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## **THREE REASONS WHY UTILITIES NEED TO DEVELOP A TELECOMMUNICATIONS EXPERTISE — WHETHER THEY LIKE IT OR NOT**

*Lawrence J. Spiwak\**

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**[\*1]** Since the Telecommunications Act of 1996 was enacted slightly over two years ago, many of my former colleagues in the electric utility industry have often asked me whether they should diversify into some sort of telecommunications venture. My common response is that they should not focus primarily on developing a specific telecom “entry” strategy for their company per se (unless, of course, that is the direction in which they deliberately want to move their company), but rather on promoting an overall corporate strategy that recognizes the importance of having a broader telecommunications expertise as an additional, complementary tool to help them to manage—and, in particular, to defend—their core utility business in this confusing era of “deregulation” and “competition.” I make this recommendation for essentially three reasons.

First, and perhaps the most obvious reason, utilities’ economies of scale and scope, coupled with their existing sunk assets, corporate culture

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\* Lawrence J. Spiwak currently serves as the President and Chairman of the Board of Editorial Advisors of the Phoenix Center for Advanced Legal and Economic Public Policy Studies, a Washington, D.C.-based, nonprofit think-tank dedicated to filling the substantial vacuum for high quality, objective, and scholarly analysis of the important public policy issues of the day. Prior to joining the Phoenix Center, Mr. Spiwak was a senior attorney with the Competition Division of the FCC’s Office of General Counsel and, because of his active membership in the energy bar prior to joining the FCC, was responsible for drafting the Commission’s rules regarding public utility entry into telecommunications and information services markets. This article was excerpted in large part from Mr. Spiwak’s upcoming article, *Utility Entry Into Telecommunications: Exactly How Serious Are We?*, Phoenix Center for Advanced Law and Economic Policy Studies Working Paper Series (forthcoming Spring 1998), which can be downloaded free of charge from the Internet at [www.phoenix-center.org](http://www.phoenix-center.org). The views expressed herein are exclusively those of the author, however, and in no way reflect the views of the Phoenix Center, its Adjunct Fellows, or any individual members of its Editorial Advisory Board.

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and, in some cases, telecommunications operational experience, make telecommunications entry a very attractive and effective strategy to help investor-owned utilities maximize shareholder value.

Second, utilities need a telecommunications expertise because the success of current electric utility restructuring initiatives are tied directly to the successful use of advanced telecommunications technology as a way to monitor, dispatch, and bill each residential customer for each electron on the grid. If a utility does not have its own in-house telecommunications expertise, then it will be forced to rely on a rival firm's telecom expertise, as well as their rival's choice in systems and technology.

Third, utilities need a telecommunications expertise because policymakers are now attempting to use the telecommunications restructuring experience as a template for electric utility industry restructuring legislation. As such, utilities need to be able to explain to public policy officials that just because both the electric utility and telecommunications industries use poles and wires (and are also pervasively regulated by the federal government and the states as well), the similarities end right there—i.e., these networks do not operate in the same way and, therefore, should not be regulated in the same way.

### **Reason 1: A Value-Added Service**

Telecommunications as a value-added service. In these confusing times of “deregulation” and “competition,” investor-owned utilities must develop new ways to protect and, if possible, maximize shareholder value. One obvious source of new revenue is for utilities to maximize the utilization of their existing assets by entering, to some [**\*12**] degree, one or more telecommunications markets, and compete for market share against the incumbent monopolist.<sup>1</sup> Without a detailed understanding of the

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1. From a public policy view, it should be noted that utilities are one of the few number of potential new entrants post-1996 Act with sufficient scale and scope to make a tangible improvement in market performance. See S. REP. NO. 104-23, at 7 (1995) (allowing utilities to “become vigorous competitors in the telecommunications industry is in the public interest” because consumers “are likely to benefit when more well-capitalized and experienced providers of telecommunications services actively compete.”) (Emphasis supplied.) Accordingly, it is really no surprise that utilities are entering successfully—both *sua sponte* or in joint ventures with other parties—the telecommunications and information markets, and thereby providing tangible, (continued. . .)

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cultural and political dynamics unique to the telecommunications industry, however—i.e., what are the explicit and hidden subsidies new entrants must pay, what are the areas where strategic anticompetitive conduct is likely to occur, which constituencies are “protected” or “favored” by the regulators, who are the major lobbyists, etc.—there are numerous pitfalls that could stymie this entry strategy before it even gets started.

For example, utility lawyers need to recognize that in the telecommunications industry (wholly unlike the utility industry) the incumbents generally have been extremely successful (primarily by spending a substantial amount of time, effort and capital) in their efforts to ensure that the political/regulatory process will continue to permit them to retain (if not improve) their dominant status.<sup>2</sup>

Similarly, utility lawyers must also realize that because politicians believe vigorously that anything connected to the “information superhighway” must be reappropriated to pay for the yellow-brick toll-road that will lead our children over the bridge to the twenty-first century, utility lawyers need to structure their clients’ entry strategies to ensure that any revenue their clients derive from a telco-entry strategy will go directly to reinvestment or shareholders, rather than to politicians’ desire

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facilities-based telecommunications competition against the incumbent provider. See, e.g., Central & South West’s joint venture with ICG to provide local and long-distance service in Austin and Corpus Christi Texas connected its first customers with local service, *CSW Press Release* (Aug. 5, 1997); Joint venture announced between Southern Company and ICG to construct 100-mile fiber network to provide local telephone service in Atlanta, *ICG Press Release* (June 17, 1997); Connectiv, a subsidiary of Delmarva Power & Light is currently providing head-to-head competition against Bell Atlantic; Joint venture announced between PEPCO and RCN to provide Washington, D.C., area residents and businesses with local and long-distance telephone, cable television and Internet services from single supplier, *Two Energy Utilities Set Sights on Bell Atlantic Territories*, *Communications Business & Finance* (Aug. 18, 1997); Boston Edison and C-TEC’s RCN unit form partnership to offer local phone, long-distance, video and internet access, *Boston Edison Press Release* (Sept. 30, 1997).

<sup>2</sup> See Lawrence Spiwak, Antitrust, the “Public Interest” and Competition Policy: The Search for Meaningful Definitions in a Sea of Analytical Rhetoric, *ANTITRUST REPORT* (December 1997), at 2, 4 & notes 12, 14 and citations therein [hereinafter *The Search for Meaning*].

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to wire the schools of America.<sup>3</sup>

Finally, utility lawyers must be able to counter successfully the various attempts made by opponents of utility entry—of which there are a wide spectrum of strange bedfellows ranging from incumbent monopolists to consumer “ombudsmen.” These opponents will attempt to use the regulatory process to delay or outright deter utility entry by hyping what I describe as the “cultural” (“utilities have a competitive advantage over other new entrants”) and the “cross-subsidization” (“the utility’s captive ratepayers are improperly subsidizing the utility’s entry into telecommunications”<sup>4</sup>) myths.<sup>5</sup>

## **Reason 2: Regulated Competition**

FERC’s and the states’ notion of “competition” rely on telecommunications technology to follow the electrons. After reviewing the Federal Energy Regulatory Commission’s (FERC) restructuring paradigm and its current effects on market structure, conduct and performance, it tragically appears that Order No. 888 and its progeny will probably never lead to tangible competition or “deregulation.” Why do I think this, you ask? Because FERC officials told me so.

Unfortunately, FERC officials have stated publicly that even though some may view the concept of “regulated [\*13] competition [as] an oxymoron like ‘postal service’ or ‘airline food,’” they prefer to “think of regulation as evolving into a guardian and guarantor of competition, instead of its substitute.”<sup>6</sup> Moreover, FERC officials have stated publicly that “government should not hesitate to intervene where non-market power values are deemed worthy of protection, if it can do so in a competitively neutral way and in defense of the competitive interests of the market.”<sup>7</sup> Given the above, we should not be surprised when the chair

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3. See *id.* at 4 & notes 13, 14-15.

4. See, e.g., Massachusetts Attorney General Weighs in on RCN-Boston Edison Complaint, *COM. DAILY*, March 2, 1998.

5. For a complete exegesis of this topic, see *Utility Entry into Telecommunications*, *supra* note 1.

6. Hoecker Cites “Misconceptions,” *ELECTRIC UTILITY WEEK*, March 31, 1997 (emphasis supplied).

7. Congress Should Mandate FERC Oversight of ISOs, Coalition Says, *INSIDE FERC*, March 31, (continued. . .)

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of the FERC proclaims proudly that “regulated competition” is perfectly appropriate because FERC will not “race headlong towards ‘deregulation’ that is based largely on untested theories about the behavior of competitive markets.”<sup>8</sup>

Not that I want to spoil the party here, but the problem with these statements is that they fly in the face of established legal precedent and basic economic first-principles. Like it or not, “Economic regulation is supposed to be a substitute for, and not a complement of, competitive rivalry. It is not, contrary to popular belief, ‘because we can.’”<sup>9</sup>

In other words, economic regulation is only appropriate where one or more firms are capable of successfully exercising market power (charging monopoly prices or restricting output) for a sustained period of time, and additional entry is unlikely.<sup>10</sup> Accordingly, if the stated goal of public policy is truly to promote “competition”—and, a fortiori, lead to tangible “deregulation”—it is unclear how FERC’s current restructuring policy will really maximize consumer welfare—i.e., produce, through rivalry, lower prices and more services—in the long-run.<sup>11</sup>

Space constraints prevent a detailed exegesis here about why the current electric utility restructuring effort probably will fail. One of the key points to understand is that FERC apparently has forgot that the teachings of Sir Isaac Newton are just as relevant today as when he had that apple for lunch.<sup>12</sup> Specifically, electricity is not a “commodity” in the

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1997 (emphasis supplied).

8. FERC Chair Hoecker Delivers Scary Halloween Message for Industrials, FOSTER ELECTRIC REPORT, No. 125, Nov. 5, 1997 (emphasis supplied).

9. See *The Search for Meaning*, supra note 2, at 7 (emphasis in original).

10. *Id.* at 7-8.

11. *Id.* at 14.

12. Other points include the facts that: Order No. 888 provides absolutely no incentive—indeed, as discussed *infra*, it is actually a disincentive—to build any new transmission facilities; FERC requires everyone (except certain utilities with few or no transmission facilities) to post (i.e., signal) their prices (OASIS); by refusing to eliminate expressly “carrier of last resort”/“obligation to serve” responsibilities in a so-called competitive environment, FERC prohibits improperly firms from exiting the market; a demonstrable trend in industry reconcentration (accompanied by, of course, FERC’s imposition on the merging parties of the  
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conventional sense of the term, such as wheat, pork bellies or frozen concentrated orange juice. It cannot be stored, stacked, or even touched; rather, because under the laws of physics electricity always seeks to follow the path of least resistance, electricity may only either be used or lost (i.e., “grounded”). As such, there is no clear point of demarcation between the interstate transmission and local distribution facilities of a utility’s network. Indeed, a utility’s network is more than just a grid system of powerlines. A utility network is a complex infrastructure with a large investment in monitoring and operating equipment with its associated communications networks and computers. To wit, power problems in Arizona can require instant and accurate operations in the Northwest to prevent a West Coast blackout.<sup>13</sup> Electricity is, therefore, probably better characterized as a “network product” that exists only as a function of the capacity and condition of the network itself.<sup>14</sup>

Notwithstanding the above, however, various public policy officials—including FERC, the states, and even regulators abroad now—believe apparently that by using telecommunications technology, firms can somehow monitor and dispatch this “commodity” (i.e., each electron on the national grid) directly from the turbine’s magnets straight to each

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requisite amount of “voluntary” commitments necessary to assuage rivals’ “fair” competition concerns); and the fact that FERC requires everyone (again, with small exceptions) to file homogeneous transmission tariffs. Aside from probably violating the Mobile-Sierra doctrine, it is unclear how mandated homogeneity will result in dynamic economic efficiencies in the long run. It is nice to see, however, that FERC officials have finally, albeit unwittingly, conceded this point as such. See FOSTER ELECTRIC REPORT, *supra* note 8 (reporting that FERC intends to “expand upon certain themes” such as “considering whether to revise or enlarge the pro forma tariffs to allow for product and service innovations”).

<sup>13.</sup> Jerry A. Sturdivant, Power Deregulation is the Road to Ruin, *THE COLOMBIAN*, July 24, 1997 (op-ed section).

<sup>14.</sup> Indeed, in a true commodity market a purchaser actually buys a tangible product. Thus, after a commodity is purchased, the buyer must be able to either immediately resell the commodity, or have some specific place arranged to hold the commodity before it can be used or resold. If the purchaser neglects to arrange a storage destination for the commodity, however, then (as actually happened to my good friend’s grandfather) the buyer may get an unexpected phone call in the middle of the night to come pick up two loads of pork bellies from the yard. Yet, unless we are all suddenly supposed to be bound by the laws of Sir Fig Newton, rather than his brilliant and apple-loving brother Sir Isaac, it is unclear how one is supposed to pick up a truckload of raw bulk power.

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residential consumer's doorstep.<sup>15</sup>

The big problem, however, is that these officials fail to recognize the basic economic fact that no matter how well technology can provide real-time pricing and demand-side management, because Order No. 888 seeks to establish a perpetual resale model without providing any real incentive—indeed, empirical evidence indicates that it is actually a disincentive—to commit the substantial sunk costs necessary to build any new transmission capacity,<sup>16</sup> technology can overcome neither the laws of physics nor the laws of economics.<sup>17</sup> Rather, all this high-tech capability

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<sup>15</sup> See, e.g., News and Insight on Business in the Golden State Spotlight, LA TIMES, February 23, 1998, at D2 (reporting that while California retail wheeling experiment had to be postponed for at least three months to solve technical problems with hardware and software, officials were “confident” that they would not need a second delay); Electric Shorts, FOSTER ELECTRIC REPORT, No. 130, January 21, 1998 (reporting that the United Kingdom’s Office of Utility Regulation recently decided to delay by eight months the full opening of the country’s retail electric utility markets, “citing the same computer glitches and other technical hangups that have forced California to delay the opening of that state’s markets to retail choice by three months”).

<sup>16</sup> See Peter Coy, Utilities: Prognosis 1997, BUSINESS WEEK, January 13, 1997, at 118. These disincentives include, inter alia: permitting utilities to recover only the embedded (rather than the incremental, forward-looking) costs of transmission facilities; having to provide rivals with “network” service (i.e., essentially having to provide multiple rivals—who are often geographically separated and therefore have very different demand and cost characteristics—with the de facto ability to dispatch their system and to have priority over native load requirements); and, as discussed supra, continuing residual “obligation to serve”/“carrier of last resort” responsibilities in this so-called competitive environment.

<sup>17</sup> Order No. 888’s disincentive to build any new transmission capacity has also led utilities to engage in what I call the “Great Generation Swap.” As mentioned supra, FERC apparently believes that with “open access,” consumers should be able to buy power from anywhere in the country and have this power wheeled directly to their doorstep. From an economic point of view, however, the most efficient way to dispatch a grid generally is to place the generation as close to the load as possible; if this structure is impractical, however, then utilities must constantly evaluate the benefits of purchasing and transmitting cheaper, distant generation versus the possible costs of not adequately serving their native load—i.e., just because you can buy cheap hydropower in the Pacific Northwest and wheel that power to Key West, Florida, doesn’t mean that this is still a good idea. Thus, assuming arguendo that restructuring actually produces a market structure that is conducive to competitive rivalry—e.g., the ownership of generation and transmission facilities are completely unbundled (we are talking about some serious structural separation here), residual “obligations to serve”/“carrier of last resort” burdens are eliminated, and the supply curve for transmission capacity becomes elastic and shifts to the right, such that bottleneck concerns are alleviated—then a national “portfolio” of generation assets would make sense because the “marketer” will be able to meet demand anywhere in the country efficiently. Unfortunately, because existing policies provide no  
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achieves is helping one monopolist to more easily purchase power from a variety of generation sources, and then basically to “free ride” off of another monopolist’s constrained transmission system—even though the latter needs all the transmission capacity available to serve its native load.<sup>18</sup> This free-rider problem is now exacerbated by the introduction of non-utility “power marketers” that, by definition, add no new capacity to the market and simply increase the economic costs of delivering power to the consumer.<sup>19</sup>

As such, the concept of, and now primary reliance on, energy brokering/marketing programs as a means of bringing “more” competitors to a distribution system characterized by static (i.e., unchanging) capacity does absolutely nothing to improve either consumer welfare or a regulated firm’s bottom line.<sup>20</sup> Instead, this

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incentive to build any new transmission or generation capacity to get the competitive power to the people and “obligation to serve”/“carrier of last resort” responsibilities continue, current restructuring policies are simply providing utilities with the economically irrational incentive to “swap” both generation assets and loads with each other to minimize operational distortions on the national distribution grid just to provide politicians with the “appearance” of competition that politicians demand to observe.

18. See *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380-81 (9th Cir. 1994). There, the court refused to find a utility’s refusal to let a rival use a constrained power line to be a violation of § 2 of the Sherman Act because the utility had a limited amount of capacity on the line and it desired to use that capacity to the limit when it could obtain inexpensive power. According to the court, when the utility can obtain less expensive inputs from the production market (i.e., cheap power) these savings can be rolled into its other costs and result[ ] in...savings to all of its customers. In this sort of regulated industry, it is certainly to the benefit of the monopolist’s customers if its rates are as low as possible. Indeed, that is the major reason for the existence of regulatory commissions....In other words, the public interest is well served when that happens, and that gives even more weight to the propriety of the refusal. As such, the court found the plaintiff’s argument that a monopolist has “a duty to deal based on the extent to which a competitor might benefit if it had unlimited access to the monopolist’s facility,” rather than a “duty to deal based on the harm that would result to competition from the monopolist’s refusal,” improperly turns “the essential facilities doctrine on its head.”

19. See, e.g., *Enova Corporation & Pacific Enterprises*, 79 FERC (CCH) & 61,107 (1997); *Morgan Stanley Capital Group Inc.*, 79 FERC (CCH) & 61,109 (1997); see also Agis Salpukas, *California’s Effort to Promote Plan For Electricity Is Off to a Slow Start*, NY TIMES (Feb. 26, 1998) at D1, D6 (reporting that because of “hard-sell techniques or even outright fraud,” California regulators had to suspend the licenses of dozens of non-utility marketers).

20. See, e.g., *id.*, (Energy marketer’s offer of a 10% rate cut was not the result of competitive (continued. . .))

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“virtual” competition provided by the information superhighway will require the presence of constant, heavy-handed and tangible regulation, and therefore any true benefits for consumers will remain in virtual cyberspace bank accounts, rather than as cold, hard cash in their wallets, as well.<sup>21</sup> Indeed, all that FERC’s “neo-competition” policy achieves successfully is the improper reallocation of wealth from one firm to another, unduly burdening an already constrained national transmission grid (hence the recent proliferation of rolling blackouts), and providing public policy officials with yet another press release to enhance their political narcissism.<sup>22</sup>

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savings, but rather was an automatic bonus—mandated by the California State legislature and paid for by a special bond issue—for every energy user who switched providers in the state.); Agis Salpukas, *Utility Deregulation: Boon or Boondoggle?*, NY TIMES, February 1, 1997 (business section) (reporting that consumers were not aware that most of the alleged savings resulting from New Hampshire’s retail-marketing plan were not the “result of free-market competition or any economies of scale that [a new entrant] might bring to bear on a regional market. Rather, they stem from state-mandated subsidies and from the willingness of...marketers to shave their profit margins to near zero to get a piece of the action.” (emphasis supplied). The article further reported that while the deregulation of the national market for electricity “might ultimately bring about lower prices in some parts of the country, the monthly bills of the 17,000 New Hampshire residents taking part in the current pilot program could bounce back up if the subsidies are phased out and [the] winners of the marketing battle reward themselves by taking a profit.” Readers should therefore not equivocate the pseudo-benefits produced by this “neo-competition” with the benefits produced by rivalrous competition—i.e., static economic efficiencies in the form of declining prices and dynamic economic efficiencies in the form of new products and services.). See, e.g., Lawrence Spiwak, *Reconcentration of Telecommunications Markets After the 1996 Act: Implications for Long-Term Market Performance*, ANITRUST REPORT (May 1997) at 17, 19 & note 8 (explaining how the FCC’s Competitive Carrier paradigm successfully deregulated the U.S. domestic long-distance market by creating a market structure conducive to competitive rivalry, under which carriers are forced to lower prices, innovate their services and, if necessary, actually pay people to be their customers); Peter Elstrom, *Slugfests: Reach out and Pay Someone*, BUSINESS WEEK (March 23, 1998) (reporting that MCI is upset because AT&T is “flooding the market with checks” worth \$369 million in January 1998 alone, up from \$70 million a month in fourth-quarter ‘97, just to pay people to switch carriers).

21. Indeed, any notion that “state-sponsored, managed competition”—i.e., when regulators order firms, as a condition of providing service, to lower their previously-approved just and reasonable rates to an apparently more “affordable” level—can either actually maximize consumer welfare or be sustained in the long-term is simply specious at best. *The Search for Meaning* at 7-8, 11-14 and citations therein; see *infra* note 2.

22. See *The Search for Meaning* at 2-5, 14; see also, Margie Hyslop, *Electricity Dereg May Not* (continued. . .)

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### **Reason 3: Telecom and Utilities Are Not the Same**

Utilities need telecommunications expertise when congress and the states attempt to “cookie-cutter” the Telecom Act onto the electric market. Many people think that because the telecommunications and electric utility industries both use poles and wires, these industries are the same and, therefore, should be regulated identically as well.<sup>23</sup> Wrong. Despite the fact that the telecommunications and electric utility industries both use poles and wires, the similarities basically end right there.

These are very different industries, with very different structural (and even cultural) characteristics and, as such, do not merit homogeneous treatment. These distinctions include, but are not limited to, the facts that:

1. Utility and telecommunications networks operate in fundamentally different ways. **[\*14]**
2. While both the telecommunications and electric utility industries are highly capital intensive, the costs with constructing generation and (especially) transmission capacity are very different from the costs associated with constructing a telecommunications network.
3. Electricity and telecommunications products are sold and

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Lower Rates, THE MONTGOMERY JOURNAL, June 4, 1997, at A1; Hiram Reisner, Big Business Wins, Homeowners Lose Louisiana Competition Study Shows, ELECTRIC UTILITY BUSINESS & FINANCE, October 7, 1996 (reporting that in “terms of the economy as a whole, the benefits of expected lower prices for industrial customers do not offset the reduction in disposable income for consumers due to higher residential rates.” In fact, the state would “see an overall reduction in personal income, retail sales, tax revenues, and economic output” for several years). Funny, I thought that the law is pretty clear on this point: The “public interest” may not be used to benefit a particular individual or group; rather, an agency’s actions must be consistent with the interest of “the public” as a whole. See, e.g., Northeast Utilities Service Co. v. FERC, 993 F.2d 937, 951 (1st Cir. 1993).

<sup>23</sup>. I guess telecommunications is now the popular industry to emulate because FERC realized that their initial attempt to “cookie-cutter” gas deregulation on the electric utility industry left far too many holes. Of course, given the Clinton administration’s recent statement that electricity can be marketed, labeled, and sold in the exact same way as food and nutritional supplements, I could be wrong. See Clinton Administration March 28, 1998 Comprehensive Electricity Competition Plan at Section II.A (<http://www.hr.doe.gov/electric/ceep.htm>).

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marketed in very different ways.<sup>24</sup>

Moreover, despite current restructuring efforts to ignore or change long-standing law, the significant fact that Congress decided to regulate telecommunications companies as common carriers, but—for very legitimate public policy reasons—has deliberately, and heretofore repeatedly, refused to regulate electric utilities as common carriers, simply cannot be ignored.

Unfortunately, I cannot convey quickly how much of my time is wasted explaining this seemingly obvious concept to people. Without understanding the significant differences between the telecommunications and electric utility industries, it will be just that much harder for utility executives to affect positively any proposed electric utility restructuring legislation.<sup>25</sup>

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<sup>24</sup> For example, bulk power used to be transmitted for third parties or “wheeled” across transmission facilities on a “point-to-point” basis—i.e., from the generation facility directly to the purchaser’s substation. Over the past several years, however, FERC, at the urging of industrial customers and munis, has moved away from the concept of “point-to-point” service towards a “network service” regime (which, unfortunately, arose from a misconception of how a telephone network operates). “Network” service—unlike “point-to-point” service—basically permits one or more rivals to dictate how the actual owner of the network operates and dispatches its network. Because of all of the difficult elements (i.e., loop flow, spinning reserve, line loss, etc.) inherent to a functioning grid (remember, energy follows the path of least resistance), allowing multiple rivals—who are often geographically separated and therefore have very different demand and cost characteristics—to de facto dispatch another’s system has a direct effect on optimal system efficiency and reliability. The joke is that traditional “switched” telephone service is in fact the ultimate “point-to-point” service, and that even in the new wave of “non-switched” telecommunications technology, the information “packets,” unlike electrons, have specific destinations assigned to them.

<sup>25</sup> A classic example of this type of analytical obfuscation can be found in a paper authored by advocates for municipal utilities and RBOC interests. See, e.g., William D. Steinmeier et al., *The Cost of Ignoring History* (unpublished manuscript). There, the authors argued that the FCC should adopt an embedded cost methodology—rather than a total element long-run incremental costs methodology—in setting the appropriate pricing methodology for interconnection and network elements, simply because FERC had used embedded cost methodology. The problem with such a pedantic approach, however, is that it ignores the caveat I offered above, i.e., just because the electric utility and telecommunications industries both use poles and wires, the similarities end right there. Accordingly, the key issue is not to argue the merits and faults of FERC’s actions versus the FCC’s actions, but to determine sua sponte the correct pricing methodology—as well as other regulatory restraints—that should be imposed in light of the specific underlying structural characteristics of the particular industry where the regulation is supposed to be applied.

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## **Conclusion**

Given the above, it is important that utility and telecommunications practitioners not get carried away with the hyperbole of “convergence.” Again, the operative word is expertise, not necessarily entry. As explained above, while there are many similarities between the two industries—including assets capable of multiple cross-industry functions—practitioners must recognize and respect the substantial differences between these two industries as well. If this distinction is not made, the public policy mistakes of one industry restructuring are likely to be continued—rather than disregarded and abandoned appropriately—in the other.

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