

1989

Mississippi Power & Light Company: A Departure Point for Extension of the "Bright Line" Between Federal and State Regulatory Jurisdiction over Public Utilities

James E. Hickey Jr.

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

James E. Hickey Jr., *Mississippi Power & Light Company: A Departure Point for Extension of the "Bright Line" Between Federal and State Regulatory Jurisdiction over Public Utilities*, 10 J. Energy L. & Pol'y 57 (1989)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/622

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

Mississippi Power & Light Company: A Departure Point for Extension of the "Bright Line" Between Federal and State Regulatory Jurisdiction over Public Utilities

James E. Hickey, Jr.*

I. INTRODUCTION

The United States Supreme Court is currently in the process of directly addressing issues dealing with the allocation of jurisdiction over public utilities between state public utility commissions (PUCs) and the Federal Energy Regulatory Commission (FERC).¹ The eventual court resolution of the federal-state jurisdictional issues will have a special and immediate impact on the tens of billions of dollars associated with nuclear power plants that, for a variety of reasons, do

* Associate Professor of Law, Hofstra University School of Law; B.S., University of Florida 1966; J.D., University of Georgia 1970; Ph.D. in International Law, Jesus College, University of Cambridge 1977.

I thank my research assistants, Suzanne Abels and Daniel Gonzalez for their able and diligent work on this article. While the content of this article is my responsibility alone, I would like to thank Professors Neil Ellis, Bernard Jacob, Joseph Tomain, and Vern Walker for their comments on the initial draft.

¹ See *Northwest Central Pipeline Corp. v. Kansas State Corp.* Comm'n, 57 U.S.L.W. 4302 (U.S. Mar. 6, 1989) (state-ordered, natural gas production limits imposed on gas wells neither are preempted by FERC authority under the Natural Gas Act to regulate acquisition and sales practices of interstate pipe lines nor do they violate the commerce clause of the Constitution); *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609 (1989) (a state scheme of utility regulation does not "take" property in the Constitutional sense simply because it disallows recovery of millions of dollars of capital investment costs in four cancelled nuclear power plants that are not used and useful in service to the public); *New Orleans Pub. Serv., Inc. v. New Orleans City Council*, 850 F.2d 1069 (5th Cir. 1988), cert. granted, 57 U.S.L.W. 3451 (U.S. Jan. 9, 1989) (No. 88-348) (whether, under abstention doctrine, a federal district court may refuse to adjudicate a federal claim that the Federal Power Act and orders issued by the FERC preempt local regulatory authorities from ruling on the very matters decided by the FERC); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428 (1988) (barring state inquiries into FERC-ordered interstate wholesale rates and allocations associated with the operation of Grand Gulf No. 1 nuclear power plant); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (once the FERC allocates wholesale hydroelectric power, a state regulatory body must recognize that allocation when it exercises its authority over retail electric rates); *Transcontinental Gas Pipe Line v. State Oil & Gas Bd.*, 474 U.S. 409 (1986) (the Natural Gas Act and the Natural Gas Policy Act preempt state regulations that required an interstate pipeline to buy natural gas from all parties owning interests in a common gas pool).

not become operational, or that are abandoned or cancelled.²

In recent years at least 100 nuclear power plants worth \$30 billion have been abandoned.³ Many of those plants were cancelled by electric utilities in some stage of construction and at least two, the Shoreham nuclear plant on Long Island and the Seabrook nuclear plant in New Hampshire, have been completed but may not become operational.⁴ Estimates of cost overruns, abandonments, and cancellations vary but industry-wide they are well in excess of \$100 billion.⁵ The manner in which the jurisdictional issues presently before the Supreme Court are ultimately decided may also have a profound impact on the future financial health of the electric industry, the corporate structure of electric utilities, and the relative burdens to be borne by utility shareholders and electric consumers.⁶ In addition, resolution of the state versus federal jurisdiction questions may influ-

² See J. TOMAIN, *NUCLEAR POWER TRANSFORMATION*, Ch. 4 (1987). At the end of 1987, 107 commercial nuclear power plants were operating in the United States that provided roughly 15% of the nation's electric supply. ENERGY INFORMATION ADMINISTRATION, *ANNUAL ENERGY REVIEW 1987*, DOE/EIA-384(87) at 213 (May 1988).

³ J. TOMAIN & J. HICKEY, *ENERGY LAW & POLICY* 186 (1989) [hereinafter TOMAIN & HICKEY]. Greenhouse, *High Court Rejects Charges by Utilities for Unused Plants*, N.Y. Times, Jan. 12, 1989, at 1, col. 1; Wald, *Nuclear Plant Decision Is Limited*, N.Y. Times, Jan. 12, 1989, at D5, col. 4.

⁴ See *Petition of Public Service Co. of N.H.*, 539 A.2d 263, 264 (N.H. 1988) ("The likelihood . . . of [the completed Seabrook nuclear power plant producing electricity is a matter] . . . of speculation and uncertainty."); Rodgers & Gray, *State Commission Treatment of Nuclear Plant Cancellation Costs*, 13 HOFSTRA L. REV. 443 (1985); Cook, *Nuclear Follies*, FORBES, Feb. 11, 1985, at 82; *PSC OKs Deals to Shut Shoreham*, *Newsday*, Nov. 11, 1988, at 7, col. 1.

⁵ Rodgers & Gray, *supra* note 4, at 443-44 n.3, refers to a 1985 estimate of a total nuclear power investment by the electric industry before 1990 of \$365 billion. The interest expense component of that estimate associated with cost overruns alone was estimated to be about \$100 billion. *Id.*

⁶ A sampling of the reaction that these issues have generated among some segments of the electric industry in the wake of the Supreme Court's *MP&L* decision are as follows: The National Association of Regulatory Utility Commissioners has expressed the "fear" that *MP&L* "creates a lot of incentives for utilities to set up holding companies to build new power plants and sell the electricity back to their operating companies, so that the F.E.R.C. will cut the states out" of reviewing the prudence of the investment. Taylor, *Court Cuts State Roles on Utilities*, N.Y. Times, June 25, 1988, at 33, 35, col. 5. An electric industry trade magazine recently characterized the *MP&L* decision as "frustrat[ing] . . . attempts by the states to insulate their ratepayers from the cost-of-service effects of FERC decisions involving interstate agreements governing allocations of wholesale electric power." Public Utilities Fortnightly, Aug. 4, 1988, at 45. The decision has been predicted to reach beyond the electric utility industry to "[r]estrict the ability of state regulators to disallow costs incurred by gas utilities pursuant to wholesale purchased gas contracts." *Id.* Natural Gas Association representatives have stated that "[s]tate regulators will be severely affected in their ability to regulate in the public interest in multistate projects." N.Y. Times, June 25, 1988, at 35, col. 5. The decision also has been described as somehow "[s]hrinking" state rate-making power. Public Utilities Fortnightly, Aug. 4, 1988, at 46.

ence the availability of the nuclear power option for the electric industry well into the twenty-first century.

The purpose of this Article is to suggest that the Supreme Court's decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* (MP&L) issued on June 29, 1988⁷ may provide an appropriate departure point from which to extend the "bright line"⁸ between FERC and state PUC jurisdiction to deal with the costs associated with failed nuclear power plants. The issue of a jurisdictional bright line extension initially is posed where state PUCs, in setting retail electric rates, disallow or severely restrict recovery costs of failed nuclear power plant costs from retail ratepayers. This Article first provides a factual background against which to examine the jurisdictional "bright line" law. Second, it analyzes the MP&L decision's clear affirmation of the statutory, judicial, and constitutional bases for drawing the jurisdictional "bright line" that are found in Part II of the Federal Power Act, the filed rate doctrine, preemption principles, and the commerce clause of the Constitution. Finally, it discusses the extension of that jurisdictional "bright line" to deal with the current and future costs of inoperable, abandoned, or cancelled nuclear power plants.

⁷ 108 S.Ct. 2248 (1988).

⁸ The term "bright line" was first used by the Supreme Court in an electric utility context in the *FPC v. Southern Calif. Edison Co. (Colton)*, 376 U.S. 205, 215-16 (1964). The Supreme Court there held that § 201(b) of the Federal Power Act, 16 U.S.C. § 824a (1982), conferred exclusive jurisdiction upon the FPC (the forerunner of the FERC) over all wholesale electric energy sales in interstate commerce that are not expressly exempted by the FPA and stated the following:

Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary case by case analysis. This was done in the [Federal] Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

The judicial history of the use of the term "bright line," however, is confined neither to the Supreme Court nor to the line between federal-state regulation of public utilities. In chronological order see, for example, the following cases: *Lau v. Stack*, 269 Mich. 396, 257 N.W. 848, 851 (1934) ("bright line" was used in one sentence to differentiate two cases. "This promptness of action marks a very bright line between *Semmes v. Fuller* and the case at bar."); *Girard Trust Co. v. Commissioner*, 122 F.2d 108, 110 (3d Cir. 1941) ("bright line" is used in the context of a religious charitable trust case); *International Reform Fed'n v. District Unemployment Comp. Bd.*, 131 F.2d 337, 341 (D.C. Cir. 1942) ("bright line" appears in a quotation of the *Girard* case, *supra*); *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) ("bright line" is mentioned by Justice Frankfurter in a concurring opinion on a FELA negligence case that noted a lack of a "bright line" between negligence and non-negligence); *Butz v. Union Pac. R. Co.*, 233 P.2d 332, 340 (Utah 1951) ("bright line" appears in the dissenting opinion as a direct quote from J. Frankfurter in the *Wilkerson* case). The use of the term has risen exponentially in both federal and state court decisions, into the hundreds of cases in the 1980s and in a wide variety of contexts too numerous to mention.

II. FACTUAL BACKGROUND⁹

The application and analysis of the jurisdictional "bright line" in the *MP&L* decision is examined in three factual contexts: (1) The evolution of the electric utility industry from strictly local enterprises toward an interstate, integrated, industry; (2) the electric utilities' decisions to build nuclear power plants and the unique historical reasons behind the cost overruns, abandonments, and cancellations of nuclear power plants; and (3) the particular facts before the Supreme Court in *MP&L*.

A. *The Evolution of the Electric Industry*

The *MP&L* decision and its "bright line" analysis should be viewed against the factual backdrop of the development of the electric business from fragmented, purely local, intrastate companies to interconnected, coordinated, interstate systems increasingly involving federal interests and reasonably subject to federal regulation. The electric business in the United States began on September 4, 1882 when Thomas Edison's Pearl Street Station in New York City, the first commercial plant for producing or generating electricity with the use of steam, came on line. Initially, the private companies that produced, transmitted, and distributed electricity were small and unregulated. For the most part, these fledgling private utilities were located in cities where customers were situated close to each other and could be more cheaply served.¹⁰

Regulation of private utilities, in turn, by municipalities, state PUCs, and the Federal Power Commission (the predecessor agency to the FERC) reflected the electric utility industry's growth in size, made possible by increasing consumer demand and advancements in technology.¹¹ It was in the municipalities that the electric business first began to affect the quality of life of an increasing number of people. As a practical matter, electric distribution lines were placed

⁹ See generally TOMAIN & HICKEY, *supra* note 3, at 389-483 (1989); C. PHILLIPS, *THE REGULATION OF PUBLIC UTILITIES* 523-73 (1984); L. HYMAN, *AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE* (2d ed. 1985); CONGRESSIONAL RESEARCH SERVICE FOR THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, *The Electric Utility Sector: Concepts, Practices, and Problems*, 95th Cong., 1st Sess., REPORT FOR USE BY THE ENERGY AND POWER SUBCOMMITTEE (Comm. Print 95-14, 1977).

¹⁰ For example, in 1892 the City of Chicago had more than 30 electric companies, each of which sold electricity to a small number of customers. At that time only 5,000 customers out of a Chicago population of 1,000,000 used electric lights. See D. Anderson, *State Regulation of Electric Utilities*, in *THE POLITICS OF REGULATION* 5 (J. Wilson ed. 1980).

¹¹ The FERC succeeded the Federal Power Commission as of October 1, 1977 pursuant to the Energy Organization Act, 42 U.S.C. § 7172(a) (1982).

in the public streets or inevitably crossed streets and the municipalities undertook to regulate the new, private utility companies by granting them competitive franchises to sell electricity.¹²

The state PUCs began to regulate the electric industry when small franchises merged to take advantage of the economies of scale and advancements in technology. Those conditions made larger generating facilities feasible and transmission of electricity over longer distances more efficient. This, in turn, expanded service territories beyond municipal boundaries.

The electric utility industry eventually became increasingly involved in interstate and wholesale sales of electricity as individual utilities consolidated into interstate holding companies. By the early 1930s, just sixteen such holding companies controlled over seventy-five percent of the electricity generated in the United States. Since the holding companies did not directly generate or sell electricity, they were not regulated by state and local authorities except to the extent that all corporations were regulated. In addition, there was no federal regulation of electric utilities at that time.¹³

The absence of specific federal regulation led to holding company abuses that were answered by enactment of the Public Utility Holding Company Act of 1935 (PUHCA).¹⁴ The effect of PUHCA was to limit integrated electric systems to single operating areas unless the holding company could demonstrate the following: (1) that control of more than one system would achieve substantial economies of scale; (2) that the areas involved would be confined to one state or its immediate neighbors; and (3) that local management, efficient operation, and effective regulation would be assured. PUHCA effectively dismantled the holding company system while at the same time it explicitly endorsed and preserved integrated electric holding company systems that operate in adjacent multistate areas.¹⁵

The geographic expansion of service territories and corporate mergers occurred largely because of a decrease in the cost of long distance electricity transmission. Regional power pools emerged to make the most widespread use of power plants at the lowest marginal

¹² Competitive franchises, rather than exclusive franchises, were granted, in part, in the expectation that competition would assure lower prices for electricity to the consumer.

¹³ See *infra* notes 54-63.

¹⁴ 515 U.S.C. §§ 79-79z (1982).

¹⁵ Today there are 13 holding companies that remain in operation that are registered with the Securities and Exchange Commission. However, they account for only about 15% of the electric industry's generation. See generally Hawes, *Public Utility Holding Company Act of 1935—Fossil or Foil?*, 30 VAND. L. REV. 605 (1977).

costs.¹⁶ Power pooling generally provides a more secure and economical bulk power supply for pool participants through sharing electricity reserves, joint planning, and coordinated operations.¹⁷

Electric supply in the United States today tends to be coordinated and synchronized among many different electric systems and companies. Integration is achieved through the physical interconnection of electric facilities, by the efforts of regional reliability councils, and by investor-owned utilities pooling their power resources, as well as by the establishment of large public power systems. The key to nationwide or region-wide coordination of electric supply is to encourage the physical interconnection of electric systems. Today, virtually every major electric utility system in the United States is connected, or capable of being connected, with its neighboring system. There are large interconnected networks of electric systems forming a nearly complete national grid.

To ensure that such an interconnected system functions effectively, nine voluntary regional Electric Reliability Councils were formed by electric utilities in the latter half of the 1960s. Their purpose is to maintain and to improve the reliability of interconnected electric operations and to assure the adequacy of regional electricity supplies. Reliability often demands having several alternative pathways for the transmission and distribution of electric power supply so that no single system failure will interrupt electric service. The availability of coordinated and interconnected power supply among electric companies and systems reduces the need for a particular system to keep additional reserves ready, for example, in emergencies.¹⁸

In addition to the reliability councils, there are seventeen formal power pools in existence across the United States.¹⁹ A formal power

¹⁶ "When utilities form a group to examine their joint needs and resources and agree to operate and plan their systems for the best combined economy and reliability, they may be considered to be 'pooling' their resources and such a group is often referred to as a 'power pool.'" FERC, *POWER POOLING IN THE UNITED STATES* 2 (1981) [hereinafter *POWER POOLING*]. For a useful introduction to marginal costs in an electric utility context, see Kadane, *The Legality of Marginal Cost Pricing for Utility Services*, 5 *HOFSTRA L. REV.* 755 (1977).

¹⁷ *POWER POOLING*, *supra* note 16, at 2.

¹⁸ The reliability councils coordinate the generation and transmission plans of various electric systems and power pools within each region. In 1968 The National Electric Reliability Council (NERC) was formed. It is a consortium of the regional councils that addresses problems of interregional operations and national electric reliability, including the adequacy of power supply and delivery systems in North America. NERC also develops and maintains national standards for interconnected electric operations.

¹⁹ The formal power pools are: Allegheny Power Systems, Inc. (APS); American Electric Power System (AEP); California Power Pool (CPP); Central Area Power Coordination Group (CAPCO); Illinois-Missouri Pool (IL-MO); Michigan Electric Coordinated System (MECS); Middle South Utilities, Inc. (MSU); Mid-Continent Area Pool (MAPP); Missouri-Kan Gas Pool

pool is characterized by a contractual agreement among two or more electric systems that coordinates the planning and operation of their bulk power facilities. Of these seventeen formal power pools, nine are so-called tight pools²⁰ that typically enforce electric reserve requirements by assessing penalties. Tight pools also assure economy of system operations by central dispatching.²¹ Interstate wholesale sales of investor-owned electric utilities now fall under the exclusive federal jurisdiction of the FERC.²²

B. *Decisions to Construct Nuclear Power Plants*

In general, decisions by utilities in the 1960s and early 1970s to build nuclear power plants were based upon the historical record of past electric demand and on widely-accepted forecasts about future electric demand and the economic viability of nuclear power plants.²³ From its inception in 1882 and into the 1960s, the electric industry historically was characterized by an inelastic demand,²⁴ steady and predictable growth (a constant seven percent growth rate each year since World War II), abundant and reliable domestic sources of fossil fuel supplies (coal, oil, and natural gas) and steadily declining electric rates. In the years following World War II, a pronuclear electric power consensus existed in the United States among the consuming public, the local, state, and federal governments, and the electric industry. In addition, the emergence of OPEC and its exercise of foreign cartel power in the oil markets in the early 1970s caused a substantial increase in oil and gas prices and a fear by all concerned that those increased fuel prices would drive electric prices unacceptably high. This served to consolidate and affirm the pronuclear power plant consensus and to reaffirm the reasonableness of planning deci-

(MOKAN); New England Power Pool (NEPOOL); New York Power Pool (NYPP); Pacific Northwest Coordination Agreement (PNCA); Pennsylvania-New Jersey-Maryland Interconnection (PJM); Southern Company System (SOCO); Texas Municipal Power Pool (TMPP); Texas Utilities Company (TUCO); and Wisconsin Power Pool (WPP). See *POWER POOLING*, *supra* note 16, at 9.

²⁰ The tight power pools are MECS, NEPOOL, NYPP, PJM, APS, AEP, MSU, SOCO, and TUCO (the latter five are also public utility holding company systems).

²¹ For example, the presence of a single authority with responsibility to designate which system generating units shall be used at any point in time, taking into account the most economical and safest combinations of units.

²² For a discussion of FERC jurisdiction under Part II of the Federal Power Act, see *infra* text accompanying notes 51-85.

²³ See generally *TOMAIN & HICKEY*, *supra* note 3, at 393-94.

²⁴ Inelastic demand means that consumers tend to continue to demand the same supply of electricity without regard to price.

sions to build nuclear power plants.²⁵

However, dramatic and unforeseen events in the 1970s and 1980s caused those industry forecasts about demand and price — although for the most part reasonable when made — to be wrong.²⁶ The steady and predictable seven percent growth in demand flattened to one or two percent a year. This was primarily due to energy conservation efforts. In addition, OPEC's cartel power over petroleum was broken in the mid-1980s. The result was a dramatic fall in the price of oil and gas. The drop in fuel prices reduced the cost of electricity generated by fossil fuel and, by comparison, made electricity generated by nuclear fuel more expensive. At the same time, the cost of nuclear power plants grew dramatically for several unforeseen reasons: (1) increased construction costs caused by double digit inflation, (2) new environmental concerns about the disposal of nuclear waste, (3) heightened concern over nuclear plant safety as a result of the Three Mile Island and Chernobyl disasters, and (4) prolonged delay in regulatory licensing procedures.

The increased costs, regulatory delays, and heightened environmental and safety concerns shattered the pronuclear consensus. Many consumers and local and state governments, for the first time, began to oppose nuclear power plant construction. In addition, the electric industry became more competitive and demand became more elastic (*i.e.* price responsive) than was the case when many of the nuclear generation planning and construction decisions were originally made. Historically, large utility companies were protected from meaningful competition. This changed, however, in the 1980s with the advent of cogeneration, independent power producers, and increased development of alternative energy sources such as solar, wind, and geothermal energy.²⁷ As a result, many nuclear power plants planned in the late 1960s and early 1970s, based on accepted pre-construction assumptions, became either relatively very expensive producers of electricity or inoperable, cancelled, and abandoned plants in various stages of planning and construction in the 1980s.²⁸

²⁵ At one time, the conventional wisdom was that nuclear-generated electricity would be too cheap to meter.

²⁶ Prudent planning for future power supply must be undertaken by a utility system at least 10 to 15 years in advance if the system is to have the needed capacity constructed and in place to meet future demand. In the most stable of times such power planning is an inexact science. Perhaps if there were in place an objective and accepted standard for assessing the prudence of power planning decisions, such disputes over prudence as existed in the *MP&L* case might have been averted.

²⁷ See TOMAIN & HICKEY, *supra* note 3, at 513-59.

²⁸ *Supra* note 3.

C. *The MP&L Facts*

The *MP&L* facts provide a typical example of nuclear power plant planning by an electric utility system in the 1960s upset by the unforeseen and unprecedented events of the 1970s and 1980s as described above. *MP&L* involved Middle South Utilities, a public utility holding company operating a highly-integrated and coordinated tight electric power pool in the States of Arkansas, Louisiana, Mississippi, and Missouri.²⁹ Middle South Utilities operates through four wholly-owned subsidiary operating companies. In Mississippi the op-

²⁹ The Administrative Law Judge (ALJ) in *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 at 65,098 (1986), aptly described the MSU System in greater detail as follows:

The Middle South system consists of a parent holding company (MSU) and various subsidiary companies wholly owned by MSU. These subsidiaries include four operating companies (AP&L, LP&L, MP&L, and NOPSI), a single asset generating company (MSE), and a corporate services company, Middle South Services, Inc. (MSS). Although subdivided into separate corporate entities, the Middle South system has common officers who plan and operate Middle South system as a coordinated, fully integrated electrical system.

. . . . [The] planning, construction and operation of major generation facilities are performed by Middle South as a single system on a coordinated basis [T]he planning for all new generating units, such as Grand Gulf, is done on a system basis by the Middle South System Operating Committee. The System Operating Committee consists of one representative from each of the operating companies and two representatives from MSS.

. . . MSS provides accounting, engineering and other administrative services to the four operating companies MSS is responsible, *inter alia*, for long-range generation expansion planning for Middle South [G]eneration additions are planned on a system-wide basis, including decisions as to the type, size, location, and timing of construction of units. In particular, . . . the timing of generation unit additions takes into account overall system reserve capabilities [S]uch coordinated system planning is intended to provide the best service to the system as a whole and to the public.

. . . [D]ecisions on generation additions were made on the basis of the system as a whole, including site selection to achieve locational economies (such as locating units due to access of fuel supply or available water supply), sizing units to achieve economies of scale, and timing construction of units to achieve desirable levels of system reserves [T]he operating companies jointly plan on a system basis for the construction and operation of major facilities to best meet the combined loads of all the companies and to provide the best level of service to the public. . . . [T]he ultimate decision on the addition of new generating plant is made jointly by the chief executive officers of the operating companies, relying upon the recommendation of the System Operating Committee.

The MSU System, in turn, participates in the Southwest Power Pool (SPP), which is a regional Reliability Council encompassing the States of Arkansas, Louisiana, Kansas, Oklahoma, and parts of Mississippi, Missouri, New Mexico, and Texas. The SPP is not a power pool in the normal sense. It encourages interconnection agreements and coordination among parties. However, it does not assume responsibility for any members' power supply obligations. *POWER POOLING*, *supra* note 16, at 119, 123.

erating subsidiary, Mississippi Power & Light Company, and the other three operating companies, are vertically-integrated companies. They sell both interstate wholesale electric power (to each other and to other nonpool wholesale customers) and retail electric power locally to homes and businesses within their respective service territories. All electric generating facilities for the Middle South Utilities power pool were always planned, built, and operated for the benefit of the entire multistate Middle South Utilities system.³⁰ The coordination and operation of all pool power plants were and still are centrally-controlled and centrally-dispatched by a subsidiary service company of Middle South Utilities, at offices in Pine Bluff, Arkansas.³¹

During the 1950s Middle South Utilities built gas turbine electric generating facilities and located them in Louisiana near abundant supplies of inexpensive natural gas.³² In the ensuing years, up to around 1971, Middle South Utilities built several relatively inexpensive oil and gas fired generating units.³³ In the late 1960s and 1970s, Middle South Utilities also began to add nuclear and coal-fired generating units in an attempt to reduce costs and to achieve economies of scale.³⁴ The Grand Gulf nuclear power plant at issue in the case was a part of this system-wide, power pool planning program.

During all phases, from planning through construction to operation, the purpose of the Grand Gulf nuclear power plant has always been to meet the Middle South Utilities system needs and not the isolated individual needs of Mississippi Power & Light.³⁵ Middle South Utilities' diversification program to coal and nuclear generation appeared vindicated in the early 1970s by natural gas curtailments and the 1973 Arab oil embargo, "which cast a dark shadow over oil and gas-fired generation from a reliability and cost standpoint."³⁶ However, by the late 1970s Middle South Utilities system demand, rather than growing at the historical projected rate, flattened.³⁷ Nevertheless, Middle South Utilities continued to build the first unit of the Grand Gulf project in the expectation that in the long run alternative sources of electric energy would be more costly

³⁰ *Id.* The MSU System is one of only nine tight power pools in existence in the United States and one of only five public utility holding company power pools. *See supra* note 20.

³¹ Middle South Services, Inc., 30 F.E.R.C. ¶ 63,030, at 65,142.

³² *Id.* at 65,143.

³³ *Id.*

³⁴ *Id.* at 65,144.

³⁵ Middle South Energy, Inc., 26 F.E.R.C. ¶¶ 63,044, at 65,101-02.

³⁶ Middle South Services, Inc., 30 F.E.R.C. ¶¶ 63,030, at 65,168.

³⁷ *Id.* at 65,169. *See supra* notes 24 and 25 and accompanying text.

on an overall cost per kilowatt hour.³⁸ In response to lower projected demand, Middle South Utilities dropped plans to construct the second and third units of the Grand Gulf Project.

Although the Grand Gulf nuclear plant had originally been assigned to Mississippi Power & Light to build, it became apparent that Mississippi Power & Light could not finance plant construction by itself.³⁹ For that reason, Middle South Utilities formed Middle South Energy, Inc. in 1974, solely to finance the Grand Gulf project. The formation of Middle South Energy meant that each of the four operating companies put their credit behind the Grand Gulf project.⁴⁰ Middle South Energy received title to the plant and hired Mississippi Power & Light to build and operate it.⁴¹ The resulting corporate structure meant that sales and allocations of Grand Gulf nuclear plant electricity by Middle South Energy to the four operating companies (including Mississippi Power & Light) were subject to FERC jurisdiction because they were interstate wholesale sales and allocations of power.⁴²

In 1982 Middle South Utilities filed a pair of agreements with the FERC for approval in anticipation of the Grand Gulf plant coming on line.⁴³ One agreement was a System Agreement which set the terms and conditions for electric power transactions among the four operating companies, including both payments made in proportion to each company's share of the Middle South Utilities system demand (capacity equalization payments) and rates for energy exchanged among the operating companies. The other agreement was a Unit Power Sales Agreement which governed the specific wholesale sales from the Grand Gulf nuclear power plant by Middle South Energy to the four operating companies.

The FERC approved an electric power allocation formula among the operating companies that required an allocation of thirty-three percent of Grand Gulf's capacity costs to Mississippi Power & Light as just and reasonable under the FPA.⁴⁴ That allocation represented Mississippi Power & Light's proportional energy demand on the Mid-

³⁸ Middle South Energy, Inc., 26 F.E.R.C. ¶ 63,044, at 65,102; *Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525, 1532 (D.C. Cir. 1987).

³⁹ *Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525, 1532-33 (D.C. Cir. 1987).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See the discussion of Part II of the FPA, *infra* at text accompanying notes 51-87.

⁴³ See *Mississippi Industries*, 808 F.2d at 1534.

⁴⁴ See *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, at 61,656 (1985) and 32 F.E.R.C. ¶ 61,425, at 61,943 (1985), *aff'd*, *Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525 (D.C. Cir. 1987).

dle South Utilities system.⁴⁵ The FERC based its system-wide allocation on the theory that Middle South Utilities was a highly integrated and coordinated power pool and that Grand Gulf had been planned to meet overall system needs and objectives.⁴⁶

Mississippi Power & Light, while the FERC proceeding was pending, also filed for a retail rate increase with the Mississippi Public Service Commission (State PSC). The State PSC approved a retail rate increase predicated on the revenue that Mississippi Power & Light needed to cover its purchase power expenses associated with the thirty-three percent allocation of Grand Gulf power as ordered by the FERC. The Attorney General of Mississippi and consumer groups appealed the State PSC retail rate increase approval to the Mississippi Supreme Court on grounds, *inter alia*, that the State PSC had violated its duty to set retail rates that reflected a fair rate of return which, in turn, was to be based on prudently-incurred expenses. The Mississippi Supreme Court agreed and held that it was error for the State PSC to grant a retail rate increase without first examining the prudence of the management decisions that led to the construction of the Grand Gulf nuclear power plant.⁴⁷

The Grand Gulf plant was not built and brought on line until 1985. By that time, flattened growth in Middle South Utilities system demand, lower fossil fuel prices, soaring increases in construction costs, and increased construction and regulatory delays resulted in a completed plant with costly and unneeded capacity.⁴⁸ The eventual cost of the Grand Gulf nuclear power plant rose to over four times the original projections to \$3.6 billion.⁴⁹ Wholesale electric rates, reflected as rate base components of Mississippi Power & Light's retail rates, rose correspondingly to absorb the escalated Grand Gulf costs. The impact on Mississippi retail consumers, as a result of the flow-through of expenses of the FERC-mandated Grand Gulf electric power allocations (at the ordered wholesale rate), was that operating expenses in the retail rates of Mississippi Power & Light (approved by the State PSC) were higher than they otherwise would have been if the State PSC had cut off those expenses at the retail pocket. It was the wholesale rates and allocations of Grand Gulf power to Mississippi Power & Light, as ordered by the FERC, that the State of

⁴⁵ Middle South Energy, Inc., 26 F.E.R.C. ¶ 63,044, at 65,110 (1984).

⁴⁶ *Id.*

⁴⁷ See *State ex rel. Pittman v. Mississippi PSC*, 506 So.2d 978 (Miss. 1987).

⁴⁸ *Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525, 1533, 1555 (D.C. Cir. 1987).

⁴⁹ This compares with a 1974 estimated cost of the plant of \$875 million. See *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 850 F.2d 1069, 1071 (5th Cir. 1988).

Mississippi attempted, on prudence grounds, to prevent the State PSC from passing through to Mississippi ratepayers as an operating expense component of the retail rate set by that state agency.

III. THE JURISDICTIONAL "BRIGHT LINE" AND THE MP&L DECISION

The Supreme Court in *MP&L* reversed the Mississippi Supreme Court's decision, characterizing it as a state "effort to invade the province of federal authority" that "must be rejected."⁵⁰ In ruling that the jurisdictional "bright line" between state and FERC authority over public utilities had been crossed by the State of Mississippi, the Supreme Court affirmed the overlapping statutory, judicial, and constitutional premises upon which that jurisdictional line is drawn. Those premises are found in Part II of the Federal Power Act (FPA), the filed rate doctrine, preemption principles, and interstate commerce.

A. *Part II of the Federal Power Act*

The Supreme Court in *MP&L* relied on Congress' enactment of Part II of the FPA as a primary reason to extend the jurisdictional "bright line" in a way that affords the FERC exclusive jurisdiction over the wholesale rates and allocations of Grand Gulf nuclear power.⁵¹ The Supreme Court stressed that where, as here, the Federal Power Act establishes federal jurisdiction, the "bright line" must be "drawn" to exclude state jurisdiction.⁵² Justice Scalia's concurring opinion was emphatic in invoking Part II of the FPA as a basis for extending the jurisdictional line to bring issues of the "prudence" of a particular utility's decision to join a power pooling arrangement with affiliated companies within exclusive federal jurisdiction.⁵³

Prior to 1935, the federal government had minimal regulatory power over the electric business.⁵⁴ State regulatory jurisdiction over private utilities in ratemaking, was and remains, confined to retail

⁵⁰ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428, 2442 (1988).

⁵¹ *Id.* at 2440.

⁵² *Id.* Of course, where, as in *Arkansas Electric Coop. Corp. v. Arkansas PSC*, 461 U.S. 375, 384 n.8 (1983), it is clear that "Congress did not intend to subject rural electric cooperatives [as opposed to investor-owned utilities] to the federal regulatory scheme" of the FPA, then state regulatory jurisdiction is not preempted.

⁵³ *Id.* at 2443.

⁵⁴ The federal government regulated the surplus electric power sales from irrigation dams under the Reclamation Act of 1902, 43 U.S.C. §§ 372-91 (1982), and it regulated the licensing of private hydroelectric projects located on navigable waters of the United States with the passage of Part I of the FPA in 1920, 16 U.S.C. §§ 791-823 (1982). Part I of the FPA also established the Federal Power Commission (FPC) to carry out licensing duties.

electric rates. State PUCs generally have regulated retail rates in one of four ways: (1) the fair value method,⁵⁵ (2) the prudent investment method,⁵⁶ (3) the amortization of costs method,⁵⁷ or (4) the used and useful method.⁵⁸ The fair value method required rates to be determined according to the actual present value of the assets employed in the public service. Under the prudent investment method, a utility that makes a prudent investment decision, for example to build a new power plant that later has to be cancelled or abandoned based on information reasonably available to it at the time of its decision, is permitted to recover the costs associated with that decision in retail rates. The used and useful method requires that utility property be used and useful in providing service to customers before costs may be included in a utility's rate base. The amortization of costs method permits utilities to recover plant cancellation or abandonment costs in installments over a period of years. Since the United States Supreme Court's decision in *FPC v. Hope Natural Gas Co.*,⁵⁹ courts, both federal and state, generally have deferred to the rate determinations of the FERC and state PUCs and have not questioned the rate method employed by them as long as the "end result" is "fair" and "reasonable."⁶⁰

In 1927 the Supreme Court in the *Attleboro* case,⁶¹ for the first

⁵⁵ See *Smyth v. Ames*, 169 U.S. 466 (1898).

⁵⁶ See *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276 (1923).

⁵⁷ See *In re Boston Edison Company*, 46 P.U.R. 4th 431, 471-73 (Mass. Dep't Pub. Utils. 1982).

⁵⁸ See *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609 (1989); *In re Pub. Serv. Co. of N.H.*, 130 N.H. 265, 539 A.2d 263 (1988) *cert. denied*, 109 S.Ct. 858 (1989).

⁵⁹ 320 U.S. 591 (1944).

⁶⁰ See generally, TOMAIN & HICKEY, *supra* note 3, at 159-220; Gary & Roach, *The Proper Regulatory Treatment of Investment in Cancelled Utility Plants*, 13 HOFSTRA L. REV. 469 (1985); Olson, *Statutes Prohibiting Cost Recovery for Cancelled Nuclear Power Plants: Constitutional? Pro-Consumer?*, 28 J. URB. & CONTEMP. L. 345 (1985).

In *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609 (1989), the Supreme Court in dicta seemed to leave the door open for utilities to challenge the used and useful method as an unconstitutional taking of property in certain circumstances. The Supreme Court rejected the challenge by an electric utility to the Pennsylvania PUC's denial of the recovery of cancelled nuclear plant costs in retail electric rates through a 10 year amortization because the uncompleted plant was not used and useful. However, the Supreme Court did imply that such a challenge to PUC exclusion of cancelled or abandoned nuclear power plant costs might be sustained if (1) the resulting "reduced rates jeopardize the financial integrity" of the utility or (2) it is "demonstrated that [the retail] rates are inadequate to compensate current equity holders for the risk associated with their investments" *Id.* at 618. In *Duquesne*, the effect on the utility met neither criteria because the denial of the amortized recovery of the cancelled nuclear plant costs to the utilities involved reduced annual revenue allowance by only .5% or less. *Id.*

⁶¹ *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

time, but not the last, rebuffed attempts by state regulatory bodies to regulate interstate transmissions of wholesale sales of electricity.⁶² The result of that judicial rebuff was to create a regulatory vacuum called, appropriately, the "Attleboro Gap." That is, state authority over retail rates could not extend to interstate wholesale electric sales which were left unregulated. The *Attleboro* Court was not attempting to confine *federal* regulation, for there was none at the time, but to confine *state* regulation. Initially, the "Attleboro Gap" caused few problems because unregulated interstate wholesale transactions were few in number.

In 1935 Congress filled the "Attleboro Gap" with Part II of the FPA.⁶³ The *Attleboro* decision and Part II of the FPA are inseparable and must be read together when considering the line between state and FERC jurisdiction over private electric utilities.⁶⁴ The reflection of *Attleboro* in Part II of the FPA is unmistakable. Part II clearly and unambiguously indicates the limits of state jurisdiction and articulates the exclusive power of the FERC to set just and reasonable rates for interstate wholesale sales of electricity by private utilities. The seminal lesson of *Attleboro* and Part II of the FPA, which has been challenged without success time and again by state authorities (including the State of Mississippi in *MP&L*), is that state regulatory power over private utilities may not encroach into the area of "interstate wholesale electric sales."

Section 201(a) of the FPA, contains the general policy declaration of Congress in enacting Part II of the FPA. Section 201(a) does not appear to bar, as a general matter, the assertion of FERC's exclusive jurisdiction in appropriate circumstances even where states previously may have exercised regulatory jurisdiction.⁶⁵ In direct response

⁶² *Id.*

⁶³ 16 U.S.C. §§ 824 to 825r (1982).

⁶⁴ As the Supreme Court said in *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 311 (1953):

Part II [of the FPA] is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate . . . sales for resale in interstate commerce, while the former established federal jurisdiction over such sales of the FPA.

⁶⁵ See *Attleboro*, 273 U.S. at 83. The Conference Report on the FPA, H.R. Rep. No. 1903m, 74th Cong., 1st Sess. 74, makes clear that Section 201(b) "remove[s] any doubt as to the Commission's [FERC] jurisdiction over facilities used for generation . . . of electric energy to the extent provided in other sections [of the FPA]" The D.C. Circuit quoted this language in interpreting § 201(b) in *Mississippi Indus. v. F.E.R.C.*, 808 F.2d 1525, 1543 (D.C. Cir. 1987).

Section 201(a), 16 U.S.C. § 824 (1982), articulates congressional policy in establishing exclusive federal regulatory jurisdiction by declaring that "Federal regulation" of interstate wholesale sales of electricity is "necessary in the public interest" as follows:

It is declared that the business of transmitting and selling electric energy for ultimate

to *Attleboro*, Section 201(a) acknowledges the limits of state jurisdiction over private utilities by providing that federal jurisdiction extends "to those matters which are not subject to regulation by the States."⁶⁶ In other words, an exercise of FERC jurisdiction where a clear federal interest is established would seem to be wholly consistent with congressional policy in enacting Part II of the FPA. For example, included in those federal interest "matters not subject to" state regulation is the FERC's exclusive interstate wholesale ratemaking authority specifically conferred by Sections 205 and 206 of the FPA. Other federal interests expressed by Congress in Part II of the FPA in favor of exclusive federal regulation over private utilities in appropriate circumstances would be in Section 202 over power pooling, interconnected utility operations, national emergencies, and electric transmissions in interstate or foreign commerce.⁶⁷ Federal interests might arguably also be established in Section 203⁶⁸ over the sale or lease of utility assets and in Section 204⁶⁹ over the issuance of securities.

Section 201(a) of the FPA, of course, does not control the *meaning* of specific grants of jurisdiction in other sections of the FPA.⁷⁰ Section 201(a), however, does directly reflect the origins of Part II as an

distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this [Part and the Part next following]. . . and of that part of such business which consists of the transmission of electric energy in interstate commerce . . . is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

⁶⁶ *Id.*

⁶⁷ 16 U.S.C. § 824a (1982).

⁶⁸ *Id.* § 824b.

⁶⁹ *Id.* § 824c.

⁷⁰ In *FPC v. Southern Cal. Edison Co. (Colton)*, 376 U.S. 205, 215 (1964), citing *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945), Justice Brennan wrote for the majority that § 201(a) was indeed a "policy declaration . . . of great generality," and that "[i]t cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." The limited impact of Section 201(a) on other specific provisions of the FPA reflects a fundamental principle of statutory interpretation. See *generally Bissette v. Colonial Mort. Corp. of D.C.*, 477 F.2d 1245, 1246 (D.C. Cir. 1973) (a section of statute declaring its purpose has been said not to constitute an "operative section" capable of overriding other "specific provisions" in the act); *Samuels v. District of Columbia*, 650 F. Supp. 482, 484 (D.D.C. 1986) (a statutory preamble that is "merely a general statement of policy . . . and certainly does not override the specific requirements laid out in the body of the statute"); *Council of Haw. Hotels v. Aghsalud*, 594 F. Supp. 449, 453 (D. Haw. 1984) ("[A] general statutory section setting forth legislative policy and purpose neither constitutes an operative section of the statute nor prevails over more specific provisions."). However, see Justice Brennan writing for the joint dissent in *Mississippi Power & Light v. Mississippi ex rel. Moore*, 108 S.Ct. 2428, 2447 (1988) (discussing Section 201(a) in apparent contravention of his opinion in *Colton* and basic principles of statutory interpretation).

outgrowth of *Attleboro* in the sense that it acknowledges, statutorily, the limits imposed by the *Attleboro* decision on state jurisdiction and it affirmatively grants to the FERC exclusive jurisdiction over federal interests in the form of interstate electric transmissions and wholesale sales.⁷¹ Section 201(b)(1),⁷² plainly provides for exclusive federal jurisdiction under Part II of the FPA over a private utility's "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," as well as "over all facilities" used for interstate energy transmission and interstate wholesale sales.⁷³ Section 201(b)(1) thus reflects congressional policy that, to the extent "specifically provided" under other sections of the FPA (e.g., interstate wholesale rates), federal jurisdiction may, in appropriate circumstances, encompass electric generation, intrastate transmissions of electricity, and local distribution facilities.

Sections 205 and 206 of the FPA⁷⁴ affirmatively bestow on the FERC exclusive jurisdiction over interstate wholesale rates and contracts affecting interstate wholesale rates for energy produced from electric generating facilities. In Section 205(a), "[a]ll rates and charges" for interstate wholesale energy and for interstate transmissions of energy made by public utilities must be "just and reasonable" or they will be "declared to be unlawful" by the FERC.⁷⁵ In addition, Section 205(b) prohibits rate discrimination by forbidding public utilities to "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect . . . between locali-

⁷¹ See, e.g., *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 301-04 (1952) ("We do not agree" that the Federal Power Commission jurisdiction "only begins where local regulatory power ends." (emphasis added)).

⁷² 16 U.S.C. § 824(b)(1) (1982).

⁷³ *Id.* Section 201(b)(1) provides:

The provisions of this [Part II] shall apply to the transmission of electric energy in interstate commerce *The Commission shall have jurisdiction over all facilities for such transmission and sale of electric energy, but shall not have jurisdiction, except as specifically provided in this [Part and the Part next following], . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce* (emphasis added).

Id.

⁷⁴ 16 U.S.C. § 824d, 824e (1982).

⁷⁵ Section 205(a), 16 U.S.C. § 824d(a) (1982) provides in relevant part as follows:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

ties”⁷⁶ Section 206 empowers the FERC to remedy unjust, unreasonable, or unduly discriminatory rates and charges and related contracts.⁷⁷ The FERC has the duty to establish the just and reasonable rate and to correct undue discrimination for “any” jurisdictional transmission or sale.⁷⁸ It would seem that the mandatory federal consideration of the justness and reasonableness of rates necessarily involves, to some extent, a prudence inquiry.⁷⁹ A state prudence inquiry arguably would overlap the exclusive federal inquiry into wholesale rates and allocations.

FERC jurisdiction under Sections 205 and 206 also extends to allocations and contracts providing for allocations of electric energy subject to interstate wholesale rates. That is, the FERC has exclusive jurisdiction, not only to approve interstate wholesale rates and contracts affecting those rates, but also to mandate specific allocations of electric power under those rates.⁸⁰ Once the FERC allocates wholesale power, a state regulatory body must recognize that allocation when it exercises its authority over retail rates.⁸¹ This exclusive FERC jurisdiction to mandate interstate wholesale power allocations already has been endorsed in several multistate-affiliated-utility contexts among both affiliated and unaffiliated electric utilities.⁸² If the

⁷⁶ Section 205(b), 16 U.S.C. § 824d(b) (1982) provides in relevant part as follows:

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission . . . maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

⁷⁷ Section 206(a), 16 U.S.C. § 824e(a) (1982) states in relevant part as follows:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

⁷⁸ See *supra* notes 76 and 77.

⁷⁹ See *Appalachian Power Co. v. Pub. Serv. Comm'n of W.Va.*, 812 F.2d 898, 905 (4th Cir. 1987), where the 4th Circuit found that a state “prudence inquiry” was inseparable from a FERC “justness and reasonableness” inquiry under §§ 205 and 206 of the FPA.

⁸⁰ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

⁸¹ *Id.*

⁸² For example, in *State of Minnesota v. FERC*, 734 F.2d 1286 (8th Cir. 1984), the Eighth Circuit rejected Minnesota PUC challenges to FERC jurisdiction over a coordinating agreement that, *inter alia*, allocated costs, on the basis of each utility’s responsibility for incurring such costs, through a rate of return formula among affiliated companies with integrated operations in Minnesota, North Dakota, South Dakota, Wisconsin, and Michigan. The Court held that the FERC “possessed jurisdiction to review and approve the proposed amendment” to the coordination agreement that made those allocations. *Id.* at 1289. See *Northern States Power Co. v.*

FERC has jurisdiction over agreements involving unaffiliated electric systems, there would seem to be no reason to deny similar jurisdiction over coordination agreements among operating subsidiaries of a public utility holding company such as Middle South Utilities.⁸³

Significantly, FERC jurisdiction under the FPA to set interstate wholesale power *allocations* was already decided specifically with regard to the Grand Gulf allocations of power among the four operating companies, including Mississippi Power & Light.⁸⁴ Here the FERC's jurisdiction over allocations was held to be "unquestionable."⁸⁵ On this point, the *MP&L* Court unanimously agreed. The joint dissent of Justices Brennan and Marshall did "not question" the prior decisions on this point.⁸⁶

Finally, although not discussed by the *MP&L* decision, it would seem that the jurisdictional "bright line" should be drawn in a way that encourages interstate power pooling and integrated utility operations. Section 202(a) of the FPA imposes on the FERC the affirmative duty to promote the voluntary interconnection and coordination of utility facilities.⁸⁷ A construction of the jurisdictional scope of the

Minnesota Pub. Util. Comm'n, 344 N.W.2d 374 (Minn.), *cert. denied*, 467 U.S. 1256 (1984); Northern States Power Co. v. Hagen, 314 N.W.2d 32 (N.D. 1981); *see also* Central Iowa Power Coop. v. FERC 606 F.2d 1156, 1167-8 (D.C. Cir. 1979) (the FERC has jurisdiction under Section 206 to decide whether a voluntary power pooling agreement among 31 unaffiliated electric systems was unjust, unreasonable, or unduly discriminatory).

⁸³ *See* Appalachian Power Co. v. Pub. Serv. Comm'n of W.Va., 812 F.2d 898 (4th Cir. 1987), where the Fourth Circuit rejected a West Virginia Public Service Commission attempt to assert state authority over an agreement allocating costs under an interstate electric energy transmission agreement among the operating companies of the AEP multistate holding company tight power pool. The Fourth Circuit held that "State regulatory authorities must give effect in calculating retail rates to the costs and allocations reflected in the federally regulated transactions that precede final retail sale of energy." *Id.* at 905.

⁸⁴ *See* Mississippi Indust. v. F.E.R.C., 808 F.2d 1525 (D.C. Cir. 1987); *see also* New Orleans Pub. Serv. Inc. v. Council of New Orleans, 850 F.2d 1069 (5th Cir. 1988).

⁸⁵ Mississippi Indust. v. F.E.R.C., 808 F.2d 1525, at 1542 (D.C. Cir. 1987). ("FERC's allocation of Grand Gulf's costs and capacity like the setting of entitlement percentages in *Nantahala Power & Light*, does . . . directly affect costs and, consequently, wholesale rates. We cannot disregard the Supreme Court's clear and timely message that FERC's jurisdiction under such circumstances is unquestionable.")

⁸⁶ The joint dissent stated:

Indeed, it makes a great deal of sense to read . . . [Part II of the FPA] as allowing FERC to exercise jurisdiction over the allocation of costs among interstate pool members because otherwise every state commission would have a parochial incentive to claim that the costs must be imposed on the utilities located in other States.

Mississippi Power & Light v. Mississippi *ex rel.* Moore, 108 S.Ct. 2428, 2448 (1988).

⁸⁷ 16 U.S.C. § 824a(a) (1982) provides as follows:

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection

FPA should be consistent with this Section 202(a) duty, especially where, as in *MP&L*, jurisdiction over interstate power pooling activities is involved. It seems logical to reject an interpretation of FERC jurisdiction under Part II of the FPA that effectively discourages, rather than encourages, interconnections and coordinated electric utility operations. That is, if each state authority with retail rate jurisdiction were authorized to reject, independently, system-wide wholesale rates and allocations of interstate power pools for the operating companies in each of their respective states, then clearly this would be a disincentive to companies to form and operate power pools. It is plainly stated in Section 202(a) that Congress intended the scope of FERC jurisdiction to facilitate coordinated and interconnected operations rather than to thwart them.

B. *The Filed Rate Doctrine*

The Supreme Court in *MP&L* also applied, in addition to Part II of the FPA, the judicially-crafted filed rate doctrine to extend the jurisdictional "bright line."⁸⁸ The filed rate doctrine requires simply that rates properly on file with the FERC are the *only* rates that may be charged. That is, a private utility has "the right" to the federally-

and coordination of facilities for the generation transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. 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.

The continuing congressional concern with the encouragement of power pooling was affirmed with the enactment of Section 205(a) of PURPA in 1978, 16 U.S.C. § 824a-1(a) (1982), which gives the FERC the power to exempt utilities from state efforts to prohibit or prevent the voluntary coordination of utility operations. This PURPA provision was enacted in recognition that individual state agency efforts to keep retail rates as low as possible might conflict with the electric power supply needs of other neighboring states or might hinder coordination of interstate electric operations. See *POWER POOLING*, *supra* note 16, at 46 and discussion of *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972), *infra* note 84 and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), *infra* text accompanying notes 113-15.

⁸⁸ *Mississippi Power & Light*, 108 S.Ct. at 2439. (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963-64, 970 (1986)). The filed rate doctrine was articulated by the Supreme Court in *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951) ("The right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that in its opinion, it is the only or the more reasonable one.").

filed just and reasonable rate.⁸⁹

The filed rate doctrine precludes state regulatory authorities from exercising their jurisdiction over retail rates in a way that alters, rejects, or ignores the properly-determined interstate wholesale filed rates set by the FERC under the FPA.⁹⁰ Thus, any "trapping" of FERC-mandated wholesale rates reflected as cost components of retail rates by state PUCs is prohibited.⁹¹ This reaffirms the so-called *Narragansett* doctrine. The doctrine, which is a refinement of the filed rate doctrine, is named after the state court decision which held that the Rhode Island PUC, in fashioning retail rates, had to give full effect to the FERC-mandated wholesale rates.⁹² The *Narragansett* court insisted that the consumer-ratepayer's right to the FERC-ordered rate, and no other, be protected. In so doing, the court also recognized that it was protecting utility shareholders from swallowing purchase power expenses legitimately-incurred by the utility.⁹³

Once the FERC makes a final determination of a just and reasonable rate, no regulated company may charge any other rate and the FERC may not thereafter alter that rate. Under the filed rate doctrine a state authority may not retrospectively ignore a rate properly filed and determined to be just and reasonable by the FERC.⁹⁴ If a

⁸⁹ *Id.*

⁹⁰ 16 U.S.C. § 824d(c) (1982). See also 18 C.F.R. § 35.1(a) (1988). The FPA requires regulated electric utilities to file with the FERC all rates and contracts relating to interstate wholesale rates. As mentioned, while all rates must be "just and reasonable," their legality does not hang upon the FERC's approval. 16 U.S.C. § 824d (a). Unless filed rates are challenged, either by an interested party or on the Commission's initiative, the filed rates become the legal rates which are presumed just and reasonable until the FERC ultimately determines they are not. *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 255-56 (Frankfurter, J., dissenting); *Otter Tail Power Co. v. FERC*, 583 F.2d 399, 405-06 (8th Cir. 1978).

⁹¹ *Mississippi Power & Light*, 108 S.Ct. at 2439.

⁹² The court in *Narragansett Elec. Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358, 1362-63 (1977), *cert. denied*, 435 U.S. 972 stated:

In fixing just [retail] rates, the [Rhode Island] PUC must protect both the right of the public utility company and its investors to an opportunity to earn a return reasonably sufficient to maintain the utility's financial integrity . . . and the consumer's right [and obligation] to pay a rate which accurately reflects the cost of service rendered plus a reasonable profit.

. . . .
[N]o matter what method it [the Rhode Island PUC] adopts in considering *Narragansett's* proposed rate increase, it must treat the FPC filed . . . purchase price . . . as an actual operating expense.

⁹³ *Id.*

⁹⁴ See *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981). This would appear to be especially the case, where as here a state authority fails to challenge the filed rate as unjust or unreasonable or imprudent before the FERC despite its participation in those proceedings and its clear opportunity to do so. Arguably, a state authority that spurns a clear opportunity to join an issue before the FERC, such as the prudence issues raised by the State of Mississippi

utility is *required* to charge not only a particular FERC-mandated rate, but is required to take a specific allocation of power as well, then that allocation similarly should not be allowed to be changed indirectly by state PUCs. The discussion of preemption, below, makes this clear.

C. Preemption Principles

The Supreme Court in *MP&L* also relied on preemption principles to preclude state inquiries into "the prudence of the management decisions that led to the construction and completion of [the] Grand Gulf" plant to the extent those inquiries interfered with FERC-mandated rates and electric power allocations.⁹⁵ Preemption, as applied here by the Supreme Court, means simply that if federal regulatory jurisdiction of the FERC is established,⁹⁶ otherwise lawful state jurisdiction is precluded. Preemption is grounded in the supremacy clause of the United States Constitution.⁹⁷ In the narrow context of regulatory jurisdiction over nuclear power plant costs, preemption questions arise in conjunction with the Federal Power Act or the commerce clause.⁹⁸ Federal and state courts have applied preemption principles to draw the jurisdictional "bright line" in a way that requires state PUCs to give full effect to FERC-approved interstate wholesale rates and electric power allocations.⁹⁹ Special mention

later in state courts, should be precluded from raising the issue later in a more favorable forum. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971).

⁹⁵ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428, 2431 (1988).

⁹⁶ For a discussion of Part II of the FPA and the filed rate doctrine, see *supra* at text accompanying notes 51-94.

⁹⁷ Article VI, Clause 2 provides in relevant part:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

⁹⁸ See *supra* text accompanying notes 51-87 for a discussion of Part II of the FPA and *infra* text accompanying notes 109-16 for a discussion of the interstate commerce clause.

⁹⁹ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-67 (1986) (NCUC's allocation of entitlement and purchase power is preempted by federal law. FERC has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers.); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987) ("[O]nce the FERC has allocated wholesale power, a state regulatory body, may not refuse to recognize that allocation."); *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444, 1452-53 (8th Cir. 1987) ("State Commissions, in other words must respect, defer to, and accept FERC's determinations with respect to wholesale rates, and may not re-examine the reasonableness of these determinations in the context of a retail-rate proceeding We hold that the ordinary Missouri statutory process of suspension and investigation is not pre-empted by the Federal Power Act."); *Appalachian Power Company v. Pub. Serv. Comm'n*, 812 F.2d 898,

needs to be made of two preemption cases, *Pike County*¹⁰⁰ and *Nantahala*,¹⁰¹ that relate directly to the treatment of preemption principles and the jurisdictional "bright line" in the *MP&L* decision.

In *Pike County*, a Pennsylvania state court distinguished between a state commission's obligation to reflect FERC-mandated wholesale rates, as legitimate purchase power expenses in retail rates, and a state commission's right to rule on the prudence of any *option*, exercised by a retail utility, to purchase electric power subject to a FERC-mandated rate. The *Pike County* court was concerned with a set of facts that falls safely within state jurisdiction and which does not encroach upon federal jurisdiction. *Pike County* did not involve

902 (4th Cir. 1987) ("FERC's jurisdiction over interstate wholesale rates is exclusive."); *Utah v. FERC*, 691 F.2d 444, 446 (10th Cir. 1982) ("Generally speaking, the cases hold that where there is a sale at wholesale of electric energy in interstate commerce that the jurisdiction of the FERC is exclusive."); *Public Serv. Co. v. Public Util. Comm'n*, 644 P.2d 933, 937-38, 940 (Colo. 1982) ("The reach of federal jurisdiction under the Natural Gas Act is a constitutional exercise of federal power under the Commerce Clause of the U.S. Constitution. As a result, the Act preempted the authority of state commissions to regulate the rates charged for natural gas by interstate pipeline companies. . . . The jurisdiction to determine the reasonableness of the interstate wholesale rate charged by CIG to Public Service & Western Slope therefore rests exclusively with FERC."); *Washington Gas Light Co. v. Public Serv. Comm'n*, 508 A.2d 930, 941 (App. D.C. 1986) (citing *Peoples Counsel v. Public Serv. Comm'n*, 444 A.2d 975 (App. D.C. 1982)) ("The Public Service Commission is preempted by the Federal Power Act from reviewing the reasonableness of the wholesale rate approved by the FERC."); *Office of Pub. Counselor v. Indiana & Mich. Elec. Co.*, 416 N.E.2d 161, 164 (Ind. Ct. App. 1981) ("As this agreement involves the wholesale of electricity in interstate commerce, pursuant to the Federal Power Act, regulation of the rates contained therein is within the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC)."); *Eastern Edison Co. v. Department of Pub. Util.*, 388 Mass. 292, 446 N.E.2d 684, 688 (1983) ("Thus, the power to establish rates for interstate sales at wholesale of electric energy is vested exclusively in FERC."); *Northern States Power Co. v. Minnesota Pub. Serv. Comm'n*, 344 N.W.2d 374, 378 (Minn. 1984), *cert. denied*, 467 U.S. 1256 (1984) ("Moreover, that Court indicated Congress intended to draw a 'bright line' easily ascertainable between state and federal jurisdiction making unnecessary a case-by-case analysis. FERC jurisdiction is plenary and extends to all wholesale sales in interstate commerce."); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 36 (N.D. 1981) ("[I]n enacting the Federal Power Act, [Congress] intended to vest exclusive federal authority in the Federal Power Commission to regulate interstate wholesale utility rates."); *Narragansett Elec. Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358, 1361 (1977), *cert. denied*, 435 U.S. 972 (1978) ("We conclude, therefore, that jurisdiction to determine the reasonableness of the wholesale rate charged by NEPCO to Narragansett rests exclusively with the FPC."); *City of Chicago v. Illinois Commerce Comm'n*, 13 Ill. 2d 607, 150 N.E.2d 776, 780 (1958) ("The Natural Gas Act of 1938 vested the power to fix rates for natural gas transported and sold to distributory companies in interstate commerce exclusively in the FPC and preempted any right which might have existed in the States to regulate such rates."); *Citizens Gas Users Ass'n v. Public Util. Comm'n*, 165 Ohio St. 536, 138 N.E.2d 383, 384 (1956) ("[P]ower to fix rates for natural gas transported and sold in interstate commerce is vested exclusively in the Federal Power Commission, and the State Public Utilities Commission has no authority to interfere with rights thus established.").

¹⁰⁰ *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 77 Pa. Commw. 268, 465 A.2d 735 (1983).

¹⁰¹ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

any overlap, on prudence or other grounds, between state and federal jurisdiction. The *Pike County* court accurately stated:

The FERC . . . determine[s] whether it is just and reasonable for . . . [a wholesale] company [i.e. a utility] to charge a particular [wholesale] rate, but makes no determination of whether it is just and reasonable for *Pike* [the retail utility] to incur such a rate as an expense. The [state] PUC, on the other hand, has no jurisdiction to analyze . . . [the wholesale utility's] cost of service data and makes no determination as to the reasonableness for . . . [the wholesale utility] to charge its rates. The [state] PUC focuses on *Pike* [the retail utility] and its cost of service data to determine whether it is reasonable for *Pike* to incur such costs in light of available alternatives The regulatory functions of the FERC and the PUC thus do not overlap, and there is nothing in the federal legislation which preempts the [state] PUC's authority to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority (emphasis in original).¹⁰²

The *Pike County* decision mirrors accurately the current placement of the jurisdictional "bright line" which depends upon whether, in the court's words, the "light of available alternatives" shines.¹⁰³ If the retail utility has an *alternative* (i.e., a choice or option) to purchase or not to purchase power at a FERC-mandated wholesale rate, the prudence of the retail utility decision to choose one alternative or the other safely falls on the state jurisdiction side of the bright line and is not preempted. However, when the FERC properly fixes allocations of power it removes the "available alternatives" and requires purchases of a specific amount of electric power at the FERC-mandated rates. At that point, federal jurisdiction attaches, and those required purchases must be given full effect as an operating expense by the state commission under preemption principles. *Pike County* has been followed by both the FERC and the courts.¹⁰⁴

In the second case, *Nantahala*, the Supreme Court held, consistently with *Pike County*, that exclusive federal regulatory jurisdiction

¹⁰² *Pike County*, 465 A.2d at 738.

¹⁰³ *Id.*

¹⁰⁴ See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986); *Kentucky W.Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988); *In re Sinclair Machine Prod., Inc.* 126 N.H. 822, 498 A.2d 696, 703 (1985); *Spence v. Smyth*, 686 P.2d 597, 600 (Wyo. 1984); *Pacific Power & Light Co.*, 27 F.E.R.C. ¶ 61,080 (1984); *Southern Co. Serv., Inc.*, 26 F.E.R.C. ¶ 61,360 (1984); *Philadelphia Elec. Co.*, 15 F.E.R.C. ¶ 61,264 (1981); see also Duffy, *Will the Supreme Court Lose Patience with Prudence?*, 9 ENERGY L.J. 83 (1988); Hobelman, *The Narragansett Decision and Its Aftermath*, 6 ENERGY L.J. 33, 48-52 (1985).

under the FPA extends not only to FERC-mandated *rates* but also to FERC-mandated *allocations* of electric power properly found to be just and reasonable.¹⁰⁶ Justice O'Connor in *dicta* in *Nantahala* referred to *Pike County* and stated that where a retail utility has power "available elsewhere," it is "assumed" the utility has a choice to buy or not to buy a particular "quantity" of interstate wholesale electric power at a FERC-mandated rate.¹⁰⁶ In those circumstances, and impliedly where there is no overarching federal interest, a state PUC might legitimately inquire into the reasonableness and prudence of the utility selection among those available power purchase choices. As stated in *Nantahala*:

Without deciding this issue, we may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price (emphasis in original).¹⁰⁷

¹⁰⁶ *Supra* note 60. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). In *Nantahala*, two utility companies, Nantahala Power & Light Co. (Nantahala) and Tapoco, Inc. (Tapoco) were wholly owned subsidiaries of the Aluminum Company of America (Alcoa) and each owned hydroelectric power plants on the Little Tennessee River. Nantahala served customers at wholesale under rates regulated by the FERC and at retail under rates regulated by the North Carolina Utilities Commission (NCUC). Tapoco's sole function was to manage the power that went to Alcoa. Tapoco owned hydroelectric facilities in Tennessee and North Carolina. Nantahala and Tapoco turned most of the electricity generated by these plants over to the Tennessee Valley Authority (TVA), a federal power marketing authority. The hydroelectric power turned over to TVA was variable in the sense that TVA could call on that power for its system (grid) as needed. In exchange for that power, Nantahala and Tapoco jointly received from TVA a fixed supply of low-cost "entitlement" power. The entitlements to each company were apportioned and fixed by agreement. Both also purchased higher-cost purchase power from TVA when its TVA entitlements were insufficient to meet their loads. The agreements among TVA, Nantahala and Tapoco were filed with, and were regulated by, the FERC. Nantahala subsequently applied to the NCUC to raise its intrastate retail rates. The NCUC issued an order that apportioned the shares of TVA entitlement power between Nantahala and Tapoco differently from the allocation of entitlement power already ordered by the FERC under the agreements on file with the FERC. The NCUC allocation gave North Carolina retail customers a greater share of lower-cost entitlement power and a resulting overall lower rate for Nantahala's retail customers. The different allocation also resulted in a higher rate for Tapoco power sales to Alcoa. Both companies challenged the NCUC's order in the North Carolina state courts. The Supreme Court of North Carolina held that the NCUC's order was not preempted by federal law because it did not affect the interstate wholesale rates over which the FERC had exclusive jurisdiction under § 201(b) of the FPA. The Court further held that the order did not attempt to reform or alter the agreements which the two companies had filed with the FERC and did not violate either the supremacy or commerce clauses. *State ex rel. Util. Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397 (1985). The companies appealed and the United States Supreme Court reversed.

¹⁰⁶ *Nantahala*, 476 U.S. at 972.

¹⁰⁷ *Id.* Indeed, any other interpretation of that *dicta* would seem to be inconsistent with the

Justice O'Connor's *dicta* in *Nantahala* presents a valid but untested statement of the law. It would seem fair to say that the statement represents "good law" to the extent that either there is no federal interest requiring a federal prudency determination, or the State PUC has not acted unreasonably in frustration of some federal interest.¹⁰⁸ Certainly, *Nantahala* confirms that electric power is *not* "available elsewhere" where the FERC orders an allocation of a particular quantity of power at a specific wholesale rate. In those circumstances, a utility must purchase the allocated amount and a state PUC must reflect that FERC-required allocation (i.e. purchase) at the FERC-approved wholesale rate in its retail rates as an operating expense component of retail prices. The state authority is preempted and may not be exercised to cut off that mandated purchase at the retail pocket. To so trap those expenses would give state authorities a veto power over FERC decisions in violation of the jurisdictional bright line. Thus, the *MP&L* decision firmly roots into the legal landscape the obligation of state regulatory authorities to pass through FERC-mandated *allocations* of electric power at the approved wholesale rate as operating expenses in retail rates.

D. Interstate Commerce

The *MP&L* decision ends with the following invocation:

There "can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive." Consequently, a state agency's "efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." Mississippi's effort to invade the province of federal authority must be rejected. The judgment of the Mississippi Supreme Court is reversed. (citations omitted).¹⁰⁹

Under the Commerce Clause of the United States Constitution, Article I, Section 8, Congress has the power "to regulate Commerce . . . among the several States." The Commerce Clause may provide a premise for drawing the jurisdictional "bright line" between state and

holding of the case that the FERC has exclusive jurisdiction to mandate interstate wholesale power allocations.

¹⁰⁸ See *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 612 (3d Cir. 1988) (Where a State PUC acts "evenhandedly" to protect the retail consumer in furtherance of "a legitimate local purpose" and the federal interest, here in interstate commerce, is "incidental," PUC assertion of jurisdiction is proper.). The implication is that if a state PUC acts unreasonably and the federal interest is not incidental, FERC, rather than state PUC, jurisdiction should attach.

¹⁰⁹ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428, 2442 (1988).

federal spheres of authority independent of Part II of the FPA.¹¹⁰ In contrast to the invocation of interstate commerce in the *MP&L* decision, the Supreme Court in *Nantahala* pointedly refrained from engaging in interstate commerce analysis.¹¹¹ In *Nantahala*, the Supreme Court declined to base its decision on interstate commerce principles and emphasized that because it applied Part II of the FPA to discern the jurisdictional bright line, it was "unnecessary . . . to reach . . . arguments [that state exercise of jurisdiction] . . . placed an undue burden on interstate commerce in violation of the Commerce Clause."¹¹² That reluctance arguably has been overcome by the Court in *MP&L*. That is, although independent bases clearly existed for its decision just as existed in *Nantahala*, the Court pointedly invoked interstate commerce as an additional ground upon which to confine state regulatory jurisdiction here. Indeed, the Supreme Court in other circumstances has found that interstate commerce was an appropriate premise on which to draw the jurisdictional bright line over the regulation of public utilities. In *FPC v. Florida Power & Light Co.*, the Supreme Court indicated that federal regulation of intrastate electric power transmissions was proper because of the interstate nature of the generation and supply of electric power.¹¹³ And in *FERC v. Mississippi*¹¹⁴ the Supreme Court similarly observed in rejecting the State of Mississippi's challenge to FERC jurisdiction under the Public Utility Regulatory Policies Act:

[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect Indeed, the utilities

¹¹⁰ See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) ("The Commerce Clause — independently of the Federal Power Act — restricts the ability of the states to regulate matters affecting interstate trade in hydroelectric energy"). In that case the State of New Hampshire was held to have acted inconsistently with the commerce clause by attempting to restrict the flow of privately owned and produced electricity in interstate commerce. *Id.* at 344. It is admittedly not entirely clear that the Court in *MP&L* was invoking interstate commerce independently of the Federal Power Act. However, modern commerce clause jurisprudence arguably applies to the jurisdictional "bright line" analysis involving private utilities in light of both the heavy federal interest expressed in Part II of the FPA and the Supreme Court's acknowledgement, in other cases mentioned in the text, of the pervasive effect of electric energy on interstate commerce.

¹¹¹ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 973 (1986).

¹¹² *Id.* Justice Douglas in dissent in *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 471 (1972), observed that expansive application of the commerce clause to the electric industry would "mean that every privately owned interconnected facility in the United States . . . is within the FPC's jurisdiction."

¹¹³ *Florida Power & Light*, 404 U.S. 463 (1972).

¹¹⁴ 456 U.S. 742 (1982).

involved in this very case, Mississippi Power & Light Company and Mississippi Power Company, sell their retail customers power that is generated in part beyond Mississippi's borders, and offer reciprocal services to utilities in other States The intrastate activities of these utilities, although regulated by the . . . [State PSC] bring them within the reach of Congress' power over interstate commerce.¹¹⁵

The lesson here of *MP&L* may be that the jurisdictional "bright line" should be extended in the future not only on the premises of the FPA, the filed rate doctrine, and preemption principles, but also by discrete reference to the commerce clause. If so, future state rate regulation of nuclear power plant costs that, under modern commerce clause jurisprudence, has a substantial effect on interstate commerce, which is not "indirect," "speculative," or "incidental," may unconstitutionally cross the jurisdictional "bright line."¹¹⁶

IV. THE EXTENSION OF THE JURISDICTIONAL "BRIGHT LINE"

The extension of the "bright line" to determine spheres of state-federal jurisdiction over costs associated with inoperable, cancelled or abandoned nuclear power plants depends on the jurisprudential conclusions to be drawn from the majority's opinion in *MP&L*. In addition, the joint dissent raises, by implication, certain practical considerations which require comment. Furthermore, there are several future factual scenarios under which federal interests might be sufficient to justify exercise of exclusive FERC jurisdiction.

A. *Conclusions to Be Drawn from MP&L*

The following conclusions, drawn from the *MP&L* decision, serve as an appropriate departure point from which to extend the jurisdictional "bright line" to determine state-federal spheres of public utility regulatory jurisdiction in the future:

1) The jurisdictional "bright line" is likely to be extended by agencies and courts by continued reliance on the interrelated foundational premises of Part II of the FPA, the filed rate doctrine, preemption principles, and interstate commerce.

2) The *MP&L* decision underscores the continuing vitality of both the *Nantahala* and *Pike County* decisions. In the absence of overriding federal interests, general exercises of purchase power options by

¹¹⁵ *Id.* at 757.

¹¹⁶ See *Northwest Central Pipeline Corp. v. Kansas State Corp. Comm'n*, 57 U.S.L.W. 4302, 4311 (U.S. Mar. 6, 1989). See also *Arkansas Elec. Coop. Corp. v. Arkansas PSC*, 461 U.S. 375, 389-93 (1983).

electric utilities coming within state PUC jurisdiction and FERC-mandated electric rates and power purchases (i.e., allocations) are within exclusive FERC jurisdiction and fall outside state PUC jurisdiction.

3) The Court in *MP&L* unanimously agreed that once FERC jurisdiction is established, and it orders a specific power allocation, a state PUC must fully reflect those required allocations at the FERC-approved wholesale rate in state-approved retail rates.

4) The *MP&L* decision makes clear that where FERC jurisdiction is not established and no specific electric power allocation has been mandated by FERC, a state PUC, acting reasonably under its rate making standards, may exclude from retail rates the costs associated with electric power supply decisions.

5) The *MP&L* decision establishes that a corporate restructuring that brings nuclear power plant costs and power allocations under FERC jurisdiction is not *per se* invalid. However, the *MP&L* decision does not detail the circumstances, other than in the context of a highly-integrated tight power pool comprised of affiliated utilities, under which corporate restructuring may justify attachment of exclusive FERC jurisdiction.

6) Narrowly viewed, the *MP&L* decision in the words of Justice Scalia's concurring opinion ends "the battle . . . over who has jurisdiction, FERC or the states, to evaluate the prudence of a particular utility's entering pooling arrangements with affiliated companies for the sharing of electrical generating capacity or the creation and wholesaling of electrical energy."¹¹⁷

7) Broadly viewed, *MP&L* supports a future extension of the "bright line" to sustain FERC jurisdiction where federal interests exist that fairly can be said to have roots in the interaction of the foundational premises of Part II of the FPA, the filed rate doctrine, preemption principles, and interstate commerce.¹¹⁸

The principles of federalism reflected in *MP&L* and the conclusions drawn from that decision should comprise the sole premises for determining FERC jurisdiction. If a public utility meets the jurisdictional criteria reflected in Part II of the FPA, the filed rate doctrine, preemption principles, and interstate commerce, FERC jurisdiction should attach without regard to the substantive issues involved in any particular case.

¹¹⁷ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428, 2445 (1988) (Scalia, J., concurring).

¹¹⁸ In *MP&L*, the federal interest was established in "interstate wholesale sales" among affiliated utilities that are members of an interstate tight power pool.

B. *Some Practical Considerations*

The joint dissent in *MP&L* apparently would deny FERC jurisdiction even in circumstances where the requirements for federal jurisdiction are met:

[R]egardless of FERC's jurisdiction to allocate incurred costs among member utilities and regardless of its jurisdiction to review the prudence of an interstate pool's projects in order to set wholesale rates for intrapool transactions, state utility commissions retain jurisdiction to determine whether incurring those costs involved prudent purchase decisions that can be passed on to retail customers.¹¹⁹

The joint dissent objects to allowing private electric utilities that have been under state PUC jurisdiction to qualify for FERC jurisdiction:

[A]llowing only FERC review of interstate pool decisions would effectively allow retail utilities that either belong to interstate pools or span more than one state to pick and choose between state and federal regulation by deciding whether to form subsidiaries to operate their generating facilities and sell them "wholesale" electricity.¹²⁰

The joint dissent, without factual or other support, ventures beyond the jurisprudential requirements for FERC jurisdiction and asserts practical concerns that electric utilities will "switch" jurisdictions at will. That is, the joint dissent seems not so much concerned with the legal requirements for extension of the jurisdictional "bright line" as it is with whether, in any event, FERC jurisdiction *ought* to be exercised.

As a jurisdictional matter, the *decision* of an electric utility to come under state or federal jurisdiction should not matter. For example, if a group of nonutility investors decided to go into the electric utility business and chose to structure their utility operations so as to come under FERC jurisdiction, rather than state PUC jurisdiction, no one would question their right to do so as long as they met the jurisdictional requirements. The new utility's *substantive reasons* for selecting exclusive FERC jurisdiction would be irrelevant in the FERC decision whether to exercise jurisdiction over it. The same should be true for existing utilities that want to come under FERC

¹¹⁹ *Mississippi Power & Light*, 108 S.Ct. at 2449 (Brennan, J., dissenting).

¹²⁰ *Id.* Justice Brennan writing for the joint dissent also asserts that Part II of the FPA constructed an impenetrable barrier to federal jurisdiction in matters involving state regulation of retail rates in apparent contravention of his *opinion* in *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964). See Justice Scalia's concurring opinion, *Mississippi Power & Light*, 108 S.Ct. at 2444-45 and the discussion of Part II of the FPA, *supra* notes 51-87.

jurisdiction. The only jurisdictional concern of the FERC and reviewing courts should be whether sufficient federal interests of the sort required by Part II of the FPA, the filed rate doctrine, preemption principles, and interstate commerce are present.

Even assuming the joint dissent's "practical concern" approach is justified, electric utilities are not likely to cavalierly seek exclusive FERC jurisdiction in any event. Extension of the jurisdictional predicates set out in *MP&L* is unlikely to result in a flood of utilities seeking to transfer utility assets to FERC jurisdiction for several reasons. First, an electric utility must satisfy the statutory federal interests criteria for assertion of FERC jurisdiction. This may require, depending on the circumstances, a substantial corporate restructuring with implications for management, shareholders, and consumers far beyond regulatory forum considerations. Second, the great majority of state PUCs do not deny at least some sharing of the financial burden for inoperable, cancelled, or abandoned nuclear plant assets among ratepayers and shareholders.¹²¹ In those jurisdictions there is less need for the utility to seek a jurisdictional shift of assets. Third, utilities which do not suffer from severe financial distress as a result of a relatively lesser valuation of nuclear plant assets at the state PUC also have less motivation to seek a shift in jurisdictional forum. Finally, given the future instability and uncertainty of state PUC and FERC ratemaking policies, an electric utility might be ill-advised to seek a shift in jurisdictional forum solely for regulatory convenience.

That said, extension of the jurisdictional "bright line" based on the *MP&L* federalism predicates, as discussed above, to achieve exclusive FERC jurisdiction would seem to be wholly appropriate for utilities in severe financial emergencies as a result of the costs associated with inoperable, cancelled, or abandoned nuclear plants. As a matter of practical finances, those nuclear plant assets should be permitted to come under the jurisdiction of the regulatory body (assuming the jurisdictional predicates are met), state PUC or the FERC, that would allow the highest earnings on those assets to improve the utility's financial performance and to enhance or restore shareholder confidence. At present, this is likely to be the FERC because it allows construction work in progress to be reflected in wholesale rates.¹²² An opportunity to accomplish a jurisdictional shift of nuclear plant assets may be especially appropriate in the following circumstances: (1) where the financial distress of an electric utility is acute and (2)

¹²¹ See TOMAIN & HICKEY, *supra* note 3, at 177-96.

¹²² 18 C.F.R. § 35.26 (1988).

where the state authorities act unreasonably over a long period of time to place the entire monetary burden for nuclear plant assets on the utility shareholders and to categorically shield ratepayers from bearing any of the burden of nuclear plant costs.¹²³

Giving effect to such financial circumstances in extending the jurisdictional "bright line" would not dispense with prudence inquiries into power planning decisions of electric utilities and would not eliminate state PUC participation in the decision-making process. The rate-making obligation of the FERC under Sections 205 and 206 to approve only "just and reasonable" rates necessarily includes a prudence inquiry.¹²⁴ In addition, heightened FERC scrutiny of prudence issues can be assured by states directly pursuing the issue before the FERC. State authorities, including PUCs, have a right to become a party and participate fully in any FERC proceeding merely by filing a notice of intervention.¹²⁵ As a party, a state authority may place directly in issue any prudence or other questions it may have concerning the wholesale rates and power allocations of an electric utility.¹²⁶

C. Scenarios Under Which Federal Interests Might Be Sufficient to Justify FERC Jurisdiction

There are several scenarios in light of *MP&L* under which the jurisdictional "bright line" might be extended to bring costs associated with inoperable, cancelled, or abandoned nuclear power plants under exclusive FERC jurisdiction in the future.

1) Electric utilities could replicate the corporate restructuring that occurred in *MP&L*. Here, unaffiliated electric utilities operating in neighboring states could become corporately affiliated and form a tight power pool similar to the Middle South Utilities holding company power pool. The utilities could also form a generation company (Genco) which would sell electricity from pool facilities to operating companies (Discos) that would distribute the electric power to

¹²³ See *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 618 (1989).

¹²⁴ See *Appalachian Power Co. v. Public Serv. Comm'n of W.Va.*, 812 F.2d 898, 905 (4th Cir. 1987), where the Court observed that a FERC inquiry into the justness and reasonableness of wholesale rates under Sections 205 and 206 of the FPA is inseparable from state prudence inquiries.

¹²⁵ Rule 214, 18 C.F.R. § 385.214(a)(2) (1988) of the FERC's regulations provides that "[a]ny State Commission is a party to any [FERC] proceeding upon filing a notice of intervention in that proceeding"

¹²⁶ Indeed, the State PSC and the State of Mississippi were parties to the FERC proceedings at which the Grand Gulf wholesale rate and allocation agreements were at issue. *Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525 (D.C. Cir. 1987).

consumers.

2) Unaffiliated electric utilities operating in different states could remain unaffiliated but participate in new or existing interstate power pools and dedicate all planned, constructed, and unconstructed utility generating plant assets to serve the pool members.¹²⁷

3) An intrastate utility that buys a portion of its power interstate, or that has transmission facility connections with out-of-state utilities, could internally reorganize into the Genco-Disco corporate structure mentioned in point one above.

4) An intrastate electric company also might come under FERC's exclusive jurisdiction through a bankruptcy reorganization into the Genco-Disco structure mentioned above that is approved by a federal bankruptcy court.¹²⁸

In each of these scenarios there arguably would be sufficient federal interests established in interstate commerce, in interconnected and coordinated utility operations, in power pooling, or in wholesale sales for electric utilities to fall on the federal side of the jurisdictional "bright line."

V. CONCLUSION

The *MP&L* decision affords a jurisprudentially sound departure point for extending the "bright line" between state and federal electric rate jurisdiction to deal with the billions of dollars of costs associated with inoperable, cancelled, or abandoned nuclear power plants. The Supreme Court in *MP&L* firmly roots into the legal landscape the following four interrelated legal bases that should be used for "bright line" analysis to determine whether a state PUC or the FERC has jurisdiction over the electric rates and power allocations of investor-owned utilities: Part II of the FPA, the filed rate doctrine, preemption principles, and interstate commerce concerns.

¹²⁷ *Supra* notes 16-20.

¹²⁸ The federal bankruptcy code arguably is not concerned with which regulatory commission, state, or federal, has jurisdiction after confirmation of a bankruptcy plan. See 11 U.S.C. § 1129(a)(6) (1982): "The court shall confirm a plan [if] . . . any regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."

But see proposed legislation, S.46, introduced in the Senate in early 1989 to prevent electric utilities from relying on corporate reorganization under the bankruptcy code to come under exclusive FERC jurisdiction. The bill is entitled the "Electric Utility Bankruptcy Clarification Act" and is directed against any recovery of costs from ratepayers of inoperable nuclear power plants, such as the Seabrook or Shoreham nuclear power plants. 135 Cong. Rec. S. 46 (daily ed. Jan. 25, 1989). Public Service Co. of New Hampshire, which is currently undergoing a chapter eleven reorganization, would be affected by S.46 if it were enacted into law.

The "bright line" drawn by *MP&L* permits several observations regarding state-federal jurisdiction for the future. The prudence of a utility's entering into interstate power pooling arrangements with affiliated companies to share nuclear power plant capacity and the wholesaling of electric energy falls exclusively within the federal sphere of rate jurisdiction. In addition, it would seem that the costs associated with failed nuclear power plants, when properly mandated by the FERC as components of interstate wholesale rates and allocations of electric power, must be passed on to retail ratepayers by state PUCs. Those costs may not be cut off or trapped by state regulatory authorities at the retail ratemaking pocket. On the other hand, state PUCs legitimately may inquire into the prudence of a utility's exercise of an option to purchase or not to purchase a particular quantity of interstate wholesale electric power at a FERC-mandated rate. Moreover, private utilities as a matter of law are not barred from undergoing a corporate restructuring that brings nuclear power plant costs under the exclusive FERC jurisdiction, even in circumstances where state PUCs formerly exercised jurisdiction. It would seem here that the underlying motives of utilities for such corporate restructuring should be irrelevant as long as the jurisdictional requirements laid down by *MP&L* are met.

The jurisdictional "bright line" predicates endorsed by the Supreme Court in *MP&L* are also consistent with sound energy policymaking. The majority admirably resisted the temptation, as urged by the joint dissent, to engage in judicial policymaking by refusing to decide whether either state or federal jurisdiction *ought* to be exercised. Rather, its decision properly was confined to the legal question of whether exclusive federal rate jurisdiction existed. That judicial restraint maintains the existing measure of regulatory flexibility for utilities, without significantly sacrificing accountability, that could be important in the preservation of the nation's nuclear power option, the financial health of electric utilities, and the movement toward greater integration and coordination of electric operations. With mounting concerns about the reliability and availability of fossil fuel energy sources, the environmental effects of fossil fuel use such as particulate pollution, acid rain, ozone, and global warming, the reexamination of the use of nuclear power may be in order in the near future.

For the present, however, new commercial development of nuclear power is at an end in the United States. If utilities are foreclosed from recovering prudently-incurred costs of failed nuclear power plants in circumstances that threaten their financial health and their

ability to render reliable electric service, they are unlikely to undertake the construction of nuclear power plants in the future. The Supreme Court properly should leave those policy determinations concerning the nuclear power option to the energy markets, consumers, and the legislative and executive branches of government.

