AFTER PUHCA REPEAL

The State Response

Will the industry be able to meet capital investment and growth expectations?

By Robert W. Gee

n Aug. 1, 2005, one week before President Bush signed into law the Energy Policy Act of 2005 (EPACT), the New Jersey Board of Public Utilities initiated an investigation. Its purpose: to determine whether to adopt additional measures to protect ratepayers as a consequence of the imminent repeal of the Public Utility Holding Company Act of 1935 (PUHCA) that would be effectuated by the president's signature. Later this year, the board may decide to adopt new measures limiting under what conditions a utility holding company would be permitted to acquire a New Jersey electric or gas utility.

Some of the options being weighed include limiting non-utility parent company investments to no more than 25 percent of aggregate asset value, and mandating a number of independent board seats at the utility company level. This is one example of how states are looking into expanding their reach into areas previously committed primarily to federal jurisdiction under the now repealed PUHCA.

At stake is the future of the electric utility industry, and whether it will be able to meet capital investment and growth expectations. Advocates calling for the repeal of PUHCA sought to remove various restraints limiting certain forms of utility ownership and structures that they believed had inhibiting effects on capital formation. Claims that PUHCA was unnecessary for ratepayer protection were premised in part on the argument that states were fully empowered to address the type of holding company abuses that originally had prompted enactment of the 70-year-old statute.

That some states now would review their own jurisdiction to serve in that capacity comes as no surprise. When it repealed PUHCA, Congress virtually invited them to take a fresh look at their own jurisdiction to regulate mergers and acquisitions, and to consider conditions they deem necessary for ratepayer protection. Among other things, EPACT gave states a new federally enforceable right to access holding company books and records, wherever located.[1] But utilities and certain sectors of the financial community are concerned that some of these initiatives may run counter to the goal of capital attraction intended by PUHCA repeal.

State Commission Concerns

The primary concerns of state commissions fall into the following categories:

- Utility company cross-subsidization of affiliate company activities within a holding company structure sharing joint or common costs;
- Diversification by the utility or ownership of diversified assets within the holding company that might place at risk the credit quality of the utility company;
- Improper use of utility company assets or its revenue streams as collateral for upstream or affiliate loans; and
- Transfer pricing between a utility and its subsidiaries or affiliates engaging in business practices with one another, with a risk that the utility will be charged prices in excess of market for goods and services.

For now, four states—California, Kansas, Maryland, and New Jersey—have opened proceedings to address measures for ratepayer protection within a utility holding-company structure.[2] Although the steps by these four states do not necessarily signal a trend, it is widely assumed that other states are in a monitoring mode, weighing their own options as a consequence of the new legislation.

"Among the states, there have been two schools," says North Carolina Commissioner Sam J. (Jimmy) Ervin IV, also chairman of the Committee on Electricity for the National Association of Regulatory Utility Commissioners (NARUC). "One group believed that PUHCA repeal was OK so long as there was adequate access by regulators to holding company books and records. Another group thought that repeal was not a good thing."

Despite this divergence of opinion, Ervin believes that most NARUC members keenly are interested in learning more about what is being done to address the full panoply of issues that could arise with a more complex corporate structure. Because these are difficult questions, Ervin does not see most states jumping to adopt a particular approach. Rather, "for those that can take the time, they are thinking about it."

Ervin sees NARUC providing an educational resource for members to decide for themselves how best to ensure ratepayer protection, rather than the organization dictating any single approach or set of approaches. "Because one size does not fit all," he doubts that NARUC will take a prescriptive stance.

Other reasons are legal and practical. Ervin says NARUC members could be called upon to decide what type of conditions to adopt in merger applications before them. "Voting for a preferred approach or condition in a NARUC resolution could subject a commissioner to a claim of predecisional bias—grounds for disqualification."

A Whole New World: PUHCA 2005

When Congress repealed PUHCA, it did not simply wipe the slate clean. Rather, it transferred to the Federal Energy Regulatory Commission (FERC) utility holding company oversight authority previously held by the Securities and Exchange Commission (SEC), providing FERC with access to books and records of utility holding companies "relevant to costs incurred" by the public utility affiliated with a holding company and

"necessary or appropriate" to protect utility customers.[3] In addition, it gave FERC new substantive authority to review and allocate costs of certain non-power goods and services provided by affiliated companies within a utility holding company system upon request of the holding company or state commission having jurisdiction over the utility.[4] Collectively, these new provisions are referred to as PUHCA 2005.

Moreover, in revising and strengthening FERC's merger review authority, Congress authorized it to allow a given transaction conditioned upon it finding the transaction consistent with the public interest, and not resulting in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company (or to allow an applicant to show how such activities are consistent with the public interest).[5]

In its final rule effectuating PUHCA 2005, FERC chose a cautious, incremental path. NARUC and other commentaters urged it to promulgate specific requirements mandating the blanket filing of agreements allocating costs of non-power goods and services purchased by jurisdictional utilities from affiliated companies, or to impose additional rules regarding cross subsidization, encumbrances of utility assets, or diversification into non-utility businesses. Instead, FERC opted to rely on the case-by-case exercise of its ratemaking authority under the Federal Power Act and Natural Gas Act and of its enhanced merger review authority. It deferred adoption of a more prescriptive approach until it had an opportunity to convene a subsequent technical conference in a year, based on lessons learned.

A glance at comments filed separately by various state commissions during the pendency of the final rule indicates that some would have preferred that FERC do more. For example, two state commissions (Missouri and Arkansas) asked FERC not to rely on ratemaking authority but rather to mandate structural safeguards to limit ratepayer exposure to holding company diversification. Specifically, they sought continuation of the SEC's "functionally related" approach of limiting the quantity and types of non-utility businesses with which a utility may be affiliated, as well as prohibitions on a utility entity engaged in non-utility businesses, and structural separation of utility and non-utility assets.

Yet neither NARUC nor any of these state commissions felt so strongly about these matters to raise them on rehearing of FERC's final rule. Recognizing that FERC preferred to exercise its new authority on case-by-case basis, Ervin did not challenge that approach, observing that "NARUC concluded that FERC did not do anything that justified further litigation."

Charles Gray, NARUC's executive director and a 20-year veteran of the PUHCA repeal debate, says the unusual degree of cooperation between FERC and the state commissions on this, as well as other new requirements called for by EPACT is another reason for not pursuing rehearing. In Gray's opinion, "The states believe that FERC has been very engaged with them in addressing implementation of all of its new rules. There is a strong sense that if there are problems down the road, we are comfortable we can raise them at that time."

A Range of Options for States

A "savings clause" of PUHCA 2005 expressly disclaims any intent to preclude a state commission "from exercising its jurisdiction under otherwise applicable law to protect utility customers."[6] Given the preservation of this authority, states have a number of options on how to proceed.[7] For some, arriving at a decision may be premised on addressing prior abuses. However, for others, giving necessary weight to a set of variables will make resolution a more difficult process. Although a strong regulatory impulse may influence a command-and-control outcome, at this time there is no clear indication that most states will not attempt to balance protecting ratepayers from unacceptable risks and attracting needed capital into the electric sector.

The investor-owned electric utility industry certainly hopes this is the case. "The electric utility industry needs new infrastructure, but PUHCA of 1935 restricted the sector's access to additional capital, and prohibited certain kinds of investors," says David Owens, executive vice president for the Edison Electric Institute (EEI). These restrictions are removed by the replacement with PUHCA 2005, but Owens says ratepayer interests still are held in high priority through the transparency offered by FERC and state access to holding company books and records. Nonetheless, Owens sees this as a work in progress: "Because some states may conclude that additional measures might be needed to protect ratepayers, we need to work with them so their concerns are addressed."

If or when a state chooses to adopt additional ratepayer protection measures, three factors strongly could influence this decision.

1. Scope and Breadth of Existing Oversight Authority.

Even prior to repeal of PUHCA 1935, many states held varying degrees of oversight authority by statute or conditions imposed in rate or merger and acquisition proceedings. A mid-1990s survey of state commissions by NARUC found that all but three state commissions at that time (Florida, Michigan, and Montana) held authority to approve mergers and acquisitions, and thereby the authority to condition these transactions.[8] In addition, nearly all states hold authority over affiliate transactions and cost allocations.[9]

Prior cases have shown that when a state commission exer-

cises its ratemaking authority, its power is at its zenith. In a February 2004 survey of the rate and merger approval authority of state public utility commissions, Fitch Ratings concluded that the broad statutory mandates to uphold the public interest and ensure reliable service at just and reasonable rates have empowered commissions to exercise authority not directly spelled out under their statutes. Even when such authority is challenged by the utility, most likely such cases have been resolved in a consensual outcome rather than litigated to a conclusion.[10] Fitch Ratings similarly found that the exercise of merger approval authority by state commissions had given them indirect authority to order holding-company formation as a condition to securing approval for the transaction.[11]

The leveraging of this existing authority highlights the fact that commissions will need to examine whether to rely solely on this practice, or whether to go one step further by adopt-

State Commission Proposals to Prescribe Utility Holding Company Requirements

State	Proposal	Status
California Public Utilities Commission	The commission has required investor-owned energy utilities and parent companies to submit current information concerning capital budgets for the next five years (2006-2010). Parent holding companies also have been required to provide financial statements for any current investments in energy infrastructure serving California, as well as estimates of the participation, if any, of their affiliates in the development, financing, construction, operation, management, or ownership of energy infrastructure that will meet any part of California's expected need for reliable supplies of energy. The commission may propose additional rules or regulations regarding reporting requirements for the allocation of capital between utilities and their non-regulated affiliates by the parent holding companies, and changes to the commission's affiliate transaction rules.[1]	Pending
Kansas Corporation Commission	Staff recommended that the commission adopt ring-fencing rules that would require, among other things, that a holding company be formed in the event a jurisdictional diversified public utility company owns nonutility assets or earns associated revenues that exceed 10 percent for a single-state utility, and 20 percent for a multi-state utility. The proposed rules also would require that: (1) separate books and records be created and maintained among the utility and its holding company and affiliates; and (2) mechanisms be established for issuing debt solely for public utility purposes, with measures to prevent such debt from being used for any other purposes.[2]	Pending
Maryland Public Service Commission	Staff has proposed a rule creating a "utility code of conduct" that would address myriad activities between utilities and affiliates. The proposed code also includes a provision for submission of an annual "ring-fencing report" to the commission disclosing, among other things, all transactions between a utility's "core service" and "non-core service" affiliates. It also would require a summary of all measures intended to protect the utility's financial strength and credit ratings from the activities of core service and non-core service affiliates.[3]	Approved for final adoption on Feb. 15, 2006
New Jersey Board of Public Utilities	Board issued a notice for comment on a proposed rule that would prevent a holding company that owns a New Jersey gas or electric company from investing more than 25 percent of the combined assets of its utility and utility-related subsidiaries into businesses unrelated to the utility industry. Additionally, the rule would prevent a holding company whose primary businesses are not utility related from purchasing a New Jersey utility, unless it divests a sufficient amount of non-utility assets to comply with the rule.[4] Comments also are sought on appropriate protections to ensure that the board of directors of a utility has appropriate autonomy from the board of directors of the public utility holding company, as well as the extent to which members of the board of directors of a public utility should be permitted to serve on the board of directors of other public utilities and their public utility holding companies. Comments are also sought on specific recommendations concerning an appropriate percentage (*e.g.*, 66%, 51%, 40%) of public utility directors that are not members of the board of directors of: the public utility holding company system and other public utilities and their public utility holding companies.[5]	Pending

1. Order Instituting Rulemaking Concerning Relationship Between California Energy Utilities And Their Holding Companies And Non-Regulated Affiliates, Docket No. R. 05-10-030, October 27, 2005.
2. Report and Recommendation of the Staff of the State Corporation Commission of Kansas, Docket No. GMIX-181-GIV, January 13, 2006.
3. See source reference at footnote 15.
4. Energy Competition Standards, Public Utility Holding Company Standards, Proposed New Rules, Docket No. AX05070641, December 19, 2005, 37 N.J.R. 4889.
5. Source: request for informal comments by Staff of New Jersey Board of Public Utilities.

ing the type of *ex ante* structural requirements such as those recommended by some state commissions to FERC in its final PUHCA rule.

At least one leading state commissioner regards reliance on ratemaking authority as inadequate. "Rate cases are reactive," says Jeanne Fox, president of the New Jersey Board of Public Utilities. According to Fox, commissions now are called upon to address issues in a dynamic, competitive capital market where ownership, control, and management of a utility system could be situated at points far distant from one's state where services are provided. "This new kind of competitive market calls for a new kind of regulation."

Whether to impose structural conditions now or when a case arrives at one's doorstep involves a delicate balancing act with profound strategic significance. If a state commission possesses unclear or ambiguous legal authority to impose conditions, promulgating a rule relying on such authority will likely be challenged on appeal. The commission thus runs the risk that a court may find it acting beyond the scope of its authority, and prevent the commission from imposing such conditions in future contested cases. If, however, a commission refrains from adopting a rule, it may continue to leverage its assertion of this authority in specific cases so long as the question of legal empowerment remains open.

But not acting now to adopt specific measures leaves unclear what type of conditions the commission may impose in future merger applications if the commission has a sparse or nonexistent track record. Fox opts to remove this uncertainty: "It is far more preferable for us to adopt rules for transparency's sake so that companies know beforehand what's required. The alternative is to rely on a 'who-happens-to-be-in-office, who-do-you-know' system. Administrations change, but you don't want the rules to do likewise."

2. Measures Adopted By Other States.

Although state commissions are independent from one another, they typically look for guidance from practices in other states in shaping policy. One oft-cited practice has been the adoption of "ring-fencing" measures embodied in state law or imposed in rate or merger approval proceedings by state commissions when exercising authority to protect ratepayers from holding company risks. According to Fitch Ratings, "The aim of a ring-fence is to insulate an issuer [*i.e.*, the utility] from the credit risks of its holding company and affiliate companies."[12] Ring fencing could consist of any one of the following measures:[13]

- Dividend restrictions
- Equity ratio requirements
- Unregulated investment restrictions
- Maintenance of stand-alone bond ratings
- Collateralization requirements
- Working capital restrictions
- Prohibitions on inter-company loans
- Prohibitions on utility asset sales
- Independence of board members.

While various commissions previously have employed ring-fencing measures, one of the most notable instances occurred when the Oregon Public Utility Commission approved Enron Corp.'s acquisition of Portland General Electric Co. (PGE). The case illustrated administrative ring-fencing's general merit in protecting the utility from the bankruptcy exposure of its holding company parent.

The Oregon commission approved a stipulation and agreement that provided, among other things, that: (1) PGE maintain separate debt and preferred stock ratings; (2) PGE not make any distribution to Enron causing PGE's equity to fall below 48 percent of total PGE capital without the commission's approval; and (3) Enron notify the commission in advance of payment of upstream dividends from PGE. Although these conditions were sufficient to enable PGE to maintain its financial integrity upon Enron's bankruptcy, it did experience a temporary loss in credit quality of its unsecured debt, and constrained access to capital in the commercial paper market.[14]

Notwithstanding the virtues of ring-fencing, not all measures are without cost. A February 2005 report by the staff of the Maryland Public Service Commission, which evaluated various forms of ring-fencing, noted that the thickened equity ratio imposed by the Oregon commission on PGE had two downsides. It could: (1) raise the cost of capital since equity cost exceeds that of debt; and (2) result in the utility subsidizing its parent or affiliates by bolstering the latter two's credit ratings.

Ultimately, the Maryland staff concluded that it was "practically impossible to determine in advance which measures are necessary or appropriate," citing the PGE case to demonstrate that even when an appropriate measure is adopted, there are costs to customers. Accordingly, it recommended that the commission avoid adopting generic ring-fencing requirements and instead require the filing of an annual ring-fencing report from jurisdictional utilities, enabling the commission to focus separately on each utility and specific remedy if needed.[15] The commission recently adopted this recommendation and voted to require the filing of this annual report.[16]

While the Maryland commission's decision may represent a modest application of ring-fencing controls, the Wisconsin Utilities Holding Company Act (WUHCA) represents a much more activist approach.[17] Popularly termed a "mini-PUHCA," this statute (enacted in mid-1980) also has been cited as a potential reference tool for states contemplating next steps.

Whether to impose structural conditions now or when a case arrives at one's doorstep involves a delicate balancing act with profound strategic significance.

Among other things, WUHCA capped non-utility investments at 25 percent of the total assets of the utility; required Wisconsin utility holding companies to incorporate in Wisconsin; and required the Public Service Commission of Wisconsin to approve the acquisition of 10 percent or more of the utility holding companies' voting shares. Following a constitutional challenge by investor-owned utilities, a federal appellate court struck down as unconstitutional the incorporation requirement, but upheld the asset cap.[18]

The prospect of other states emulating the Wisconsin model sends shudders through the ranks of investor-owned utilities. While EEI's Owens acknowledges the potential merits of ring-fencing between the utility and its parent to protect ratepayer interests, he strongly disfavors efforts to prescribe the type of parent company asset limitations exemplified by WUHCA as they would undo the very limitations Congress intended to remove when it repealed PUHCA 1935.

Owens adds, "By repealing PUHCA, Congress intended to confer on parent companies the flexibility to invest in core-related and non-core activities that enhance the overall value of utility service. Congress also wanted to remove barriers to new investment in the utility industry. The Wisconsin statute is not one that lends itself to the diversity of capital that would be beneficial to the sector."

His sentiment is shared by a cross section of the investment community. A recent survey of 30 investment professionals taken by J.M. Cannell Inc., an electric utility advisory firm, showed that their opinions toward state commission ring fencing ran positive to neutral, while the prospect of multiple "mini-PUHCAs" drew a decidedly negative reaction from almost half of the respondents.[19]

Julie M. Cannell, president of the firm, says that the survey shows that investors accept or acknowledge that utility commissions should have oversight over mergers and acquisitions, with the burden on utilities to show that their actions are in the public interest. "But they don't want regulation to stand in the way of transactions that add value."

According to Cannell, the respondents found financial and public policy merit to ring-fencing as it was adopted in Oregon, but had significant questions with the potential proliferation of "mini-PUHCAs": "They generally regard a Wisconsin-type statute as an artificial impediment that would keep utilities small and prevent them from realizing economies of scale."

Cannell believes Wall Street understands that regulators don't want the investment community to dictate to them. However, investors also want regulators to appreciate their view that multiple inefficiencies exist within the utility sector within the context of a more dynamic, globally competitive world. She adds: "They would prefer that companies be permitted to become more efficient and optimize their earning power through consolidation if necessary."

Cannell disputes the notion that permitting utilities this discretion means that investors just want to get rich: "It is the job of investors to seek out value opportunities."

But NARUC's Gray doesn't think that investors' negative perception of states' attitudes toward investment is necessarily accurate. He cites the Iowa preapproval process as demonstrating that some states welcome infrastructure investment. As for mergers, he notes: "The record shows that state commissions appear generally to have been receptive to most mergers and acquisitions and the benefits offered by these transactions."

3. Prior Experiences Involving Troubled Utilities.

Although this last factor may play a more immediate role in fewer states, the prior problems of troubled utilities still could be viewed by a broader number of states as a barometer of "what to avoid" and prompt serious consideration of additional protections. In two states, New Jersey and Kansas, difficulties of jurisdictional utilities with failed diversification investments clearly are playing a role in influencing whether to adopt a new set of rules.

In New Jersey, proposed rules to limit actions of utility holding companies have been driven by the board's most recent experience with Elizabethtown Gas Co., a division of a company (NUI Utilities) whose failed investments with its parent and mismanagement caused a downgrade in credit quality to below investment grade of the parent, the company, and the utility division. The board was moved to address what became an emergency.[20]

The impact of this experience can be seen in the current New Jersey board proposal to limit non-utility holding company investments to 25 percent or less of combined asset value, and mandate a set number of independent seats on utility boards to ensure desired independence from the parent company. The latter limitation addresses the subject of corporate governance, a matter state utility commissions customarily do not regulate. Public Service Electric & Gas has challenged the board's legal authority to propose this type of restriction.

The Kansas experience with two troubled utilities similarly

has influenced events. There, two regulated utilities, Aquila Inc. and Westar Energy Inc., were situated as divisions within a parent company, and thus not separate subsidiaries. Although neither was placed into bankruptcy, both experienced financial distress owing to non-utility investments and activities.

Because neither company had been subject to the registered holding company requirements of PUHCA 1935, its repeal had no impact on pre-existing federal regulatory oversight.[21] Nonetheless, the impairment of credit experienced by these companies has prompted the Kansas Corporation Commission to consider adopting comprehensive ring-fencing rules for all utilities, requiring, among other things, the formation of holding companies and structural protections by utilities owning non-utility assets (or earning revenues attributable to them) greater than 10 percent on a single-state basis or 20 percent on a multi-state basis. This proposal has drawn the strenuous opposition of several utilities, asserting that the commission lacks legal authority.

When Congress repealed PUHCA 1935, it strove to advance two interests: continued ratepayer protection from holding company abuses, and attraction of needed capital to the electric utility sector from a more diversified class of investors. Balancing both interests will require the deft management of seemingly divergent public policies. How well the state commissions manage this new role, in concert with FERC, will determine whether Congress struck the right balance. F

Robert W. Gee is the president of Gee Strategies Group LLC, an energy and utilities consulting firm. He previously served as the chairman of the Public Utility Commission of Texas and as an assistant secretary at the U.S. Department of Energy. He can be reached at rwgee@geestrategies.com.

Endnotes

1. Section 1264 of the Energy Policy Act of 2005 (EPACT).
2. See the accompanying table.
3. Section 1264 of EPACT.
4. Section 1275(b) of EPACT.
5. Section 1279(a) (4) of EPACT.
6. Section 1269 of EPACT.
7. A recently issued report by Standard & Poor's assessing the potential impact of PUHCA repeal anticipated that states would become "more active" in reviewing holding company operations. However, it found that this enhanced scrutiny would vary by jurisdiction. Although EPACT "grants state commissions considerable leeway," the larger staffed commissions will be "better able to review cost allocation where the potential for subsidization is high." Jeffrey Wolinsky, "PUHCA Is Dead—What Now For U.S. Utilities?," Standard & Poor's, Jan. 10, 2006.
8. NARUC Compilation of Utility Regulatory Policy, 1995-1996. Following the NARUC survey, a fourth state commission (Indiana) was found lacking merger approval authority by its state supreme court. See also *Briefing Paper, Implications of EPACT 2005 for State Commissions, The National Regulatory Research Institute*, October 2005 (NRRI Briefing Paper), at p. 9.
9. NRRI *Briefing Paper* at 6.
10. U.S. Utilities Survey of State Public Service Commissions (Utilities Survey), Fitch Ratings, February 2004 at p. 2.
11. Utilities Survey at p. 4.
12. Utilities Survey at p. 2.
13. "Ring-Fencing, A State-By-State Summary, Regulatory Research Associates-Regulatory Focus," Oct. 15, 2003.
14. Utilities Survey at p. 5.
15. *Commission Staff Analysis of Ringfencing Measures for Investor-Owned Electric and Gas Utilities*, Maryland Public Service Commission, Feb. 18, 2005, at pp. 18-19. Among other things, the report would provide a: (1) summary of all measures intended to protect the utility's financial strength and credit ratings from the activities of core service and non-core service affiliates; 2) corporate organization chart identifying the utility and its core service and non-core service affiliates; and) description of each core service and non-core service affiliate's business.
16. Concurrently, the commission also decided to adopt a code of conduct governing relations between the utility and its affiliates. See the accompanying table.
17. Wisconsin Statutes Sec.196.795.
18. *Alliant Energy Corporation, et al. v. Bie, et al.,* 330 F.3d 904 (7th Cir. 2003). The U.S. Supreme Court denied the utilities' petition for certiorari, thereby declining to hear an appeal of the lower federal court decision.
19. *State-Federal Utility Regulatory Issues: An Assessment of Investor Perceptions*, J.M. Cannell Inc., December 2005. The survey pool was comprised of representatives from sell and buy-side equity firms, sell and buy-side fixed income firms, hedge funds, and credit rating agencies.
20. Elizabethtown Gas Co. was the New Jersey operating division of NUI Utilities Inc., a wholly owned subsidiary of NUI. From September 2002 to November 2003, NUI and NUI Utilities experienced multiple downgrades by various credit rating agencies resulting in a decline from investment-grade to speculative-grade ratings. These downgrades were caused primarily by failed investments of nonregulated subsidiaries, inadequate internal controls, and failure to issue timely reports as required by the SEC. Despite Elizabethtown Gas' adequate financial results on a standalone basis, credit rating agencies were required to lower its ratings to below investment grade because of the high degree of integration between NUI and NUI Utilities. Circumstances also were aggravated by a guilty plea with respect to conduct committed by an unregulated energy trading subsidiary of NUI, resulting in the payment of a criminal fine.
These series of events prompted the board to bring in an outside auditor to review the conduct of the NUI Utilities, and ultimately to conduct an expedited proceeding to approve the acquisition of its common stock by AGL Resources Inc. (AGL), pursuant to a stipulation and agreement. That stipulation provided, among other things, that: (1) AGL establish a policy requiring NUI Utilities to pay an upstream dividend of no more than 70 percent of its quarterly earnings to AGL; and (2) AGL establish a board of directors committee (or modify such an existing committee) to include oversight of ring-fencing issues and corporate governance best practices to allow AGL to certify annually to the New Jersey Board that activities of AGL's affiliates have not had a material adverse impact on Elizabethtown Gas.
21. Aquila was not part of a holding company, and Westar was a single state "exempt" holding company under PUHCA 1935.