

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue cap at the top. The globe in the top bulb is dark blue, while the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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The Repeal of the Public Utility Holding Company Act of 1935 (PUHCA) and Its Impact on Electric and Gas Utilities

Adam Vann, American Law Division

November 20, 2006

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Adam Vann
Legislative Attorney
American Law Division

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The Repeal of the Public Utility Holding Company Act of 1935 (PUHCA) and Its Impact on Electric and Gas Utilities

Summary

The Public Utility Holding Company Act of 1935 was repealed in the Energy Policy Act of 2005. Prior to repeal, the Public Utility Holding Company Act of 1935 required “holding companies,” *i.e.*, companies with subsidiaries engaged in the electric utility business or the retail distribution of natural or manufactured gas, to register with the U.S. Securities and Exchange Commission, satisfy certain disclosure requirements, and comply with strict operational limitations. These operational limitations imposed significant geographic and corporate holdings restrictions upon holding companies and effectively limited ownership of public utilities to a small subset of companies focused specifically on the industry.

Pursuant to the repeal, the Securities and Exchange Commission no longer has oversight authority for electric and gas holding companies, and many of the procedural and substantive requirements placed upon public utility holding companies by the Public Utility Holding Company Act of 1935 have been repealed. The burden of oversight of the financial transactions of public utility companies, including mergers and acquisitions, now falls more heavily on the Federal Energy Regulatory Commission (FERC). FERC’s oversight authority over public utilities, previously established in the Federal Power Act and the Natural Gas Act, was enhanced by the Energy Policy Act of 2005, which included the Public Utility Holding Company Act of 2005. This new legislation requires holding companies and their affiliates to provide the Commission (as well as state regulators) access to their books and records and also grants the Commission additional authority for oversight of holding company transactions.

In addition, the U.S. Securities and Exchange Commission, the U.S. Department of Justice, and the Federal Trade Commission will continue to enforce generally applicable laws as they apply to public utility holding company transactions. These laws, which were unaffected by the Energy Policy Act of 2005, prevent transactions that would substantially impede competition and can require pre-merger notification.

This report will describe the current state of federal oversight of public utility holding companies and transactions involving public utilities. It will be updated as necessary.

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The Repeal of the Public Utility Holding Company Act of 1935 (PUHCA) and Its Impact on Electric and Gas Utilities

Introduction

Congress has imposed ownership and operational limitations on the utility industry since early in the 20th century. Different statutes have targeted different industry practices, all with the general goal of ensuring dependable utility services for the public at reasonable rates. The most recent legislative effort to further these goals is the Energy Policy Act of 2005.

One of the most significant provisions in the Energy Policy Act of 2005 is the repeal of the Public Utility Holding Company Act of 1935 (PUHCA 1935).¹ PUHCA 1935 imposed a number of substantive restrictions and procedural requirements upon companies that owned greater than 10% of the voting securities or otherwise exercised a controlling interest over electric and/or gas public utilities. The statute was administered by the U.S. Securities and Exchange Commission (SEC).

PUHCA 1935 had long been a subject of controversy. Supporters of PUHCA 1935 had claimed that the strict limitations on public utility holding companies protected the financial health of utility providers and therefore the dependability of service and the consistency of rates. Supporters also argued that the limitations provided a barrier against market domination and manipulation by large corporations. Proponents of repeal argued that ownership restrictions and SEC filing requirements were unduly burdensome and effectively barred investment in the utility industry for many new investors who could bring new ideas and vitality to the industry.

PUHCA 1935's reach had been receding for many years prior to its repeal. In 1978, the Public Utility Regulatory Policies Act (PURPA) created exemptions from PUHCA 1935 requirements for owners of certain types of cogeneration and renewable energy power plants, referred to as "Qualifying Facilities."² The Energy Policy Act of 1992 created another class of PUHCA exemptions for owners of

¹ The Public Utility Holding Company Act of 1935 was enacted as Title I of the Public Utility Act, P.L. 74-333.

² Public Utility Regulatory Policies Act of 1978, P.L. 95-617, at § 210 (e), 16 U.S.C. § 824a-3(e).

generation facilities serving the wholesale electricity market, commonly referred to as “Exempt Wholesale Generators.”³

The Energy Policy Act of 2005 repealed PUHCA 1935, thus revoking the SEC’s authority to oversee mergers and other transactions of public utility holding companies.⁴ In the same legislation, Congress adopted new language concerning regulation of holding companies, often referred to as the Public Utility Holding Company Act of 2005 (PUHCA 2005).⁵ PUHCA 2005 expands the authority of the Federal Energy Regulatory Commission (FERC) to oversee transactions and other financial activities of public utility holding companies through grants of access to those companies’ books and records.⁶ The statute grants similar access rights to state regulatory authorities. However, unlike its predecessor, PUHCA 2005 does not impose any of the substantive restrictions that effectively barred many entities from ownership of public utilities.

Although the repeal of PUHCA 1935 allows previously ineligible investors to own public utilities without satisfying SEC requirements, transactions involving utilities and public utility holding companies still must satisfy the regulatory requirements of other agencies. The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) are both charged with enforcing the applicable antitrust statutes, § 7 of the Clayton Act and the pre-merger provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.⁷ In addition, laws and regulations enforced by the SEC governing the issuance of securities and disclosure requirements remain in effect for these entities.

SEC Oversight of Public Utilities Under PUHCA 1935

In order to understand the significance of the repeal of PUHCA 1935 and the laws and regulations enacted in its place, it is necessary to understand the scope and function of PUHCA 1935.⁸ PUHCA 1935 regulated “holding companies” that had subsidiaries that were electric utility companies or that engaged in the retail

³ Energy Policy Act of 1992, P.L. 102-486, at § 711, (amending PUHCA 1935 to include exemption for wholesale generators of electricity).

⁴ Energy Policy Act of 2005, P.L. 109-58, at §§ 1261- 1277.

⁵ *Id.*

⁶ Pursuant to its statutory grant of expanded authority, FERC has adopted regulations to effectuate its enhanced authority to regulate public utility holding companies. *See* Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 70 Fed. Reg. 74,592 (Dec. 20, 2005), FERC Stats. and Regs. ¶ 31,197 (2005).

⁷ 15 U.S.C. § 18.

⁸ For a more detailed discussion of PUHCA 1935, see CRS Report RS20015, *Electricity Restructuring Background: Public Utility Holding Company Act of 1935 (PUHCA)*, by Amy Abel.

distribution of natural gas or manufactured gas. The statute defined a “holding company” as (a) a company that controls 10% or more of the outstanding voting securities of a public utility company (or of another holding company); or (b) a person whom the SEC determines exercises a controlling influence over the management of policies of any public utility or holding company so as to make it necessary or appropriate in the public interest to subject that person to the requirements of the statute.⁹

Under the statute, public utility holding companies faced substantial restrictions on their operations. All electric public utilities were required to be part of a single intergrated public utility system “consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal physical conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region ... not so large as to impair ... the advantages of localized management, efficient operation, and the effectiveness of the regulation.”¹⁰ Substantially similar rules applied to gas utility companies.¹¹

PUHCA 1935 also placed restrictions on many transactions related to public utility corporate structure. Mergers and acquisitions were required to maintain the simplicity of the holding company system and be in the public interest.¹² Public utility holding companies were not permitted to hold non-utility businesses unless such businesses were “reasonably incidental, or economically necessary or appropriate” to the operations of the public utility system.¹³ The SEC was tasked with regulating securities issuances of companies in a holding company system, in order to guard against significant debt-equity imbalance.¹⁴ The statute also limited interaffiliate transactions, prohibiting some transactions completely while requiring advance reviews of other transactions and requiring all interaffiliate transactions to be “at cost.”¹⁵

PUHCA 1935’s restrictions on utility holding companies were enacted in response to the creation of a small number of “power trusts” in the early part of the 20th century that controlled the utility industry through holding companies. These companies made huge profits through predatory use of their market power. The holding companies also mixed their utility holdings with their non-utility businesses, leveraging their “safe” utility businesses to finance and guarantee riskier business ventures. Some attributed the stock market crash of 1929 in part to the practices of these holding companies, as many who had invested in utility stocks lost their

⁹ PUHCA 1935, P.L. 74-333.

¹⁰ *Id*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id*

¹⁵ *Id.*

savings due to the non-utility activities of holding companies. PUHCA 1935 was enacted to guard against exercise of undue market power and the cross-subsidization of utility and non-utility investments.

The importance and effectiveness of the restrictions of PUHCA 1935 had been a subject of disagreement for some time. Prior to the recent repeal of the statute, Congress had twice acted to create exceptions to the PUHCA 1935 requirements. In 1978, Congress enacted the Public Utility Regulatory Policies Act. Portions of this Act created an exemption from the PUHCA 1935 requirements for owners of certain qualifying cogeneration and renewable power plants, commonly referred to as “Qualifying Facilities.”¹⁶ The Energy Policy Act of 1992 created another exemption from the PUHCA 1935 requirements for independent electricity generators serving the wholesale electricity market, commonly referred to as “Exempt Wholesale Generators.”¹⁷

The Repeal of PUHCA 1935 and Enactment of PUHCA 2005

In recent years, the creation of exemptions gave way to calls for the complete repeal of PUHCA 1935. Supporters of repeal argued that repeal of PUHCA would spur investment in the transmission infrastructure and facilitate competition in the industry and that enhanced federal and state laws and regulations since the enactment of PUHCA provide for adequate customer protection.¹⁸ Even the SEC, the agency charged with administering the statute, called for its repeal on more than one occasion.¹⁹ Those who opposed the repeal argued, among other things, that PUHCA 1935 protected customers by preventing utility companies from cross-subsidizing and incurring excessive capital costs, reducing the potential for exercise of undue market power, and ensuring the reliability of utility services and the reasonableness of rates.²⁰

¹⁶ P.L. 95-617, at § 210 (e), 16 U.S.C. § 824a-3(e).

¹⁷ Energy Policy Act of 1992, § 711 (amending PUHCA 1935 to include exemption for wholesale generators of electricity).

¹⁸ See Testimony of Pat Wood III, Chairman, Federal Energy Regulatory Commission, Before the Government Reform Subcommittee on Energy and Resources, 109th Cong., 1st Sess. (2005).

¹⁹ See SEC, *The Regulation of Public Utility Holding Companies* (1995); see also U.S. Securities and Exchange Commission, *Statement Concerning Proposals to Amend or Repeal the Public Utility Holding Company Act of 1935* (1982), and *Public Utility Holding Company Act Amendments: Hearing Before the Subcommittee on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 2d Sess.* (1982).

²⁰ See Lynn Hargis, *PUHCA For Dummies: An Electricity Blackout and Energy Bill Primer*, Public Citizen’s Critical Mass Energy and Environmental Program, September 2003, [<http://www.citizen.org/documents/puhcafordummies.pdf>] .

Congress repealed the entirety of PUHCA 1935 in the Energy Policy Act of 2005.²¹ The repeal became effective on February 8, 2006.²² As of that date, all of the SEC-enforced requirements and restrictions placed on public utility holding companies under PUHCA 1935 were removed. Holding companies are no longer required to meet the SEC's disclosure and registration requirements simply by virtue of their status as holding companies, although the SEC's other procedural requirements for the issuance of securities and regular reporting by public companies remain in effect. The utility industry is now open to a broader group of investors who may have been previously deterred by the restrictions of PUHCA 1935, and conversely, public utility holding companies are now free to pursue a broader range of opportunities, including merger with and acquisition of other utilities outside their geographic area and investment in non-utility assets. However, the repeal of PUHCA 1935 also creates the potential for the return of some of the problems in the utility industry that the enactment of the statute was intended to curtail; namely, undue exercise of market power and cross-subsidization of utility and non-utility businesses.

Congress sought to provide a safeguard against many of the concerns regarding reliability of service and the reasonableness of rates by enacting new oversight legislation, often referred to as PUHCA 2005. PUHCA 2005 expanded the authority of FERC and state regulatory commissions to oversee holding company and utility financial activities and transactions. FERC had authority over many holding company activities prior to the enactment of PUHCA 2005, but the statute represents an extension of this authority that is intended to compensate in part for the removal of SEC oversight of holding companies.

To facilitate FERC enforcement of rate regulation, limitations on cross-subsidization and other substantive standards, PUHCA 2005 created new reporting and review requirements for holding companies, their subsidiaries and their affiliates. First, a holding company and its subsidiaries must maintain and make available to FERC "such books, accounts, memoranda, and other records as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary and appropriate for the protection of utility customers with respect to jurisdictional rates."²³ Further, subsidiaries and affiliates of holding companies must maintain and make available to FERC "such books, accounts, memoranda, and other records with respect to any transaction with another affiliate, as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates."²⁴ This oversight authority is intended to allow FERC to discourage improper dealings between and among a holding company and its subsidiaries or other affiliates, including improperly priced

²¹ Energy Policy Act of 2005, P.L. 109-58, at §§ 1261- 1277.

²² *Id.* at § 1274.

²³ *Id.* at § 1264.

²⁴ *Id.*

transactions and cross-subsidization. The Act required FERC to issue regulations to effectuate the scheme envisioned in the legislation by December 8, 2005.²⁵

FERC adopted the required regulations in Order No. 667, which was published on December 8, 2005, and went into effect on February 8, 2006.²⁶ These regulations detailed the new filing requirements for holding companies and traditional service companies as well as the requirements for maintaining books and records and making these books and records available to FERC for review.²⁷ FERC also determined that Section 1275(c) of the Energy Policy Act, which provides that the Energy Policy Act does not affect the authority of the Commission or state agencies under other applicable laws, was a “savings clause” which did not give the Commission the authority to issue regulations on previously regulated activities.²⁸ As a result, FERC declined to issue further regulations on holding company system cross-subsidization, encumbrances of utility assets, diversification into non-utility businesses, or the extension of cash management rules.²⁹ FERC noted that current Commission regulations adopted pursuant to the authority of the FPA and the NGA already provide for agency oversight of such activities and that states’ regulations also provide oversight for these activities. Therefore, the Commission ruled that it would “monitor industry activities and we will adopt new regulations on cross-subsidization or encumbrances of utility assets, pursuant to our FPA and NGA authorities, only at such time as our current regulations appear to be insufficient.”³⁰

PUHCA 2005 also grants authority to state utility commissions to access books and records of holding companies and their affiliates.³¹ According to the statute, upon written request of a state commission having jurisdiction over a public utility in a holding company system, the holding company and any associated companies or affiliates thereof must produce for inspection any books, accounts, memoranda or other records that (a) have been identified in reasonable detail in a proceeding before the state commission; (b) the state commission determines are relevant to costs incurred by such public-utility company; and (c) are necessary for the effective discharge of the responsibilities of the state commission with respect to such proceedings.³²

The new access and review authority granted to FERC and state commissions in PUHCA 2005 are intended to help fill potential oversight gaps created by the repeal of PUHCA 1935. Specifically, the record access and review provisions may help to mitigate the potential for the exercise of undue market power by any public

²⁵ *Id.* at § 1272.

²⁶ Order No. 667, 70 Fed. Reg. 75,592 (2005).

²⁷ *See* 18 C.F.R. Part 366.

²⁸ Order No. 667, 70 Fed. Reg. at 75,626.

²⁹ *Id.*

³⁰ *Id.*

³¹ Energy Policy Act of 2005, P.L. 109-58, at § 1265.

³² *Id.*

utility holding company system, as well as to protect against cross-subsidization between utility and non-utility subsidiaries. These provisions are ultimately intended to help ensure reasonable rates and reliable service. However, it is important to note that, as FERC stated, PUHCA 2005 “is primarily a ‘books and records’ statute, and does not give the Commission any new substantive authorities.”³³

PUHCA 2005 and Order No. 667 also continue to exempt Qualifying Facilities and Exempt Wholesale Generators, as well as foreign utility companies, from the requirements otherwise applicable to holding companies and their affiliates and subsidiaries under the statute and regulations.³⁴ Certain additional persons and classes of transactions are also exempted. These important exemptions include passive investors (mutual funds and other collective investment vehicles); broker/dealers, underwriters and fiduciaries who buy and sell securities in the ordinary course of business; utilities that have no captive customers; transactions in which the holding company affirmatively certifies that it will not charge, bill, or allocate to the public utility or natural gas company in its holding company system any costs or expenses and will not engage in financing transactions with the public utility or natural gas company; transactions between or among affiliates that are independent of and do not include a public utility or natural gas company; electric power cooperatives; and local gas distribution companies.³⁵ FERC also has discretionary authority to grant exemptions from the applicable requirements for any person or transaction.³⁶ FERC exempted these Qualifying Facilities, Wholesale Generators, and foreign utility companies because its main regulatory interest is to monitor the costs incurred by traditional utilities providing monopoly service in order to ensure reasonable rates. The exemptions and waivers are intended to remove from PUHCA 2005 regulation those entities that would be unlikely to affect jurisdictional rates.³⁷

The Continuing Regulatory Authority of FERC, FTC, and DOJ

As FERC has stated, the change in PUHCA law granting it new authority to review books and records did not affect the Commission’s

... primary means of protecting customers served by jurisdictional companies that are members of holding company systems: the [Federal Power Act (FPA)] and the [Natural Gas Act (NGA)]. In particular, the Commission’s rate authorities and information access authorities under the FPA and the NGA enable the Commission to detect and disallow from jurisdictional rates any imprudently-

³³ Order No. 667, 70 Fed. Reg at 75,592.

³⁴ Energy Policy Act of 2005, P.L. 109-58, at § 1266(a); 18 C.F.R. § 366.3.

³⁵ *Id.*

³⁶ 18 C.F.R. § 366.3(d).

³⁷ Markian M.W. Melnyk and William S. Lamb, PUHCA’s Gone: What is Next for Holding Companies?; 27 Energy L. J. 1,18 (2006).

incurred, unjust or unreasonable, or unduly discriminatory or preferential costs resulting from affiliate transactions between companies in the same holding system. This includes both power transactions and non-power goods or services transactions between Commission-regulated companies that have captive companies and their “unregulated” affiliates. ... further ... in the context of individual rate cases involving public utilities that seek to flow through in jurisdictional rates the costs of affiliate purchases of non-power goods and services, the Commission has the ability to protect customers by reviewing the prudence and justness and reasonableness of such costs. The Commission has also adopted rules and policies regarding cash management practices or arrangements that involve Commission-jurisdictional companies.³⁸

Under the FPA and NGA, FERC is charged with regulating the interstate transmission of natural gas and electricity.³⁹ The FPA also grants FERC authority over electric utility mergers.⁴⁰ Section 203 of the FPA requires FERC to approve any merger attempted by the public utilities within the agency’s jurisdiction before the transaction can occur. Section 203 was modified somewhat by the Energy Policy Act of 2005, but most of FERC’s authority was preexisting. Under the revised Section 203, a public utility must obtain prior FERC approval in order to (a) sell, lease or dispose of its facilities or any portion of its facilities valued in excess of \$10,000,000 without prior FERC approval, (b) merge or consolidate their facilities with any other entity; (c) purchase, acquire or take any security of any other public utility with value in excess of \$10,000,000; or (d) purchase, lease or otherwise acquire a generation facility valued in excess of \$10,000,000 that is used for interstate wholesale sales and is subject to FERC ratemaking authority.⁴¹ The revised Section 203 also requires holding companies to obtain FERC approval prior to any merger or acquisition with any transmission company, electric utility, or holding company valued at over \$10,000,000.⁴²

PUHCA 2005 also extends FERC’s authority under Sections 306 and 317 of the FPA to holding company systems.⁴³ These sections allow FERC to conduct investigations and hearings, compel the production of witnesses and documents,

³⁸ 70 Fed. Reg. at 75,592.

³⁹ 16 U.S.C. § 824(b).

⁴⁰ Although the FPA and NGA are similar in many respects, the NGA does not contain a provision that parallels the above-cited provision in the FPA concerning authority over mergers. This may be because mergers of natural gas utility companies were less frequent and not cause for significant concern when the NGA was enacted in 1938.

⁴¹ 16 U.S.C. § 824b(a)(1). Note that these new threshold amounts triggering jurisdiction represent a substantial increase over the previous threshold amounts of \$50,000. There had been some concern that the revised language of Section 203(d) would require FERC approval for equipment purchases in excess of \$10,000,000 and various types of internal transactions. FERC addressed these concerns in an administrative order, generally excluding these types of transactions from the purview of Section 203. *See* Transactions Subject to FPA Section 203, Order No. 669, 71 Fed. Reg. 1348 (Jan 6, 2006), FERC Stats. and Regs. ¶ 31,200 (2005).

⁴² 16 U.S.C. § 824b(a)(2).

⁴³ Energy Policy Act of 2005, P.L. 109-58, at § 1270.

enjoin and restrain violations, and impose penalties.⁴⁴ Previously these sections granted such authority only with respect to public utilities.

The new FERC oversight authority granted in PUHCA 2005 is best seen as creating a new tool for FERC to enforce its preexisting authority under the FPA and, to a lesser extent, the NGA. FERC's previously existing authority under the FPA and NGA gave it jurisdiction over rates and in many cases FERC permission was required for certain transactions. PUHCA 2005 should not be thought of as a simple transfer of authority from the SEC to FERC. FERC is not tasked with enforcing strict corporate ownership and management rules as the SEC was required to do under PUHCA 1935. PUHCA 2005 confirms FERC's preexisting authority to regulate transactions under the FPA and the NGA, and grants the Commission a few new tools to do so.

As the previous paragraphs describe, although the repeal of PUHCA 1935 removes extensive restrictions on transactions involving public utilities and their holding companies previously enforced by the SEC, it does not affect the regulation of these entities by FERC. Transactions are also subject to the general regulation of other federal agencies. Although the SEC is no longer tasked with enforcing the restrictions of PUHCA 1935, holding companies and their investors still must comply with the SEC's general reporting requirements and securities regulations. Also, two antitrust laws, the Clayton Act and the Hart-Scott-Rodino Antitrust Improvements Act, are relevant in the context of prospective mergers and acquisitions that are now permissible in the absence of PUHCA 1935. The United States Justice Department (DOJ) and the Federal Trade Commission (FTC) are charged with enforcing these laws.⁴⁵

The Clayton Act and the Hart-Scott-Rodino Act apply to any utility mergers or acquisitions. Accordingly, in addition to the FERC review of these transactions as set forth in the revised Section 203 of the FPA, mergers in the energy industry are also reviewed from the perspective of their compliance with the requirements of antitrust and market-based concerns by DOJ and FTC. Section 7 of the Clayton Act prohibits mergers or acquisitions which "tend to create a monopoly."⁴⁶ The pre-merger notification provisions of the Hart-Scott-Rodino Act require that certain mergers and acquisitions (those meeting applicable size and other criteria) be notified to both the Attorney General and the Chairman of the Federal Trade Commission prior to consummation of the transaction. The statute prohibits the consummation of any covered transaction prior to the expiration of a statutorily specified "waiting period" unless the reviewing agency grants an "early termination."⁴⁷

⁴⁴ *Id.*

⁴⁵ For a more detailed discussion of the federal government's role in preventing exercise of monopolies, see CRS Report RS20241, *Monopoly and Monopolization: Fundamental But Separate Concepts in U.S. Antitrust Law*, by Janice Rubin.

⁴⁶ 15 U.S.C. § 28.

⁴⁷ 15 U.S.C. §§ 18a(b)(1), (2).

As the above text demonstrates, several regulatory agencies have overlapping jurisdiction over electric utility mergers and acquisitions. DOJ, FTC and FERC are each tasked to some extent with jurisdiction over electric utility merger transactions, and each utilizes the DOJ/FTC Horizontal Merger Guidelines.⁴⁸ Theoretically at least, all are proceeding from the same assumptions and will reach the same conclusion with respect to particular transactions. However, the differing statutory and regulatory prisms through which these Guidelines are necessarily filtered may produce different results. Approval of a transaction by one federal agency does not constitute federal government approval, and the transaction is still subject to scrutiny under the antitrust laws.⁴⁹

What Lies Ahead for the Utility Industry

The repeal of PUHCA 1935 does not remove all obstacles to previously barred electric and gas utility transactions. State regulatory agencies still have the authority to regulate electric and gas utilities. By granting state commissions increased access to utility and holding company books and records in PUHCA 2005, legislators may have been contemplating increased participation of the state commissions in review and regulation of public utility holdings companies. Since the repeal of PUHCA 1935, no state has enacted any new laws or regulations concerning review of public utility mergers or other transactions. Some states may rely on preexisting statutory or regulatory language authorizing review of transactions to ensure that they are in the public interest. Other states may enact new legislation or take regulatory action to increase review or possibly even restrict certain transactions involving public utilities. State commissions as well as FERC may increase regulation of cross-subsidization between utility and non-utility businesses in the same holding company system, the use of utility balance sheets to finance non-utility businesses, and the financial health of potential holding company owners.⁵⁰ These measures may help to protect consumers who rely on utility service from the financial vulnerabilities of non-utility entities. These protections are especially important in the case of utilities that provide monopoly service for customers.

Increased merger and acquisition activity is also possible. A review of analyst predictions by the American Public Power Association reveals a wide spectrum of predictions, some analysts expecting a large-scale centralization of the industry

⁴⁸ The Guidelines were promulgated in 1992 and revised in 1997 to take account of possible inefficiencies resulting from a merger or acquisition transaction. FERC utilizes the Guidelines in its examination of utility market power.

⁴⁹ See *Otter Tail Power Co. v. U.S.*, 410 U.S. 376, 372-73 (1973). In support of this conclusion, the Court cited *California v. Federal Power Commission*, 369 U.S. 482, 489 (1961) (holding that a Federal Power Commission approval of an asset acquisition pursuant to Natural Gas Act authority did not bar an antitrust suit, as no pervasive scheme for antitrust review had been entrusted to a single agency) and *U.S. v. Radio Corp. of America*, 358 U.S. 334 (1959) (holding that an exchange of radio stations that had been approved by the Federal Communications Commission as in the “public interest” was subject to attack in an antitrust proceeding).

⁵⁰ Melnyk and Lamb, at 27 Energy L.J. at 15.

(including one prediction of a 50% reduction in the total number of major electric utilities), while others expect to see only a small change in the industry structure.⁵¹ Among the “non-traditional” investors who could become players in the utility sector are large private equity funds, diversified U.S. energy companies, diversified foreign investors and certain foreign banks and pension funds.⁵² This new investment could allow entities with varied backgrounds to enter into the utility sector.

⁵¹ *The Electric Utility Industry After PUHCA Repeal: What Happens Next?*, October 2005, American Public Power Association, at pp 2-3.

⁵² Melnyk and Lamb, 27 *Energy L.J.* at 20.