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Powerplant and Industrial Fuel Use Act of 1978 and Possible Amendments Thereto Symposium - Coal Utilization by Electric Utilities - The Costs of Conversion.

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POWERPLANT AND INDUSTRIAL FUEL USE ACT OF 1978 AND POSSIBLE AMENDMENTS THERETO¹

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I. INTRODUCTION

The preceding article in this issue ably describes the importance to the nation of increased use of coal by electric utilities and the impediments thereto created by governmental regulatory and environmental restrictions. This article describes the principal effort by the federal government to try to *force* the increased use of coal through the Powerplant and Industrial Fuel Use Act of 1978 (FUA),² and analyzes the Act's workability and fairness. It also outlines what is known at this time of the Administration's forthcoming amendments to FUA, which focus upon displacing the use of oil and gas by electric utilities.

The Fuel Use Act was enacted on November 9, 1978 as one of the

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1. This article is an updated version of a previously unpublished paper prepared for use in a workshop on the Act. The workshop, sponsored by Applied Political & Social Science Research, Inc. of Washington, D.C., was held October 9-11, 1979.

2. Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C.A. §§ 8301-8483 (West Supp. 1978).

five parts of the national energy legislation passed by the 95th Congress. The stated purpose of FUA is to encourage increased use of coal and other alternative fuels³ by new and existing electric powerplants⁴ in place of petroleum and natural gas.

FUA replaced the coal conversion program set up under the Energy Supply and Environmental Coordination Act of 1974 (ESECA)⁵ with a more effective and comprehensive regulatory scheme. Under ESECA, in order for the Department of Energy to issue an order prohibiting a powerplant from burning petroleum or natural gas, the Secretary had to determine that the facility was capable of burning coal and that to do so was practicable. Environmental Protection Agency (EPA) approval was required. The burdens and jurisdictions were not clearly defined, and few prohibitions were ultimately implemented.

By contrast, FUA establishes a clear statutory mandate against the use of natural gas or petroleum as a primary energy source by *new* powerplants.⁶ It also restricts in several ways the use of natural

3. Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, § 102(b)(3), 42 U.S.C.A. § 8301(b)(3) (West Supp. 1978) (Fuel Use Act). "Alternative fuel" is defined in section 103(a)(6) as any fuel other than petroleum or natural gas, including electricity and
 (A) petroleum coke, shale oil, uranium, biomass, and municipal, industrial, or agricultural wastes, wood, and renewable and geothermal energy sources;
 (B) liquid, solid, or gaseous waste byproducts or refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity, as determined under rules prescribed by the Secretary; and
 (C) waste gases from industrial operations.

Id. § 103(a)(6), 42 U.S.C.A. § 8302(a)(6).

4. *Id.* § 102(b)(8), 42 U.S.C.A. § 8301(b)(8). The Act applies not only to electric powerplants but also to other industrial facilities, described as "Major Fuel Burning Installations." These are defined in section 103(a)(10)(A) as a "stationary unit consisting of a boiler, gas turbine unit, combined cycle unit, or internal combustion engine" that (i) is designed for a fuel input rate of 100 million Btu's per hour or greater, or (ii) consists of a combination of two or more such units located at the same site if they have an aggregate designed fuel heat input rate of 250 million Btu's per hour or greater. *Id.* § 103(a)(10)(A), 42 U.S.C.A. § 8302(a)(10)(A).

5. 15 U.S.C. §§ 791-798 (1976).

6. Fuel Use Act, § 201, 42 U.S.C.A. § 8311 (West Supp. 1978). However, it appears the Department of Energy (DOE) wishes to exempt from FUA's ban on natural gas the burning of unconventional gas. To further this goal, the Economic Regulatory Administration (ERA) has proposed a plan involving a "marriage" between FUA and the Natural Gas Policy Act (NGPA), which is implemented by the Federal Energy Regulatory Commission (FERC). The proposed "marriage" would require that ERA's definition of "commercially unmarketable" natural gas be matched to FERC's definition of high cost gas, for which unregulated prices are allowed under NGPA. *Id.* § 103(a)(3)(B)(i), 42 U.S.C.A. § 8302(a)(3)(B)(i); *cf.* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 107(b), 92 Stat. 3350, 15 U.S.C.A. § 3317(b) (West Supp. 1978) (high-cost gas). "Commercially unmarketable" natural gas is excluded from FUA's coverage. In this way, the production of coalbed methane, geopressured methane,

gas by those *existing* powerplants which have not obtained an exemption. First, the Act provides that natural gas shall not be used as a primary source after January 1, 1990.⁷ In addition, units that are not now using gas and that have not done so since 1977 are prohibited from using natural gas prior to, as well as after, 1990.⁸ Units which are getting a limited proportion of their fuel requirements from gas are prohibited from increasing that proportionate usage.⁹ The Secretary of the Department of Energy (DOE) may enforce these prohibitions either by rule or by issuing individual orders against affected utilities.¹⁰

The Act defines an electric powerplant as

any stationary electric generating units, consisting of a boiler, a gas turbine, or a combined cycle unit, which produces electric power for purposes of sale or exchange and —

- (i) has the design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater; or
- (ii) is in a combination of two or more electric generating units which are located at the same site and which in the aggregate have a design capability of consuming any fuel (or mixture thereof) at a fuel input rate of 250 million Btu's per hour or greater.¹¹

New electric powerplants are defined as those for which construction or acquisition began on or after the date of the statute's enactment, November 9, 1978.¹² Facilities where construction or acquisition began between April 20, 1977, the date the proposed Act was submitted to Congress, and November 9, 1978, are also considered *new*, unless the Secretary finds that such construction or acquisition could not be cancelled, rescheduled, or modified to comply with FUA without (a) adversely affecting reliability or (b) imposing sub-

Devonian shale and other unconventional sources would be encouraged both by the unregulated price provided by FERC and the ready market opened by ERA's waived ban on burning these fuels.

7. Fuel Use Act, § 301(a)(1), 42 U.S.C.A. § 8341(a)(1) (West Supp. 1978).

8. *Id.* § 301(a)(2), 42 U.S.C.A. § 8341(a)(2).

9. *Id.* § 301(a)(3), 42 U.S.C.A. § 8341(a)(3).

10. *Id.* § 303, 42 U.S.C.A. § 8343.

11. *Id.* § 103(a)(7)(A), 42 U.S.C.A. § 8302(a)(7)(A). Paragraph (ii) excludes "any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour and the exclusion of which for purposes of such clause is determined by the Secretary, by rule, to be appropriate." *Id.* § 103(a)(7)(C), 42 U.S.C.A. § 8302(a)(7)(C).

12. *Id.* § 103(a)(8)(A), 42 U.S.C.A. § 8302(a)(8)(A).

stantial financial penalties.¹³ The interim rules issued by the Economic Regulatory Administration (ERA) give a restrictive meaning to the statutory terms "construction" and "acquisition."¹⁴ Moreover, the rules place on the utility the burden of demonstrating that one of these "transitional" facilities is an existing facility.¹⁵ The effect of these provisions is to classify as "new" facilities a number of plants arguably intended by Congress to be classified as "existing" facilities, and to thereby broaden the number of plants covered by the prohibitions for new facilities.

II. THE STATUTORY FRAMEWORK

The Act may affect an electric utility in either of two ways: (1) the utility may be prohibited from constructing a *new* plant utilizing either natural gas or petroleum as a boiler fuel, unless it can qualify for an exemption, and thus may be forced to utilize coal or an alternate; or (2) unless it can either qualify for an exemption or develop a system compliance plan, an *existing* facility may be forced to convert from the use of natural gas to the use of coal or another alternate fuel. As a practical matter, this will require closing down a natural gas-fired plant. In either case, heavy involvement with the federal government, particularly the Economic Regulatory Administration of DOE, is required.

A. General Prohibitions: New Facilities

Section 201 of the Act provides that unless an exemption is obtained, "(1) natural gas or petroleum shall not be used as a primary energy source in any *new* electric powerplant and (2) no *new* electric powerplant may be constructed without the capability to use coal or some other alternate fuel as a primary energy source."¹⁶

13. *Id.* § 103(a)(8)(B), 42 U.S.C.A. § 8302(a)(8)(B).

14. See 43 Fed. Reg. 54912-54916 (Nov. 22, 1978). An interim rule on criteria for determining whether a transitional facility is new or existing was issued in 44 Fed. Reg. 17464 (Mar. 21, 1979).

15. 43 Fed. Reg. 54914 (Nov. 22, 1978).

16. Fuel Use Act, § 201, 42 U.S.C.A. § 8311 (West Supp. 1978). Since "electric power plant" is defined in section 103(a)(7) as one utilizing a boiler, gas turbine unit, combined cycle unit, or internal combustion engine, this would apparently not include a hydroelectric or solar unit. Section 103(a)(7)(B)(i) specifically excludes units licensed by the Nuclear Regulatory Commission. *Id.* § 103(a)(7)(B)(i), 42 U.S.C.A. § 8302(a)(7)(B)(i).

B. General Prohibitions: Existing Facilities

Section 301(a)(1) of the Act provides that unless an exemption is obtained, natural gas may not be used as a primary energy source in an *existing* electric powerplant *on or after January 1, 1990*.¹⁷ Section 301(a)(2) prohibits the use of natural gas in an existing plant *before* January 1, 1990, unless the plant used gas as a primary energy source in 1977.¹⁸ Moreover, natural gas may not be used under this provision in greater proportions than the plant's average yearly use of gas during the period 1974 through 1976.¹⁹ The term "proportions" has been unofficially interpreted by ERA to refer to percentage of gas used, rather than quantity used.

Section 301(b) provides that the Secretary of Energy may, before 1990, prohibit by individual order the use of natural gas, petroleum, or both in an existing facility, if he finds:

(1) the plant has the technical capability to use an alternate fuel as a primary energy source; or

(2) the plant previously had this technical capability and could have it again without

(i) a substantial physical modification of the powerplant;

or

(ii) a substantial reduction in rated capacity of the powerplant; *and*

(3) it is financially feasible for the plant to use alternate fuel as its primary energy source.²⁰

ERA will make all such findings on a case-by-case basis. The interim rules²¹ provide some guidelines as to how the agency will define "technical capability," "substantial modification," and other key terms.

In addition, section 405 of the Act directs the Secretary to prohibit all existing powerplants which used coal or another alternate fuel in 1977 from increasing their use of *petroleum* above that used during this base year, unless the Secretary issues a permit authorizing increased use.²² The purpose of this provision is to prevent elec-

17. *Id.* § 301(a)(1), 42 U.S.C.A. § 8341(a)(1).

18. *Id.* § 301(a)(2), 42 U.S.C.A. § 8341(a)(2).

19. *Id.* § 301(a)(3)(A), 42 U.S.C.A. § 8341(a)(3)(A). If the plant began operation after January 1, 1974, the use of natural gas may not exceed the average yearly proportion of natural gas used during the first two calendar years of its operation. *Id.* § 301(a)(3)(B), 42 U.S.C.A. § 8341(a)(3)(B).

20. *Id.* § 301, 42 U.S.C.A. § 8341.

21. 44 Fed. Reg. 43190 (July 23, 1979).

22. Fuel Use Act, § 405, 42 U.S.C.A. § 8375 (West Supp. 1978). This statutory provision

tric powerplants with dual or multiple fuel-burning capacity from converting from coal or another alternate fuel back to oil.

The permit authorizing increased usage of petroleum is to be issued under very restrictive terms: specifically, it is only to be granted if (1) EPA or the state air pollution control agency certifies that the powerplant operator cannot comply with Clean Air Act requirements, and the plant has established the duration of the need for increased petroleum use; *and* (2) the appropriate state regulatory authority certifies the increased oil use is necessary to prevent impairment of reliability of service.²³

The permit is to be granted "only for such period" as the Secretary determines necessary to comply with Clean Air Act requirements or to prevent impairment of reliability of service, whichever occurs first.²⁴ According to the interim rules, the primary problems that this permit is designed to alleviate are (1) powerplants experiencing temporary interruptions in their use of coal or other alternate fuel use—such as those installing pollution control equipment, waiting for fuel delivery, or trying to bring a unit within a system on line; and (2) powerplants unable to burn coal or any alternate fuel for an indeterminate period of time—such as those plants with financial or physical limitations which preclude them from complying with section 405.²⁵

C. Exemptions: General Requirements

The Act provides for two types of exemptions—temporary and permanent—either of which may be sought by a new or existing powerplant. A prescribed administrative procedure must be followed by the utility before any exemption will be issued by the Secretary. When the conditions that preclude compliance are of limited duration, only a temporary exemption will be granted. To obtain a temporary exemption, the utility must demonstrate it has a compliance plan capable of bringing alternate energy sources into operation at the end of the exemption period. ERA does not appear to favor the concept of a utility attempting to "stack" one temporary exemption on another when the first expires.

was implemented by an interim rule issued by ERA on May 8, 1979 and appearing in 44 Fed. Reg. 28594 (May 15, 1979).

23. Fuel Use Act, § 405, 42 U.S.C.A. § 8375 (West Supp. 1978).

24. *See id.*

25. *See* 44 Fed. Reg. 28594 (May 15, 1979).

There are various categories of exemptions; some are mandatory, others discretionary. A utility may apply for several exemptions concurrently, but only one exemption will be granted per electric generating unit. It appears that only one filing fee will be charged per unit, even if the utility requests exemptions on several grounds. Moreover, upon a change of circumstances, a utility apparently may, at least prior to 1990, request a change in the grounds for an exemption, or may seek reconsideration of its request for an exemption which has previously been denied. The grounds upon which a temporary or a permanent exemption will be granted overlap to a great extent.²⁶ However, there are distinctions, and it is important to note carefully the requirements established by the interim rules for all exemptions being considered.

Although FUA contains no express requirements for such a prerequisite, the rules issued by ERA require the filing of a Fuels Decision Report (FDR) at the time a petitioner applies for either a temporary or a permanent exemption, unless an emergency or retirement exemption is sought.²⁷ The purpose of the FDR is to demonstrate the petitioner's eligibility for one or more exemptions and to provide the ERA with additional information. The rules indicate the report should show the petitioner "rigorously explored and objectively evaluated all reasonable alternatives to oil and gas," and it requires extensive documentation. Because of its length and complexity and the lack of statutory authority for this administrative requirement, the report has been critically viewed by affected utilities as creating an unnecessary "paper barrier" to obtaining an exemption.

D. Temporary Exemptions

Temporary exemptions are preferred by ERA to permanent ones. A temporary exemption for the use of natural gas or petroleum will be granted for either a *new*²⁸ or an *existing*²⁹ plant if the petitioner

26. Compare Fuel Use Act, § 211 (a)(1), (2), 42 U.S.C.A. § 8321(a)(1), (2) (West Supp. 1978) (grounds for granting temporary exemption for new facility) and *id.* § 311(a)(1), (2), 42 U.S.C.A. § 8351(a)(1), (2) (temporary exemption for existing facility) with *id.* § 212(a)(1)(A), (B), 42 U.S.C.A. § 8322(a)(1)(A), (B) (permanent exemptions for new facilities) and *id.* § 312(a)(1)(A), (B), 42 U.S.C.A. § 8352(a)(1)(A), (B) (permanent exemptions for existing facilities).

27. 44 Fed. Reg. 43191 (July 23, 1979); see 44 Fed. Reg. 28951 (May 17, 1979) (Fuels Decision Report Interim Rule).

28. Temporary exemptions for *new* facilities are set out in section 211 of the Act. Fuel Use Act, § 211, 42 U.S.C.A. § 8321 (West Supp. 1978). The length of the exemption is no more than five years, unless the basis of the exemption is lack of alternate fuel supply or

demonstrates that despite diligent good faith efforts:

(1) It is unlikely that an adequate and reliable source of coal or other alternate fuel will be available at a cost which does not substantially exceed the cost of imported oil as a primary energy source (mandatory);³⁰ or

(2) Site limitations exist that preclude the use of coal or another alternate fuel (mandatory);³¹ or

(3) The Act's prohibitions cannot be followed without violating applicable environmental requirements (mandatory);³² or

(4) The utility demonstrates it will comply with the Act at a future date through use of a synthetic fuel derived from coal or an alternate fuel (mandatory);³³ or

(5) The utility demonstrates the exemption would be in the public interest (discretionary).³⁴

In addition to these common grounds for temporary exemptions which apply to both new and existing powerplants, there are additional exemption provisions that are applicable to existing facilities only. Specifically, an *existing* facility may also obtain an exemption if the petitioner demonstrates:

(6) That at the expiration of the exemption period it will follow the Act's prohibitions by adopting an innovative technology (mandatory);³⁵ or

future use of synthetic fuels, in which case a five year extension is possible. *Id.* § 211(e), 42 U.S.C.A. § 8321(e).

29. Temporary exemptions for *existing* facilities are set out in section 311. *Id.* § 311, 42 U.S.C.A. § 8351. Many of these exemptions may be obtained for up to ten years (most initially for up to five years, with a possible five year extension). *Id.* § 311(h), 42 U.S.C.A. § 8351(h).

30. *Id.* §§ 211(a)(1), 311(a)(1), 42 U.S.C.A. §§ 8321(a)(1), 8351(a)(1).

31. *Id.* §§ 211(a)(2), 311(a)(2), 42 U.S.C.A. §§ 8321(a)(2), 8351(a)(2). The term "site limitations" is defined in section 103(a)(16) of the Act. *Id.* § 103(a)(16), 42 U.S.C.A. § 8302(a)(16). It encompasses various specific physical limitations associated with a particular site, such as inaccessibility to coal or another alternative fuel, lack of transportation facilities, handling and storage facilities, or waste disposal facilities for coal or other fuels, or a lack of an adequate and reliable water supply.

32. *Id.* §§ 211(a)(3), 311(a)(3), 42 U.S.C.A. §§ 8321(a)(3), 8351(a)(3). The term "applicable environmental requirements" is defined in section 103(a)(17) to include any federal or state law applicable to air pollution, water pollution, or solid waste disposal. *Id.* § 103(a)(17), 42 U.S.C.A. § 8302(a)(17).

33. *Id.* §§ 211(b), 311(b), 42 U.S.C.A. § 8321(b), 8351(b).

34. *Id.* §§ 211(c), 311(e), 42 U.S.C.A. §§ 8321(c), 8351(e). Several existing powerplants have been granted temporary exemptions under this provision to burn natural gas, due to the short supply of petroleum in general and middle distillates in particular. See 44 Fed. Reg. 52716 (Sept. 10, 1979).

35. Fuel Use Act § 311(c), 42 U.S.C.A. § 8351(e) (West Supp. 1978).

(7) That the powerplant will permanently cease operation at or before the expiration of the exemption period (mandatory);³⁶ or

(8) That the powerplant is to be operated solely as a peakload powerplant, and so certifies (mandatory);³⁷ or

(9) That such exemption is necessary to prevent impairment of reliability of service (mandatory).³⁸

The duration of any temporary exemption granted for a new powerplant not yet in service will be measured from the date the plant is placed in service.³⁹

E. Permanent Exemptions

In order to qualify for one of the *permanent* exemptions for *new* powerplants, the utility must first comply with the prerequisites contained in section 213 of the Act. Two of these general requirements warrant attention. First, if the appropriate state regulatory authority has not approved a powerplant, the exemption shall not take effect until all approvals required by such state authority which relate to construction or operation have been obtained.⁴⁰ Secondly, it must be demonstrated⁴¹ that despite reasonable good faith efforts by the utility, no alternative supply of electric power is available within a reasonable distance at a reasonable cost without impairing reliability of service.⁴² A substantial evidentiary showing is required, including the submission of a Fuels Decision Report as corroboration.⁴³

This latter requirement, in particular, presents a potentially significant obstacle for the petitioning utility. Its broad scope and essentially vague standards of "reasonableness" leave much discretion with the Secretary. Therefore, despite the fact that the grounds

36. *Id.* § 311(d)(1), 42 U.S.C.A. § 8351(d)(1). Once this particular exemption has been granted for a powerplant, no other type of temporary exemption for an existing plant may be issued for that facility. *Id.* § 311(d)(2), 42 U.S.C.A. § 8351(d)(2).

37. *Id.* § 311(f), 42 U.S.C.A. § 8351(f). The term "peakload powerplant" is defined in section 103(a)(18)(A) of the Act. *Id.* § 103(a)(18)(A), 42 U.S.C.A. § 8302(a)(18)(A).

38. *Id.* § 311(g)(1), 42 U.S.C.A. § 8351(g)(1). This particular exemption may not be granted if the powerplant has obtained any other type of temporary exemption. *Id.* § 311(g)(2), 42 U.S.C.A. § 8351(g)(2).

39. *Id.* § 211(e)(3), 42 U.S.C.A. § 8321(e)(3).

40. *Id.* § 213(b), 42 U.S.C.A. § 8323(b).

41. Except for permanent exemptions granted for cogeneration or for peakload powerplants. *See id.* § 212(c), (g), 42 U.S.C.A. § 8322(c), (g).

42. *Id.* § 213(c), 42 U.S.C.A. § 8323(c).

43. The evidentiary showing required of the utility under this provision is set out in the interim rules in 44 Fed. Reg. 28987 (May 17, 1979).

for permanent exemptions are nearly as broad as those for temporary ones—even including a “public interest” permanent exemption—it should be remembered that to obtain an exemption this prerequisite must first be satisfied. A restrictive interpretation of this provision could counterbalance the seemingly moderate showing required to obtain a permanent exemption.

Either a *new* or an *existing* powerplant will be granted a permanent exemption if the petitioner demonstrates that:

(1) Despite diligent good faith efforts, it is unlikely an adequate and reliable source of coal or other alternate fuel will be available at a cost that does not substantially exceed the cost of imported oil as a primary energy source (mandatory);⁴⁴ or

(2) Despite diligent good faith efforts, site limitations exist that preclude the use of coal or another alternate fuel (mandatory);⁴⁵ or

(3) Despite diligent good faith efforts, the Act's prohibitions cannot be followed without violating applicable environmental requirements (mandatory);⁴⁶ or

(4) The construction or operation of a facility using coal or an alternate fuel is not feasible because of a state or local requirement other than a building code or nuisance or zoning law.⁴⁷ The petitioner must also demonstrate that a good faith attempt to obtain a variance has been made, and that the granting of the exemption would be in the public interest (discretionary);⁴⁸ or

(5) The economic and other benefits of cogeneration will be unobtainable unless petroleum or natural gas, or both, are used in the new or existing facility (discretionary);⁴⁹ or

44. Fuel Use Act, §§ 212(a)(1)(A), 312(a)(1)(A), 42 U.S.C.A. §§ 8322(a)(1)(A), 8352(a)(1)(A) (West Supp. 1978). As an alternative showing under this exemption, a *new* facility may meet the requirement by demonstrating that such a supply of coal or other alternate fuel will not be available within the first ten years of the useful life of the powerplant. *Id.* § 212(a)(1)(A), 42 U.S.C.A. § 8322(a)(1)(A).

45. *Id.* §§ 212(a)(1)(B), 312(a)(1)(B), 42 U.S.C.A. §§ 8322(a)(1)(B), 8352(a)(1)(B).

46. *Id.* §§ 212(a)(1)(C), 312(a)(1)(C), 42 U.S.C.A. §§ 8322(a)(1)(C), 8352(a)(1)(C).

47. *Id.* §§ 212(b); 312(b), 42 U.S.C.A. §§ 8322(b), 8352(b).

48. *See id.* §§ 212(b)(3), 312(b)(3), 42 U.S.C.A. §§ 8322(b)(3), 8352(b)(3). Section 313(b) stipulates the Secretary may not grant a permanent exemption to an *existing* powerplant under this provision or under provision (9) pertaining to intermediate load plants unless the petitioner demonstrates there is no alternate supply of electric power available within a reasonable distance and cost that could be obtained without impairing reliability. *Id.* § 313(b), 42 U.S.C.A. § 8352(b). The nature of the evidentiary showing that the utility must make is set out in the interim rules at 44 Fed. Reg. 43197 (July 23, 1979).

49. Fuel Use Act, §§ 212(c)(1), 312(c)(1), 42 U.S.C.A. §§ 8322(c), 8352(c) (West Supp. 1978). Section 213(c)(1) provides that *except for* an exemption under this section or that section pertaining to peakload powerplants, the Secretary may not grant an exemption for a

(6) The powerplant uses or will use a mixture of oil or natural gas and coal or another alternate fuel, and that the amount of the former will not exceed the minimum percentage of heat input needed to maintain reliability of operation (mandatory);⁵⁰ or

(7) The powerplant will be maintained and operated only for emergency purposes (mandatory);⁵¹ or

(8) The powerplant is to be operated solely as a peakload powerplant (mandatory);⁵² or

(9) The powerplant is to be used solely as an intermediate load plant, and meets certain other criteria (discretionary).⁵³

A *new* powerplant may also seek a permanent exemption by demonstrating:

(10) That required use of coal or another alternate fuel would not allow the utility to obtain adequate capital for financing the plant (mandatory);⁵⁴

(11) That an exemption is necessary to prevent impairment of reliability of service (discretionary).⁵⁵

There are also additional grounds upon which an *existing* powerplant may be granted a permanent exemption. Specifically, these include:

(12) An exemption for the use of natural gas by certain powerplants with capacities of less than 250 million Btu's per hour, if the plant is incapable of consuming coal without either (i) substantial physical modification, or (ii) substantial reduction in rated capacity (mandatory);⁵⁶ or

new powerplant unless the petitioner has shown no alternative supply of electric power is available within a reasonable distance at a reasonable cost without impairing reliability of service. *Id.* § 213(c)(1), 42 U.S.C.A. § 8323(c)(1).

50. *Id.* §§ 212(d)(1), 312(d)(1), 42 U.S.C.A. §§ 8322(d)(1), 8352(d)(1). The Secretary of Energy may authorize a higher percentage for existing powerplants if he finds the higher percentage of natural gas would be mixed with synthetic fuels derived from municipal wastes or agricultural wastes and would thus encourage the use of new technologies. *Id.* § 312(d)(1)(B)(3), 42 U.S.C.A. § 8352(d)(1)(B)(3).

51. *Id.* §§ 212(e), 312(e), 42 U.S.C.A. §§ 8322(e), 8352(e). As defined by rule by the Secretary.

52. Certain other requirements must also be met for this exemption; they differ for new plants and existing plants. *See id.* §§ 212(g), 312(f), 42 U.S.C.A. §§ 8322(g), 8352(f).

53. *Id.* §§ 212(h), 312(g), 42 U.S.C.A. §§ 8322(h), 8352(g). See section 212(h) for new plant requirements and section 312(g) for existing plant requirements. A new or existing powerplant that has been granted an exemption under this subsection may not be granted a permanent exemption under (1), (2), or (3).

54. *Id.* § 212(a)(1)(D), 42 U.S.C.A. § 8322(a)(1)(D).

55. *Id.* § 212(f), 42 U.S.C.A. § 8322(f).

56. *Id.* § 312(h), 42 U.S.C.A. § 8352(h).

(13) An exemption for the use of liquified natural gas (LNG) by certain powerplants for environmental reasons (mandatory).⁵⁷

Thus, whether a permanent or a temporary exemption is sought by a utility, there exists a broad array of possible grounds from which to choose. The availability of any of them will of course depend upon the DOE's interpretation of the statutory language used and its overall attitude toward the exemptions as reflected in the regulations. Moreover, given the lengthy period of time over which the Act is to be implemented, this administrative stance may shift along with changing economic conditions, fuel availability, and experience under FUA.

F. System Compliance Option

Section 501(a) of the system compliance option, set out in Title V of the Act, provides that existing electric powerplants owned or operated by an electric utility shall be considered in compliance with any prohibitions relating to the use of natural gas if there is in effect a plan of system compliance for the utility approved by the Secretary.⁵⁸ It further stipulates that *no exemption for the use of natural gas shall be available for any existing powerplant which has been or is covered by such a plan*, other than an exemption for a plant to be operated for emergency purposes only.⁵⁹ Such a system compliance plan must outline an orderly proposal to eliminate by 1995 the use of natural gas as a primary fuel for the system.⁶⁰ However, electric utilities which submit a plan would be permitted to use in 1990 up to 20 percent of their 1976 gas consumption.⁶¹

An initial question which comes to mind when assessing the system compliance plan is why a utility might prefer to formulate a plan rather than seek a permanent exemption to FUA. The system compliance option is most likely to benefit those utilities that use a large amount of natural gas. ERA feels there are several advantages to a gas-dependent utility choosing this option. First, it allows the utility to negotiate its timetable for compliance, subject to ERA approval. Thus, rather than being subjected to the immediate sta-

57. *Id.* § 312(i), 42 U.S.C.A. § 8352(i).

58. *Id.* § 501(a), 42 U.S.C.A. § 8391(a).

59. *Id.* § 501(a), 42 U.S.C.A. § 8391(a); *see id.* §§ 212(e), 312(e), 42 U.S.C.A. §§ 8322(e), 8352(e) (emergency exemptions).

60. *Id.* § 501(b)(3), 42 U.S.C.A. § 8391(b)(3).

61. *Id.* § 501(b)(4), 42 U.S.C.A. § 8391(b)(4); *see id.* § 501(e), 42 U.S.C.A. § 8391(e) (determination of base period use).

tutory prohibitions of the Act, the utility can institute the required phase-out of natural gas over a period of years. This more gradual cutback could minimize the impact upon a utility's rate schedule. Moreover, a system compliance plan can be structured to permit above base-year proportions of natural gas use during the 1980-1990 period.⁶²

The system compliance option is designed to provide an opportunity for utilities to comply with FUA's natural gas restrictions on a system-wide rather than an individual plant basis. Accordingly, it could prove less costly and time-consuming for the utility than seeking individual exemptions for all units within a system, and would eliminate the uncertainties associated with the exemption process. In addition, it would allow the shifting of gas allocations among the various units within a system, thereby permitting gas use in the system's most efficient powerplants even if those plants would have been ineligible for an exemption to burn natural gas.

Furthermore, all of the plants within a system would be insulated from the possibility of a prohibition order against the use of natural gas, saving administrative time, uncertainty, and possible capital expense in converting to coal. Another potential advantage of going ahead and filing a plan as soon as possible would be that the utility could take advantage of any interim rule provisions which might later be made more stringent in the final rules. It may also be possible that ERA would be more conciliatory and less likely to impose obstacles to a compliance plan than to a later exemption application. ERA has recently indicated it is willing to be flexible in the negotiation of these plans.

The statutory requirements for approval of a system compliance plan are established in section 501(b). To qualify, the utility must provide the information requested and demonstrate to ERA's satisfaction its commitment to the following terms:

(1) Identification of all powerplants owned or operated by the utility that would be subject to prohibitions under the Act relating to the use of natural gas if a system compliance plan were not approved;⁶³

(2) Identification of those powerplants the utility believes would be likely to be entitled to an exemption if a plan were not approved;⁶⁴

62. *See id.* § 301(a), 42 U.S.C.A. § 8341(a).

63. *Id.* § 501(b)(1)(A), 42 U.S.C.A. § 8391(b)(1)(A).

64. *Id.* § 501(b)(1)(B), 42 U.S.C.A. § 8391(b)(1)(B).

(3) A commitment that if a plan is approved the utility will not thereafter use natural gas or petroleum as a primary energy source in any new *baseload* powerplant;⁶⁵

(4) A commitment that if a plan is approved, the utility will not use natural gas on and after January 1, 1990, in excess of (i) 20 percent of its base period usage of natural gas adjusted for emergency or peakload purposes if applicable,⁶⁶ or, if lower (ii) its minimum peakload requirement⁶⁷ adjusted for emergency or peakload purposes, if applicable;⁶⁸

(5) A commitment that if a plan is approved, the utility will not on or after January 1, 1995, use natural gas except in peakload or intermediate load powerplants,⁶⁹ and that the volumes of gas consumed in those powerplants will not exceed 75 percent of the amount permitted under paragraph (4), above;

(6) A commitment that on and after January 1, 2000, the utility will not use natural gas as a primary energy source unless ERA grants it a temporary extension for emergency or peakload purposes;⁷⁰

(7) A commitment that upon approval of the system compliance plan the utility will obtain the natural gas used by its system only under the provisions of (i) a contract executed prior to November 9, 1978, other than under an extension or renewal of the contract on or after November 9, 1978; (ii) a contract executed on or after November 9, 1978, but only if the contract has been approved by ERA; or (iii) an extension or renewal occurring on or after November 9, 1978, of a contract entered into before November 9, 1978, but only if the extension or renewal has been approved by ERA;⁷¹

(8) A ten year forecast to be annually revised and extended, which provides support for a conclusion by ERA that the commitments in the utility's system compliance plan will be met.⁷² The

65. *Id.* § 501(b)(2), 42 U.S.C.A. § 8391(b)(2).

66. *Id.* § 501(b)(4)(A), 42 U.S.C.A. § 8391(b)(4)(A). See section 501(e), which sets up rather complicated rules for determining base period usage.

67. *Id.* § 501(b)(4)(B), 42 U.S.C.A. § 8391(b)(4)(B). The term "minimum peakload requirement" is defined in section 501(f) of the Act. *Id.* § 501(f), 42 U.S.C.A. § 8391(f).

68. *Id.* § 501(d)(2), 42 U.S.C.A. § 8391(d)(2).

69. *Id.* § 501(b)(3)(A), 42 U.S.C.A. § 8391(b)(3)(A).

70. *Id.* § 501(b)(3)(B), 42 U.S.C.A. § 8391(b)(3)(B). Section 501(d) of the Act and section 504.4(h) of the interim rules provide that the Secretary may extend this deadline for five years beyond January 1, 2000, if it is demonstrated that use of the natural gas is to be for emergency or peakload purposes only. 44 Fed. Reg. 36005 (June 20, 1979).

71. Fuel Use Act, § 501(b)(5), 42 U.S.C.A. § 8391(b)(5) (West Supp. 1978).

72. See *id.* § 501(b)(6), 42 U.S.C.A. § 8391(b)(6).

forecast should include demand for electricity, construction plans, and a financial plan;⁷³ and

(9) A plan for use of fuel conservation measures that will minimize natural gas and petroleum consumption.⁷⁴ To date, ERA has not indicated exactly what this requirement entails.

Moreover, the utility must update all of the above information on an annual basis, and a plan may be revised only if the Secretary approves.⁷⁵ ERA may revoke a plan if it finds there has been "material noncompliance" by the utility.⁷⁶

The statute sets a *January 1, 1980 deadline* for the submission of a plan.⁷⁷ However, the ERA has issued an important clarification of its interpretation of the timetable associated with the plan. In its interim rule for the system compliance plan,⁷⁸ the ERA stated that while it believes the Act requires the submission of all plans by January 1, 1980, it will consider utilities to have met this deadline if they submit by January 1, 1980, (i) an expression of their *intent* to utilize the system compliance option, (ii) a request for a meeting with ERA to discuss the proposed plan, (iii) a proposed timetable for submission of an entire plan before August 1, 1980, and (iv) other information required by the statute and by ERA.⁷⁹ All other submissions required for the proposed system compliance plans must be filed with ERA by August 1, 1980. However, ERA has indicated that it is unlikely any plans will be finalized until several months after this information is submitted, thus extending the actual deadline to around January 1, 1981.

Deciding which approach to the Act to choose requires a complex analysis of many factors affecting a particular utility, and is made more difficult by the present uncertainties over how the provisions of the Act relating to exemptions and to the system compliance plan will be implemented under the final rules. Many utilities initially indicated their dissatisfaction with and possible confusion over the system compliance option as it now stands, arguing that submission of a plan demands too much of a compromise. However, as this article is being finished in early Spring 1980, ERA has received

73. *See id.* § 501(b)(6), 42 U.S.C.A. § 8391(b)(6).

74. *See id.* § 501(h), 42 U.S.C.A. § 8391(h).

75. *Id.* §§ 501(b)(6), (c), 42 U.S.C.A. § 8391(b)(6), (c).

76. 44 Fed. Reg. 36003 (June 20, 1979).

77. Fuel Use Act, § 501(b), 42 U.S.C.A. § 8391(b) (West Supp. 1978).

78. 44 Fed. Reg. 36002 (June 20, 1979).

79. 44 Fed. Reg. 36004 (June 20, 1979).

approximately fifty letters of intent. Of course, the number of plans ultimately accepted remains to be seen.

ERA indicated last fall that a utility would *not* be penalized if, after filing a letter of intent to comply, negotiating with DOE, and failing to formulate a mutually acceptable system compliance plan, it then withdrew its letter of intent and instead waited to seek an exemption on a case-by-case basis. ERA does expect such utilities to make a good faith negotiating effort; however, the company will not be committed to the plan merely by submitting a letter of intent. Only after the plan has been negotiated, approved, and accepted is it binding. This flexibility will be useful in allowing the utility time to wait and see what new legislation may be passed that will affect its system.

One troublesome provision in the system compliance plan is that requiring the utility to agree not to build a new baseload natural gas fired plant even if the utility could otherwise qualify for a permanent exemption for new plants.⁸⁰ Another stumbling block is the provision stipulating ERA must review and approve extensions, renewals, or new natural gas contracts.⁸¹ ERA has indicated, however, that this review will be used merely to insure that such contracts comply with the plan and to verify the quantity of gas purchased, rather than to allow the agency to control the contract provisions. Public comments on these and other provisions of the system compliance plan may result in some changes when the final rules are issued.

Another significant question which has not yet been definitively resolved is how "system" is to be defined for purposes of the plan. ERA has indicated in informal discussion that at the individual operating company level, "system" must include all powerplants owned or operated by the company. Thus, it will apparently not be possible for an individual company to submit system compliance plans for some of its plants and later seek individual exemptions for others; a company must be "all in" or "all out" of the plan.

At the holding company level the definition of "system" could arguably be interpreted more flexibly to permit the holding company to be split into separate operating entities, with some entities choosing the system compliance option and others seeking exemptions. There has been no mention of such an arrangement in the

80. *See id.*

81. Fuel Use Act, § 501(g), 42 U.S.C.A. § 8391(g) (West Supp. 1978).

interim rules, and it is unclear whether ERA is receptive to negotiations on this question.

Although ERA has expressed doubt that a company can leave units out of a "system" if it chooses the system compliance option, it has acknowledged that any unit exempted before a final plan is signed will remain outside of the system for the duration of the exemption. If the exemption is a temporary one, that unit will fall back into the system and will come under the plan when the exemption expires. When the plan is negotiated, ERA will take into account the future reintegration of such a unit into the system compliance plan.

Finally, it should be noted that section 501(h) states that approval of any system compliance plan "shall be on such terms and conditions as the Secretary determines appropriate, including terms and conditions requiring the use of effective fuel conservation measures which are practicable and consistent with the purposes of this Act."⁸² Clearly, this provision leaves the Secretary with broad discretion to make compliance more or less difficult, and would appear to be a possible area of contention if DOE chooses to interpret broadly this authority.

III. PROPOSED AND INTERIM REGULATIONS

Pursuant to its authority under the Fuel Use Act, the ERA published proposed and, more recently, interim rules applicable to new,⁸³ transitional,⁸⁴ and existing⁸⁵ electric powerplants. These rules established definitions, procedures, and the standards and criteria that the ERA proposed to follow in implementing the Act's prohibitions and its exemption provisions. Comments were solicited on all issues, and the ERA conducted seven public hearings in various locations around the country.

The issuance of the proposed rules elicited an outcry from various members of Congress, including the chairman of the Senate Committee on Energy and Natural Resources, the chairman of the Senate Subcommittee on Energy Regulation,⁸⁶ and the ranking Republican on the House Subcommittee on Energy and the Environment.

82. *Id.* § 501(h), 42 U.S.C.A. § 8391(h).

83. Proposed rules pertaining to new facilities, defined in section 103(a)(8) of FUA, were issued on November 9, 1978, and appeared in 43 Fed. Reg. 53974 (Nov. 17, 1978).

84. Proposed rules pertaining to transitional facilities, defined in section 103(a)(8)(B) of FUA, were issued on November 16, 1978, and November 24, 1978, and appeared in 43 Fed. Reg. 54912 (Nov. 22, 1978) and 43 Fed. Reg. 55745 (Nov. 29, 1978).

85. Proposed rules pertaining to existing facilities, defined in section 103(a)(9) of FUA were issued January 23, 1979, and appeared in 44 Fed. Reg. 5808 (Jan. 29, 1979).

86. See Letter from U.S. Senate Committee on Energy and Natural Resources to then Secretary of Energy, James R. Schlesinger (Feb. 26, 1979).

The concern voiced was that DOE was attempting to implement FUA in such a harsh manner as to reinstitute many of the policy objectives originally proposed by the Administration and rejected by Congress. The proposed regulations were characterized as unduly broad and overreaching, leaving DOE with almost unlimited authority to regulate fuel allocation and to exercise nationwide control over industry fuel-related decisions.

For example, many comments were received⁸⁷ criticizing the ERA's imposition of a Fuels Decision Report (FDR) requirement when such a report was not clearly provided for by the statute. As previously discussed a FDR must be submitted as part of any petition for a temporary or permanent exemption from a final statutory prohibition or prohibition order, unless an emergency or retirement exemption is requested.⁸⁸ The report is to contain an analysis and a documentation of the evidence required in support of the exemption request. The type of information that must be included in the report will differ, depending upon the kind of exemption.⁸⁹ Similar to a technical, analytical environmental impact statement, this report has been attacked as excessive, confusing, and unduly burdensome and expensive. Utilities seemed particularly hostile to the requirement that corporate conservation practices be included in the report.

Another provision of the proposed rules that occasioned much negative reaction was that dealing with DOE's cost test for conversion, which is arguably the core of the regulations for existing plants.⁹⁰ As previously discussed, one basis for seeking a temporary or a permanent exemption under FUA is a showing by the utility that the cost of using coal or another alternate fuel during the period of the requested exemption will "substantially exceed" the cost of using imported petroleum.⁹¹ If the utility is requesting an exemption for an existing powerplant on this basis, it must use the cost calculations set out in the rules.

Under the rules, the cost of using an alternate fuel as a primary energy source will be deemed to be "substantially in excess" of the cost of imported oil where the ratio of the former to the latter exceeds an index set periodically by ERA.⁹² This ratio is designed to

87. See 44 Fed. Reg. 43176 (July 23, 1979).

88. See 44 Fed. Reg. 43191 (July 23, 1979), 44 Fed. Reg. 28951 (May 17, 1979).

89. See 44 Fed. Reg. 28974 (May 17, 1979).

90. See 44 Fed. Reg. 5820 (Jan. 29, 1979).

91. See Fuel Use Act, §§ 211(a)(1), 212(a)(1)(A), 311(a)(1), 312(a)(1)(A), 42 U.S.C.A. §§ 8321(a)(1), 8322(a)(1)(A), 8351(a)(1), 8352(a)(1)(A) (West Supp. 1978).

92. 44 Fed. Reg. 43191 (July 23, 1979).

insure the cost index is set so that the additional costs of using alternate fuels do not exceed the benefits to the nation from reducing our consumption of oil and natural gas. The index is currently 1.3.⁹³ In other words, a utility that has not obtained an exemption must convert to coal unless it can show conversion would cost at least 30 percent more than burning oil. ERA has received many comments suggesting this ratio is excessive.⁹⁴

The cost calculations used⁹⁵ in determining a new or existing plant's eligibility for this exemption take into account cash outlays for capital investment and annual expenses, and the effect of depreciation and taxes on cash flow. There are two comparative cost tests—a general cost test and a special cost test. A utility must use the general cost test to demonstrate eligibility for a permanent exemption, but may use either the general or the special cost test to prove eligibility for a temporary exemption.⁹⁶ The difference between the tests is the time period over which costs are calculated.⁹⁷ When using the general cost test, the cost of alternate fuel versus imported petroleum must be computed for the remaining useful life of the plant.⁹⁸ Under the special cost test, the cost is computed only for the term of the exemption.⁹⁹

The petitioner may be eligible for a permanent exemption if it demonstrates the cost of using an alternate fuel beginning with each successive year within the first ten years of operation, or for an existing plant, the first ten years of the exemption, will always substantially exceed the cost of using imported petroleum over the useful life of the powerplant. If the cost of the alternative fuel will not always substantially exceed that of imported petroleum, the utility will only be entitled to a temporary exemption during the period that the alternative fuel is more expensive. The interim rules then set out a number of equations which petitioners must use to conduct these tests. Not surprisingly, many legitimate questions concerning these calculations were raised by affected utilities.¹⁰⁰

93. *Id.*

94. See 44 Fed. Reg. 43176 (July 23, 1979).

95. Cost calculations for *new* powerplants are set out in 44 Fed. Reg. 28979 (May 17, 1979). A few amendments to these calculations were published in 44 Fed. Reg. 43189 (July 23, 1979). Cost calculations for existing powerplants are set out in 44 Fed. Reg. 43191 (July 23, 1979).

96. 44 Fed. Reg. 43191 (July 23, 1979).

97. In the cost calculations for new powerplants, the type of fuel consuming equipment being considered is another difference. See 44 Fed. Reg. 28979 (May 17, 1979).

98. 44 Fed. Reg. 43191 (July 23, 1979).

99. *Id.* at 43191.

100. For details on the cost calculations, see the interim rules cited in 44 Fed. Reg. 43176 (July 23, 1979).

Because of the discrepancies between the statute and the proposed rules, other provisions of the rules also elicited adverse reaction from utilities. For example, criticism focused upon ERA's suggested criteria for aggregation of new and existing facilities; the definition of alternative site; the definition of electric powerplant to include internal combustion engines; the standard for determining technical capability to utilize coal; its guidelines for demonstrating there is no alternative supply of power, and, in particular, its requirement that purchased power and system conservation measures be considered possible alternative power sources; its determination of the "reasonable cost" of obtaining an alternate fuel supply; its proposals to interpret restrictively the exemption for a new plant's "inability to obtain adequate capital"; the requirement that no environmental exemption would be considered until the utility had applied for and received a final EPA determination; its alleged exclusion of various procedural protections for the petitioning utility, including the imposition of a significant filing fee and apparent elimination of the utility's right to question witnesses at hearings; its procedures for issuing prohibition orders; and its seemingly broad interpretation of DOE's statutory authority to prescribe appropriate "terms and conditions" for obtaining an exemption.

Many of these criticisms of the proposed rules were addressed by ERA in its comments published along with the interim rules¹⁰¹ for FUA, and some of the changes reflected in the interim rules were apparently in response to public criticism from affected utilities. However, some dissatisfaction with the interim rules remains; various utilities have suggested in their comments on the interim rules that the rules are still inconsistent with the statute, or that they reflect an unfair or impracticable interpretation of the Act.

For example, although the FDR provision was substantially restructured and streamlined in the interim rules to reduce the utilities' reporting burden, some utilities continue to question not only the statutory authorization for the FDR but also what they see as its excessive reporting requirements. Many utilities no doubt feel the report should be eliminated altogether, but this appears extremely unlikely.¹⁰²

There is also continuing criticism of ERA's cost calculations in the comments submitted on the interim rules. Some utilities have

101. The pertinent interim rules issued to date are those for *new* facilities, criteria for exemptions, 44 Fed. Reg. 28978 (May 17, 1979); *existing* facilities criteria for exemptions and amendment of certain provisions published earlier, 44 Fed. Reg. 43176 (July 23, 1979); for prohibitions against the increased use of petroleum by existing electric powerplants, 44 Fed. Reg. 28594 (May 15, 1979); and for the system compliance option, 44 Fed. Reg. 36002 (June 20, 1979).

102. See 44 Fed. Reg. 28950-53 (May 17, 1979).

indicated they feel the structure of the cost test is flawed, and the use of the cost test as the sole determinant of the availability of various exemptions is contrary to the intent of the Act. Many utilities have also argued the cost ratio remains too high, and urged it be lowered from 1.3 to 1.1. In addition, utilities are still unhappy with the interim provision relating to coal capability in existing units, because the rule seems to require only a showing of design capability rather than actual capability.

The general contention which underlies these and similar criticisms—such as those aimed at the imposition of application fees for exemptions—is that the interim rules, like the proposed rules, are designed to make exemptions to the Act less easily obtainable than Congress intended. Another line of attack has been to argue public hearings under FUA should be conducted as hearings “on the record” in order to provide allegedly necessary adjudicatory protections such as cross-examination. Such protections are needed, utilities urge, to avoid curtailing rights guaranteed by due process and the Administrative Procedure Act. They also argue ERA should modify other aspects of the interim rules such as those dealing with administrative procedures and sanctions,¹⁰³ and that it should liberalize its interpretation of statutory requirements for exemptions for new and existing plants.

The deadline for the submission of comments on the interim rules was October 31, 1979. It is possible that changes in the interim rules dealing with cost calculations, the “substantially exceeds” index, the FDR, administrative procedures, the general terms and conditions for exemptions, and other issues will be reflected in the final rules whenever they are published by ERA.

IV. PROPOSED LEGISLATION FOR DISPLACEMENT OF OIL AND GAS OVER ELECTRIC UTILITY BOILERS

In 1979 the Administration began contemplating further legislative proposals to mandate or encourage conversion from oil and gas to coal. In his January 1980 State of the Union Message, President Carter stated:

Utility Oil Use Reduction—This new initiative will aid in the effort to reduce our reliance on oil by requiring our Nation’s utilities to substantially convert from oil to coal-burning or other energy facilities . . . over a defined timetable. This bill is a key tool in our effort to increase the use of coal, our most abundant natural fuel source.¹⁰⁴

103. See 44 Fed. Reg. 28543 (May 15, 1979); 44 Fed. Reg. 43187 (July 23, 1979).

104. The State of the Union 1980, Prepared Address Submitted to Congress by President Carter (Jan. 23, 1980).

The Carter Administration's specifications for the proposed legislation were sent to Congress on March 6, 1980. The proposal would consist of two phases. Under Phase I, FUA would be amended to provide a statutory "list" of specific electric powerplants which would, upon enactment, be prohibited from using oil or gas in the future. The list included powerplants at 50 generating stations. The Secretary of Energy would also be authorized, within 18 months of enactment, to add to the list additional existing powerplants found to be technically capable of burning coal or other alternate fuel or fuel mixtures. Through such mandated prohibition, Phase I allegedly would achieve displacement of an estimated 350,000-550,000 barrels of oil and natural gas equivalent per day in 1985.

This new program would be coordinated with existing programs under ESECA and FUA. Utilities would be permitted to petition the Secretary of Energy under any of the temporary exemptions already contained in FUA.¹⁰⁵ If a utility planned to contest the prohibition, it could seek one of the permanent exemptions.¹⁰⁶ As a "stick," the legislation would provide that a utility not in compliance by December 31, 1984, would thereafter not be permitted to recover automatically the associated costs of oil and gas through the fuel adjustment clause. As a "carrot," the Secretary of Energy would be authorized to provide federal financial assistance to facilitate utility compliance with Phase I prohibitions.

This financial assistance would be perhaps the most important aspect of Phase II, which would also be in the form of an amendment to FUA. Phase II would encourage electric utilities to displace oil and gas usage as quickly as possible by providing \$6 billion in federal funds. It appears that although the Phase II program would not be mandatory, DOE believes analysis, public pressure, and federal assistance would lead at least some utilities to participate in the plan. If a utility elected to participate, it would submit a Fuel Displacement Plan. This plan would include a commitment to achieve a net reduction in consumption of petroleum and natural gas to some level below the base period, 1974-1978 average, which would be a voluntary target to be met by 1990.

State authorities would have one year to approve or disapprove the plan, including a determination for need of the power. DOE would then have up to 90 days to approve the plan after approval by the Governor. Apparently only those utilities whose Fuel Displacement Plan was approved by March 1, 1983 would be eligible for the federal funds mentioned above. Payments under the program would be proportional to the utility's relative share of the base

105. See notes 28-39 and accompanying text, *supra*.

106. See notes 40-57 and accompanying text, *supra*.

period average oil and gas consumption by all utilities, discounted by any displacement funded under Phase I. Any utility accepting funds that failed to achieve its fuel displacement target in calendar year 1990 would be required to return the funds to the Treasury with interest. The overall goal under Phase II would be to displace 500,000 barrels, or equivalent, per day of oil and gas before the end of 1990.

Another aspect of the proposed legislation would provide that any electric utility consuming 250,000 barrels per year or more of petroleum or natural gas equivalent would be required to submit within one year a Fuel Displacement Study (FDS) to the Secretary of Energy and to an appropriate state regulatory authority. The requirement would apply to 174 electric utilities which collectively represent over 90 percent of all utility oil and gas consumption in the United States. Other utilities could submit an FDS on a voluntary basis. The FDS would contain a fifteen year forecast of the estimated cost of continued use of oil and gas by a utility as compared to the cost of system-wide conversion to an alternate fuel or energy conservation program. The Fuel Displacement Study would be incorporated into a Fuel Displacement Plan if the utility subsequently chose to participate in the Phase II program. The purpose of the FDS would thus be to require the affected utilities to evaluate the social and economic benefits of adopting an aggressive oil/gas displacement policy, whether or not the utility decided to apply for federal assistance through the submission of a Fuel Displacement Plan.

The most recent development is the introduction of bills in both the House and Senate. On April 2, 1980, Representative John Dingell, Chairman of the House Commerce Subcommittee on Energy and Power, introduced H.R. 6930, the House version of the Powerplant Fuel Conservation Act of 1980. This House bill, known as the "oil backout" legislation, appears more rigorous than the Administration-supported Senate bill (S.2470) introduced a few days earlier by Senator Wendell Ford, Chairman of a Senate Energy Subcommittee.¹⁰⁷ The Senate bill, for example, would prohibit the use of automatic adjustment clauses for pass-throughs of oil and gas cost increases only for those utilities that had not converted or obtained an exemption before 1985; the House bill would prohibit the use of such adjustment clauses for all utilities after 1985. Additionally, the Senate version would allow utilities to obtain a temporary exemption under FUA to burn natural gas rather than oil; the House

107. Powerplant Fuels Conservation Act of 1980, S.2470, 96th Cong., 2d Sess., 126 CONG. REC. S2863 (daily ed. March 24, 1980).

version would not permit utilities to substitute gas for oil before a grant for conversion was awarded. The House bill would also mandate that grants for voluntary conversions be used only for conversions that would not have been undertaken prior to the proposed legislation. This limitation on the distribution of grant money for voluntary conversions is not present in the Senate version. Furthermore, the House bill excludes the "hit list" of affected powerplants included in the Senate bill.

V. OUTLOOK

It appears unlikely that any action will be taken on the proposed legislation this term, as differences between the House and Senate versions will have to be ironed out. This process may in turn be slowed by opposition to the legislation itself. Evidence of such opposition appeared from several groups when hearings on the House version began. Environmentalists voiced concern about powerplants burning more coal without the imposition of stricter sulphur dioxide emission controls, arguing that this could exacerbate the acid rain problem. Other criticism of the FUA amendments has come from congressmen who view the legislation as a "bailout" for utilities, and who question whether billions of dollars should be so appropriated in a period of federal budget belt-tightening. Still other factions have questioned whether the Administration's list of mandatory conversion units is complete and accurate.

Clearly, much work remains to be done on the controversial FUA amendments in the House, and Senate hearings have not yet been scheduled as of the time this article was written. Thus, it is too early to predict the final form that the proposed legislation will take. What does appear more certain is that the Administration's goal of a legislative enactment by June 1, 1980 will not be met. In the meantime, FUA remains the law of the land. It is understood a number of utilities have indicated an intent to participate in the Systems Compliance Option, and negotiations are presumably proceeding in that area. As the 1990 deadline for natural gas cut-off approaches, it may well appear unreachable in many instances, and pressures will mount either for exemptions or extension of the 1990 date. In summary, considerable activity of great national importance is foreseeable in the implementation of both the current law and the proposed amendments.