No. 89-1283

In the Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, ET AL., PETITIONERS

v.

OHIO POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION AS RESPONDENT SUPPORTING PETITIONERS AND FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 318 of the Federal Power Act (16 U.S.C. 825q), which governs "Conflict of jurisdiction" between the Federal Energy Regulatory Commission (FERC) and the Securities and Exchange Commission (SEC), precludes FERC jurisdiction whenever the FERC and the SEC have jurisdiction to regulate the same subject matter, or only when there is an actual conflict between a requirement of the FERC and a requirement of the SEC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 880 F.2d 1400. The pertinent orders of FERC (Pet. App. 31a-67a, 68a-73a) are reported at 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,098 and 43 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,046.

JURISDICTION

The court of appeals entered its judgment on July 28, 1989. Rehearing petitions filed by FERC and petitioners were denied on October 12, 1989 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on February 9, 1990. The Court granted certiorari on March 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 318 of the Federal Power Act (enacted as Section 213 of the Public Utility Act of 1935), 16 U.S.C. 825q, provides:

> **Conflict of jurisdiction.** If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79 *et seq.*] or of a rule, regulation, or order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.

STATEMENT

This case involves the circumstances under which Section 318 of the Federal Power Act ousts FERC of jurisdiction to regulate public utilities that are also regulated by the SEC under the Public Utility Holding Company Act. FERC and the SEC support petitioners in their view that the court of appeals' interpretation of Section 318 improperly limits the regulatory jurisdiction of FERC.

1. The Public Utility Act of 1935, ch. 687, 49 Stat. 803, included two separate but overlapping pieces of legislation.[1] Title I, the Public Utility Holding Company Act (PUHCA), 15 U.S.C. 79 *et seq.*, entrusts the Securities and Exchange Commission with regulation of the corporate structure and financing of public utility holding companies and their affiliates. At the same time, Title II, which is designated Parts II and III of the Federal Power Act (FPA), 16 U.S.C. 824 *et seq.*, entrusts the Federal Energy Regulatory Commission with regulation of the wholesale sale of electricity by electric utilities in interstate commerce.

The Public Utility Act had "two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758 (1973). The first purpose arose in response to widespread abuses by holding companies and their subsidiaries, including: (1) the issuance of securities to the public that were based on unsound asset values or on paper profits from intercompany transactions, which prevented investors from obtaining accurate financial information; (2) the subjection of operating subsidiaries of holding companies to unreasonable charges under service, construction, or sales contracts that were not based on arm's-length dealing or otherwise constrained by competition; and (3) the extension of holding company ownership

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[1] For the history of the consolidation of the two statutes into what ultimately became the Public Utility Act of 1935, see DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938,* 14 Geo. Wash. L. Rev. 30, 37 (1945).

to disparate, unintegrated operating utilities throughout the country without regard to economic efficiency or coordination of managment. See Section 1(b) of PUHCA, 15 U.S.C. 79a(b).[2]

The second aim of the Public Utility Act—to provide effective regulatory control over the transmission and sale of electric energy in interstate commerce—arose in response to a gap in state regulation of utility rates and services that developed in the wake of this Court's decision in *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 86-90 (1927). The Court in *Attleboro* held that interstate wholesale sales of electricity were beyond the reach of state regulators. This holding created a regulatory gap: the States could not regulate interstate wholesale suppliers of electricity and, although the federal government had the constitutional power to regulate in this area, there was no federal agency with statutory authority to do so.[3]

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[2] As this Court noted in *North American Co.* v. *SEC*, 327 U.S. 686, 701 n.11 (1946), "[t]he congressional findings as to abuses listed in § 1(b) [of PUHCA] were based upon some of the most exhaustive and comprehensive studies ever to underlie a federal statute." Among these studies were the 101-volume report of the Federal Trade Commission and an extensive investigation by a House of Representatives committee that disclosed a number of abuses related to the "pyramiding" of control of operating public utilities through holding companies. See *Utility Corporations*, S. Doc. No. 92, 70th Cong., 1st Sess. (1928); *Report on the Relation of Holding Companies to Operating Companies in Power and Gas Affecting Control*, H.R. Rep. No. 827, 73d Cong., 2d Sess. (1934). Both reports are expressly referred to in PUHCA Section 1(b). See generally 1L. Loss, *Securities Regulation* 131-143 (2d ed. 1961).

[3] S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935). The general trend in this Court's modern Commerce Clause jurisprudence has moved away from the mechanical line drawing applied in *Attleboro*. See *Arkansas Electric Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377-380, 390-393 (1983).

2. a. At the core of PUHCA were the requirements of Section 5, 15 U.S.C. 79e, that holding companies with operating utility subsidiaries register with the SEC, and of Section 11, 15 U.S.C. 79k, that each registered holding company comply with stringent geographical integration and corporate simplification requirements.[4] Thus, although the statute did not eliminate holding companies altogether, each holding company that survived regulatory scrutiny would be limited to operation of a single integrated utility system, doing business in a single area or region and possessing a relatively simple capital structure.

Other provisions of PUHCA provided that the SEC was to maintain control over the financing and structure of holding companies and their affiliates. PUHCA therefore granted the SEC detailed authority over, *inter alia*, the issuance of securities by holding companies or their subsidiaries (Sections 6 and 7, 15 U.S.C. 79f, 79g); acquisition by holding companies or their affiliates of securities, utility assets, or any interests in any other business (Sections 9 and 10, 15 U.S.C. 79i, 79j); and accounting and record-keeping functions of holding companies and their affiliates (Sections 15 and 20, 15 U.S.C. 79*o*, 79t).

A principal aim of PUHCA was to protect investors and consumers by preventing holding companies and their subsidiaries from paying or receiving unjustified prices for goods or services due to "an absence of arm's-length bargaining or from restraint of free and independent competition." 15 U.S.C. 79a(b)(2). To this end, Section 13(a) of PUHCA, 15 U.S.C. 79m(a), prohibited any registered holding company from contracting for services, sales, or construction with an associated public utility or mutual

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[4] The term "holding company" will be used in this brief to refer to public utility holding companies registered under Section 5 of PUHCA, 15 U.S.C. 79e.

service company. In addition, Section 13(b), 15 U.S.C. 79m(b), made it unlawful for subsidiaries of a holding company to contract with associated companies except in accordance with SEC regulation. The SEC was to oversee such contracts "as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies." 15 U.S.C. 79m(b).

b. The primary purpose of the FPA was to fill the "*Attleboro* gap" by authorizing the FPC—now FERC [5]—to regulate wholesale electric rates charged by public utility operating companies in interstate commerce. 16 U.S.C. 824, 824d. See *Jersey Central Power & Light Co.* v. *FPC*, 319 U.S. 61, 67-68 & n.7 (1943). The legislation required utilities to file their rate schedules with FERC and authorized FERC to suspend any rate increase for up to five months, order refunds for rates it finds exceed a "just and reasonable" level, and prescribe rates to be charged prospectively. See Sections 205(e), 206(a), 16 U.S.C. 824d(e), 824e(a).

To assure effective regulation, Congress conferred certain additional powers on FERC. For example, it is unlawful for a public utility to "sell, lease, or otherwise dispose of" its facilities, or to "purchase, acquire, or take any security of any other public utility" without FERC approval (Section 203 of the FPA, 16 U.S.C. 824b). It is also unlawful for any public utility to issue securities or assume debts or other obligations without FERC authorization (§ 204, 16 U.S.C. 824c). In addition, Section 301, 16

[5] The Act designated the Federal Power Commission to administer its provisions. On October 1, 1977, the FPC ceased to exist and its functions were transferred to FERC and the Secretary of Energy pursuant to provisions of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 and Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (1977).

U.S.C. 825, requires public utilities to keep accounts and records as required by FERC, and authorizes FERC to prescribe a system of accounts for that purpose.

c. The powers over public utilities granted to the FPC overlapped to some extent the powers granted to the SEC to regulate holding companies and their affiliates. Therefore Congress included Section 318 of the FPA, 16 U.S.C. 825q, to govern conflicts arising between the two agencies. See, *e.g.*, H.R. Rep. No. 1318, 74th Cong., 1st Sess. 35 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 54 (1935). Section 318, entitled "Conflict of jurisdiction," provides that where a company is subject to a PUHCA-based SEC requirement and an FPA-based FERC requirement, the SEC's requirements will be given controlling effect.

3. This case arose out of a rate filing that Ohio Power Company, an operating utility subsidiary within the American Electric Power Company, Inc. holding company system, made with FERC in 1982. Pursuant to Section 205 of the FPA, 16 U.S.C. 824d, Ohio Power sought to increase its rates for wholesale service to its ratepayers, including the petitioner municipalities. Litigation before FERC ensued concerning whether and to what extent Ohio Power was entitled to recover the price it had paid for coal to its wholly owned mining subsidiary, the Southern Ohio Coal Company (SOCCO), pursuant to the terms of a contract between Ohio Power and SOCCO.

a. In 1971, Ohio Power, as part of the American Electric Power system sought SEC approval under PUHCA of a series of transactions that would permit it to establish SOCCO as a coal-mining subsidiary. Under Ohio Power's proposal, SOCCO was to develop and mine various reserves of coal owned by Ohio Power, and thus assure a reliable supply for certain Ohio Power generating units then under construction. The SEC noted that under the

proposal before it, "[t]he charges for coal by [SOCCO] * * * will be based on an amount equal to the actual cost of [SOCCO] in developing the reserve and mining such coal, including all appropriate overheads and interest charges and including a reasonable rate of return on Ohio Power's equity investment in [SOCCO]." *In re Ohio Power Co.*, HCAR No. 17383, (Dec. 2, 1971), J.A. 79. The SEC approved the transactions, and in three subsequent orders authorizing further financing for SOCCO's mining operations, specified that the price at which SOCCO sold coal to Ohio Power could "not exceed the cost" to SOCCO. *In re Ohio Power Co.*, HCAR No. 20515, 14 SEC Dkt. 928 (Apr. 24, 1978), J.A. 79; *In re Southern Ohio Coal Co.*, HCAR No. 21008, 17 SEC Dkt. 310, 312 (Apr. 17, 1979), J.A. 85; *In re Southern Ohio Coal Co.*, HCAR No. 21537, 19 SEC Dkt. 1309, 1309 (Apr. 25, 1980), J.A. 93.

b. In the proceedings before FERC arising from Ohio Power's 1982 rate-increase application, Ohio Power contended that the SEC had approved its plan to purchase the coal "at cost" from SOCCO. According to Ohio Power, this meant that FERC was barred by Section 318 of the FPA from prohibiting the pass-through in rates of any part of the price Ohio Power had paid its subsidiary for the coal.

Following an investigation initiated by FERC under Sections 205 and 206 of the FPA, 16 U.S.C. 824d, 824e, FERC concluded that Section 318 did not bar it from reviewing and prohibiting the pass-through of any excessive payment Ohio Power had made to its affiliate SOCCO for the "captive" coal on the ground that the rates reflecting such excessive payments would not be "just and reasonable" under the FPA. Pet. App. 31a-67a. As FERC viewed it, while PUHCA authorized the SEC to regulate the intra-

corporate price of coal between Ohio Power and its subsidiary, that statute did not bar FERC—operating under a statutory mandate to protect ratepayers from excessive rates—from prohibiting the pass-through of any portion of a utility's coal costs that led to rates that were not "just and reasonable" in light of market conditions. Pet. App. 34a-40a. FERC found this approach particularly warranted in this case, since the evidence showed that Ohio Power had paid SOCCO about 25-33% over prevailing market prices for the coal it purchased during the period from 1982-1986. Pet. App. 58a-59a.[6] FERC therefore ordered Ohio Power to refund to ratepayers the difference between the market price and the higher amount it actually paid SOCCO. Ohio Power's petition for rehearing was denied. Pet. App. 68a-73a.

4. a. A panel of the D.C. Circuit vacated FERC's order, with one judge concurring only in the judgment. The majority first determined that since Congress had designed Section 318 to allocate jurisdiction between FERC and the SEC, Section 318 could not be deemed "entrusted to FERC's administration" and therefore FERC's interpretation of that provision was entitled to no deference. Pet. App. 8a. The court then held that at least one prerequisite to application of Section 318—regulation of the "same subject matter" by both the SEC and FERC—was met in this case. The court held that in regulating the price term in the coal contract between Ohio Power and SOCCO, the SEC was regulating the "same subject matter" as was regulated when FERC determined the appropriate price for the same coal for ratemaking purposes. Pet. App. 9a-13a. The court supported this conclusion by

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[6] FERC also found that Ohio Power had paid SOCCO "50% above market in 1980 [and] 94% [above market] in 1981," the two years before the initiation of proceedings before FERC. Pet. App. 58a.

observing that the purposes underlying SEC and FERC jurisdiction in this area were similar (Pet. App. 10a-11a), and rejected FERC's contention that SEC disclaimers of ratemaking authority were relevant. Pet. App. 11a-13a. See note 15, *infra*.

FERC argued that it was not ousted of jurisdiction under Section 318 because the statute required an actual conflict between FERC and SEC "requirements" before the rule of SEC precedence would take effect. According to FERC, the SEC itself recognized that inter-affiliate contracts under Section 13(b) of PUHCA, 15 U.S.C. 79m(b), could in some circumstances be based on market price, rather than cost. See 17 C.F.R. 250.92 (seller-produced goods may be sold to holding company affiliate at no greater than market price). Moreover, FERC argued that the four SEC orders addressing the Ohio Power-SOCCO arrangement had set cost as an upper limit to the price that SOCCO could charge for coal, but did not impose any "requirement" as to the exact price that should be paid. Thus, according to FERC, its market price rule—which on the facts of this case resulted in a coal price lower than cost—did not conflict with the SEC orders or any other SEC regulatory action. See Pet. App. 14a.

The court of appeals rejected FERC's argument "because it proceeds from a false premise that the bar of Section 318 applies only when there is a present conflict between SEC and FERC prescriptions." Pet. App. 14a. According to the court, Section 13(b) of PUHCA subjected Ohio Power to PUHCA-based "requirements" concerning the coal contract with SOCCO, even aside from the four SEC orders. The court held that, in light of Section 318, this alone established that "[i]n the absence of exemption, it is for the SEC rather than FERC to determine the inter-associate price." Pet. App. 14a.

The court thus did not decide whether the SEC orders required that SOCCO sell the coal to Ohio Power at cost, or instead merely set cost as a ceiling. Rather, the court rested its decision "on the threshold matter of the language of the statute, which commits the determination of the inter-associate price to the SEC." Pet. App. 15a-16a. The court observed, however, that its reading of the statute was "informed" by the possibility that Ohio Power would be subject to "trapped costs" if both the FERC and SEC actions were valid. Pet. App. 16a.

b. In an opinion concurring in the judgment, Judge Mikva disagreed with the majority's interpretation of Section 318. He noted that Section 318 speaks in terms of conflicting FERC and SEC "requirements," and that therefore FERC is divested of jurisdiction under Section 318 only where "requirements" the SEC and FERC impose are "in actual conflict." Pet. App. 19a-22a. Because, in Judge Mikva's view, "the SEC's orders * * * permit Ohio Power to pay less than cost for coal, FERC's imposition of a market price less than cost does not in this case create a jurisdictional conflict." Pet. App. 23a.

Judge Mikva nonetheless agreed with the majority that the FERC order had to be vacated. In his view, FERC's Rule 35.14(a)(7) (18 C.F.R. 35.14(a)(7)) barred FERC from imposing a market-price test.[7] Pet. App. 23a-28a. In discussing Rule 35.14(a)(7) in its own decision, FERC had held that it merely "creates a presumption of reasonableness, not a conclusive finding of reasonableness" with respect to pricing at cost. Pet. App. 41a. The majority did not reach the issue of the meaning of Rule 35.14(a)(7).

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[7] Rule 35.14(a)(7) provides in pertinent part:

> Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause.

c. The court of appeals denied petitions for rehearing and suggestions for rehearing *en banc* filed by FERC and petitioners. Pet. App. 29a. Noting that he would have granted the petition for rehearing by the panel, Judge Mikva filed a statement reemphasizing his view that "the statutory interpretation engaged in by the majority * * * generates a no-man's land where neither the [SEC] nor FERC will patrol holding company practices which can oppress consumers, investors and the public." Pet. App. 30a.

SUMMARY OF ARGUMENT

The Federal Power Act gives FERC regulatory jurisdiction over firms involved in the interstate wholesale sale of electricity. The Public Utility Holding Company Act gives the SEC jurisdiction to regulate firms organized as public utility holding companies and their utility and non-utility subsidiaries. Some firms involved in the interstate wholesale sale of electricity are subsidiaries of public utility holding companies, and are therefore subject to regulation by both FERC and the SEC. Section 318 of the FPA, the statute at issue in this case, governs the terms on which FERC's regulatory jurisdiction co-exists with that of the SEC.

Both the SEC and FERC agree that the court of appeals erred in interpreting Section 318 to oust FERC of jurisdiction in an area whenever the SEC in administering PUHCA has imposed some regulation in that area. Instead, the agencies take the position that Section 318, along with several provisions of PUHCA, allow substantial room for concurrent, consistent regulation. Section 318's rule of SEC precedence takes effect only when regulations or orders adopted under PUHCA and the FPA create conflicting obligations for regulated entities.

In considering the merits of this position, the view of both the SEC and FERC that Section 318 permits concurrent, consistent regulation is entitled to substantial deference. This interpretation can be traced back to positions that the SEC has taken since at least 1944, only nine years after the FPA and PUHCA were enacted. Particularly because the purpose of Section 318 is to resolve questions of jurisdiction between the SEC and FERC, the fact that the two affected agencies agree on how Section 318 is to be interpreted should be dispositive unless it is inconsistent with the terms of the statute.

Far from being inconsistent with the terms of the statute, the view that a regulated entity must obey both FPA-based and PUHCA-based regulation in the absence of an actual conflict is embodied in Section 318 itself, which appears under the heading "Conflict of jurisdiction" and takes effect only where an entity is subject to "requirements" imposed under both PUHCA and the FPA. When the statute was enacted, Section 318 was repeatedly explained as addressing the problem created by "conflicts" between the two agencies. In the only judicial decisions construing Section 318, this Court and the courts of appeals have looked to the existence of an actual conflict between the requirements imposed by FERC and the SEC to determine whether Section 318 is triggered.

Moreover, the statutory purposes of the FPA and PUHCA would be disserved by the interpretation advanced by the majority below. Before adopting its sweeping "field preemption" analysis, the court of appeals should have considered more carefully the differing expertise and regulatory missions of the two agencies in this case. Whereas the SEC's expertise and mission center on the analysis of financial structure, capital formation, and fraud prevention, the mission and expertise of FERC are

focused on engineering and ratemaking. To oust FERC of jurisdiction just because the SEC has taken some action—or perhaps even if the SEC has authority to take some action—threatens to create regulatory "gaps" and to thwart the goals of the FPA. Therefore, although the SEC plainly is entitled to precedence under Section 318 when its regulations conflict with those of FERC, requirements imposed by both agencies should be given full effect in cases in which they pose no actual conflict.

ARGUMENT

SECTION 318 OF THE FEDERAL POWER ACT OUSTS FERC OF ITS AUTHORITY UNDER THAT ACT ONLY WHEN THE EXERCISE OF THAT AUTHORITY ACTUALLY CONFLICTS WITH ACTION TAKEN BY THE SEC IN ITS ENFORCEMENT OF THE PUBLIC UTILITY HOLDING COMPANY ACT.

A. The Long-Standing Interpretation By Both The SEC And FERC Requiring Actual Conflict Before Section 318 Ousts FERC Of Jurisdiction Is Entitled To Substantial Deference

Section 318 does not oust FERC of regulatory jurisdiction in the absence of an actual conflict between requirements imposed by FERC and those imposed by the SEC. This interpretation was advocated by the SEC as long ago as 1944, a mere nine years after PUHCA and the FPA were enacted. It has been consistently recognized by FERC as well. Therefore, as an interpretation by the agencies entrusted with administration of the statutes involved, it is entitled to substantial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1. In *Northwestern Electric Co.* v. *FPC*, 321 U.S. 119 (1944), the authority of the FPC to impose a particular accounting requirement on a regulated interstate seller of electric power was challenged under Section 318, since the utility was also a subsidiary of a registered holding company and therefore subject to the SEC's authority to im-

pose accounting requirements pursuant to Section 15 of PUHCA, 15 U.S.C. 79*o*. In connection with the litigation, the SEC was asked its views concerning the interpretation of Section 318. The SEC responded, in a letter from Chairman Purcell that was appended to the brief for the government. Since the views expressed in the letter have remained the SEC's consistent position for nearly a half century, they are worth quoting at some length:

> Section 318 of the Public Utility Act of 1935 resolves the question of possible conflicting requirements of the Public Utility Holding Company Act of 1935 and rules, regulations, and orders thereunder with the Federal Power Act and rules, regulations and orders thereunder by providing that in case of conflict the requirements of the former Act shall prevail. Not all of the provisions of the Public Utility Holding Company Act of 1935 are self-operative, however; and in the absence of rules, regulations or orders of the S.E.C. implementing such provisions of that Act, these provisions neither compel nor prohibit any action. Until the S.E.C. does by rule or order impose "requirements" pursuant to the sections which are not self-operative, there can be no conflict of requirements and Sec. 318 does not apply. It was not intended that utility companies should be able to thwart regulation by the F.P.C. by conjuring up under Sec. 318 imaginary conflicts with *potential* action of the S.E.C.
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> * * * In our view no action taken by the S.E.C. applicable to Petitioner Northwestern conflicts with the action of the F.P.C. in the case under review.

Resp. Br. App. D, at 98-99, *Northwestern Electric Co.* v. *FPC*, 321 U.S. 119 (1944).

Northwestern Electric involved acounting requirements of the SEC and the FPC, not regulation of inter-affiliate purchases as in this case. In discussing the specific application of Section 318 to the facts of the case, the SEC noted that "[w]hile the S.E.C. has exercised no accounting jurisdiction with respect to Northwestern, it does sometimes deal with accounting questions in connection with companies which are also subject to F.P.C. jurisdiction." Resp. Br. App. D, at 101. In the view of the SEC, however, "this exercise of accounting jurisdiction is not inconsistent with subsequent or concurrent accounting regulation of the same company by the F.P.C., and does not *per se* make Sec. 318 applicable." *Id.* at 102. The conclusion to be drawn was that "[t]his dual accounting regulation * * * has sound pragmatic justification, and is not inconsistent with the purpose of Sec. 318." *Ibid.*

The position advocated in the SEC's letter is essentially the position we urge in this case. In the absence of an SEC action taken under PUHCA that "compel[s] [ ]or prohibit[s]" some action by a regulated entity, the entity cannot be said to be subject to any "requirement" under PUHCA. Therefore, there is no "conflict" of "requirements" that requires resolution by reference to Section 318; regulation by both agencies that is "consistent" and "concurrent" is fully in accord with the intent of Section 318, the balance of the FPA, and PUHCA.

The SEC adopted the above view shortly after enactment of the Public Utility Act of 1935, which contains both the PUHCA and the FPA. As a nearly "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," *Udall* v. *Tallman*, 380 U.S.

1, 16 (1965), this understanding is entitled to substantial weight.[8] Accord *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389-390 (1984); *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). Moreover, although the SEC has rarely had occasion formally to address the relationship between PUHCA and the FPA since that time, it has continued to adhere to this view when the issue has arisen.

For example, in *Appalachian Elec. Power Co.*, 27 S.E.C. 1029 (1948), the SEC approved, *inter alia*, the formation of a new holding company subsidiary to operate a generating plant on behalf of two of the holding company's other operating subsidiaries. The SEC noted, however, that its approval of the arrangement did not divest FERC of jurisdiction over the terms of the contract for sale of the power to be generated by the plant. *Id.* at 1035. The SEC "regard[ed] [the terms of the contract] as a matter to be determined primarily by the regulatory authorities having jurisdiction over the rates and accounts of the companies concerned." *Ibid.* To be sure, the SEC retained the ability "to determine at a later date whether the actual operation of the contract in any way contravenes the standards of the Holding Company Act." *Ibid.* Nonetheless, unless and until the SEC so determined, FERC was not ousted of regulatory jurisdiction over aspects of the same transaction.

2. FERC and its predecessor also have interpreted Section 318 to give the SEC regulatory action precedence only in cases of actual conflict with FERC regulation. In the case at hand, FERC noted that, if the four SEC orders ap-

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[8] It should be noted that PUHCA has remained virtually unchanged since its passage in 1935.

proving the Ohio Power-SOCCO arrangement were interpreted to set only a ceiling price for Ohio Power's coal purchases, the actual price below that ceiling would remain subject to FERC regulation. Pet. App. 34a-35a. Thus, although the discussion is phrased in terms of whether the SEC and FERC regulate the same "subject matter," FERC's interpretation of Section 318 is that both agencies retain concurrent, consistent regulatory jurisdiction in the absence of conflicting requirements. FERC has recently taken the same position in a number of other cases. See, *e.g., Savannah Elec. & Power Co.,* 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240, at 61,779 (1988) (Section 318 requires a "direct conflict"); *Central Illinois Public Serv. Co.,* 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,073, at 61,327 (1988) (same).

The roots of FERC's "actual conflict" position date back to just after enactment of the FPA.[9] In *In re George B. Evans,* 1 F.P.C. 511, 515-516 (1937), the SEC had approved the purchase of utility assets by a holding company, as well as the issuance of securities and other aspects of a complex transaction attendant upon a utility bankruptcy. The FPC recognized that it had no jurisdiction under Section 318 over those particular aspects of the transaction that the SEC had approved. *Id.* at 515. Nonetheless, the FPC continued to exercise jurisdiction under Section 203 of the FPA, 16 U.S.C. 824b, over the sale of

[9] The fact that FERC has only recently fully articulated its view of Section 318 does not affect the deference due that interpretation. An agency's current policy "is entitled to deference even if it represents a departure from [the agency's] prior policy." *NLRB* v. *Curtin Matheson Scientific, Inc.,* 110 S. Ct. 1542, 1549 (1990). In *Chevron* itself the fact that the agency had recently modified its interpretation did not alter the Court's conclusion that its new view was entitled to deference. 467 U.S. at 853-859. Here, FERC has not changed any prior position in articulating its interpretation of Section 318; deference to its view is therefore entirely apt.

the same utility assets. 1 F.P.C. at 515-516. Although the FPC did not articulate a particular interpretation of Section 318, its actions are fully consistent with an actual conflict analysis and inconsistent with a broad field preemption theory. See also *In re Olcott Falls Co.*, 3 F.P.C. 310, 312 (1942).

3. Nothing in this case alters the rule that an administrative construction of a statute entrusted to an agency must be accepted by the courts so long as it is reasonable and does not violate the plain terms of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).[10] The fact that Section 318 could be characterized as a "jurisdictional" statute does not affect the legitimacy of the FERC-SEC interpretation. *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) ("[I]t is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."); see also *Dole* v. *United Steelworkers*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting).[11] Where Congress has granted agencies broad

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[10] Although FERC itself did not argue below that its interpretation of the statute was entitled to *Chevron* deference, the court of appeals considered this contention (Pet. App. 8a) and rejected it, and the petition for certiorari raised the deference issue as the first question presented. Therefore, even assuming *arguendo* that the deference argument is correctly tested by the rule that issues not raised or considered in the court of appeals will ordinarily not be considered by this Court, see *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), that rule does not apply to this case. Cf. *On Lee* v. *United States*, 343 U.S. 747, 749-750 n.3 (1952) (although court of appeals would have been within its discretion in refusing to consider point not preserved for appeal, "their having passed on it leads us to treat the merits also").

[11] The court of appeals held (Pet. App. 8a) that the FERC construction of the statute was not entitled to deference because "Section 318 cannot be said to be entrusted to FERC's administration." The court

powers to regulate an industry, as in the FPA and PUHCA, it is reasonable to assume that it left the resolution of jurisdictional as well as non-jurisdictional ambiguities to the agencies that must face the pragmatic issues involved in achieving the congressional purpose. *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988); *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844-845 (1986); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 123, 125-126 (1985). In addition, the considerations of agency expertise that ordinarily support deference are fully applicable to this case. It is the SEC and FERC—and not the courts—that would be most aware if a broad field pre-emption rule were necessary to achieve the statutory goals of the FPA and PUHCA. Conversely, it is the SEC and FERC that would be most acutely aware of regulatory gaps that could be created by unnecessarily curtailing FERC's authority.

Even if only limited deference to agency interpretations of "ordinary" jurisdictional statutes were appropriate, see *Mississippi Power & Light Co.*, 487 U.S. at 383 (Brennan, J., dissenting), the joint position of the SEC and FERC with respect to a statute that allocates jurisdiction between them would still be entitled to substantial deference. Any concern that an agency's "institutional interests in expanding its own power" would lead it to interpret a jurisdictional statute too broadly is highly attenuated here. *Id.* at 387. First, Section 318 does not limit the reach of federal regulation of the utility industry, and no policy in favor of such limitation is discernible in its language or legislative

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of appeals may have been unaware, at least until the petition for rehearing in this case, see FERC Pet. for Reh'g 7, that the SEC had adopted the same construction in the *Northwestern Electric* case in 1944, as discussed above.

history. Because any interpretation of Section 318 would therefore simply allocate federal regulatory responsibilities, this case raises no issues concerning the expansion of federal power by agency action into areas Congress intended to leave free of federal regulation. Second, because Section 318 allocates jurisdiction between two agencies, the fact that they agree on an interpretation of the statute strongly suggests that neither agency is bent on expanding its jurisdiction unduly.

B. The Language, Structure And Legislative History Of Section 318 Make Clear That FERC's Authority Is Precluded Only When Its Regulation Actually Conflicts With SEC Regulation

The long-standing view of the SEC and FERC that Section 318's rule of SEC precedence is triggered only in the event of an actual conflict is not only a permissible construction of the statute; it is the most compelling interpretation. The language and legislative history of Section 318 both point to the need for an actual conflict in requirements before the rule of SEC precedence takes effect. This conclusion is supported by consideration of related provisions in PUHCA that also allocate regulatory jurisdiction over utility subsidiaries of holding companies. Moreover, the actual conflict analysis has been applied in the only judicial decisions—in this Court and in the courts of appeals—that have interpreted Section 318.

1. The language of Section 318 ousts FERC of jurisdiction only where there is an actual conflict between a FERC and an SEC ruling. See Pet. App. 18a-20a. The rule of SEC precedence embodied in Section 318 takes effect only when an entity is subject to "a *requirement* of [PUHCA] and a *requirement* of [the FPA]" with respect to the same subject matter (emphasis added). Further, Section 318, as promulgated by Congress (Public Utility

Act of 1935, ch. 687, Tit. II, § 213, 49 Stat. 863), was entitled "Conflict of jurisdiction." The use of the term "conflict" indicates that Congress intended the provision to take effect only where there is a conflict between actions of the two agencies, not merely where both have authority to regulate the same entity or transaction.

In PUHCA, Congress enacted two provisions that, like Section 318 of the FPA, allocate jurisdiction between the two agencies. Section 21 of PUHCA, 15 U.S.C. 79u, provides that nothing in the statute "shall affect the jurisdiction of any other commission * * * of the United States or of any State * * * insofar as such jurisdiction does not *conflict* with any provision of [PUHCA] or any rule, regulation, or order thereunder" (emphasis added). In enacting this provision, Congress recognized that the public utility industry was subject to regulation by state and federal agencies other than the SEC. The terms of the provision make clear that Congress intended by adopting a rule of "conflict" pre-emption to permit such concurrent regulation.

This conclusion is buttressed by Section 20(b) of PUHCA, 15 U.S.C. 79t(b), which provides that "the rules and regulations or orders of the [SEC] in respect of accounts shall not be inconsistent with the requirements imposed by [any law of the United States] or any rule or regulation thereunder." This provision, like Section 21, shows Congress's recognition that affiliates of public utility holding companies are subject to regulation under other "law[s] of the United States," such as the FPA. In establishing a rule that prohibits the SEC from adopting requirements inconsistent with those of other regulatory agencies, Congress again demonstrated that it did not intend SEC regulation unnecessarily to confine the regulatory authority of other agencies.

In addition to their use of the terms "conflict" or "inconsistent" to trigger their respective rules, Sections 21 and 20(b) of PUHCA undercut the theory on which the court of appeals' field preemption holding is based. The field pre-emption theory adopted by the court of appeals is appropriate in cases in which Congress intended a comprehensive federal regulatory system to "occupy a given field to the exclusion of state law." *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1150 (1988). These provisions, however, make clear that SEC regulation was not intended to be so comprehensive as to leave no room for concurrent, consistent regulation by a sister agency.[12] Cf. *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. 1262, 1273-1278 (1989) (co-existence of consistent federal and state regulatory regimes where no congressional intent to occupy the field can be shown).

2. The legislative history of the Public Utility Act of 1935 supports the conclusion that a "conflict" in regulatory "requirements" must be shown before the rule of SEC precedence takes effect. Thus the Conference Report on the Public Utility Act repeatedly stated that

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[12] Thus, contrary to the court of appeals' suggestion (Pet. App. 16a-18a), this Court's decisions in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), that FERC's wholesale rate jurisdiction is exclusive were not based on concerns that "cost trapping" would result from permitting concurrent state ratemaking review. Rather, those decisions rested on an interpretation of the FPA as having occupied the field with respect to interstate power rates, and an application of the filed rate doctrine, which holds that such rates "filed with FERC or fixed by FERC must be given binding effect [by states]." *Nantahala*, 476 U.S. at 962-963; accord *Mississippi Power*, 487 U.S. at 371-373.

Section 318 resolved "conflicts" that might arise in concurrent regulation under the FPA and PUHCA. The report stated:

> In subsection (a) of section 318, in which *conflicts* of jurisdiction between the Securities and Exchange Commission and the Federal Power Commission under this bill are resolved in favor of the former, the House amendment adds to such *matters of conflict* the assumption of obligation or liability in respect of a security. The conference substitute is enlarged to include any *conflict* arising under this bill.

H.R. Rep. No. 1903, 74th Cong., 1st Sess. 75 (1935) (emphasis added).

In fact, Congress's concern with including a provision to resolve conflicts between the agencies is traceable through a consistent line of earlier versions of Section 318. Thus, Section 335 of the original House bill introduced on February 6, 1935 (H.R. 5423, 74th Cong., 1st Sess.), was substantially the same as present Section 318, and was entitled "conflict of jurisdiction". Section 316 of the earliest version of the Senate bill (S. 2796, 74th Cong., 1st Sess.), as introduced and referred to the Committee on Interstate Commerce on May 7, 1935, was also entitled "conflict of jurisdiction," and applied "in case of conflict between provisions of the [FPA] and PUHCA." See S. Rep. No. 621, 74th Cong. 1st Sess. 54 (1935).[13]

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[13] In subsequent versions of S. 2796, *supra* (as introduced in the House on June 13, 1935 and as reported from the Committee on Interstate and Foreign Commerce on June 24, 1935), the provision became Section 318 and the "conflict of jurisdiction" title was retained. The House report accompanying it specified that it was designed to govern "conflicts between the two agencies." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 19 (1935).

In June 1935, when the Public Utility Act was under consideration in the House of Representatives, Representative Wadsworth offered an amendment to substitute the FPC for the SEC as the agency responsible for administering Title I of the Public Utility Act, *i.e.*, PUHCA, out of concern for the duplication of effort that the bill could impose on regulated entities seeking to comply with the requirements of both agencies. However, after examining Section 318, he withdrew his proposed amendment and indicated his view that the proper balance between excessive duplication of effort and necessary regulation would be met by Section 318:

> I find, however, * * * that at the very end of the bill * * * in section 318, provision is made for the avoidance of *conflicts in jurisdiction*, and in reading that section I have reached the conclusion that *a large measure* of duplication and overlapping can be, and will be, avoided.

79 Cong. Rec. 10,507 (1935) (emphasis added).

Therefore, although Section 318 in the final bill assured that "a large measure" of duplication would be avoided by giving precedence to SEC regulations in cases of "conflict," there is no evidence that Congress intended entirely to oust FERC from the field simply because PUHCA imposes a not inconsistent requirement on the regulated entity. Pet. App. 14a. The statute's use of the term "requirement," together with the reference to "conflicts" in the title of Section 318 and (repeatedly) in its legislative history, and Congress's express recognition in several provisions that other agencies have concurrent jurisdiction over public utilities, lead to the conclusion that only in cases of conflicting requirements imposed under the two statutes does Section 318 override FERC's jurisdiction.

3. Judicial interpretation of Section 318 has been based on the proposition that an actual conflict between requirements imposed by each agency is a prerequisite to applying Section 318's rule of SEC precedence. Thus, in *Northwestern Electric Co.* v. *FPC*, 321 U.S. 119 (1944), an operating electric utility subsidiary of a registered holding company argued, *inter alia*, that a particular accounting treatment required by the FPC under the FPA was in conflict with the accounting regulations of the SEC. See pp. 14-16, *supra*. This Court rejected the claim that PUHCA-based accounting requirements absolved the utility of any obligation to comply with consistent FERC-based regulation in the following passage:

> The petitioners attack the regulations as in conflict with the *powers and the regulations* of the Securities and Exchange Commission, *which also has regulatory power* over Northwestern; but an examination of the statute and of the orders and proceedings of the Securities and Exchange Commission satisfies us that *no conflict exists*.

321 U.S. at 125 (emphasis added). The "no conflict" rule upon which the Court relied—which was fully in accord with the SEC's submission to the Court—is precisely the approach advocated by the SEC and FERC in this case.

In a subsequent case, the Fourth Circuit, expressly relying on *Northwestern Electric*, followed the same approach in resolving an operating utility's claim that an FPC-imposed accounting requirement was preempted under Section 318 by allegedly inconsistent accounting regulations imposed by the SEC. In *Appalachian Power Co.* v. *FPC*, 328 F.2d 237 (4th Cir.), cert. denied, 379 U.S. 829 (1964), the Fourth Circuit held that "[u]nder section 318 of the Federal Power Act * * * *actual conflicts* between the FPC and the SEC are resolved in favor of the SEC."

328 F.2d at 250 (emphasis added). After a careful analysis of the accounting rules at issue in the case, the court concluded that "the effort to discover an *incompatibility* between the two governmental agencies must fail," *id.* at 252 (emphasis added), and that Section 318 was therefore not triggered.[14] This reasonable construction of Section 318 would be foreclosed under the broad field pre-emption rule adopted by the panel majority below.

C. Interpreting Section 318 To Apply Only In Cases Of Actual Conflict Is Appropriate In Light Of The Substantially Different Goals And Capabilities Of The SEC And FERC

Congress's decision to entrust administration of PUHCA to the SEC and administration of the FPA to FERC was based on its pursuit of two differing goals in regulating utility subsidiaries of holding companies. In light of this intended difference between the two regulatory regimes, the congressional purpose can be achieved only if each agency is allotted the opportunity to pursue its own regulatory mission, *i.e.*, if the concurrent, consistent regulations of both agencies are held to be

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[14] In *Mississippi Industries* v. *FERC,* 808 F.2d 1525, 1550-1551, reh'g granted and vacated in part on other grounds, 822 F.2d 1104 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987), the D.C. Circuit discussed the applicability of Section 318 to an agreement involving the wholesale sale of electricity among holding company subsidiaries. Relying on the SEC's explanation that PUHCA excluded inter-affiliate sales of electricity from SEC jurisdiction (808 F.2d at 1550), the court held that Section 318 did not oust FERC of jurisdiction. Like this Court in *Northwestern* and the Fourth Circuit in *Appalachian Power,* the D.C. Circuit reached this holding by finding that there was no "inconsistency" between the actions taken by the two agencies (*ibid.*), and that there was no "conflict" between FERC and the SEC (*id.* at 1551). The D.C. Circuit panel in this case did not discuss its understanding of this language from *Mississippi Industries.* See Pet. App. 13a.

valid in the absence of actual conflict. The court of appeals erred because it largely failed to appreciate the differing goals underlying each statute, and therefore discounted the need to give each agency latitude to administer its own statute.

1. a. PUHCA was designed to eliminate the notorious financial abuses documented in the Federal Trade Commission report and other studies. See note 2, *supra*. Among the specific abuses Congress found to trigger the need for stringent regulation were abuses in the issuance of securities such as "the absence of uniform standard accounts" for investor information, the issuance of securities based upon "fictitious or unsound asset values," and the "overcapitalized" holding company structures that tended to "prevent voluntary rate reductions." 15 U.S.C. 79a(b)(1). Also underlying the stringent regulatory regime instituted by PUHCA were the "excessive charges" that operating subsidiaries had to pay to service and supply affiliates resulting from "an absence of arm's-length bargaining" (15 U.S.C. 79a(b)(2)), and the allocation of costs among holding company subsidiaries to thwart effective state regulation (15 U.S.C. 79a(b)(2) and (3)).

To eliminate these primarily financial abuses, PUHCA is directed largely toward financial transactions, corporate structures, acquisitions of assets, and potential conflicts of interest. See generally *Public Utility Holding Company Act: Hearings on H.R. 5220, H.R. 5465, and H.R. 6134 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 553, 579-583 (1982) (statement of SEC concerning proposals to amend or repeal the Public Utility Holding Company Act of 1935). Congress therefore entrusted the administration of PUHCA to the SEC, the agency with expertise in financial transactions and corporate finance.

b. Although also enacted as part of the Public Utility Act of 1935, the FPA resulted from an entirely different problem—the regulatory gap created by *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), in which the Court held that interstate wholesale sales of electricity were beyond the reach of state regulation. The FPA was thus directed primarily at operational and ratemaking issues in particular, rather than issues of corporate structure and securities regulation. Congress therefore entrusted administration of the FPA to the FPC, the agency most qualified to deal with the engineering and energy policy issues that arise in the course of regulating energy generation and transmission. In short, the Public Utility Act of 1935 was divided into separate sections conferring distinct responsibilities on two separate agencies, even though affected companies would be subject to the overlapping regulatory authority of the two agencies.

c. Although the underlying purposes of the two regulatory schemes were different, the possibility of conflicts between the agencies remained. Throughout PUHCA, the SEC is repeatedly authorized to take regulatory action with respect to holding companies "in the public interest or for the protection of investors or consumers." *E.g.*, 15 U.S.C. 79e(a), 79f(b), 79g(a), 79j(a), 79k(b)(1), 79m(b), 79*o*(b). The FPA in turn gives FERC regulatory authority to act "in the public interest," *e.g.*, 16 U.S.C. 824a(a), 824b(a), and to set rates that are "just and reasonable," *e.g.*, 16 U.S.C. 824d(a), 824e(a). The content of "the public interest" under PUHCA and the determination of what PUHCA requires "for the protection of investors or consumers" is largely within the discretion of the SEC; similarly, FERC has broad authority to determine the scope of the similar terms of the FPA. Because the SEC may determine that PUHCA requires actions that are in conflict with actions that FERC determines are

necessary under the FPA, a rule for resolving conflicts was necessary.

The fact that the statutory "public interest" standards under which the SEC and FERC operate are verbally similar does not alter the conclusion that regulation by each agency was intended in general to achieve different purposes, consider different factors, and take advantage of distinct spheres of expertise. The differing focus of the SEC and FERC is illustrated by *City of Lafayette* v. *SEC*, 454 F.2d 941 (D.C. Cir. 1971), aff'd *sub nom. Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 754-755 (1973). *City of Lafayette* involved orders by the SEC and the FPC approving issuances of securities by two utilities, one of which was a holding company subsidiary subject to PUHCA, the other of which came only within the jurisdiction of the FPA. Both orders were attacked on the same ground—that the funds raised would be used to finance a conspiracy between the two utilities to suppress competition. The court recognized that both the SEC and the FPC operated under a broad "public interest" charter. 454 F.2d at 948. Nonetheless, the court held that the FPC, because of its broad mandate "to enhance optimum interconnection and interchange of electric energy, not to mention its array of other activities in furtherance of electric energy capability," *id.* at 951, had to take the complaint into account before approving the financing, while the SEC, which had "no regulatory authority over operations of the utility," *ibid.*, could reasonably refuse to do so. In short, despite the fact that both agencies had what appeared to be the identical task of regulating in the "public interest," the court found that the purposes toward which the regulation was aimed were substantially different.[15]

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[15] The SEC has repeatedly emphasized that its function is distinct from that of FERC, most notably in statements disclaiming authority

The basis of the decision in *City of Lafayette*—that the FPC and the SEC were required to regulate similarly situated entities with substantially different ends in view—underscores that the proper interpretation of Section 318 permits consistent, concurrent regulation by the two agencies. Because regulation by the SEC may not be an adequate substitute for regulation by FERC, ousting FERC of jurisdiction in the absence of an actual conflict with SEC regulation would threaten to frustrate achievment of Congress's regulatory objectives. Given the differing regulatory missions of the two agencies, the actual conflicts standard best preserves the ability of each agency to meet the congressional goals of regulation under its respective statute.

2. There are a number of specific areas of regulatory overlap in which application of the broad field preemption analysis embraced by the majority below would

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over ratemaking. As the SEC explained in *The Southern Co.*, HCAR No. 21665, 20 SEC Dkt. 799, 801 (Aug. 5, 1980):

> The Federal Power Act, adopted as Title II of the statute of which the Holding Company Act was Title I, separated those matters of Federal concern which involved rates and operations, and assigned their administration to another agency, now the [FERC], specially qualified and equipped to deal with the technology of energy generation and transmission.

See also *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978) ("[O]ur control over [holding companies] relates only to their structure, to their intra-system transactions, and to their finances. We have no power over their dealings with their customers, retail or wholesale." (citing *City of Lafayette*)); *accord Louisiana Power & Light Co.*, HCAR No. 22765, 26 SEC Dkt. 1422, 1431 (Dec. 21, 1982); *New England Elec. Sys.*, HCAR No. 22309, 24 SEC Dkt. 298, 308 (Dec. 1, 1981); *Arkansas Power & Light Co.*, 45 S.E.C. 567, 574 (1974); *Vermont Yankee Nuclear Power Corp.*, 43 S.E.C. 693, 699 (1968); *New England Power Serv. Co.*, 10 S.E.C. 562, 571 (1941).

threaten to disrupt long-standing cooperation between the two agencies to achieve their regulatory goals. Among the most important of these is the transfer of securities and utility assets. Sections 9 and 10 of PUHCA, 15 U.S.C. 79i, 79j, generally prohibit holding companies and their affiliates from acquiring securities or utility assets without SEC approval. However, Section 203 of the FPA, 16 U.S.C. 824b, provides that FERC approval is required before any public utility may "sell, lease, or otherwise dispose of" its facilities or "merge or consolidate such facilities * * * with those of any other person." Thus, as a general matter, while PUHCA gives the SEC jurisdiction over *acquisitions* of securities and utility assets by holding company affiliates, the FPA gives FERC jurisdiction over the *sales* of the same items by public utilities. In any transaction in which a holding company affiliate purchases securities or utility assets of a public utility, both the SEC and FERC will have regulatory authority over the transaction.[16]

If the field pre-emption approach to Section 318 adopted by the court below were accepted, FERC's concurrent authority over such transactions—even in cases in which the exercise of that authority in no way conflicts with SEC regulation—would be called into question. In the words of the majority below, Sections 9 and 10 of PUHCA could be taken to establish that "it is for the SEC rather than FERC to determine" whether the transfer in

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[16] The view that FERC may regulate some aspects of a transaction while the SEC regulates other aspects dates back at least to *In re George B. Evans,* 1 F.P.C. 511, 515-516 (1937), in which the FPC exercised jurisdiction over the "sale and lease" of electrical facilities under Section 203 of the FPA, while the SEC had earlier exercised its jurisdiction over the purchase of facilities, as well as the issuance of securities, in connection with the same transaction. See pp. 18-19, *supra.* See also *In re Olcott Falls Co.,* 3 F.P.C. 310, 312 (1942).

question was appropriate. See Pet. App. 14a. Thus, the SEC would become the sole entitity with regulatory jurisdiction over the "subject matter" of such transactions, despite the fact that the goals of SEC regulation under Sections 9 and 10 of PUHCA [17] differ dramatically from the goals of FERC regulation under the FPA.[18] A regulatory gap would be opened, and important aspects of the transaction would, contrary to congressional intent, go unregulated.[19]

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[17] Among the goals of SEC regulation under Sections 9 and 10 are the avoidance of undue concentration of control over utilities (see 15 U.S.C. 79j(b)(1)), preclusion of corporate waste in transaction fees (see 15 U.S.C. 79j(b)(2)), and avoidance of unduly complicated capital structure (see 15 U.S.C. 79j(b)(3)).

[18] FERC has stated that its goals under Section 203 of the FPA include ensuring "maintenance of adequate service and coordination of facilities in the public interest," see *Savannah Elec. & Power Co.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240, at 61,778 (1988). See also *Central Illinois Public Serv. Co.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,073 (1988). The *Savannah Electric* case involved the sale of utility assets to a public utility holding company. The utility argued to FERC that, because the SEC had already approved the purchase of the utility assets under PUHCA, see *The Southern Co.*, HCAR No. 24579, 40 SEC Dkt. 442 (Mar. 1, 1988), Section 318 ousted FERC from any further jurisdiction over the matter. Noting that "section 318 comes into play only when there is a direct conflict between this agency and the SEC," and that "no conflict has been demonstrated between our responsibility to protect the interests of ratepayers and to ensure reliable and adequate service and the SEC's mandate under PUHCA," FERC held that it could "fulfill [its] obligations under section 203 of the FPA in a manner that is complementary to the SEC's jurisdiction over reorganization transactions." 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,073, at 61,328.

[19] Even under the actual conflict approach, FERC action in passing upon the transfer of utility assets could pose a conflict with SEC action with respect to the same transaction. However, unlike the field pre-emption approach adopted by the court of appeals, analyzing the situation in terms of whether it poses an actual conflict would leave

Nor is the overlap between SEC and FERC authority limited to Sections 9 and 10 of PUHCA and Section 203 of the FPA. With respect to accounting rules, Sections 15(a) and 20(a) of PUHCA, 15 U.S.C. 79*o*(a), 79t(a), grant the SEC broad authority to prescribe uniform systems of accounting for holding companies and their affiliates. Similarly, Section 301 of the FPA, 15 U.S.C. 825, grants broad authority to FERC to prescribe methods of accounting to be used by public utilities.[20] The SEC's designation of accounting methods to be used for its reporting purposes and for purposes of disclosure to investors is obviously not inconsistent with FERC's designation of accounting methods to be used in ratemaking proceedings.[21] Yet a broad field preemption analysis in this

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substantial latitude for FERC to impose conditions on the transaction in accord with its mandate under the FPA. Cf. *Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747, 759 (1973) (FPC has broad powers under the FPA to impose conditions on transaction before approving it).

[20] As FERC has emphasized in a recent case, "[i]t is essential that [FERC] have available to it for ratemaking purposes a set of financial statements that will enable it to determine the current cost of providing service under its adopted scheme of regulation and to be able to properly monitor past performance under approved rates by inspection of financial statements that comport with the ratemaking principles used to develop them." *Arkansas Power & Light Co.,* 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,034, at 61,084 (1987).

[21] The concurrent regulation of accounting matters by both agencies is illustrated by *In re Oklahoma Gas and Electric Co.,* 22 S.E.C. 209, 219 (1946), in which the SEC noted that its approval of the accounting treatment of a particular transaction is "not intended to restrict or otherwise affect the jurisdiction of the Federal Power Commission." The FPC subsequently modified the treatment of the same transaction, *In re Oklahoma Gas and Electric Co.,* 5 F.P.C. 52, 54, 59 (1946), and the SEC accordingly modified its own order to avoid inconsistency. *In re Oklahoma Gas and Electric Co.,* 22 S.E.C. 466 (1946).

area could threaten to undermine the ability of FERC to obtain the information it requires to fulfill its statutory mandate under the FPA when, under certain circumstances, the "subject matter" of accounting is also regulated by the SEC.[22]

3. The court of appeals misinterpreted Section 318 because it failed to appreciate the difference in goals and expertise between the two agencies.[23] Under a more appropriate analysis, the court of appeals would not have simply determined that PUHCA gives the SEC authority over inter-affiliate contracts for the sale of goods and then concluded that FERC therefore can have no regulatory role with respect to those same arrangements. Instead, the

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[22] Although Section 20(b) of PUHCA, 15 U.S.C. 79t(b), requires that SEC accounting rules "not be inconsistent" with the "requirements imposed by [any law of the United States] or any rule or regulation thereunder," SEC accounting rules could differ from those of FERC in ways that are not "inconsistent" with those rules, but that nonetheless require somewhat less or different information from a regulated entity. In such a case, application of a broad field preemption theory could impair FERC's ability to obtain the information it needs for ratemaking purposes.

[23] Thus, in a portion of its opinion (Pet. App. 9a-13a) in which it rejected the argument that Section 318 is inapplicable to this case because FERC and the SEC regulate different "subject matter," the court noted the similarity of regulatory mission between the SEC and FERC. In general, it should be possible to resolve issues arising under Section 318 without attempting to define precisely whether the "subject matter" as to which the SEC has imposed "requirements" is the same as the "subject matter" as to which FERC has imposed "requirements." Under the actual conflict analysis that we propose, the key issue is the pragmatic determination of whether the regulatory requirements are in conflict. If they are, Section 318 gives precedence to the SEC requirement. If they are not, they are unaffected by Section 318.

court should have inquired whether there is any conflict between actual SEC and FERC regulation. Only if requiring Ohio Power to comply with FERC's order in this case would conflict with that company's obligation to comply with the four SEC orders would Section 318 render the FERC order invalid. The court of appeals expressly refused to undertake this inquiry, which depends on the meaning of four SEC orders that have never been construed by any court and that relate to a particular coal mining operation of no general legal significance. This Court should remand the case to the court of appeals so that the necessary inquiry into the meaning of the four SEC orders can be undertaken.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00906