University of Richmond Law Review

Volume 39 | Issue 2 Article 6

1-2005

# Competition: The Wrong Goal

Hullihen Williams Moore
*Commissioner, Virginia State Corporation Commission*

# COMPETITION: THE WRONG GOAL

*The Honorable Hullihen Williams Moore* *

This program was described as one addressing certain pressing issues relating to the organization, regulation, oversight, and physical infrastructure of the electric industry in the context of ongoing initiatives to restructure the industry. That is a tall order. I want to focus on the context: "the ongoing initiatives to restructure the electric utility industry." Initiatives such as this restructuring should be founded on sound economics and sound public policy. Economics and economists are thus important.

Unfortunately, not everyone holds economics and economists in high esteem. This may be understandable because often those in government and industry use, or misuse, economics and economists to advance their own visions or ideas without performing, or at least without revealing, the full analysis that a disciplined economist would perform.

Wendell Berry is a Kentucky philosopher, writer, and advocate for the farmer—not agribusiness, but the farmer—one who works his own land. Mr. Berry has few good words for economics or economists:

> To those who still uphold the traditions of religious and political thought that influenced the shaping of our society and the founding of our government, it is astonishing, and of course discouraging, to see economics now elevated to the position of ultimate justifier and explainer of all the affairs of our daily life, and competition enshrined as the sovereign principle and ideal of economics.
>
> As thousands of small farms and small local businesses of all kinds falter and fail under the effects of adverse economic policies or live under the threat of what we complacently call "scientific progress," the economist sits in the calm of professorial tenure and government subsidy, commenting and explaining for the illumination of the press

* Commissioner, Virginia State Corporation Commission, 1992–2004. A.B., 1965, Washington & Lee University; LL.B., 1968, University of Virginia School of Law.

> and the general public. If those who fail happen to be fellow humans, neighbors, children of God, and citizens of the republic, all that is outside the purview of the economist.[1]

Berry goes on to review how the displaced farmers have moved to the cities as unemployed and, often, unemployable.[2] He laments the loss of top soil that he said is a result of competition.[3] These, he says, are costs that are not accounted for.[4] Wendell Berry does not think that saying there will be some winners and some losers is enough:

> There is no limit to the damage and the suffering implicit in this willingness that losers should exist as a normal economic cost.
>
> The danger of the ideal of competition is that it neither proposes nor implies any limits. It proposes simply to lower costs at any cost, and to raise profits at any cost.[5]

In his essays, Berry makes some important and valid points. He highlights the downside of what we call progress: the loss of topsoil, the displacement of families, the creation of unemployment, the destruction of communities, and the impact of the unemployed on the cities, as well as many other issues.[6] These issues, however, are not, or rather should not be outside the purview of the economist. The true economist would not agree that "there is no limit to the damage and suffering . . . [that will be acceptable] as a normal economic cost."

The issues Mr. Berry raises are costs, and they are considered in a complete economic analysis. Some may be readily quantifiable. Others may be much more difficult to quantify and still others, almost, or completely, impossible to value precisely. The true economist, however, identifies these issues and costs and considers them in the analysis. In short, there is little that should be "outside the purview of the economist" in forging public policy.

This symposium looks at aspects of a major policy initiative—the Federal Energy Regulatory Commission's ("FERC") vision for

---

1. *See* WENDELL BERRY, *Economy and Pleasure*, *in* WHAT ARE PEOPLE FOR? 129, 129 (1990).

2. WENDELL BERRY, *What Are People For?*, *in* WHAT ARE PEOPLE FOR?, *supra* note 1, at 123–25.

3. *See id.* at 124.

4. *See id.* at 123–24.

5. BERRY, *supra* note 1, at 131.

6. *See* BERRY, *supra* note 2.

the electric utility industry. While the Standard Market Design ("SMD")[7] and the White Paper[8] may never be adopted as such, those documents are a fair statement of FERC's vision. I would like to comment on FERC's vision. First, it must be recognized for what it is: a public policy initiative that fundamentally re-orders and restructures an industry that is the life blood of our economy.

Let me begin by backing up and stating some basics with which I hope we can all agree. First, the overall objective of sound public policy is to increase net social welfare—to make us collectively better off. What does this mean in the electric industry? Consider a basic premise with which, again, I hope we can all agree. Electricity is necessary. We can argue about how much, but however we define "necessary," electricity fits the definition.

I hope we can also agree on the goal of our society with respect to the electric industry. Our goal should be an industry that provides reliable service at reasonable rates with the electricity produced and delivered in an environmentally responsible manner. Once the goal is established, the goal becomes the polar star. Each action we take, or fail to take, can, and should, be fairly judged by whether it moves us toward, or away from, that goal.

This approach is critical to the current public policy debate in the electric industry. Once the goal is established, our discussion is then about the means to achieve the goal. The means do not become the goal. Thus, competition cannot become the goal, but rather the means to achieve our goal for the electric industry. In like manner, regulation cannot become the goal.

As the idea of competition in wholesale and retail electricity markets began to evolve some years ago, FERC began its move to commoditize electricity. By "commodity competition," I mean a market structure where the various components of electric power service are separated, and where these components and their derivative products are traded in a market that is characterized by many buyers and many sellers. Corn is a good example.

---

7. Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, 67 Fed. Reg. 55,452 (proposed Aug. 29, 2002) (to be codified at 18 C.F.R. pt. 35) [hereinafter SMD].

8. FED. ENERGY REGULATORY COMM'N, Docket No. RM01-12-000, WHITE PAPER: WHOLESALE POWER MARKET PLATFORM, (2003) [hereinafter WHITE PAPER], *available at* http://www.ferc.gov/industries/electric/indus-act/smd/white_paper.pdf (last visited Nov. 9, 2004).

In the beginning, at FERC, the National Association of Regulatory Commissioners, and here in Virginia, we asked questions. For example, how would prices be established? To the vast majority of questions and issues raised, two answers were given. First, "The market will take care of that," and whenever the follow-up question, "How?," was asked, the second answer was given: "You must have faith in the market."

My reaction and our advice at the state and federal levels have been simple. First, perform a complete analysis considering all of the costs, benefits, risks, and alternatives to attain the goal. Second, do not make this leap of faith to competition thinking you can make corrections on the way down without anyone getting hurt.

FERC, of course, now acknowledges that the market does not answer all of the questions everyone said it would.[9] This move to competition at the state and federal levels has created many problems. Often, proposed solutions raise more problems that must be solved. At each stage, it appears that commodity competition is now the goal. FERC is adding level upon level of proposed solutions in the form of regulations to try to make competition work.[10] It is, I believe, appropriate to examine the costs and the risks of these proposed solutions.

Let me just name a few of these solutions along with some risks that FERC's endeavor may create. First, the price for electricity. As FERC has acknowledged, "[w]holesale electricity markets do not automatically structure themselves with fair behavioral rules" as well as other elements necessary to check market power and encourage entry.[11] FERC states this as though it has made a great discovery.

California had its ideas as to how the market should be set up and ruled, and few complained about them until they failed. Then

---

9. *Id.* at 1–3.

10. The SMD and related White Paper and its Appendix are prime examples. The SMD rulemaking is over 600 pages in length, and the White Paper and Appendix outline areas where yet more rules and regulations are needed. SMD, 67 Fed. Reg. at 55,452–54; WHITE PAPER, *supra* note 8, at app. A at 1–18. In response to these and other FERC actions, Regional Transmission Organizations ("RTOs"), such as PJM Interconnection, and their members have dozens of filings pending. For a listing of all filings made by PJM Interconnection with FERC, see http://www.pjm.com/documents/ferc.html (last visited Nov. 9, 2004).

11. WHITE PAPER, *supra* note 8, at 1.

everyone, with the benefit of hindsight, "knew" they were going to fail. They "knew" their failure was inevitable because California did not do it right.[12] Professor Frank Wolak of Stanford University is the current chairman of the Market Surveillance Committee of the California Independent System Operator ("ISO"). He wrote a lengthy analysis of the California debacle.[13] He states that the parties acted as expected.[14] The fundamental failure was that federal regulators failed to regulate.[15] FERC failed to establish just and reasonable rates as it is required to do by the Federal Power Act.[16] Professor Wolak explains that there was no "shortage of observers with radar guns" reporting the law breakers; instead, the problem was the failure of policemen to do their jobs apprehending the speeders.[17] He concludes that a fundamental lesson from the California crisis "is that FERC must regulate, rather than simply monitor wholesale electricity markets."[18]

Professor Wolak ends his article stating that, in order to determine whether the market is delivering economic benefits in the form of lower prices to consumers than they would have received in the "former vertically integrated utility regime," FERC will need the information to determine what regulated prices would have been in that regime.[19] This information would be, of course, in addition to what is needed to not only monitor the market but to regulate and correct abuses.

FERC now proposes Locational Marginal Pricing ("LMP") as a solution.[20] The LMP solution, in turn, creates problems of its own

---

12. *See, e.g.*, CONG. BUDGET OFFICE, 107TH CONG., CAUSES AND LESSONS OF THE CALIFORNIA ELECTRICITY CRISIS (2001), *available at* http://www.cbo.gov/ftpdocs/30xx/doc3062/CaliforniaEnergy.pdf (last visited Nov. 9, 2004); MANIFESTO ON THE CALIFORNIA ELECTRICITY CRISIS (2001), *available at* http://www.haas.berkeley.edu/news/California_electricity_crisis.html (last visited Nov. 9, 2004).

13. *See* Frank A. Wolak, *Diagnosing the California Electricity Crisis*, *available at* http://www.ef.org/documents/CA_crisis_Wolak_vmd.pdf (last visited Nov. 9, 2004).

14. *Id.* at 4.

15. *Id.* at 1.

16. *Id.* at 4–9, 22–27, 32–37. The Federal Power Act may be found at 16 U.S.C. §§ 791–828c (2000).

17. *Id.* at 43.

18. *Id.*

19. *Id.* at 44.

20. The concept of LMP is developed in paragraphs 203 through 253 in the SMD, under the sub-heading "The New Congestion Management System." SMD, 67 Fed. Reg. 55,452, 55,479–48. FERC explains in paragraph 205:

that must be solved. First is the problem of market power. According to FERC, that must be monitored and mitigated to avoid market abuses.[21]

This monitoring and mitigating leads to other questions that require answers. First, can all aspects of the energy market be monitored in a timely and effective manner? This question is not easy to answer and has not been answered.

Market monitoring across this nation is a daunting task. The transactions are so numerous, varied, and complex as to render timely monitoring almost impossible. FERC has created an Office of Market Oversight and Investigation to address nationwide market monitoring.[22]

If the market can be monitored, then how to mitigate becomes the issue. Using the cost of a unit as a limit, for example, creates other issues to address.[23] Who monitors the cost? Almost every

---

> LMP is a market-based method for congestion management. Congestion is managed through energy prices and transmission usage charges (congestion and loss charges) determined in a bid-based market. When there is no congestion anywhere on the system (when there is enough transmission capacity to get power from the cheapest available generators to all potential buyers) there will be only one energy price in the transmission system, the price bid by the last, or marginal, generator that provides energy or load that offers to reduce its demand. When there is congestion, the cheapest generators may be unable to reach all their potential buyers. Consequently, when there is congestion there may be many different energy prices across the transmission system. Under LMP, the Independent Transmission Provider will establish separate energy prices at each node on the transmission grid and separate prices to transmit energy between any two nodes (receipt and delivery points) on the grid. These prices reflect the cost of congestion. LMP relies on economic redispatch in managing congestion. Redispatching means decreasing the energy the Independent Transmission Provider obtains in front of the constraint (where the power is flowing from) and increasing the energy the Independent Transmission Provider obtains behind the constraint (where the power is flowing to). The cost of redispatch is the basis for the congestion charges under LMP. If a customer is willing to pay the marginal cost of redispatch, which it signals through its bids, the Independent Transmission Provider will schedule the transmission service.

*Id.* at 55,480.

21. WHITE PAPER, *supra* note 8, at 1, 8–9, app. A at 11–12.

22. The White Paper states in broad generalities what should be accomplished. For example: "The market power mitigation measures must protect against the exercise of market power without suppressing prices below the level necessary to attract needed investment in new infrastructure in the region." WHITE PAPER, *supra* note 8, at 8. The three short paragraphs on Market Monitoring and Market Power Mitigation do not suggest how this may be accomplished. *See id.* at 8–9.

23. Under LMP in FERC's SMD, bid caps are envisioned as necessary mitigation for market power. These caps may be based on cost. SMD, 67 Fed. Reg. at 55,506.

generator could be the price setter at some node at some time or another. How will that be monitored in a timely manner? Corrections made two years, or even two weeks later, could be too late.

FERC is also concerned not only that prices will be too high, but also that the price under its regime may be too low to attract adequate generator growth at the right place at the right time.[24] This, of course, leads to another regulation dealing with resource adequacy. This notion has not been fully developed, but rather has been deferred.[25]

Transmission also creates issues. Will there be adequate transmission not only for reliable electric service, but additional transmission to allow competition to work effectively? Here, FERC is sending new signals for incentives that are add-on bonuses to otherwise just and reasonable rates.[26] These are incentives, thought necessary by FERC, to get the utility to perform its public service regulated duty—transmission service.

The move to competition has also created credit problems for several regulated firms and many independent power producers.[27]

My list is not exhaustive, but rather illustrative. It is fair to say that none of the "solutions" I have just discussed are necessary under traditional cost of service regulation, because cost of service does not create the problems that the regulations that try to make competition work do. I am not saying that cost of service has no problems, but certainly not all of these.

My great concern is that FERC has not done an economic policy analysis. It has not done its homework. For example, FERC

---

24. *See* WHITE PAPER, *supra* note 8, at 8.

25. The issue of resource adequacy is basically deferred and shifted to the states to address. Little or no guidance is given as to where or how resource adequacy will be ensured. *See id.* at 11, app. A at 17.

26. *See, e.g.*, Order Accepting and Suspending Proposed Tariff Sheets, Instituting Section 206 Investigation, Consolidating Proceedings, and Establishing Hearing Procedures, [Jan. 2004–Mar. 2004 Transfer Binder], 106 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,005 (Jan. 2, 2004); Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid, 68 Fed. Reg. 3842 (proposed Jan. 27, 2003) (to be codified at 18 C.F.R. pt. 35).

27. For a discussion of credit problems, see VA. STATE CORP. COMM'N, STATUS REPORT: THE DEVELOPMENT OF A COMPETITIVE RETAIL MARKET FOR ELECTRIC GENERATION WITHIN THE COMMONWEALTH OF VIRGINIA PART 1, at I-4 to I-6 (2004), *available at* http://www.state.va.us/scc/ (last visited Nov. 9, 2004).

has not factored in the risks of their proposal compared to traditional regulation. These risks are numerous and great.

The first risk is the move to commodity competition itself. This includes, for example, how market monitoring and mitigation will work. The risk of failure for a new system can be great. California taught us that.[28] There is risk of significant price increase and price volatility. There is an increased risk of generation inadequacy that FERC now acknowledges.[29] There is a risk of inadequate fuel diversity.

There is reliability risk associated with coordination among generators and transmission operators. Will FERC's Regional Transmission Organizations ("RTOs") be able to prevent and contain outages as well as under the old system? Will old neighbors who are now competitors act as they used to? Will new generators act as generators did when they were part of an integrated whole? August 14, 2003, is certainly not a confidence builder in this area. The outage began in a FERC-approved RTO.[30] And, all must agree, it was not contained.[31] Another box and another string in an RTO structure, or another department at FERC, may not be the answer to August 14th. This risk must be analyzed and evaluated. We must not only speak of patches and fixes: we must look at the underlying model and problem.

There is a risk that there will be inadequate infrastructure to support competition. This risk means that we may continue with the mitigation limits such as LMP. These limits, and LMP itself, are, in fact, different kinds of price regulations.[32] It is not a free market—it is a type of price regulation, and it may be driving

28. *See supra* notes 12–19 and accompanying text.

29. *See* WHITE PAPER, *supra* note 8, at 3, 8.

30. For an explanation of the causes and response to the August 14, 2003 blackout, see U.S.-CANADA POWER SYS. OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS (2004), *available at* https://reports.energy.gov/BlackoutFinal-web.pdf (last visited Nov. 9, 2004).

31. *See* NATURAL RESOURCES CANADA & U.S. DEP'T OF ENERGY, THE AUGUST 14, 2003 BLACKOUT ONE YEAR LATER: ACTIONS TAKEN IN THE UNITED STATES AND CANADA TO REDUCE BLACKOUT RISK 1 (2004) (reporting that eight states and fifty million people were without power), *available at* http://www.doe.gov/engine/doe/files/dynamic/137200412176_Blackout-OneYearLater.pdf (last visited Nov. 9, 2004).

32. *See* SMD, 67 Fed. Reg. 55,452, 55,479–87 (proposed Aug. 29, 2002) (to be codified at 18 C.F.R. pt. 35) (discussing LMP and market power migration).

prices higher than traditional regulation with no offsetting benefit.

We also do not know the real cost of implementing FERC's competition vision. The cost to form and administer the RTOs has amounted to hundreds of millions of dollars. The incremental cost of implementing FERC's SMD is estimated to be about $760 million per year nationally according to the United States Department of Energy ("DOE").[33] While these costs are and will be significant, they are not all of the costs. What will the cost of monitoring and mitigating market power be? We do not know because we do not know how it will be done. We do know the effort must be massive.

We also do not know the cost of generating units and transmission lines that are needed to support competition but are not needed for reliability. The total cost of these additions must be recovered in savings compared to the old regulated regime.

Will the SMD create winners and losers? Will there be an overall net benefit and, if so, is there a way, at least, to hold everyone harmless? Or, is this really a transfer of benefits so that rates may rise, drop, or stay the same overall, but with the low rate customers paying more and the higher rate areas getting lower rates?

Last year the DOE issued a cost/benefit analysis of FERC's vision as stated in the SMD.[34] It answers some of these questions, but it does not make a compelling case for going forward. Indeed, based on this study, FERC should abandon its vision.

Time does not permit a detailed discussion of the DOE report, but let me outline the major assumptions and highlight several points. The study assumes no costs for the added infrastructure, wires, and plants needed for competition that are not needed for reliability.[35] Also, the study does not factor in any of the risks I have mentioned earlier.

The study does assume a two percent increase in efficiency for coal units as a result of the SMD and a four percent increase in

---

33. *Id.* at 17–19 (showing the median annual revenue requirement for operating various RTOs in tab. 3.2).

34. *See id.* at vii–ix.

35. Instead it assumes additional generation will be constructed "as economically justified." *Id.* at 16.

efficiency for gas units because of the SMD.[36] The report does not, however, explain how these efficiencies may be achieved, but just assumes they will occur.[37] These figures may sound insignificant, but in a generation market worth hundreds of billions of dollars, two to four percent adds up to some real money.

The study also assumes transmission capability will increase five or ten percent as a result of dispatch over larger areas.[38] And, of course, it assumes perfect competition without any market manipulation.[39]

Now, with these positive assumptions, we should have positive results, depending on the cost to implement, which the DOE estimated to be about $760 million per year. Two points are clear from the study. First, the net benefits of FERC's vision will be small, if anything. In the short term, depending on the assumptions, net benefits range from $700 million to $1.1 billion per year.[40] Long term net benefits are projected to range from $200 million to $700 million per year.[41] These numbers are country-wide. While those are large numbers, they are nothing compared to the overall cost of electricity in the United States which the Energy Information Administration reported to be $250 billion in 2002.[42]

This is particularly true when we realize that none of the risks I have mentioned have been factored in, and none of the costs for the extra power plants and wires needed to make competition work have been included.

The second point that is clear is that there are areas of the country that are winners and other areas that are losers. Looking

---

36. *Id.* at 11.

37. *See id.* The assumption is based on "empirical evidence of generator efficiency improvements in the past few years for plants in the Northeast ISOs relative to the rest of the Eastern Interconnection." *Id.* The rationale for the increase in efficiency is based on price signals without any cited study or analysis. *See id.* We do not know whether the relative amount of new equipment was the same in each area, and if it was not the same, why. There is no discussion or analysis of why the competition among vendors of new equipment would not increase efficiency everywhere.

38. *Id.*

39. *See id.* at 2. Under the SMD case, pricing is based on marginal costs. *Id.*

40. *Id.* at 27.

41. *Id.*

42. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ELECTRIC POWER ANNUAL 2002, 6–7 tbl. ES (2002), *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epates.html (last visited Nov. 9, 2004).

at the retail rates and the long term analysis, of the sixteen North American Electric Reliability Council ("NERC") sub-regions in the study, six are projected to have rate decreases,[43] five are projected to have rate increases,[44] and five break even.[45] For this we are going to restructure an entire industry?

As FERC and others have moved forward with competition, they have lost sight of the goal. Instead of reliable service at reasonable rates and environmental responsibility, FERC has made competition its goal.

---

43. U.S. DEP'T OF ENERGY, REPORT TO CONGRESS: IMPACTS OF THE FEDERAL ENERGY REGULATORY COMMISSION'S PROPOSAL FOR STANDARD MARKET DESIGN 30, 31, 34, 38, 39, 43, *available at* http://www.energy.gov/engine/doe/files/dynamic/96200314265_DOE501385 MDfinal.pdf (last visited Nov. 9, 2004).Consumers in six areas are projected to have decreases in the long term in generation and transmission costs as a result of the SMD. Distribution costs, which generally amount to approximately twenty-five to fifty percent of a customer's bill, were not included in the analysis, and it is unlikely that such costs would be impacted by SMD. Of the six areas, four are projected to have generation and transmission costs decrease by one percent; one area is expected to have such costs decrease by two percent; and one area is expected to have such costs decrease by four percent. The six areas and the percentage decrease are as follows: MAAC Region (most of Pennsylvania, New Jersey, most of Maryland, Delaware, and the District of Columbia): negative four percent; VACAR Region (eastern Virginia, North Carolina, and South Carolina): negative one percent; ECAR Region (lower Michigan, western Pennsylvania, West Virginia, Ohio, Indiana, and Kentucky): negative two percent; MAPP Region (North Dakota, most of Minnesota, most of South Dakota, western Iowa, Nebraska, and eastern Montana): negative one percent; SPP Region (Kansas, Oklahoma, western Arkansas, northwestern and central Louisiana, northwestern Texas, and eastern New Mexico): negative one percent; and CA (most of California): negative one percent. *Id.*

44. *Id.* at 32, 33, 36, 40, 42. Consumers in five areas are projected to have increases in the long term in generation and transmission costs as a result of the SMD. Again, distribution costs, which generally amount to twenty-five to fifty percent of a customer's bill, were not included in the analysis, and it is unlikely that such costs would be impacted by the SMD. Of the five areas, two are projected to have generation and transmission costs increase by three percent, and three are expected to have such costs increase by one percent. The five areas and the percentage increases are as follows: Southern Region (Georgia, most of Alabama, and parts of Florida and Mississippi): one percent; FRCC Region (most of Florida): one percent; MAIN Region (Illinois, eastern Wisconsin, northern Michigan, southeastern Minnesota, eastern Iowa, and eastern Missouri): three percent; NWPP Region (Washington, Oregon, Idaho, most of Montana, western South Dakota, Wyoming, Utah, most of Nevada, and part of northern California): one percent; and AZN Region (southern Nevada, Arizona, most of New Mexico, and a small area of western Texas): three percent. *Id.*

45. *Id.* at 28, 29, 35, 37, 41. Consumers in five areas are projected to have generation and transmission costs remain unchanged as a result of SMD. The five where such costs are projected to remain unchanged are: New England Region; New York Region; TVA Region (Tennessee, western Virginia, northeastern Georgia, northern Alabama, and northern Mississippi); Entergy Region (western Missouri, eastern Arkansas, and northeastern Louisiana); and RMPA Region (Colorado). *Id.*

By making competition the goal, FERC has thus made a serious mistake. That mistake results in FERC not considering all of the alternatives to achieve the real goal and not considering all of the risks. If the DOE study is valid, it shows that FERC's SMD does not appear to be a good vehicle to attain the real goal.

Given the DOE report and the slight overall savings, the unaccounted-for costs and risks, as well as the rate increases for a number of areas of the country, it would be unconscionable for FERC to force anyone to submit to its vision.

FERC as well as other interested persons, must determine whether this is sound public policy. Instead, FERC and others assume that competition must be the model. This symposium assumes that competition must be the model. With blinders on, patch on patch has been made. Let's try "this" to solve this problem. If it doesn't work, let's try "that." The SMD and its White Paper are examples of this approach.[46] At some point, it's time to back up and see if the overall vision is worth it.

Professor Wolak argues that we must have the data to see if competition is better than regulation in order to continue.[47] I believe that we must study first and conclude, based on such a study—not hope, not faith, not theory alone, but on facts—that we will be better off. That, however, has not happened.

It has been years since this experiment began. Utilities have gone bankrupt and others have been brought to their knees. Hundreds of small businesses closed because of FERC's vision. The DOE report is all we have. Its assumptions favor competition. Yet, there is essentially no net benefit for the nation as a whole. The time is now to examine and reflect, not just to go forward blindly hoping something will make this pig fly.

The time for blind faith and hope alone is over. As Robert Frost said, "[t]ruth broke in [w]ith all of her matter-of-fact."[48] That truth and matter of fact here are not ice storms as they were for Frost. California, the Midwest, August 14, 2003, and the patches that are not working, those make up the truth that has broken in, the truth that cannot be ignored.

---

46. *See supra* notes 7–8.

47. Wolak, *supra* note 13, at 44.

48. ROBERT FROST, *Birches*, *in* COMPLETE POEMS OF ROBERT FROST 152 (1949).

To those who say it is too late to turn back, I say it is never too late to do it right. Right might be traditional regulation rather than this new layer upon layer of untried regulation with greater risk to both price and reliability.

I ask Congress, FERC, and you to remember where we started:

- The objective of sound public policy is to increase net social welfare—to make us collectively better off.
- Electricity is different. Electricity is necessary.
- Our goal for the electric industry is to provide reliable service at reasonable rates with the electricity produced and delivered in an environmentally responsible manner.

We must study all the costs, all the risks, all the benefits, and all the alternatives—not just the part FERC wants to study.

Finally, I ask that Congress, FERC, and you remember Wendell Berry. Remember that saying "there will be winners and losers" is not enough. You must look out not just for corporate America, not just for the ISOs, RTOs, and utilities, but for the people as well.

Remember those Wendell Berry spoke of. Remember our "fellow humans, neighbors, children of God, and citizens of the republic." They should be the beneficiaries of our actions, not the victims.

***