

1980

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Recommended Citation

Carroll, Jr., Thomas J. (1980) "State Jurisdiction over the Regulation of Energy Distribution and Other Public Utility Services," *Land & Water Law Review*. Vol. 15 : Iss. 2 , pp. 535 - 566.

Available at: https://scholarship.law.uwyo.edu/land_water/vol15/iss2/5

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University of Wyoming

College of Law

LAND AND WATER LAW REVIEW

VOLUME XV

1980

NUMBER 2

State regulation of public utilities and energy distribution systems is not new. But as the nation, and especially Wyoming, faces a future of diminishing supply, seemingly insatiable demand, and thus, higher prices for all forms of energy, more attention is being focused upon the regulations through which state and federal governments hope to keep the situation under control. In this article, the author explains the jurisdictional scope of Wyoming's regulatory statutes and rules, describes their relationship with federal regulation, and offers some observations about the effectiveness of current regulatory policies.

STATE JURISDICTION OVER THE REGULATION OF ENERGY DISTRIBUTION AND OTHER PUBLIC UTILITY SERVICES

*By Thomas J. Carroll, III**

INTRODUCTION

The purpose of this article is to examine the present status of the jurisdiction and regulatory power of the Wyoming Public Service Commission (hereinafter referred to as "PSC" or "Commission") with particular emphasis on recent federal legislation, state legislation, state court holdings and agency rulings. This article focuses on the Wyoming Public Service Commission, but all state utility and energy regulatory commissions around the country will be equally affected by the federal laws discussed herein, and many are subject to the same, or similar, state laws and legal problems pointed out in this article. The PSC is

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being called upon with increasing frequency to resolve the growing energy and utility service problems facing consumers and utility companies. The legal extent of its power to deal with these problems is the subject of this article.

Part I sets forth the definition of the term "public utility," which is the starting point for determining the PSC's jurisdiction. Limitations on the PSC's jurisdiction are discussed in Part II, which include the issues of federal preemption, municipally owned utilities, the "Wyodak exemption" and the "tenant exemption." Part III analyzes the statutory requirement that utility sales must be made "to or for the public" in order to be jurisdictional to the PSC. Particularly important in this analysis is the impact of the Wyoming Supreme Court's decision in *Phillips Petroleum Company v. PSC*.¹ The effect of the Natural Gas Policy Act of 1978 on the PSC's jurisdiction over natural gas sales is examined in Part IV. Part V explores the effect of the Public Utility Regulatory Policies Act of 1978 on state jurisdiction over energy distribution and regulation. Finally, Part VI looks at the five general areas of utility activity subject to regulation by the PSC.

I. DEFINITION OF "PUBLIC UTILITIES"

The PSC has jurisdiction over all "public utilities" as that term is defined by section 37-1-101(a)(vi) of the Wyoming Statutes.² The term "public utility" includes every person³ that owns, operates, leases, controls, or has power to operate, lease or control any plant, property or facility which is being used for certain specified utility activities.⁴ Such activities are spelled out in the Wyoming Statutes relating to public utility law.

1. 545 P.2d 1167 (Wyo. 1976).

2. Wyo. STAT. §37-1-101(a)(vi) (1977).

3. "Person" is defined by WYO. STAT. §37-1-101(a)(v) (1977) to mean and include "individuals, associations of individuals, firms, partnerships, companies, corporations, their lessees, trustees, or receivers, appointed by any court whatsoever in the singular number, as well as the plural."

4. Wyo. STAT. §37-1-101(a)(vi) (1977).

The transportation to or for the public of passengers or property for hire is a regulated activity.⁵ This includes regular and irregular route common motor carriers,⁶ contract motor carriers,⁷ private motor carriers,⁸ and certain activities of interstate motor carriers.⁹ It also includes railroads¹⁰ and intrastate air common carriers.¹¹

The transmission to or for the public of telephone messages, telegraph messages, or "intelligence by electricity" is an activity subject to PSC regulation.¹² In addition to telephone and telegraph companies, the statute has been held to apply to radio common carriers (RCC) which provide mobile telephone and pocket pager services.¹³ Mobile radio services are subject to PSC jurisdiction regardless of whether or not they interconnect with a land line telephone.¹⁴

Community antenna television companies, which distribute television signals to their customers by means of coaxial cable, were regulated by the PSC until 1958 when a Wyoming district court ruled that they were engaged in interstate commerce, were not public utilities, and thus were not subject to PSC jurisdiction.¹⁵ No appeal of this decision was taken to the Wyoming Supreme Court, and the PSC stopped regulating cable TV operations. In 1970,

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5. WYO. STAT. §37-1-101(a) (vi) (A) (1977).
 6. WYO. STAT. §37-8-101(a) (xiv) (A) & (B) (1977).
 7. WYO. STAT. §37-8-101(a) (xv) (1977).
 8. WYO. STAT. §37-8-101(a) (xvi) (1977).
 9. WYO. STAT. §37-8-101(a) (xvii) (1977).
 10. WYO. STAT. §37-9-101, *et seq.* (1977). For constitutional provisions relating to railroads, see WYO. CONST. art. X, §§11-19.
 11. For certain provisions relating specifically to common carriers by air see WYO. STAT. §37-11-101, *et seq.* (1977). Also, see part II of this article for a discussion of federal preemption concerning air carriers.
 12. WYO. STAT. §37-1-101(a) (vi) (B) (1977).
 13. *E.g.*, In the Matter of the Application of Pine Mountain Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Interconnected UHF Mobile Phone and Pocket Pager Service within the City of Casper, Wyoming and a 35 Mile Radius Thereto, PSC Docket No. 9662, Order dated October 2, 1978, p. 11, conclusion No. 1; In the Matter of the Application of Commercial Communications, Inc. against David R. Williams d/b/a Industrial Communications, PSC Docket No. 9661, Sub 1, Order dated May 18, 1979, p. 14, conclusions 1 and 2.
 14. A non-interconnect radio service is one in which the user radios a message to the base operator who may then convey the message to someone else by telephone or other means, but the user has no direct connection with the telephone line. The PSC regulates both interconnect and non-interconnect radio common carriers.
 15. In the Matter of Community Television Systems of Wyoming, et al., Civil Action No. 46-31, First District, Wyoming (October 6, 1958).

however, the United States Supreme Court affirmed a federal district court decision upholding the right of the Nevada Public Service Commission to regulate community antenna television companies.¹⁶ The cable TV companies argued that the Nevada statute imposed an unconstitutional burden on interstate commerce, that Congress had preempted the field of television communications, and that the statute deprived them of their property without due process of law. The district court rejected all three arguments.¹⁷

In light of the 1970 Supreme Court decision, the 1958 Wyoming district court decision is probably no longer controlling. A distinction, however, can be made between the Wyoming and Nevada statutes in that the Nevada statute specifically declares community antenna television companies to be public utilities,¹⁸ whereas the Wyoming statutes refer more generally to the "transmission of intelligence by electricity."¹⁹

In recent years the PSC's attention has focused predominantly on gas and electric utilities. There are presently 22 gas utility companies and 30 electric utility companies subject to regulation by the Wyoming PSC.²⁰ Concerning electricity, the PSC has jurisdiction over the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat or power.²¹ The PSC's jurisdiction over electric utilities includes both private investor-owned companies, of which there are 11 in Wyoming, and rural electric associations, of which there are 19.²²

With regard to gas, the PSC regulates the manufacture, distribution, sale or furnishing to or for the public

16. TV PIX, Inc., et al., v. Taylor, Jr., et al., 396 U.S. 556 (1970).

17. TV PIX, Inc. v. Reese H. Taylor, Jr., et al., Civil No. 1814 (D. Nev., December 2, 1968); Wells TV, Inc. v. Taylor, Jr., et al., Civil No. 1827, D. Nev., December 2, 1968).

18. NEV. REV. STAT. §704.020(1) (f) (1977).

19. WYO. STAT. §37-1-101(a) (vi) (B) (1977).

20. Wyoming PSC Utility Rate Book (December 17, 1979).

21. WYO. STAT. §37-1-101(a) (vi) (C) (1977).

22. Wyoming PSC Utility Rate Book (December 17, 1979). The Wyoming Supreme Court held that REA's were "public utilities" subject to PSC jurisdiction in Rural Electric Co. v. State Board of Equalization, 57 Wyo. 451, 120 P.2d 741, *reh. den.*, 122 P.2d 189 (1942).

23. WYO. STAT. §37-1-101(a) (vi) (D) (1977).

of natural or manufactured gas for lights, heat or power.²³ The PSC's jurisdiction also extends to oil and gas pipelines which provide service to or for the public, with the exception of property and equipment which is used in the exploration, development and operation of oil and gas fields and gas processing plants.²⁴ Also exempt are sales of natural gas by a producer to a consumer for use in industrial or commercial plants or establishments.²⁵

A potential problem is presented by the "producer exemption" language of the statute. The question arises in the definition and scope of the term "producer" and whether, under the language of the statute, the ownership of just one producing well, for example, could qualify a company for exemption from PSC jurisdiction on the grounds that it is a "producer," even if the essential nature and business of the company was that of a gas pipeline or distribution utility.²⁶ If that question were answered affirmatively, it would mean that a gas utility could possibly avoid PSC jurisdiction over its commercial and industrial customers by simply purchasing one producing gas well in order to claim that it is a "producer" and thus exempt from PSC jurisdiction. This could result in serious consequences for residential and commercial customers. The removal of PSC jurisdiction to regulate the sales of a gas utility to industrial and commercial customers would seriously impact on the service and rates to residential customers, particularly with regard to allocating fixed costs over as wide a base of customers as possible and assuring an adequate gas supply for high priority usage.

Water utilities are subject to PSC jurisdiction, but many of the water utilities in Wyoming are owned and operated by municipalities and thus are exempt from PSC

24. WYO. STAT. §37-1-101(a) (vi) (G) (1977).

25. WYO. STAT. §37-1-101(a) (vi) (G) (IV) (1977).

26. This problem was raised recently in the case of Northwest Pipeline Corporation v. Wyoming Public Service Commission, Wyoming Industrial Gas Co., FMC Corp., and Stauffer Chemical Co., Civil No. 87-293, First Dist., Wyo. (1979). The court, however, decided the case on other grounds and did not reach the producer exemption issue.

jurisdiction.²⁷ At the present time, 19 privately owned water utilities are being regulated by the PSC.²⁸ The supply, storage, distribution or furnishing of water to or for the public for manufacturing, municipal, agricultural or domestic uses is subject to PSC jurisdiction.²⁹ The treatment, disposal and transportation of sewage is considered not to be jurisdictional to the PSC.³⁰

The furnishing of steam to or for the public is subject to PSC regulation.³¹ While the demand for steam utility service has diminished, some additional language in that section of the statute is worth noting. Section 37-1-101(a) (vi) (F)³² provides that the PSC has jurisdiction over:

Any plant, property or facility for the production, transmission, conveyance, delivery or furnishing to or for the public of steam or *any other substance for heat or power*. (emphasis added)

The reference in the Section to "any other substance for heat or power" raises interesting questions with regard to whether the PSC would have jurisdiction over such things as coal, wood, fuel oil, liquid propane³³ or other such substances which may be delivered to a home for heat or power purposes. The broad language of that statute could also be used to support an argument that the PSC has jurisdiction over such things as solar energy panels or wind generators if they were furnished "to or for the public," for example, through a leasing arrangement.³⁴

27. A bill was introduced in the 1980 Wyoming legislative session which would amend WYO. STAT. §37-1-101(a) (vi) (E) and (H) (1977) making municipally owned utilities subject to PSC jurisdiction (House Bill No. 32), but it did not pass. See part III of this article for further discussion of the exemption for municipally owned and operated facilities.

28. Wyoming PSC Utility Rate Book (December 17, 1979).

29. WYO. STAT. §37-1-101(a) (vi) (E) (1977).

30. OP. WYO. ATT'Y GEN. 79-033 (November 28, 1979).

31. WYO. STAT. §37-1-101(a) (vi) (F) (1977).

32. WYO. STAT. §37-1-101(a) (vi) (F) (1977).

33. The PSC's jurisdiction over natural gas pursuant to WYO. STAT. §37-1-101(a) (vi) (D) (1977) does not include jurisdiction over delivery of liquified gas or petroleum products unless the delivery is by pipeline pursuant to WYO. STAT. §37-1-101(a) (vi) (G) (1977). Propane, for example, when distributed in a gaseous state through a pipeline is jurisdictional, but liquified propane delivered by truck is not.

34. See discussion of "to or for the public" requirement in part III of this article.

One additional type of activity which would come under PSC jurisdiction is the construction and operation of coal slurry pipelines. So far, no coal slurry pipelines have been built in Wyoming. A coal slurry pipeline would be considered a "plant, property or facility for the transportation or conveyance to or for the public of . . . property for hire."³⁵ A coal slurry pipeline could also fall under the definition of "any plant, property or facility for the . . . transmission, conveyance, delivery or furnishing to or for the public of . . . any other substance for heat or power."³⁶ There is currently no federal preemption of the regulatory field concerning coal slurry pipelines.³⁷ For a coal slurry pipeline to be jurisdictional to the PSC, however, it would be necessary that the transportation of the coal be made "to or for the public."³⁸ Whether a particular service or product is being provided "to or for the public" is a pivotal question relevant to all PSC jurisdictional issues and will be discussed in greater detail in part III of this article.

II. FEDERAL PREEMPTION AND OTHER LIMITATIONS ON PSC JURISDICTION

The PSC's jurisdiction over public utilities is limited in several important respects. The first of these limitations is the doctrine of federal preemption. The PSC does not have jurisdiction over matters involving interstate commerce where the regulatory field has been preempted by the United States government.³⁹ However, where the federal government has not asserted its jurisdiction over a particular interstate activity, the PSC can exercise its jurisdiction.

Even though state regulation may have some impact on interstate commerce, it is well settled that a state may regulate matters of local concern over which federal author-

35. WYO. STAT. §37-1-101(a) (vi) (A) (1977); Wyo. PSC R. §202(c) (7) (1979) defines coal slurry pipelines as being "major utility facilities" which must obtain certificate authority from the PSC before beginning construction or operation.

36. WYO. STAT. §37-1-101(a) (vi) (F) (1977).

37. See discussion of federal preemption in part II of this article.

38. WYO. STAT. §37-1-101(a) (vi) (A) & (F) (1977).

39. WYO. STAT. §37-1-101(a) (vi) (H) (1977).

ity has not been exercised.⁴⁰ Once it is established, however, that the commerce is exclusively interstate, a state may not regulate it in such a manner as to unduly or substantially burden the free flow thereof.⁴¹

A recent example of federal preemption can be found in the commuter airline business. The PSC had been exercising jurisdiction over intrastate flights of certain common air carriers, which included the regulation of their rates, routes and other conditions of service.⁴² But in 1978, Congress passed the Airline Deregulation Act.⁴³ The Act specifically preempted state regulation of the rates, routes and services of air carriers having federal authority,⁴⁴ which included every air carrier then operating in Wyoming. As a result of the Deregulation Act, the only remaining air carrier jurisdiction of the PSC, which is not subject to preemption, is its jurisdiction over common air carriers which operate strictly within Wyoming and which have no federal authority for interstate flights.⁴⁵ There are no common air carriers operating solely intrastate in Wyoming at the present time.

A second significant limitation with regard to PSC jurisdiction concerns municipally owned and operated public

40. *Continental Pipe Line Co. v. Belle Fourche Pipeline Co.*, 372F. Supp. 1333, 1335 (D.C. Wyo. 1974); *Parker v. Brown*, 317 U.S. 341 (1943); *Cities Service Co. v. Peerless*, 340 U.S. 179, 186 (1950).

41. In *Continental Pipe Line Co. v. Belle Fourche Pipeline Co.*, 372 F. Supp. 1333 (D.C.Wyo. 1974), Continental and Belle Fourche had both applied for certificate authority from the Wyoming PSC to construct and operate a pipeline serving the Well Draw field in Wyoming. The certificate was granted to Continental. Belle Fourche then decided to build a pipeline to serve only the interstate market. Continental's action to enjoin Belle Fourche's construction was denied on the grounds that the Belle Fourche line would ship crude oil *solely* interstate and that its shipments would not go to intrastate refineries, as would the oil carried by Continental. The court further found that the transportation of oil from one state to another was subject to federal regulation under the Interstate Commerce Act, 49 U.S.C. §1 (1970). The PSC was thus preempted from asserting jurisdiction and to grant the injunction sought by Continental would "interfere unduly and would substantially hamper and place a burden on interstate commerce." 372 F. Supp. at 1336.

42. The PSC's jurisdiction was exercised pursuant to WYO. STAT. §37-1-101 (a) (vi) (A) (1977) and WYO. STAT. §37-11-101-103 (1977).

43. Pub. L. No. 95-504 (1978), effective October 24, 1978.

44. Airline Deregulation Act of 1978, §105(a) (1978); Pub. L. No. 95-504, §4 (1978).

45. *OP. WYO. ATT'Y GEN.* 79-010 (May 23, 1979). The constitutionality of the Airline Deregulation Act of 1978 is presently being litigated in California in *Sierra Flite Service, Inc. v. Public Utility Commission of the State of California*, Case No. C79-0840-SW.

utilities. Any gas or electric public utility which is owned and operated by a municipality of the State of Wyoming within its corporate limits, or any municipal water utility no matter where it operates, is exempt from PSC jurisdiction.⁴⁶ However, any portion of a municipally owned and operated gas or electric public utility which extends services outside the corporate limits of that municipality is subject to PSC jurisdiction.⁴⁷ Also, if a municipal utility owns an undivided interest in an electric generating facility which is also partly owned by someone who is subject to the jurisdiction of the PSC, the sale of electricity in excess of the participating municipality's need would be subject to PSC jurisdiction.⁴⁸

The PSC also lacks jurisdiction, when certain conditions are met, over farmers' mutual telephone associations, mutual water companies, and the distribution or furnishing of certain utility services by a producer or other person for the sole use of that producer or other person, or for the use of the tenants of that producer or other person, if the utility service is not for sale to others.⁴⁹ However, this "tenant exemption" does not apply to metered or other direct sales of a utility commodity by a producer or other person to his tenants.⁵⁰ If a sale of a utility commodity is made to a person through a master meter, and the cost of the commodity is either absorbed or included in the rent through unidentifiable charges to the tenants, the PSC does not consider it to be a jurisdictional sale.⁵¹ However, as of September 4, 1979, which is the date the new PSC rules became effective, gas and electric utilities are prohibited from providing master metered service to mobile home parks, unless such service was already being provided prior to the effective date of the rules.⁵²

46. WYO. STAT. §37-1-101(a)(vi)(H) (1977).

47. WYO. STAT. §37-1-101(a)(vi)(H) (1977).

48. WYO. STAT. §37-1-101(a)(vi)(H) (1977).

49. WYO. STAT. §37-1-101(a)(vi)(H) (1977).

50. WYO. STAT. §37-1-101(a)(vi)(H) (1977).

51. WYO. PSC R. §246(a) (1979).

52. WYO. PSC R. §246(d) (1979).

The Wyoming Legislature added an additional limitation to PSC jurisdiction in 1978. The 1978 amendment provided that the PSC's jurisdiction did not apply to:

Any person who is not otherwise affiliated with a utility, that owns, leases, controls or has power to lease or control any plant, property or facility which, in a transaction approved or authorized by the commission, is leased to one or more public utilities, and is to be operated by the lessee or lessees for the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat, power or other utility purposes.⁵³

This exemption for certain owners of utility facilities who do not operate the facilities themselves, but instead lease them to regulated public utilities, is known as the "Wyodak exemption." It came about as the result of a rather creative and complex financial arrangement devised by Pacific Power and Light Company for the construction and operation of the Wyodak power plant located near Gillette, Wyoming. Pacific put together a series of agreements whereby it was able to, in effect, sell its surplus investment tax credits to a group of investment and financial institutions which could make use of the credits.⁵⁴ Pacific Power and Light, like many public utilities today, has more investment tax credits than it can reasonably use, which is due in large part to the capital intensive nature of the electric utility business. By transferring these tax benefits to persons who could use them, Pacific Power and Light will be able to produce electricity from the Wyodak plant at a significantly lower cost per kilowatt hour to the

53. WYO. STAT. §37-1-101(a) (vi) (H) (Supp. 1979).

54. In the Matter of the Application of Pacific Power and Light Company for an Order: 1) authorizing applicant to assume liability indirectly for the payment of up to \$215 million in an aggregate principal amount of interim notes issued by Wyodak Construction Company, Inc., 2) authorizing applicant to assume liability directly for the payment of the \$215 million in an aggregate principal amount of interim notes to be issued by Wyodak Construction Company, Inc., 3) authorizing applicant to issue notes of not exceeding \$215 million in an aggregate principal amount to pay such interim notes upon maturity, and 4) disclaiming jurisdiction with respect to, or authorizing, the proposed sale and repurchase of the Wyodak project and the loaning or advancing of funds to Wyodak Construction Company, Inc., PSC Docket No. 9266 Sub 51 and Sub 60.

consumer than would otherwise have been possible. The only problem was that the participating investment and financial institutions did not want to be classified as public utilities, so the amendment to the statutes was proposed and adopted. The end result will be lower electric utility bills for consumers who receive power from the Wyodak plant.

III. THE "TO OR FOR THE PUBLIC" REQUIREMENT

In order for a person or entity to be considered a public utility, the product or services provided must be furnished "to or for the public."⁵⁵ The "public" has been held to mean the "citizenry or consumers of Wyoming."⁵⁶ A utility which provides service only to consumers outside of Wyoming would not be subject to PSC jurisdiction.⁵⁷

A more difficult problem arises in the attempt to determine what "to or for" the public means, particularly in the natural gas business. The Wyoming Supreme Court held, in *Phillips Petroleum Company v. PSC*,⁵⁸ that a sale of natural gas to a pipeline wholesaler, who resold the gas to retail distribution companies, which in turn ultimately sold the gas to the public, was not subject to PSC jurisdiction. Thus, the sale of a utility commodity, under the *Phillips* case, is only jurisdictional to the PSC if it is a retail sale made to an end-use consumer. The PSC has no jurisdiction over the price a producer or wholesaler may charge for his product. This means that the PSC is foreclosed from regulating the most important cost element of a gas utility company. While the PSC could refuse to allow

55. WYO. STAT. §37-1-101(a) (vi) (A) through (G) (1977).

56. *Continental Pipe Line Co. v. Belle Fourche Pipeline Co.*, *supra* note 37.

57. The PSC, however, has asserted jurisdiction over utility companies or other entities which own a proportionate share in a power plant if any of the power from the plant goes to Wyoming consumers, even though the particular owner may not provide service to Wyoming consumers. The PSC asserts its jurisdiction over such companies, particularly their issuance of securities and assumption of debt, in order to insure that a power plant owner does not do anything to endanger the continued operations or financial viability of the power plant. See Application of Idaho Power and Light, Co., for authority to issue \$30 million first mortgage bonds and 150,000 shares preferred stock to support construction of Jim Bridger plant, Wyoming PSC Docket No. 9573.

58. 545 P.2d 1167 (Wyo. 1976).

a gas distribution company under its jurisdiction to enter into an unreasonable or overpriced contract to purchase a utility commodity from a producer or wholesaler, as a practical matter this power is of little use in the majority of cases where a distribution company needs the gas to maintain service to its customers and cannot obtain it at a cheaper price from any other supplier.

The Wyoming Supreme Court's decision in the *Phillips* case creates a serious gap in the regulation of natural gas sales in Wyoming. With regard to sales-for-resale, the Federal Energy Regulatory Commission (FERC) only has jurisdiction to regulate interstate pipeline companies.⁵⁹ Intrastate pipeline companies which sell gas for resale are not subject to regulation by the FERC. If the Wyoming PSC under the *Phillips* decision cannot regulate the sales-for-resale of intrastate pipeline companies or producers, then it means that such persons can charge their utility customers whatever prices they want for natural gas. This leaves the local utility distribution companies at the mercy of their intrastate suppliers, and it leaves the PSC powerless to protect the customers of those utility companies.

If the PSC were to not allow the local utility to recover the increases in price which it has to pay to its supplier from the rates the utility charges its customers, the utility would be selling gas for less than what it cost the utility to buy it and the utility would eventually become insolvent. A utility has a legal right to charge rates designed to recover its proper expenses, plus a fair return on its investment.⁶⁰

IV. THE EFFECT OF THE NATURAL GAS POLICY ACT OF 1978 ON PSC JURISDICTION

Under the original Natural Gas Act of 1938,⁶¹ the transportation or sale for resale of natural gas in inter-

59. 15 U.S.C. §717 (1970).

60. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The Supreme Court in the *Hope* case held that the return on common equity should be commensurate with returns on investments and other enterprises having corresponding risks and the return should be sufficient to assure confidence in the financial integrity of the enterprise, so as to

state commerce was made subject to regulation by the Federal Power Commission (which is now the Federal Energy Regulatory Commission). Besides applying to interstate pipeline companies, the Natural Gas Act was later held to encompass producers of natural gas as well as distributors in the landmark decision of *Phillips Petroleum Company v. Wisconsin*.⁶²

Intrastate producers of natural gas, however, remained unregulated under the Natural Gas Act and were free to charge whatever prices the market would bear. This resulted in the anomalous situation of certain consumers in gas producing states paying higher prices for gas produced and sold within their state than consumers in other states paid for gas from the same producing state which went into the interstate market.

The average intrastate price of natural gas in certain gas producing states, e.g., Texas, Oklahoma and Louisiana, was substantially higher than the average interstate price which a producer was limited to receiving under federal law.⁶³ The obvious incentive was for producers to sell their gas intrastate, if they could find a buyer, rather than interstate. This created a surplus of gas available within the producing states, and a shortage of gas available for sale in the interstate market. In an attempt to burst the intrastate bubble and to make more gas available for the interstate market, Congress passed the Natural Gas Policy Act of 1978,⁶⁴ (NGPA) which made intrastate gas subject to the same price regulation. Furthermore, it provided for complete deregulation of all new natural gas by 1985.⁶⁵ The NGPA is presently being challenged on constitutional

maintain its credit and to attract capital. The court also held that the particular methods used to determine a fair return on investment were not important so long as the "end result" was just and reasonable.

61. 15 U.S.C. §717 (1970).

62. 347 U.S. 672 (1954) *reh. den.* 348 U.S. 851 (1954).

63. See affidavits submitted in support of Motion for Summary Judgment in *Oklahoma, et al. v. Federal Energy Regulatory Commission*, No. CIV-78-01251-T (W.D.Okl.).

64. 15 U.S.C. §§3301-3432; 42 U.S.C. §7255; Pub. L. No. 95-621, 92 Stat. 3350 (1978).

65. 15 U.S.C. §§3301-3432 (1978).

grounds in a lawsuit filed by the states of Oklahoma, Texas, Louisiana and Wyoming.⁶⁶

Besides regulating intrastate gas and placing certain regulatory burdens on the Wyoming State Oil and Gas Conservation Commission,⁶⁷ the NGPA interferes with the jurisdiction of the Wyoming PSC in several respects. First, Section 205 of the NGPA requires the PSC to pass through certain incremental gas cost increases directly to various industrial customers of local distribution companies under the jurisdiction of the PSC.⁶⁸ The PSC is thus precluded from exercising its statutory discretion in each individual case, which could, in some situations, prove very costly to the consuming public. For example, a federally mandated rate increase for an industrial customer might cause that customer to convert to an alternate fuel source and the utility would then lose all revenues it had been receiving from that customer. If that industrial customer represented a significant percentage of the utility's sales, the rates to all the other smaller customers of the utility would have to be increased to make up for the loss of that industrial customer's contribution to the utility's fixed costs.

Secondly, the NGPA interferes with the PSC's regulation of contracts entered into by utility distribution companies under its jurisdiction. Section 314 of the NGPA⁶⁹ prohibits gas sale and purchase contracts from providing that the subject gas may only be sold or transported in intrastate commerce. Thus, more Wyoming gas may end up going out of state than would otherwise have occurred. While this is the intended beneficial purpose of the NGPA,

66. *Oklahoma, et al. v. Federal Energy Regulatory Commission*, *supra* note 63.

67. Section 503 of the NGPA (Pub. L. No. 95-621 1978) requires the states to make numerous and complex determinations regarding the classification of natural gas into certain categories for pricing purposes. Under subparagraph (c) (2) (B) of that section, the state may waive its obligations only if the Federal Energy Regulatory Commission agrees to accept the waiver.

68. Section 205(d) of the NGPA (Pub. L. No. 95-621 (1978)) provides that: **PREEMPTION OF STATE OR LOCAL LAW.** — The requirements of this title shall preempt and supersede any provision of State or local law to the extent such provision of law would preclude the pass through of any surcharge under this title or prevent the application of the requirements of this section.

69. Pub. L. No. 95-621, §314 (1978).

there is a potentially negative aspect of the legislation as far as Wyoming consumers are concerned. The NGPA may cause gas supply problems for the consumers of some Wyoming utility companies by reducing the ability of certain Wyoming companies to compete against large interstate pipeline companies for new gas supplies. Section 315 of the NGPA⁷⁰ also gives the FERC the power to regulate the duration of intrastate gas supply contracts, which again encroaches upon PSC jurisdiction.

V. THE EFFECT OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 ON PSC JURISDICTION

The Public Utility Regulatory Policies Act of 1978 (PURPA)⁷¹ was one of five separate pieces of national energy legislation, known collectively as the National Energy Act, which President Carter signed into law on November 9, 1978.⁷² The three stated goals which the PURPA is intended to achieve are the conservation of the energy supplied by utilities, the optimally efficient use of utility resources and facilities, and equitable rates to electric consumers.⁷³ To attain these purposes, PURPA establishes a series of federal policy "standards" which must be considered by each state commission to determine whether it is appropriate to adopt the standards for a given utility. The Act also ensures the right of the federal government, consumers and utilities to intervene in any state PSC rate-making proceeding.⁷⁴ PURPA covers all electric utilities selling more than 500 million kilowatt-hours annually, other than for resale, and gas utilities selling ten billion cubic feet annually, other than for resale.⁷⁵

The PSC is required by PURPA to "consider" six ratemaking standards with regard to cost-of-service, de-

70. Pub. L. No. 95-621, §314 (1978).

71. Pub. L. No. 95-617 (1978).

72. The other four laws were the National Energy Conservation Policy Act (Pub. L. No. 95-619 (1978)), the Power Plant and Industrial Fuel Use Act (Pub. L. No. 95-620 (1978)), the Natural Gas Policy Act (Pub. L. No. 95-621 (1978)), and the Energy Tax Act (Pub. L. No. 95-618 (1978)).

73. Pub. L. No. 95-617, §101 (1978).

74. Pub. L. No. 95-617, §§121-123 (1978).

75. Pub. L. No. 95-617, §§102(a) and 301(b) (1978).

clining block rates, time-of-day rates, seasonal rates, interruptible rates and load management techniques.⁷⁶ These six standards apply only to electric utilities and there is no obligation under PURPA for the PSC to adopt them. The requirement is only that the standards be "considered". However, the PSC could become obligated under state law to adopt a particular standard if the evidence indicates that the standard would result in just and reasonable rates. The determinations made by the PSC in their consideration process must be made public, reduced to writing, and are subject to review in the state courts.⁷⁷

PURPA sets forth five additional standards relating to master metering, automatic adjustment clauses, information to consumers, procedures for termination of utility service and advertising.⁷⁸ Unlike the six ratemaking standards noted above, the PSC is legally obligated to adopt these five policy standards if the consideration process determines them to be appropriate and consistent with state law.⁷⁹ All of the standards apply only to electric utilities except for the last two standards relating to termination of service and advertising.⁸⁰ Finally, the PSC must determine, after an evidentiary hearing, whether lifeline rates should be implemented by the electric utilities which are covered by the Act.⁸¹

PURPA requires that the PSC complete its consideration process for the ratemaking standards within three years, and for the five additional standards within two years.⁸² The PSC must also file an annual report with the Department of Energy for each of the ten years following the enactment of the Act stating what progress it has made in carrying out its obligations under the Act.⁸³ Any actions or hearings conducted by the PSC before the effective date of the Act will be treated as satisfying the requirements of

76. Pub. L. No. 95-617, §111 (1978).

77. Pub. L. No. 95-617, §§111(b)(1) and 123 (1978).

78. Pub. L. No. 95-617, §113 (1978).

79. Pub. L. No. 95-617, §113 (1978).

80. Pub. L. No. 95-617, §303 (1978).

81. Pub. L. No. 95-617, §114 (1978).

82. Pub. L. No. 95-617, §§112(b), 113(a), and 303(a) (1978).

83. Pub. L. No. 95-617, §116 (1978).

the Act if such proceedings substantially conformed to the requirements of the Act.⁸⁴

PURPA places a tremendous burden upon the PSC in terms of time and commitment of resources. Earlier versions of the bill made it mandatory upon the state commissions to adopt the various ratemaking and policy standards. The final version that became law, however, permits the state commissions to exercise some discretion in whether or not adoption of the standards is appropriate for the particular utilities under their jurisdiction. Giving the states this discretion and flexibility is preferable to an absolute federal mandate. The possibility of such an absolute mandate, however, cannot be ruled out, particularly if the states do not make a good faith effort to comply with the provisions of PURPA.

VI. ACTIVITIES SUBJECT TO REGULATION BY THE PSC

There are five general areas of public utility activity which the PSC regulates: rates, certificate authority, service conditions and regulations, contracts and security issuances. The Commission has no inherent or common law powers, but has only the power and authority granted to it by the Wyoming Constitution and statutes.⁸⁵ Furthermore, the statutes creating and empowering the PSC must be strictly construed and any reasonable doubt of the existence of any power must be resolved against the exercise thereof.⁸⁶

A. Rates

The PSC has jurisdiction over the rates charged by a public utility. No public utility may charge a rate different than the rate which has been authorized for that utility for a particular type of service and which has been properly

84. Pub. L. No. 95-617, §124 (1978).

85. *Tri-County Electric Association v. City of Gillette*, 525 P.2d 3 (Wyo. 1974); *Phillips Petroleum Co. v. Public Service Commission*, 545 P.2d 1167 (Wyo. 1976).

86. *Id.*

filed with the Commission.⁸⁷ All rates must be "just and reasonable" and a utility may not grant an undue or unreasonable preference or advantage in its charges.⁸⁸ A utility must charge the same uniform rate for a "like and contemporaneous service under similar circumstances and conditions."⁸⁹ Utilities, as to rates, are prohibited from granting any "undue or unreasonable preference or advantage to any person, locality or particular description of service," although a utility may establish "a sliding scale of charges or classification of service" as long as it does not discriminate between customers in the same class of business.⁹⁰

Rate increase applications to the PSC are divided into two basic types. The first is the "general rate increase" application which normally covers all elements of a utility's operations, finances, rate design, rate of return, etc. The other type of rate application, which is being used with increasing frequency because of rapid escalations in energy commodity costs, is the "pass-on" rate increase application.⁹¹

A pass-on rate increase application is one in which the utility requests permission to pass through to its customers on an expedited basis certain increases in the wholesale price of natural gas or power which the utility must pay to its supplier. Wyoming law provides that the Commission may put a rate increase requested by a utility into effect immediately, subject to further investigation, hearing and refund.⁹² The PSC's pass-on rate increase procedure has been judicially upheld.⁹³ The pass-on procedure is really just a determination in a particular case by the Commission that interim rate relief is necessary pending further investigation and opportunity for hearing.

87. WYO. STAT. §37-3-102 (1977).

88. WYO. STAT. §§37-3-101 and 37-3-104 (1977).

89. WYO. STAT. §§37-3-101 and 37-3-104 (1977).

90. WYO. STAT. §37-3-104 (1977).

91. In addition to these two basic forms of rate applications, rate increases can be made by the filing of contracts, where contract rates are applicable, and by applications to raise specific rates by customer class, type of equipment or service. See the discussion of contract rate setting under part VI (D) of this article.

92. WYO. STAT. §37-3-106(d),(e) and (f) (1977).

93. *Great Western Sugar Co. v. Wyoming PSC*, Civil Action No. 86-387, First District, Wyoming (August 16, 1979).

It has become a matter of Commission policy that such expedited pass-on rate increases are allowed only where the cost increase involved is a wholesale utility commodity cost increase, and such wholesale increase by the supplier is beyond the Commission's jurisdiction to control.⁹⁴ Secondly, the wholesale price increase must be fully documented in the application and it must be shown that it will be passed on equally or proportionately to all classes of ratepayers.⁹⁵ Thirdly, the rate increase must be an exact dollar-for-dollar pass through and must not increase the utility's rate of return.⁹⁶ If a utility is already earning above its authorized rate of return, it would only be allowed to pass on that portion of its increased commodity costs which would bring it up to its authorized rate of return.

B. Certificate Authority

A second major area of utility practice before the PSC involves certificate proceedings. Before a public utility can build facilities or commence service to a particular area not previously certificated to a like utility, it must apply for and be granted a Certificate of Public Convenience and Necessity by the PSC which authorizes it to build the particular facility or serve the particular geographic area in question.⁹⁷ A public utility may generally provide service only within its duly authorized certificated area.

94. *E.g.*, In the matter of the application of Northern Utilities Division of Kansas-Nebraska Natural Gas Co. for authority to pass-on increased natural gas purchase costs to its domestic, commercial and public authority customers in Wyoming, Wyoming PSC Docket No. 9636, Sub 22; In the matter of the application of Lower Valley Power and Light, Inc. to pass-on a \$987,909 increase in the wholesale cost of purchase power charged by its supplier; Bonneville Power Administration, Wyoming PSC Docket No. 9617, Sub 6; In the matter of the application of Montana-Dakota Utilities Company to increase all its Wyoming rates 1.785 cents per MCF and 10.955 cents to cover wholesale gas cost increases beyond the commission's jurisdiction, Wyoming PSC Docket No. 9458, Sub 30 and Docket No. 9308, Sub 28.

The PSC also uses the expedited pass-on procedure when refunds are required to be made to the customers of a utility, *e.g.*, In the matter of the application of Cheyenne Light, Fuel and Power Company for authority to refund approximately \$1,471,195 to its customers, past and present, Wyoming PSC Docket No. 9511, Sub 43; In the matter of the application of Montana-Dakota Utilities Co. to refund \$170,600 per annum as a pass-on of wholesale gas charges, Wyoming PSC Docket No. 9458, Sub 29 and Docket No. 9308, Sub 27,

95. *Id.*

96. *Id.*

97. WYO. STAT. §37-2-205 (1977); WYO. PSC R. §204 (1979).

Section 37-2-205(a) of the Wyoming Statutes⁹⁸ does allow a utility to extend service into "contiguous" areas prior to obtaining certificate authority under certain conditions in the ordinary course of the utility's business. The PSC has construed this "contiguous" provision as allowing a utility, on an emergency basis as shown by a clear public need and with simultaneous notification to the PSC, to build facilities to serve persons located in uncertificated areas adjoining the utility's certificated area and available facilities. The utility must, however, make immediate application for certificate authority under Section 37-2-205 covering such emergency service extensions. This type of construction was a rarity in the past and none has occurred within the last several years.⁹⁹

Ordinarily, only one utility is authorized to serve a particular area, but the PSC has allowed dual certification in some situations where it is in the public interest to do so. The most common situation of dual or multiple certification of service area to more than one utility has been in the radio common carrier (RCC) business. With regard to radio common carriers, which provide mobile telephone and pocket pager services, the Commission has adopted a policy of "regulated competition" which allows a certain amount of competition between RCC utilities within a service area, but still maintains control over rates, entry into the field, and the conditions of service.¹⁰⁰ The "regulated competition" approach to certain utilities has been approved by the courts in Wyoming.¹⁰¹

98. WYO. STAT. §37-2-205(a) (1977).

99. Conference with Alex Eliopoulos, Chief Counsel & Executive Secretary of Wyoming PSC.

100. *E.g.*, In the matter of the application of Pine Mountain Communications, Inc. for a certificate of public convenience and necessity to provide inter-connected UHF mobile phone and pocket pager service within the City of Casper, Wyoming and a 35 mile radius thereto, Wyoming PSC Docket No. 9662; In the matter of the application of Rule Radiophone Service, Inc. for authority to amend its existing certificated radio common carrier service area to conform with the latest service area directive of the Wyoming PSC as contained in Docket No. 9658 Sub 1 and Docket No. 9438 Sub 2, Wyo. PSC Docket No. 9600 Sub 2; In the matter of the application of Ernest B. Brownell for authority to upgrade existing mobile radio telephone service to all or part of Big Horn, Park, Hot Springs, Washakie and Fremont Counties by the addition of two new VHF channels, Wyo. PSC Docket No. 9438, Sub 2.

101. Custom Radio, Inc. and Western Radio Communications, Inc. v. Pine Mountain Communications, Inc. and the Public Service Commission of Wyoming,

PSC authority is required before a utility may commence construction of a "major utility facility."¹⁰² The term "major utility facility" is defined by the PSC rules to include all types of electric power generating plants and electric transmission lines, switching stations, and substations of greater than 69 KV energization.¹⁰³ There are no nuclear generating plants in Wyoming at the present time, but any proposal for a nuclear power plant would have to be approved by the PSC if the person constructing or intending to operate the facility was, or would become, a public utility upon completion of the plant.¹⁰⁴

The term "major utility facility" also covers natural or manufactured gas processing plants and pipelines and gas compressor stations and storage systems capable of

Civil Action No. 46502 (Seventh District, Wyoming, 1979). The court in that case held that:

7. The issuance of multiple certificates of public convenience and necessity and the commission's policy of regulated competition is in conformity with Wyoming law, is in accord with prior commission actions, and should be affirmed.

The Wyoming Supreme Court has also addressed the issue of regulated competition between utilities subject to PSC jurisdiction in the case of *Dubois Telephone Exchange v. Mountain States Telephone and Telegraph Co.*, 429 P.2d 812, 815-816, wherein it stated:

Although counsel for Dubois states Section 37-1, W.S. 1957, clearly contemplates that only one public utility will be granted a certificate of public convenience and necessity for the furnishing of telephone service within a certificated area, we fail to find language in this statute justifying such a statement, and appellant has not called our attention to any words or language in the statute which would indicate such a contemplation. In essence we held the contrary in *Big Horn Electric Company v. Pacific Power and Light Company*, 397 P.2d 455, 457-458.

Perhaps the power of the commission to do what it did, when it denied the request of Dubois in the instant matter, is best reflected in the following language contained in Section 37-31: ' . . . and provided, further, that if any public utility, in constructing or extending its line, plant or system shall interfere with the operation of the line, plant or system of any other public utility, already authorized or constructed, the commission on complaint of the public utility claiming to be injuriously affected, may, after hearing make such order and prescribe such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable . . . '

Not only does the language just quoted indicate that two similar utilities may have rights in the same territory, but it authorizes the commission in a conflict between the two utilities to make such order and prescribe such conditions as to it may seem just and reasonable. That of course is what the commission did when it refused to order what Dubois was requesting. We see no reason to say its action was without authority or contrary to law.

102. Wyo. PSC R. §§203(a), 205, 206, 207 (1979); Wyo. STAT. §37-2-205 (1977).

103. Wyo. PSC R. §202(c) (1)-(3) (1979).

104. Wyo. PSC R. §204 (1979).

transporting or storing gas at pressures in excess of 125 pounds per square inch gauge, but excluding distribution facilities.¹⁰⁵ Trunk transmission lines and associated processing or pumping facilities designed for, or capable of, processing or transporting crude oil, liquid petroleum or refined products are considered "major utility facilities," excepting well head facilities.¹⁰⁶

Coal slurry pipelines are defined as "major utility facilities" by the PSC Rules as well as coal gasification plants and associated facilities.¹⁰⁷ Also included would be any plant or facility for in situ utilization of coal or gas.¹⁰⁸ Water transmission lines, pumping stations, storage and diversion facilities are classified as "major utility facilities" unless their construction is accomplished in the regular course of the utility's business.¹⁰⁹

Finally, the term "major utility facility" applies to certain common carrier communication facilities.¹¹⁰ Included are microwave facilities or communication towers, open wire or cable toll lines and multi-channel underground toll lines.¹¹¹

Under the PSC's statutory authority to determine "the public convenience"¹¹² with regard to constructing major utility facilities, rules have been promulgated by the PSC which require a utility to consider a number of different factors which may potentially affect the "public convenience." The utility's application must set forth information showing how the construction of the particular utility facility will affect the environment and natural resources. For example, Section 205 of the PSC rules requires that the utility's application contain:

- a. . . a description of the various types of country in or through which the facility will be constructed;

105. Wyo. PSC R. §202(c) (4) (1979).

106. Wyo. PSC R. §202(c) (6) (1979).

107. Wyo. PSC R. §202(c) (7) & (8) (1979).

108. Wyo. PSC R. §202(c) (8) (1979).

109. Wyo. PSC R. §202(c) (9) (1979).

110. Wyo. PSC R. §202(c) (5) (1979).

111. *Id.*

112. Wyo. STAT. §37-2-205 (1977).

b. a brief report on the surrounding scenic, historical, archaeological and recreational locations, natural resources, plant and animal life, land reclamation, possible safety hazards, and plans for protecting the environment;

c. land, mineral and water requirements for the major utility facility, the status of the acquisition of land, or rights-of-way or of minerals and water for the project, the sources or locations thereof, and the proposed method of transportation and utilization;

* * *

g. a list of local, state, Indian, or federal governmental agencies having requirements which must be met in connection with the construction or operation of the project, and the status before those agencies. . . .¹¹³

Furthermore, an application to construct an electric generating power plant or coal gasification plant must, under Section 206 of the PSC rules, include:

a. a general description of the devices to be installed at the major utility facility to protect air, water, chemical, biological and thermal qualities; the designed and tested effectiveness of such device; and the operational conditions for which the devices were designed and tested;

b. the name of any body or source of water or river along which the major utility facility will be constructed or from which it will obtain or return water;

c. a geological report of the station site including foundation conditions, groundwater conditions, operating mineral deposits within a one mile radius, and a topographical map showing the area within a five mile radius.¹¹⁴

With regard to the "necessity"¹¹⁵ of a major utility facility, the new PSC rules require a "statement setting

113. Wyo. PSC R. §205 (1979).

114. Wyo. PSC R. §206 (1979).

115. Wyo. STAT. §37-2-205 (1977).

forth the need for the project in meeting present and future demands for service, in Wyoming or other states, and the proposed sale of the utility commodity or service which the construction of this facility will make available."¹¹⁶

There is no fixed period following the application by a utility seeking authority to construct a major utility facility within which the PSC must issue its final order granting or denying the requested certificate. Section 207 of the PSC rules allows the Commission to set the time between the filing of an application and the commencing of construction.

There is a bill presently pending in Congress, however, which would give the federal government the power to set deadlines for state action regarding priority energy projects. The bill is entitled the "Priority Energy Project Act of 1979," and is otherwise known as the "fast track" legislation.¹¹⁷ The bill, which was passed by the Senate on October 4, 1979, provides for the creation of an "Energy Mobilization Board" (EMB),¹¹⁸ which has the power to establish "reasonable deadlines for all significant final agency actions and decisions."¹¹⁹ No deadline schedule may encompass a period of more than two years unless the EMB finds that additional time is necessary.¹²⁰ If a state or local agency fails to make a decision or take action by the deadline time, the EMB would have the power to make a decision or perform the action in lieu of the agency.¹²¹ This proposed fast track legislation poses a serious threat to the jurisdiction of the PSC, as well as other state agencies involved with regulating energy matters.

The final area concerning certificate proceedings involves the discontinuance or abandonment of public utility services or facilities. A public utility must file an application and obtain PSC approval before it can sell, transfer,

116. Wyo. PSC R. §205(d) (1979).

117. S. 1308, 96th Cong., 1st Sess.

118. *Id.*, §4.

119. *Id.*, §17(a).

120. *Id.*, §17(d).

121. *Id.*, §21(a)(1).

lease, discontinue or abandon any utility service, plant or facility.¹²² PSC certificate authority is also required to transfer the ownership, or a controlling interest in the ownership, of a public utility.¹²³ The burden of proof is on the utility to show that its proposed transfer would serve the public convenience and necessity.¹²⁴ The public interest is to be given paramount consideration and the desires of the utilities are secondary.¹²⁵

Controversy has arisen in the area of PSC certificate proceedings in situations where a municipality expands its city limits into the certificated area of another public utility. The PSC's jurisdiction to grant territorial rights for utility service stops at the city limits of a municipality where the public utility involved is owned and operated by that municipality.¹²⁶ The PSC, however, retains its jurisdiction, under Section 37-1-101 of the Wyoming Statutes,¹²⁷ to regulate the granting of certificates to all non-municipally owned or operated public utilities, including those which provide service within municipalities and to that part of a municipally owned and operated gas or electric utility operating and providing service outside the municipality's corporate limits. A public utility must obtain a Certificate of Public Convenience and Necessity before it can provide utility service within a municipality.¹²⁸ After obtaining the necessary certificate from the PSC, the utility must obtain the necessary franchise from the municipality, which authorizes the utility to construct its facilities within the city limits.¹²⁹

122. Wyo. PSC R. §208 (1979); *United Fuel Gas Co. v. Railroad Commission*, 278 U.S. 300 (1929).

123. Wyo. PSC R. §209 (1979).

124. *Bridger Valley Electric Association v. Public Service Commission*, 430 P.2d 919 (Wyo. 1967), held that a utility seeking to transfer a portion of its certificate authority must comply with the certificate statutes and that the burden is on the utility to prove that the public convenience and necessity will be served by the proposed transfer.

125. *Big Horn Rural Elec. Co. v. Pacific Power & Light Co.*, 397 P.2d 455 (Wyo. 1964).

126. WYO. STAT. §37-1-101(a)(vi)(H) (1977); *Tri-County Electric Association, Inc. v. City of Gillette*, 584 P.2d 995 (Wyo. 1978).

127. WYO. STAT. §37-1-101 (1977).

128. WYO. STAT. §37-2-205 (1977).

129. WYO. CONST. art. 13, §4; WYO. STAT. §15-1-103(a)(xxi) (1977).

C. *Quality of Service*

The PSC has the statutory obligation and power to ensure that the service and facilities of every public utility are adequate and safe and that a utility's service regulations¹³⁰ are just and reasonable.¹³¹ A utility must promulgate and file with the PSC rules and regulations to govern the provision of utility service to its customers.¹³² The utility's rules must conform in principle, meaning and substance with any applicable regulations prescribed by the PSC.¹³³

The PSC may disallow or modify any existing or proposed regulation or rule of a public utility when it is found to be unjustly discriminatory, unduly preferential, unreasonable, inadequate, unsafe or otherwise in violation of law.¹³⁴ The Commission can also prescribe and order a substitute service, facility or service regulation if it determines that such is necessary.¹³⁵

Any person, municipality, public utility or the Attorney General may file a complaint with the PSC regarding any public utility problem or violation of law.¹³⁶ Furthermore, the Commission may, on its own motion, investigate any rate, service, facility or service regulation of a public utility to ensure compliance with the law and with Commission orders.¹³⁷

Section 114 of the PSC rules¹³⁸ sets out the complaint filing procedure. A person who has a problem with a public utility can file either an informal complaint or a formal

130. "Service regulation" is defined by Wyo. STAT. §37-1-102(b) (1977) to "mean and include every rule, regulation, practice, act or requirement in any way relating to the service or facilities of a public utility."

131. Wyo. STAT. §§37-3-112 and 37-3-114 (1977); Wyo. PSC R. §236 (1979).

132. Wyo. PSC R. §216 (1979).

133. Wyo. PSC R. §216 (1979). Chapters III through VII and chapters IX through XIII of the PSC Rules contain special service regulations applicable to the various types of public utilities.

134. Wyo. STAT. §37-2-122(b) (1977); *E.g.*, Empire Land and Development, Inc. v. Riverton Valley Electric Association, Wyo. PSC Docket No. 9691 (December 14, 1979).

135. *Id.*

136. Wyo. STAT. §37-2-118 (1977).

137. Wyo. STAT. §37-2-117 (1977).

138. Wyo. PSC R. §114 (1979).

complaint. An informal complaint may be made in person, by letter or other means and need not follow any particular form.¹³⁹ It should, however, contain a clear and concise statement of all the facts involved, the name and address of the complainant and the name of the utility against which the complaint is being made.¹⁴⁰ Upon receipt of an informal complaint the PSC investigates the matter and attempts to resolve the problem by informal mediation between the complainant and the utility without conducting a hearing or other formal procedure. The PSC may require a hearing upon an informal complaint on its own motion.

If a person desires a hearing, a formal complaint must be filed which specifically requests a hearing.¹⁴¹ A complainant who is unsuccessful or dissatisfied after filing an informal complaint may proceed to file a formal complaint requesting a hearing.¹⁴² There is no rule that requires a complainant to file an informal complaint first before he files a formal complaint.

D. Contracts

Public utilities are required to file with the PSC copies of all contracts to which they may be a party.¹⁴³ It is a well-established principle of utility law that a state commission can modify or annul a contract entered into by a public utility if there is a public interest reason for doing so, and such modification or annulment has been held to be a valid exercise of police power and is not an unconstitutional impairment of contracts.¹⁴⁴

The Wyoming Supreme Court recently articulated the PSC's power to modify or abrogate contracts entered into

139. Wyo. PSC R. §114(a) (1979).

140. Wyo. PSC R. §114(a) (2) (1979).

141. Wyo. PSC R. §114(b) (1979). A formal complaint form which may be used is provided in Wyo. PSC R. §1401(a), Form No. 1, (1979).

142. Wyo. PSC R. §114(a) (4) (1979).

143. Wyo. STAT. §37-3-111 (1977); Wyo. PSC R. §218 (1979).

144. *Union Dry Goods Company v. Georgia Public Service Corporation*, 248 U.S. 372 (1919); *Knoxville Water Co. v. Knoxville*, 189 U.S. 434 (1903); *Portland R. Light and P. Co. v. Railroad Commission*, 229 U.S. 397 (1913), *affirming* 56 Or. 468, 109 P. 273 (1910); *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228 (1920). For additional references to numerous state court decisions see Annot., 9 A.L.R. 1420, 1425.

by public utilities subject to its jurisdiction in the case of *Tri County Electric Association, Inc. v. The City of Gillette*.¹⁴⁵ The *Tri County* case involved the issue of whether a contract between a public utility and a city dividing up area for electric utility service could be superseded and annulled by an order of the PSC. The court held that the territorial rights of a city and a public utility regarding utility service area subsist only by action of the PSC and applicable statutes, not by contract.¹⁴⁶ The court further stated that the contract "was no more than a stipulation for the consideration of the PSC in its authority to regulate service by public utilities."¹⁴⁷

The court concluded in the *Tri County* case that utilities may not use contracts as a device to escape PSC jurisdiction:

The agreement was swallowed up by and disappeared into action taken by the PSC. . . . [w]ithout the blessing of the PSC the agreement was a nullity and could survive no further than the extent of that agency's approval. There was here no lawful contract that could extend beyond that authority resting exclusively within the PSC. Utilities cannot between themselves contract away the jurisdiction of the PSC.¹⁴⁸

Until the regulatory body having jurisdiction over the rates to be charged by a public utility has exercised its ratemaking power, it has been held that rates set by means of a contract between the utility and its customers are to be deemed valid and enforceable.¹⁴⁹ A utility can contract with its customers to set rates only if no tariff rates have been filed which would be applicable to the customer who

145. 584 P.2d 995 (Wyo. 1978).

146. *Id.*, at 1000.

147. *Id.*, at 1003.

148. *Id.*, at 1004.

149. *Preston County Light & Power Co. v. Renick*, 145 W.Va. 115, 113 S.E.2d 378 (1960); *Southern P. Co. v. Spring Valley Water Co.*, 173 Cal. 291, 159 P. 865 (1916) (involving a grant of a free use of water to a railroad company by a water company in return for an easement to the latter to lay its pipelines among the railroad right of way); *State ex rel. St. Joseph Water Co. v. Geiger*, 246 Mo. 74, 154 S.W. 486 (1912) *error dismissed*, 235 U.S. 694 (1914), *overruled on another ground*, *State ex rel. St. Joseph Water Co. v. Eastin*, 270 Mo. 193, 202, 192 S.W. 1006 (1917).

desires to enter the contract.¹⁵⁰ A utility cannot contract for a rate which is different than the filed tariff rate with any customer who falls within the service classification described in the filed tariff.¹⁵¹ To do so would violate the statutory prohibition against preferential or discriminatory rates.¹⁵²

While the PSC has the power to abrogate utility contracts which adversely affect the public interest, the PSC will not interfere with contracts which are not clothed with a public interest and which involve primarily the private interests or rights of the contracting parties.¹⁵³ Contractual questions involving the construction, validity, rights, status and legal effect of contracts have been held to be matters which lie within the jurisdiction of the courts and not utility commissions.¹⁵⁴

150. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobil Gas Service Corp.*, 350 U.S. 332 (1956); 64 AM. JUR.2d *Public Utilities* §§80, 22 and 133 (1972).

The Wyoming PSC recently faced an issue involving private contracts in the case of *In the Matter of Great Western Sugar Company's Formal Complaint and Petition for Rate and Other Relief Concerning Natural Gas Utility Industrial Contract and Tariff Rates Charged by Montana-Dakota Utilities Co., Wyo.* PSC Docket No. 9458, Sub 9, Final Order, September 8, 1977. On page 12 of its final order in that case, the PSC stated:

Under substantially all state statutes and court decisions a utility and any other person can contract for specialized (generally large) utility service at special contract rates and the same will be valid if: (1) the regulatory agency does not have an approved tariff rate covering that type or class of service, and when the contract is proffered for filing by the utility the regulatory agency may choose to take no action thereon; or (2) the regulatory agency authorizes 'filing' of, or it otherwise approves, the contract rate. Conversely, if the regulatory agency has established a tariff rate covering the utility service and does not authorize the 'filing' or in some other positive manner approve the contract rate, such contract rate is not legal under the premise that a utility and another person cannot avoid statutorily required regulation by contract or other action. Once a special contract rate is duly effective a utility regulatory agency can change the rate only if it finds that the evidence shows a 'public interest need' for the same; a change cannot be made merely because the utility has made a bad bargain.

151. *Louisville Water Company v. Public Service Com'n*, 318 S.W.2d 537 (Ky. 1958); *Leslie v. Houston Natural Gas*, 280 S.W.2d 353 (Tex. Civ. App. 1955).

152. WYO. STAT. §§37-3-101, 37-3-102, 37-3-104 (1977).

153. *Continental Pipe Line Company v. Wheatland R.E.A., Inc.*, Wyo. PSC Docket No. 9574, Sub 8 (April 19, 1979). The PSC dismissed a complaint which was based on a contractual dispute concerning utility rates between two utilities where there appeared to be no overriding public interest at stake. The Commission observed that "the construction, interpretation and enforcement of contractual rights is a judicial function; under Article 5, Section 1 of the Wyoming Constitution, the judicial power is vested in the courts."

154. *Lemhi Telephone Company v. Mountain State Telephone and Telegraph Company*, 98 Idaho 692, 571 P.2d 753 (1977); *General Cable Corporation v.*

E. Securities

The rights of every gas corporation and of every electrical corporation operating as a public utility in the State of Wyoming to issue, assume or guarantee securities and to create liens on its property situated within the State of Wyoming is a special privilege, hereby subjected to the supervision and control of the Public Service Commission of the State of Wyoming. . . .¹⁵⁵

Public utilities other than gas and electric utilities are free to issue securities without regulation by the PSC. Any security issued by a gas or electric utility company, however, without PSC approval is void,¹⁵⁶ except that such utilities may issue short term securities, other than stock, without PSC approval.¹⁵⁷

The PSC can refuse to approve the issuance of securities if it finds that such transactions are inconsistent with the public interest, or that the purposes for the issuance are not permitted by the statutes, or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility.¹⁵⁸

The purposes for which securities may be issued by a gas or electric utility are set out by statute.¹⁵⁹ In addition to the specifically enumerated purposes, a utility may issue securities "for any other purpose approved by the commis-

Citizens Utility Company, 27 Ariz. App. 381, 555 P.2d 350 (1976); Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903 (Mo. 1971) (PSC cannot enforce, construe nor annul contracts nor can it enter a money judgment); California Water and Telephone Company v. Public Utilities Commission, 334 P.2d 887 (Cal. 1959).

155. WYO. STAT. §37-6-101 (1977).

156. WYO. STAT. §37-6-106 (1977).

157. WYO. STAT. §37-6-103 (1977) provides that:

Such public utility may issue such securities other than stock or stock certificates, payable at periods of not more than 18 months after date of issuance of the same, and secured or unsecured, without application to or order of the commission, but no such securities so issued shall in whole or in part be refunded by any issue of stocks, stock certificates or other securities having a maturity of more than 18 months, except on application to and approval of the commission.

158. WYO. STAT. §37-6-102 (1977).

159. WYO. STAT. §37-6-101 (1977).

sion.”¹⁶⁰ No public notice or hearing is generally required for a securities application unless it should become a contested case under the Administrative Procedure Act.¹⁶¹ When a securities application is received by the PSC, it is assigned to a staff economist or financial analyst for review. The analyst studies the application in light of the company's present financial situation and then makes a report to the Commission. Securities applications are rarely contested in formal hearings. The real battles occur in the rate hearings over the issue of what the proper rate of return on common equity should be for a particular utility.¹⁶²

CONCLUSION

While the demands made upon the PSC have been rapidly multiplying, the jurisdiction and power of the PSC to effectively meet all of the demands have been weakened in several respects. The first inroad has been the expansion of the federal government into areas previously left to the control of the states. In some cases, this increased federal preemption has taken the form of legislation which provides for deregulation and free market activity protected by federal law from state interference. A second factor which has undermined the PSC's jurisdiction has been the narrow judicial interpretations of PSC jurisdictional statutes. The Wyoming *Phillips* case is the most significant example. A

160. WYO. STAT. §37-6-101 (1977).

161. An example of this would be where the securities transaction would jeopardize the utility's ability to provide adequate and responsive service, or where the control of utility is being transferred constituting a sale of utility facilities.

162. For an example of how rate of return issues are litigated before the PSC, see the testimony and evidence submitted in the matter of the application of Montana-Dakota Utilities Company to increase rates to all customers served by it in the Big Horn Basin and Sheridan-Buffalo service areas a total of \$1,420,882 annually. Wyo. PSC Docket No. 9458, Sub 16, Docket No. 9308, Sub 14, and Docket No. 9625, Sub 4 (1978). Also, see in the matter of the application of Northern Gas Company for authority to increase wholesale natural gas service rates to Northern Gas Division of Kansas-Nebraska Natural Gas Co., Inc. for resale to domestic and commercial customers in the Jeffrey City, Rawlins, Sinclair, Saratoga, Hanna-Elmo, Medicine Bow and Laramie, Wyoming system, Wyo. PSC Docket No. 9491, Sub 8 (June 27, 1978) and in the matter of the application of Northern Utilities, Inc. for authority to increase wholesale natural gas service rates to Northern Utilities Division of Kansas-Nebraska Natural Gas Co., Inc. for retail service in the Casper service area, Wyo. PSC Docket No. 9359, Sub 12 (June 27, 1978).

third cause has been the reluctance of the state legislature to reinforce the PSC's jurisdictional powers to better enable it to get at the root of some of the key energy problems, such as the regulation of intrastate sales-for-resale of natural gas or other energy commodities.

As energy resources become more scarce and more difficult to extract, and as demand continues to increase, or even if demand levels off, the end price of utility services to consumers has no place to go but up. The days of abundant and easily obtainable energy resources with which this country has long been favored are fast coming to an end. The lid on federal price regulation for new natural gas, for example, will be removed entirely by 1985 and the free market will become the new regulator of wholesale gas prices. The question is not whether utility rates will continue to increase, but rather by how much.

Utility rates, however, are not entirely beyond control. In order to offset, as much as possible, the inevitable escalations in wholesale energy commodity costs, the activities and other facets of public utilities which remain subject to PSC jurisdiction must come under increasingly close scrutiny. The challenge for the regulators, as well as the regulated, has never been greater. There is light, as well as heat and other utility services, at the end of the tunnel. The PSC must continue to vigorously exercise its jurisdictional powers to the fullest extent, while at the same time taking care not to sacrifice the future viability of the utility companies for the sake of immediate rate gratification. The emphasis for the PSC regulators and for utility management must be on efficiency, long term planning and development of new technology. The emphasis for the consumer must be on conservation and adaptation to a new self-renewing energy philosophy and lifestyle.