiliate transactions: (a) prohibition on a public utility providing to an affiliate any financial loan, guarantee or other benefit other than the normal payment of dividends; (b) requirement that any goods or services sold by a utility to an affiliate be priced at the higher of book or market; (c) requirement that any goods or services sold to a utility by an affiliate be priced at the lower of book or market; (d) advance review of dividend payments to protect financial

integrity of the holding company system and the working capital of in-state utility affiliate; and (e) advance approval for interaffiliate cost allocation practices and contracts above a minimum dollar level.

#### D. Issuance of debt or equity

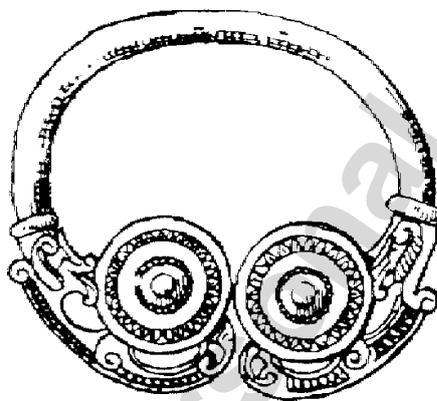
**1. Type of transaction:** The many types of securities transactions triggering regulatory concern include issuance of debt or equity, guarantees or assumptions of liabilities, (a) at the holding company level, for utility or nonutility purposes; (b) at the utility level, for utility purposes or nonutility purposes; and (c) at the nonutility level, for utility purposes or nonutility purposes.

**2. Regulatory options:** Besides prohibiting, or permitting without review, these transactions, regulatory options include requirements that (a) the terms and conditions of the security issuance are consistent with the sound and economical financing of the public utility businesses, i.e., that there is neither excess nor insufficient debt, reasonably adapted to the security structure of the utility and all companies in the holding company system; (b) the fees associated with the securities issuance are reasonable and that there are no conflicts of interest among the transacting parties and their advisers, and (c) debt incurred by or guaranteed by a public utility is used for public utility purposes only.

## IV. Choosing Among the Options: Regulatory Purpose and Multidisciplinary Analysis

### A. The regulatory purpose

Whether the subject is corporate structure or anything else, one should not launch into



regulatory design without first defining regulatory purpose.

The purpose of regulation is to align private behavior with the public interest. Regulation requires justification. Regulatory justification has two ingredients: (a) a definition of the public interest, clearly communicated; and (b) for each regulatory action, an explanation of how private behavior, if unregulated, would diverge from the public interest. Without these two ingredients, regulation is unexplained. Unexplained regulation leads to unjustified regulation.

What do I mean by the public interest? The concept is often cited

but rarely defined, by practitioners, statutes<sup>9</sup> or courts. I view it as a composite of economic efficiency, social equity and political reality.

Economic efficiency means what it sounds like: seeking biggest bang for the buck.

Social equity means shaving the hard edges off economic efficiency so that the short term pain is not so high as to distort the long-term signals that are the purpose of economic efficiency.

Political reality means that the regulator, while acting from a core of objectivity, also has to preserve the political credibility of the regulatory process. Political reality does not mean succumbing to interest group pressures; it does mean acting gradually when necessary to build support for the right actions, rather than taking actions regardless of support.

In the area of corporate structure events, the questions are:

1. What set of prohibitions, permissions and review processes offers the best chance of aligning private interest with public interest?

2. How might private behavior diverge from the public interest, and how do we shape solutions that intervene no more than necessary to produce alignment between private and public interest?

Answering that question requires access to multiple professional disciplines, discussed next.

## B. Multidisciplinary analysis

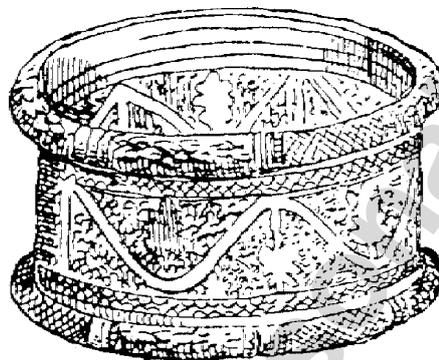
The decision-making process on corporate structure properly requires input from each of five professional disciplines. Examples of practical and academic questions, under each area, follow. The list is not exhaustive.

**1. Economics:** What are the economies and diseconomies of scale for the various components of utility service – production, transmission, distribution, customer relations? What are the economies and diseconomies of scope among various utility and nonutility activities that might take place in the same corporate family? How can this information on economies and diseconomies best be used by regulators who are reviewing management proposals to (a) expand the utility business to new geographic territories, and (b) expand the corporate investments into new business areas?<sup>10</sup>

**2. Engineering:** For utilities considering expansion-through-acquisition of service territory, what are the limits, for each of the major physical functions, beyond which quality and responsiveness of service are affected? There are reports of intermediate-term shortages in skilled crafts necessary for electricity plant construction and maintenance, among other things. Is it necessary to identify these shortages, company by company, so as to ensure that corporate managers

devote resources to the problem prior to putting resources into nonutility businesses?

**3. Business management:** What are implications for efficient and effective management when utility operations are geographically dispersed, i.e., not operationally integrated? How do managers, and regulators, determine these limits? What are the incentives,



for various management positions, which result from a mix of utility and nonutility businesses in the same corporate family? Are these incentives aligned with the public interest? What are the skill sets necessary to manage, simultaneously and successfully, monopoly and competitive businesses within the same corporate family? After several dozen mergers and acquisitions in the electric and gas industries since 1980, what data are available to assess? What means exist to gather the data? How should the data be used by regulators to assess the appropriateness of new investments by utility holding companies? What are useful case studies of prior utility efforts to invest in

nonutility businesses? How might regulators use those case studies to evaluate new corporate structure proposals?

**4. Finance and accounting:** What are appropriate mixes of finance sources for the various businesses within a utility holding company structure? To what extent is it appropriate for utility cash flow, normally used largely for payment of utility expenses and payment of dividends to the parent, to be used for investment in nonutility businesses? For example, can there be “safe harbors” for various types of investments by utility holding companies, such that should business failures occur, no damage to the utility will result? What type of damage is cause for concern? (Examples are access to financing and ability to operate and innovate without distraction.)

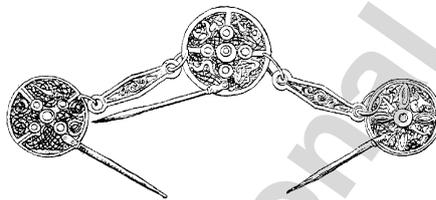
**A**re there reliable, readily available metrics so that each new business expansion does not require resource-consuming regulatory review? Are there true benefits to utility shareholders to having a utility holding company diversified into other business, as compared to the shareholders diversifying their portfolios individually?

In corporate acquisitions, there is a risk of financial circularity: the acquiring company pays a premium for a utility knowing that the premium can be recovered from monopoly ratepayers. Premium payments are capped less by market forces (where product prices limit what the acquirer will pay for the acquisition) than by

predictions of success in persuading regulators to allow the premium in rates. Given this risk, what methods exist for determining the appropriate size of acquisition premia? What regulatory policies best line up the acquirer's desire to pay a premium, the acquiree's insistence on a premium, and the ratepayer's legal right to protection from rate increases associated with the premium? (Such policies should encourage efficient mergers – meaning mergers that lower costs – and discourage inefficient mergers.)

**5. Law:** In establishing corporate structure policy, states must heed constitutional constraints. For Commerce Clause concerns, which can arise if the state discriminates against or excessively burdens interstate commerce, *see Alliant Energy Corp. v. Bie*, 330 F.3d 904, 912-19 (7th Cir. 2002), reh'g denied, 336 F.3d 545 (7th Cir. 2003), *cert. denied*, *Bridge v. Alliant Energy Corp.*, 157 L. Ed. 2d 890 (2004) (upholding, against Commerce Clause challenge, Wisconsin statute (a) limiting utility holding company investments, (b) requiring review of securities issuances and (c) requiring utility to be incorporated in the state as permissible regulation of "intrastate commerce"; but invalidating requirement that holding company be incorporated in the state as impermissible regulation of "interstate commerce"). For Takings Clause concerns, which can arise if the state acts in a manner inconsistent with shareholders' legitimate, investment-

backed expectations, *see Penn Central Transportation Company v. New York*, 438 U.S. 104, 124 (1978) (listing factors involved in the Court's fact-based "ad hoc" takings analysis, including the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed



expectations"). The Supremacy Clause should pose no concern, because (a) Congressional repeal of PUHCA 1935 evidenced no intent to preempt state regulation of corporate structure events; and (b) Sections 203 and 305 of the Federal Power Act of 1935, both of which contain provisions regulating corporate structure, also have no evidence of preemptive intent; indeed 20 years of continuous merger proposals in the electric industry, in which the parties to each merger have sought and obtained approval from both FERC and multiple states, have produced no argument or decision indicating preemptive intent in the Federal Power Act.

**D**istinct from constitutional constraints are statutory constraints. A state commission will need to ask three questions: First, does present state law accommodate the full range of regulatory options, or is modernization of state law necessary? Second, where present state law does not accommodate the full range of regulatory options, what statutory language fills the gap? Third, where present state law does accommodate the full range of regulatory options, is it still desirable to modernize the statutes, to gain clarity, prescriptiveness, and political support for regulatory action?

**T**hen come questions of regulatory procedure. What commission procedures are most likely to answer these questions effectively? Options are rule-makings, policy statements, and case-by-case adjudication. And what is the appropriate regulatory response if a utility proposes a major restructuring before the policy debate is settled?

## V. One Further Complication: Are States the Correct Fora for Regulating Corporate Structure Events?

While reducing the federal role in corporate structure regulation for gas and electric utilities, Congress left the state role undiminished.<sup>11</sup> But are states the appropriate default for corporate structure regulation? In this section I wish to introduce a debate

omitted by Congress: what is the most logical allocation of corporate structure jurisdiction between the federal and state levels?

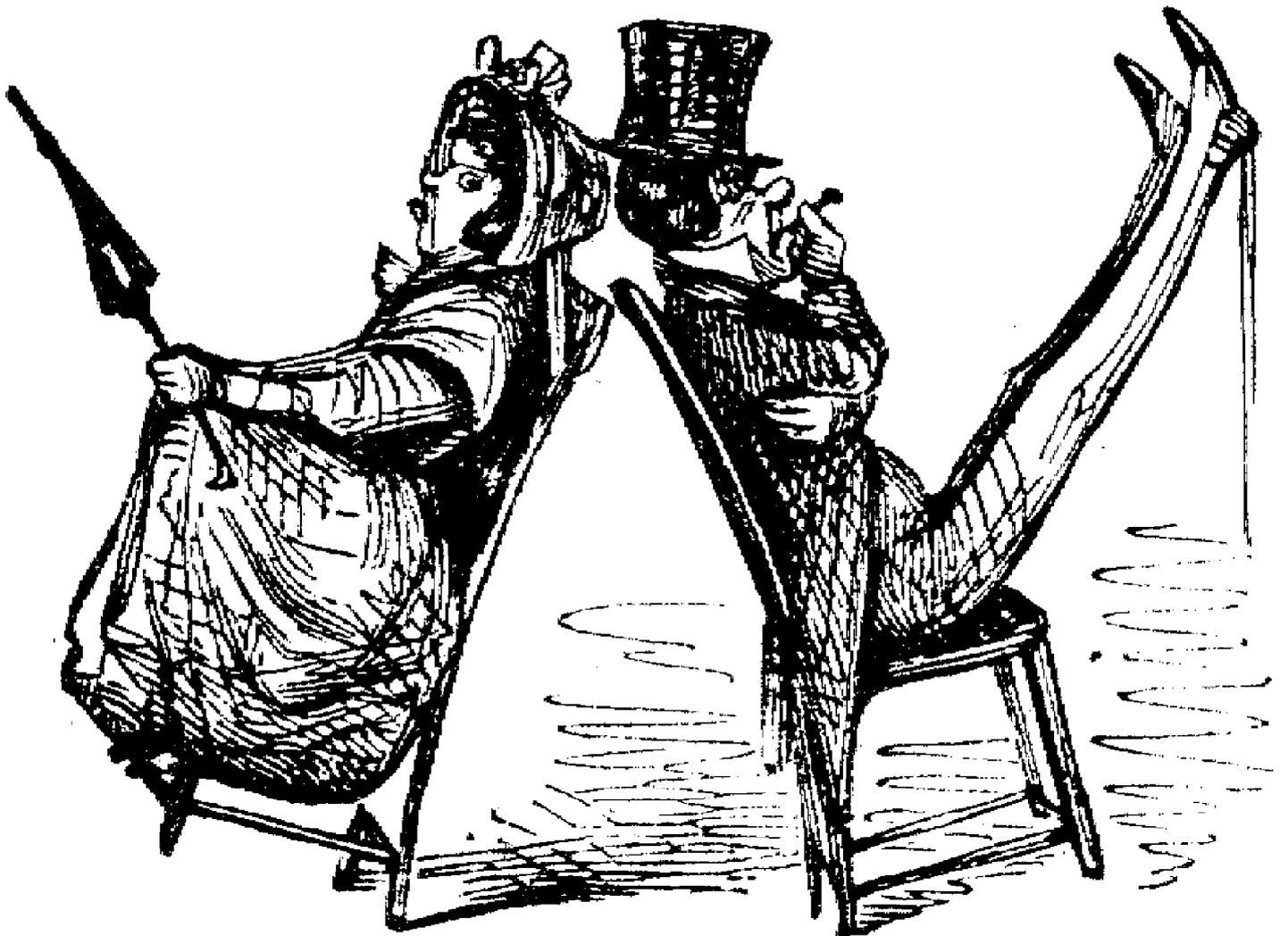
The Congressional debate did not address the possibility of multiple and conflicting state rules; in fact, some arguing for PUHCA repeal cited effective state regulation as a rationale for repeal. But 50 states plus the

District of Columbia, separately setting rules and procedures on corporate structure events, will not send clear and consistent economic signals across the industry. The sum of PUHCA repeal plus unlimited state actions does not equal a rational corporate structure policy.

It would be more productive to ask this question: To ensure an

efficient market for corporate restructuring, which corporate structure events warrant a national framework and which events are better regulated by states? On this question, there is little dialogue. Here is an attempt to begin one.

**Arguments for a national framework:** In the area of mergers, the public interest goal is to encourage efficient couplings



*In the area of mergers, the public interest goal is to encourage efficient couplings and discourage inefficient ones.*

and discourage inefficient ones. Until the modern merger trend began around 1985,<sup>12</sup> most utility corporate boundaries reflected administrative decisions by the Securities and Exchange Commission from 1935 to 1950, implementing PUHCA's mandatory breakup of the conglomerate utility holding companies of the 1930s. There is no reason to assume that the technical analyses supporting those administratively drawn boundaries are relevant today. The challenge is to design regulatory policy so that financial incentives line up with economic efficiency. If such result is to be in the nation's interest, and if corporate acquisitions cross state lines, the argument for state-by-state regulation of corporate structure events weakens.

**Arguments for state-by-state decisions:** Each state is responsible for regulating a monopoly retail provider to ensure efficient and reliable service. (Even in states which have authorized retail competition, most residential customers remain dependent on the local utility, due to the paucity of new competitive entrants.) No national regulator has this local expertise, professional perspective or political responsibility. A state thus is well-positioned to assess the effect of a merger transaction on its ability to regulate.

The foregoing arguments need not trigger a federal-state fracas over a jurisdictional zero-sum equation. There is

opportunity for a jurisdictional policy that allows for federal and state roles. Such a policy would distinguish between (a) the need for an efficient multistate market for utility asset acquisitions, and (b) the need for responsible state-level regulation to ensure efficient and reliable local service.



## VI. Conclusion: The Need for a Multidisciplinary, Multijurisdictional Regulatory Policy on Corporate Structure

This article has posed questions of policy, process and jurisdiction.

The policy question is: What is the appropriate role for regulation in the area of utility corporate structure?

The process questions are: How do we create, at the federal and state levels, a decision-making process that assembles the expertise from five professional disciplines?

The jurisdictional question is: How do we reorient a seemingly

arbitrary decision to reduce the federal role without defining the state role, so as to produce an effective mix of both levels of regulation?

There is a disproportionality between the importance of these questions and the lack of attention given them by our regulatory and political communities. That disproportionality is itself a distinct issue worthy of study. ■

### Endnotes:

1. I use the term "PUHCA 1935" to distinguish that statute from the Public Utility Holding Company Act of 2005, which includes the language repealing the PUHCA 1935, plus some provisions relating to regulators' access to books and records, and procedures for allocating certain costs among holding company affiliates. PUHCA 1935 was codified at 15 U.S.C. sec. 79 *et seq.* Practitioners customarily refer to PUHCA provisions by section number rather than by U.S. Code cite; therefore Section 1 of PUHCA is 15 U.S.C. sec. 79a, Section 2 is 15 U.S.C. sec. 79b, etc.

2. See Section 1263 of the Energy Policy Act of 2005 (EPAAct).

3. Congress granted the Federal Energy Regulatory Commission new authority to review, under Section 203 of the Federal Power Act, a public utility's acquisition of the stock of any other public utility, valued over \$10 million, Sec. 203(a)(1)(C); a public utility's acquisition of an existing generation facility, valued over \$10 million, "that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes," Sec. 203(a)(1)(D); and certain acquisitions, mergers, or consolidations involving holding companies that own electric utilities or transmitting utilities, Section 203(a)(2).

4. See Subtitle F of the EPAAct, enacting the Public Utility Holding Company Act of 2005.

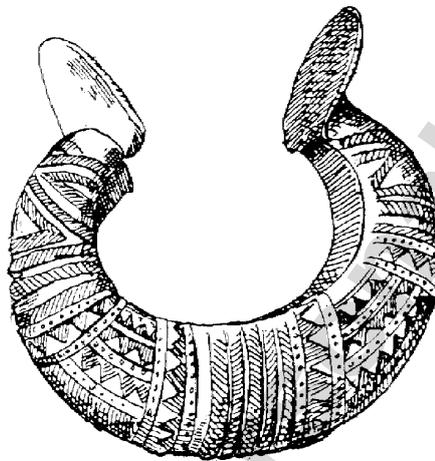
5. Two transactions, the first one consummated and second one proposed, would have faced obstacles under PUHCA 1935: the acquisition by MidAmerican Energy Holdings Co. (a holding company owning an Iowa utility, where the holding company was a subsidiary of Berkshire Hathaway, itself a holding company owning many unrelated, nonutility businesses) of PacifiCorp (which owns utilities in seven Western states), notwithstanding the difficulty of satisfying the “integrated public-utility system” test when the Rocky Mountains largely separated the two systems’ assets; a transaction which preceded repeal; and the merger of Florida Power & Light and Constellation Energy Group (a holding company owning Baltimore Gas & Electric), where the physical distance between, and separate regions of, the two entities also would raise integration questions.

6. Section 1 of PUHCA 1935 expressed this theme of accountability in multiple ways. See, e.g., Section 1(a)(5) (referring to activities of public utility holding companies “extending over many States [that] are not susceptible of effective control by any State and [that] make difficult, if not impossible, effective State regulation of public-utility companies”); Section 1(b)(1) (explaining that the public interest and the interest of investors is adversely affected when investors “cannot obtain the information necessary to appraise the financial position or earning power of the issuers”); Section 1(b)(3), (5) (explaining that the public interest is adversely affected when “control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies” or when there is “lack of public regulation”).

7. Section 2(a)(29)(A) in turn defines an “integrated public-utility system,”

As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility

assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more states, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient



operation, and the effectiveness of regulation.

8. To keep this article of manageable length and digestible by the lay reader, I omit here the complexity introduced by Section 9, which distinguishes acquisitions by “registered holding companies” from acquisitions by others. Put briefly, if the acquirer was a registered holding company, the six tests applied to any acquisition of any interest in any business (Section 9(a)(1)); if the acquirer was any other person, a “two-bite” rule applied, whereby the six tests applied not to the acquisition of the first utility company but to the acquisition of each subsequent utility company (Section 9(a)(2)).

For readers unfamiliar with PUHCA 1935, a rough but usually accurate way to distinguish “registered” holding companies from non-registered holding companies is that the former usually have utility subsidiaries in multiple states. The distinction arises because the most common exemption from “registered” status is the

“intrastate in character” exemption provided by Section 3(a)(1). The Act’s drafters assumed that intrastate holding companies were more accountable to state regulators, and therefore less in need of federal structural restrictions.

9. But see the Maryland statutes, Section 2-113 of the Public Utility Companies Article requires the Commission to supervise and regulate utilities so as to “ensure their operation in the interest of the public” and to “promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination.”

10. For an example of academic investigation into some of these questions, see the following writings of John Kwoka, Neal F. Finnegan Distinguished Professor of Economics at Northeastern University: *Electric Power Distribution: Economies of Scale, Mergers, and Restructuring*, APPLIED ECON, Nov. 2005; *Vertical Economies in Electric Power: Evidence on Integration and Its Alternatives*, INT’L. J. INDUSTRIAL ORG. May 2002; *The Comparative Advantage of Public Ownership: Evidence from U.S. Electric Utilities*, CANADIAN J. ECON., May 2005; *Mergers and Efficiency: Evidence from the U.S. Electricity Industry*, with M. Pollitt, Northeastern University Economics Discussion Paper, Aug. 2006.

11. There is no evidence, in the language of the repeal statute or in the legislative history, suggesting Congressional intent to preempt state regulation of corporate structure.

12. Following the SEC-administered breakup of holding companies mandated by Section 11(b) of PUHCA 1935 – a breakup that took over a decade – mergers in the electric industry were infrequent. The modern merger trend began 1985. In that year, Cleveland Electric Illuminating merged with Toledo Edison. (Both companies now have different names and have been parties to subsequent mergers.) PacifiCorp then merged with Utah Power & Light in 1988, followed by mergers in Kansas, New England, and the mid-Atlantic regions.