

# The National Regulatory Research Institute

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## THE TRANSFERABILITY OF THE COOPERATIVE FEDERALISM MODEL USED FOR ELECTRIC AND NATURAL GAS UTILITIES TO TELECOMMUNICATIONS REFORM LEGISLATION

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Proposals for telecommunications reform at the state and federal level call for timely, objective analysis of many issues. This paper is one in a series of focused NRRI analyses of high priority issues in telecommunications from a state regulatory and public policy perspective. The paper was prepared by NRRI with funding provided by participating member commissions of the National Association of Regulatory Utility Commissioners (NARUC). The views and opinions of the authors do not necessarily state or reflect the views, opinions, or policies of the NRRI, the NARUC, or any NARUC member commission.



## EXECUTIVE SUMMARY

Federalism is an integral part of the 1934 Communications Act. Indeed, it is fair to say that the 1934 Act owes, in part, its long and useful life to the successful delineation of workable divisions of telecommunications responsibilities between state and federal levels of government. With the recent and pervasive changes in technology, market structure, services demanded, and regulation, the 1934 Communications Act is seen by most observers as needing revisions that better allow Americans to meet the challenges and opportunities of an information age economy.

This paper reviews three models of federalism—preemptive federalism, dual federalism, and **cooperative federalism**—as they apply to telecommunications regulation. The report concludes by recommending that the "PURPA" cooperative federalism model followed recently by the U.S. Congress in the energy field is an appropriate and successful approach that can be followed in telecommunications reform legislation.

In the Public Utility Regulatory Policies Act of 1978 (PURPA) and in the Energy Policy Act of 1992, the Congress choose a cooperative approach. The **PURPA approach** began when the energy crisis faced by the United States was declared by President Carter to be "the moral equivalent of war" and an efficient workable partnership was required between the states and the federal government. The PURPA approach had the Congress mandate standards to be considered by the states in their regulation of jurisdictional electric and gas utilities. The beauty of the PURPA approach is that the federal government did not have to spend time enforcing standards and adjudicating disputes and exemption requests. Each state held hearings, conducted studies, and received the input of consumers, producers, and federal and state agencies. The end result of PURPA was a relatively seamless national set of state energy policies that accommodated to local circumstances. The national interest was served because national energy goals were accomplished efficiently, legitimate regional differences were accommodated as long as standards were considered, and consumers and producers were better off. The PURPA approach recognized that one size does not fit all. One practical measure of the success of the PURPA approach is the Congress's use of the same cooperative federalism model fourteen years later in the Energy Policy Act of 1992.

The paper also briefly examines the problem of **unfunded federal mandates** that can occur under a preemptive model of federalism. Requiring state commissions to order or authorize hundreds of billions in dollars of telecommunications infrastructure modernization would, for all practical purposes, be an unfunded federal mandate that could dwarf most other unfunded mandates.



## Introduction

Political scientists have long been fascinated by the multiple balances of power that were built in to the U.S. Constitution. One of the most important of these is the legitimate and productive tension that exists between federal and state governments. It was the explicit intent of the writers of the Constitution that both levels of government be sovereign in their respective realms, the Supremacy Clause notwithstanding. The genius of the Constitution is that the question of how to balance power is never fully answered. Some powers are reserved to the states, some to the people, and some delegated to the federal government; an arrangement as unusual for the time period in which the Constitution was written as it is today. States, autonomous regions, and provinces tend in most countries to have vestigial powers, with all significant power belonging to the national government. Centralization of power occurs whether or not the country has a democratic form of government.

Three basic models of federalism are examined here. The first has a clearly dominant role for the federal government, the second is dual federalism, and the third, and most interesting, is cooperative federalism and allows a mixture of authorities. Unfortunately, rhetoric can often confuse reality as many practitioners will automatically claim to be in the cooperative category when in reality they are not. In the sections below each of these models of federalism is briefly examined in relation to telecommunications, along with other substantive examples used by political scientists. The intent of the brief examination is to provide telecommunications regulatory policymakers with an objective appraisal of the advantages and disadvantages associated with each model.<sup>1</sup>

In the cooperative model one approach is examined in detail because of its ready relevance as a way of maximizing federal/state cooperation in developing a nationwide set of seamless telecommunications policies. The cooperative approach is that followed by the Public Utility Regulatory Policies Act of 1978 (PURPA) and by the Energy Policy Act of 1992 (EPACT). The proposition presented in this paper is that the PURPA approach is

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<sup>1</sup> A bibliography of books on federalism is found at the end of this paper.

directly transferable to telecommunications reform legislation. The PURPA approach has been very successful in terms of the improved energy policies designed and implemented for electric and natural gas utilities, as well as demonstrating that federal/state cooperation can occur in high-stakes regulatory arenas.

### **Preemption Model of Federalism**

The Constitution contains specific, broad, and unstated (or implied) powers that belong to the federal government. These include the power to declare war, coin money, and to regulate commerce with foreign nations and among the states. State governments can, among other things, regulate commerce within a state, act to ensure public health and safety, and can exert powers the Constitution does not delegate to the national government, or prohibit the states from using.<sup>2</sup> Other powers exist, such as establishing courts and the ability to spend money for the general welfare, that both states and federal governments can use. In a preemptive mode the federal government makes policy and any state role is limited to implementation. Preemption can occur in areas where both states and the federal government have powers. In a preemptive mode the federal government does not necessarily overstep its authority, rather it acts within its powers. It can mandate compliance, but may also choose to delegate to, or negotiate with, or buy services from the states. The long history of desegregation, integration, and civil rights is one prominent example of this mode.

One problem related to preemption is what Frederick S. Lane has called "mandate madness," namely the attempt by the federal government to require or mandate that a state or local unit of government comply with or act affirmatively to adopt or implement a federal policy or piece of legislation. These often "unfunded mandates" are tied to larger federal programs that send large sums of money to state and local governments that are too valuable

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<sup>2</sup> See Robert L. Lineberry with George C. Edwards III, *Government in America: People, Politics, and Policy*, Fourth ed. (Glenview, IL: Scott, Foresman and Company, 1989), 113-139.

for a state to risk losing by noncompliance with a mandate.<sup>3</sup> Tying highway construction monies to the adoption of a 55 mile per hour speed limit is an example of linking policies to mandates. Preemption occurs because states, while ostensibly having a choice over whether to adopt a mandate, actually have little or no choice because of their dependence on, for example, federal highway funds.

Over the past months the issue of federal unfunded mandates has convincingly made it to the public agenda. In the House and the Senate bipartisan bills have been submitted to control the growth of federal unfunded mandates. The pressure to bring this issue to the forefront has come from cities and states, which feel that they are having to carry the burden of these mandates.

In the telecommunications arena federal preemption has occurred in a number of areas including licensing of radio spectrum, marketing of centrex-type services, customer premises equipment, and disconnection of subscriber service for nonpayment.<sup>4</sup>

A federal policy that mandates state infrastructure deployment or a particular pricing policy could be considered as an example of preemption of state regulatory authority. An infrastructure deployment directive could actually be a kind of "unfunded mandate" as the federal government would require state commissions to authorize or order the construction of an advanced infrastructure whose cost could easily be at least two hundred billion dollars nationwide.<sup>5</sup>

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<sup>3</sup> Thomas J. Anton, *American Federalism and Public Policy: How the System Works* (New York: Random House, 1989), 191-188.

<sup>4</sup> Phyllis Bernt et al., *The Impact of Alternative Technologies on Universal Service and Competition In the Local Loop* (Columbus, OH: The National Regulatory Research Institute, 1992).

<sup>5</sup> Carol Weinhaus et al., "Beyond Future Stock: The Need for Regulatory Response to Technological Change," in David Wirick, ed. *Proceedings of the Ninth NARUC Biennial Regulatory Information Conference* (Columbus, OH: The National Regulatory Research Institute, 1994), 175-200.

## Dual Federalism

Through the first half of the history of the United States, the type of federalism most commonly observed was dual federalism, where the national and state governments each functioned autonomously within their own spheres. States during this period focused their attention on issues like schools and infrastructure projects. The federal government focused on monetary policy, foreign relations, national defense, and the postal service.<sup>6</sup> It is interesting to note that most major policies adopted by the federal government were first adopted by one or more states. The list of such policies includes child labor laws, minimum wage legislation, unemployment compensation, antipollution legislation, and the income tax.<sup>7</sup> This history has given rise to the frequently used characterization of the states as "the laboratories of democracy." Dual federalism effectively ended but did not disappear (for example, in telecommunications) when many problems and proposed solutions were nationalized, most notably during President Roosevelt's New Deal.

During this period, telephone regulation was split between the federal and state governments. The Federal Communications Commission regulated in the international and interstate arenas and state commissions regulated intrastate telephone operations. The 1934 Communications Act explicitly recognized this and codified this dual federalism. Courts refereed jurisdictional disputes; the most noteworthy of which is *Louisiana v. FCC* where FCC preemption of state depreciation practices was rejected in favor of a dual federalism that recognized state sovereignty regarding core intrastate telecommunications issues.<sup>8</sup> Dual federalism is apparent in the many innovative telecommunications reforms implemented by states that have covered pricing, infrastructure deployment, promotion of competition,

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<sup>6</sup> Even during this period Walker identified five federal cash grant programs in existence for states by 1900 and another six by 1920. These federal assistance programs included aid to agriculture, land-grant colleges, and highways. David B. Walker, *Toward and Functioning Federalism* (Cambridge, MA: Winthrop Publishers, 1989), 61.

<sup>7</sup> Lineberry, *Government in America*, 127.

<sup>8</sup> *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1980 (1986).



deregulation, market structure, distance learning, universal service, emergency telephone service (E-911), and elimination of barriers to telecommunications access for disadvantaged and the disabled citizens.<sup>9</sup> The federal government has also followed a dual federalism model in, to cite but one example, developing price cap policies for interstate carriers.

### **Cooperative Federalism**

In the third model, cooperative federalism, costs, policies, and powers are shared between state and federal levels of government.<sup>10</sup> Education and highways are two areas where cooperative federalism can be seen. Lineberry identifies three common attributes of cooperative efforts: shared costs,<sup>11</sup> federal guidelines, and shared administration.

The important point here is that intergovernmental relations occur between parties that either have common goals, or interests, or have otherwise agreed to cooperate. In table 1, five phases of intergovernmental relations or federalism have been identified by Wright and illustrates an evolution from a "conflict phase" to one where intergovernmental relations are

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<sup>9</sup> Vivian Witkind Davis, *Breaking Away from Franchises and Rate Cases: A Perspective on the Evolution of State Telecommunications Policy* (Columbus, OH: The National Regulatory Research Institute, November 12, 1994).

<sup>10</sup> Constitutional scholar E. S. Corwin defined cooperative federalism as occurring when all involved governmental units " . . . are regarded as mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem at hand." E. D. Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (February 1950): 19. The important notion here is that no level seeks advantage over the other and that both are, at least temporarily, united by a common public purpose.

<sup>11</sup> Because on a practical basis the largest day-to-day impact of federalism is financial, most scholarly work focuses a significant part of its attention on the sources, procedures, and uses associated with the use and dependence upon federal monies by states and local units of government. It is important also to recognize that significant policy issues are also simultaneously being acted upon when funds flow from the federal government. Wright argues that fiscal federalism " . . . cut its teeth on the massive political and policy issues that remained following the Supreme Court decisions on the social welfare legislation of the New Deal. It reached early adolescence in grappling with federal aid to education, urban development, and civil rights. It . . . [reached] maturity on issues related to citizen participation and effective services delivery systems." Wright, 159-160. Many would now argue that fiscal federalism is overburdened and in need of fundamental reforms regarding the sources and uses of federal funds by state and local governments.

TABLE 1

PHASES OF INTERGOVERNMENTAL RELATIONS

Phase Descriptor	Main Problems	Participants' Perceptions	IGR Mechanisms	Federalism Metaphor	Approximate Climax Period
Conflict	Defining boundaries Proper spheres	Antagonistic Adversary Controversy Exclusivity	Statutes Courts Regulation	Layer cake federalism	Pre-1937
Cooperative	Economic stress International threat	Collaboration Complementary Mutuality Supportive	Policy planning Broad formula grants Open-ended grants Tax credit	Marble cake federalism	1933-1953
Concentrated	Program needs Capitol works	Professionalism Objectivity Neutrality Functionalism	Categorical grants Service standards	Focused or channeled federalism (water taps)	1945-1960
Creative	Urban-metropolitan Disadvantages clients	National goals Great society Grantsmanship	Program planning Project grants Participation	Fused-foliated federalism (proliferated)	1958-1968
Competitive	Coordination Program effectiveness Delivery systems Citizen access	Disagreement Tension Rivalry	Revenue sharing Reorganization Regionalization Grant consolidation	Picket fence federalism (fragmented)	1955-?

Source: Deil S. Wright "Intergovernmental Relations: An Overview," in Frederick Lane, ed., *Current Issues in Public Administration*, second edition (New York: St. Martin's Press, 1982), 161.

competitive between levels of government as well as between agencies at the same level of government. Figure 1 shows the picket fence metaphor made popular by former North Carolina Governor Terry Sanford, where vertically functional bureaucracies cooperate more with each other and less with their fellow state or local agencies. Competition for scarce dollars means the vertical bureaucracy has little loyalty to other agencies at its level of government because doing so would divert federal dollars from its agency and constituency.

It is important to recognize that coordination and intergovernmental cooperation do not just happen. No state official can force a federal agency to do something; both parties have to agree to act. Dual federalism, in some sense, never "goes away" as each level of government is sovereign. Even for preempted areas the transaction costs of federal enforcement may be high enough that the federal government often finds it prudent to be cooperative rather than purely preemptive.

In the field of telecommunications the use of federal/state joint boards and conferences under section 410(a,b, and c) of the Communications Act is an example of a cooperative approach. Section 410 authorizes the FCC to create joint boards and conferences for issues that span both jurisdictions.<sup>12</sup> A 410(a) joint board is initiated by the FCC, which then selects the state members. The joint board "resolves" the issues and passes it on to the FCC, which can accept or reject the recommendation. A 410(b) conference is also initiated by, and state members are selected by, the FCC. One important difference is that the joint conference does not necessarily have to resolve the interjurisdictional issue. A 410(c) joint board is identical to a 410(b) one, except the Congress mandates its formation on a specified topic. 410(c) boards have four state members and three FCC members. Four 410(a) joint boards have been convened, one 410(b) conference, and one 410(c) board.<sup>13</sup> In recently proposed

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<sup>12</sup> Douglas N. Jones et al., *Regional Regulation of Public Utilities: Opportunities and Obstacles* (Columbus, OH: The National Regulatory Research Institute, 1969), 179-186.

<sup>13</sup> The joint boards have focused on rate integration for Hawaii, Puerto Rico, the Virgin Islands, and Alaska; a uniform system of accounts; measurement problems connected with the use of feature groups A and B access; Alaska telecommunications issues; separations; and; a joint conference considered open network architecture.

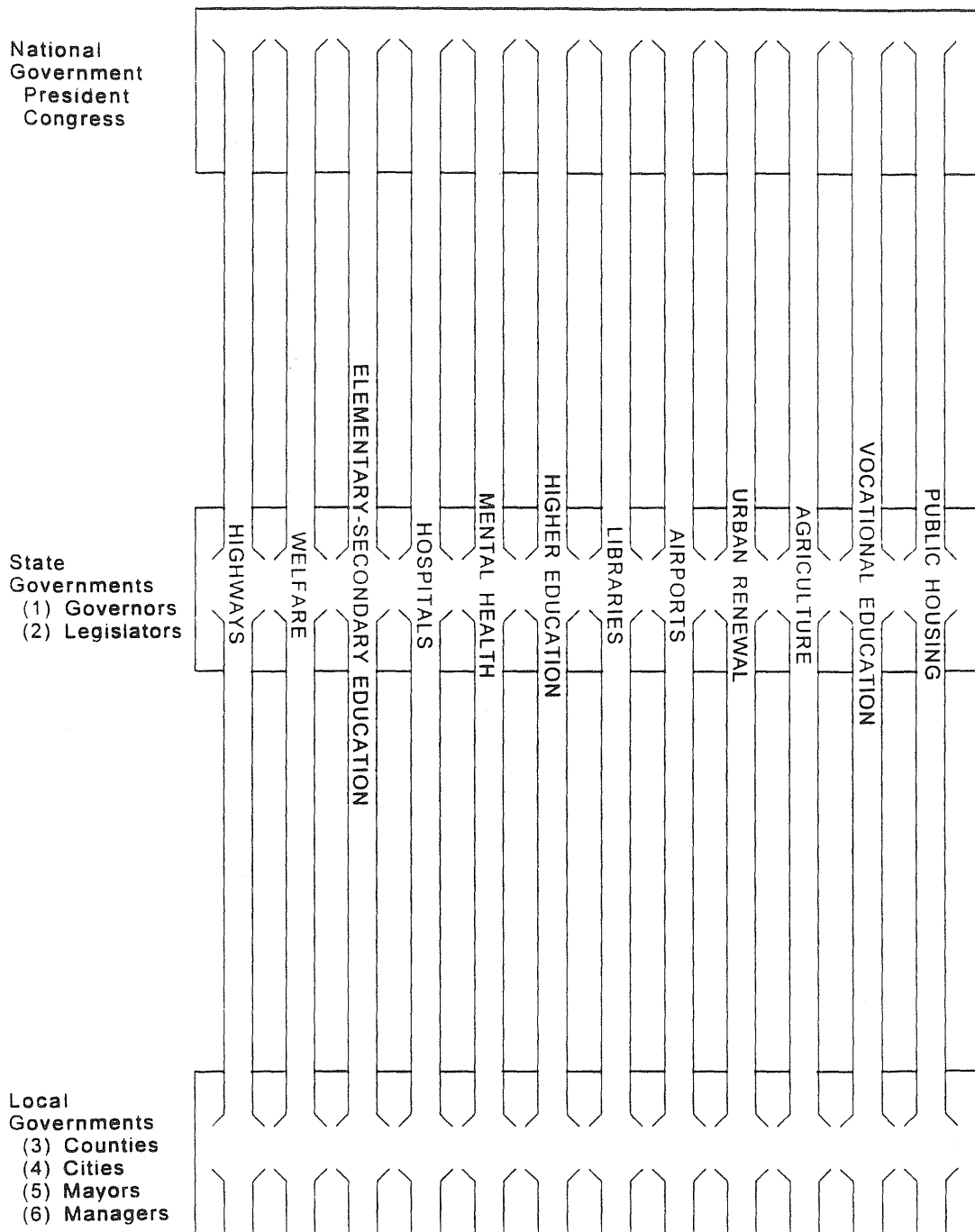


Fig. 1. A schematic representation of picket fence federalism.

Source: Deil S. Wright "Intergovernmental Relations: An Overview," in Frederick Lane, ed., *Current Issues in Public Administration*, second edition (New York: St. Martin's Press, 1982), 169.

telecommunications legislation joint boards have been envisioned as an explicit way to promote cooperative federalism.

### **Public Utility Regulatory Policies Act (PURPA) Approach**

PURPA is presented here as a clear example of cooperative federalism that has been successfully used in the shared effort of state and federal levels of government to regulate electric and natural gas utilities. Like telecommunications, the jurisdiction over electric and gas utilities is split between federal and state commissions. Competition, regulation, and technology have also significantly changed over the last decade for electric, gas, and telecommunications providers. All three utility sectors have or are about to experience similar changes, and yet it appears that the type of federalism underlying legislation enacted for electric and gas utilities is significantly different from the model of federalism proposed in major pieces of proposed telecommunications legislation. The analysis herein will show that a cooperative federalism approach was used for electric and natural gas utilities, while some features of proposed telecommunications legislation follows a preemptive approach to federal/state relations. The analysis concludes that a cooperative PURPA approach is more appropriate than a preemptive approach.

In 1977 PURPA was originally passed to meet an energy crisis that President Carter characterized as the "moral equivalent of war." At a time when a legitimate national energy emergency existed, the Congress chose to follow a cooperative rather than a preemptive model of federalism. PURPA established a process whereby the Congress set standards that state commissions must consider in a hearing-type format within a specific time period in the design of a state energy policy. States have the freedom to reject, modify, or accept the standards as long as they are given a fair consideration in a hearing.<sup>14</sup>

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<sup>14</sup> Intervention is possible by any party if no hearings were held and the standards were not considered by the statutory deadlines. Mississippi challenged the PURPA approach and the U.S. Supreme Court upheld the constitutional validity of the PURPA Act (*FERC v. Mississippi*, 102 S. Ct. 2126 (1982)).

The "standards consideration" approach allows state and federal levels to do what they do best. If a different approach with a preemptive, uniform, and inflexible set of rules had been used, the major part of federal action would have likely been on consistency, enforcement, and consideration of exemption requests. States would have had little power or authority. In a PURPA approach, states, because of their diversity, are charged with examining how best to apply a set of national standards in a way that best meets the needs and circumstances in their state.

Surprisingly, the variation between states in terms of the standards adopted by state commissions is actually relatively small. In PURPA the states did the work and the federal government received the benefits of a relatively seamless set of coherent and consistent energy policies covering all states. States made workable incremental adjustments that reflected the underlying differences between different types of states. All recognized that "one size does not fit all": that it is unlikely that urban and rural states, or energy importing and energy exporting states, or high-growth and low-growth states, or states with different mixes of nuclear, hydro, natural gas, coal, oil, solar, thermal, wind, or biomass generation will benefit if these differences are ignored. A state-centered analysis allowed for a detailed and fair consideration and permitted a range of possible outcomes that still largely conformed to the congressional standards.

The relatively uniform outcomes observed were not merely due to good fortune. Rather, under a cooperative federalism approach a process was designed with tensions and incentives that encouraged a balanced consideration of national and state interests. The key features are discussed below and are:

- **Clearly stated nonpreemptive standards**
- **Hearings**
- **Flexibility**
- **Participation**
- **Statement of policy**

The key incentive is the recognition that we live in a national economy whose structure and impacts may be muted, but not eliminated at state boundaries. Generally, no state can afford to design, or justify (based on evidence submitted in public hearings) a set of energy policies that are arbitrarily different from the policies of adjacent states, or its region. Rather, any differences must be due to the underlying economic circumstances of a state. This incentive encourages an appropriate level of uniformity.

1. **Standards** help as each state does not have to "reinvent the wheel." By not having the obligation implied by having to enforce a national set of standards—because this function has been given to the states (where no rigid requirement of uniformity necessarily exists)—federal agencies benefit from having a set of policies and outcomes better than what would otherwise have existed. By stating clear and reasonable standards, the federal government provides valuable assistance to states; and reaps a fairly uniform set of state policies in return. The PURPA of 1978 had several standards that needed to be considered. The Energy Policy Act of 1992 continued this approach and added four more standards that reflect the significant changes that have occurred since 1978 in the production and consumption of energy by Americans.
2. Having a **hearings process** helps because all parties have confidence that information and data submitted will receive a fair consideration and that conclusions reached will be supported by data. Public hearings focused on the application of the standards, allowed 51 jurisdictions to develop state policies that simultaneously accommodate to local economies as well as to the national standards.
3. **State flexibility** is possible because PURPA does not contain a provision allowing a federal agency to examine, validate, or preempt the final state policy. The federal government is allowed to participate as a party in state

proceedings. However, federal agencies simply have "a seat in the audience" just like all other parties as the state commission is the final decision-making body. Federal involvement allows clarification about the standards and permits sharing of information about the actions of other states. It also gives federal agencies a better understanding of the reasonableness of any modifications in the application of the standards in a state. A fair appraisal of PURPA hearings to date is that no unwarranted variations have occurred. One additional benefit to the federal government occurs because it is not clear whether any single federal agency is staffed to, or has the procedures in place sufficient to expeditiously handle 51 hearings regarding the applicability of a policy or set of standards. Further, federal regulatory agencies hold "paper hearings," whereas state commissions more typically hold live hearings: live hearings supplemented by written information are implicitly recognized under a PURPA approach as permitting needed state flexibility.

4. Closely related is the wide range of **participation** allowed (and even encouraged) under PURPA in the hearings. Any utility, power producer, consumer, or governmental agency can participate. Rather than having a burden to show why a party should be allowed to participate, PURPA takes the pragmatic position that effectively says if you want to participate, this shows you must be affected. PURPA allows some qualifying parties to receive financial support.
5. The PURPA process produces a **coherent set of state energy policies**, something that the federal government wants in fashioning a national energy policy. States benefit by being encouraged to develop new policies or reexamine existing energy policies.



What has been conspicuously absent in the PURPA approach is the lack of enduring federal/state disagreements. The objective of achieving a coherent set of energy policies that benefit energy producers and consumers dominates and guides the PURPA process, rather than jurisdictional disputes. In part this is due to the cooperative mode of federalism adopted by the Congress. When choices had be made the Congress opted for state flexibility and in return received a relatively seamless set of energy policies faster and at a lower cost than probably could otherwise have been expected. Even more important, American consumers and energy producers benefited by having improved, consistent, and valid energy policies in all state and federal jurisdictions.

The appendix to this paper contains a summary of the provisions of the Clean Air Act of 1992 extension of the PURPA approach. A telecommunications PURPA approach might have some differences, but would likely benefit from an adoption and adaption of the major PURPA features summarized in the appendix.

### **Conclusion**

A cooperative federalism, as typified by a PURPA-like approach, is transferable and could reduce the problems associated with preemption (court challenges) and unfunded mandates. Dual federalism is also an attractive option for America, but there are enough areas of interjurisdictional overlap in telecommunications that at least a minimum overlay of cooperative federalism is still needed. Just as the 1934 Communications Act owed its usefulness and longevity, in part, to the validity and accuracy of the dual federalism model it incorporated, so too must omnibus telecommunications reform legislation incorporate an equally valid model of federalism that mirrors the significant changes that are occurring in technology and market structure. A cooperative federalism built around the use of joint boards and a PURPA approach seem most likely to be the most valid model for the next decade. Standards for telecommunications reform legislation might include areas such as universal service, cost-based rates, competition, privacy, and interconnection.



**APPENDIX**

**SELECTED PROVISIONS OF THE  
PUBLIC UTILITY REGULATORY POLICIES ACT  
OF 1978 AS AMENDED<sup>15</sup>**

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- **STANDARDS**
  - **FLEXIBILITY**
  - **HEARINGS**
  - **PARTICIPATION**

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<sup>15</sup> Robert Burns with Mark Eifert, *A White Paper on the Energy Policy Act of 1992: An Overview for State Commissions of New PURPA Statutory Standards* (Columbus, OH: The National Regulatory Research Institute, 1993), 25-34.



## APPENDIX A

### Selected Provisions of the Public Utility Regulatory Policies Act of 1978 as Amended

P.L. 95-617, November 9, 1978, as amended by P.L. 96-294, June 30, 1980, P.L. 98-620, November 8, 1984, P.L. 99-495, October 16, 1986, P.L. 101-575, November 15, 1990, and P.L. 102-486, October 24, 1992

(19) The term "integrated resource planning" means, in the case of an electric utility, a planning and selection process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost. The process shall take into account necessary features for system operation, such as diversity, reliability, dispatchability, and other factors of risk; shall take into account the ability to verify energy savings achieved through energy conservation and efficiency and the projected durability of such savings measured over time; and shall treat demand and supply resources on a consistent and integrated basis.

(20) The term "system cost" means all direct and quantifiable net costs for an energy resource over its available life, including the cost of production, distribution, transportation, utilization, waste management, and environmental compliance.

(21) The term "demand side management" includes load management techniques.

## TITLE I--RETAIL REGULATORY POLICIES FOR ELECTRIC UTILITIES

### Subtitle A--General Provisions

#### Sec. 101. Purposes.

The purposes of this title are to encourage--

- (1) conservation of energy supplied by electric utilities;
- (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and
- (3) equitable rates to electric consumers.

## Subtitle B--Standards for Electric Utilities

### Sec. 111. Consideration and Determination Respecting Certain Ratemaking Standards.

(a) CONSIDERATION AND DETERMINATION.--Each State regulatory authority (with respect to each electric utility for which it has rate-making authority) and each nonregulated electric utility shall consider each standard established by subsection (d) and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this title. For purposes of such consideration and determination in accordance with subsections (b) and (c), and for purposes of any review of such consideration and determination in any court in accordance with section 123, the purposes of this title supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

(b) PROCEDURAL REQUIREMENTS FOR CONSIDERATION AND DETERMINATION.--  
(1) The consideration referred to in subsection (a) shall be made after public notice and hearing. The determination referred to in subsection (a) shall be--

(A) in writing,

(B) based upon findings included in such determination and upon the evidence presented at the hearing, and

(C) available to the public.

(2) Except as otherwise provided in paragraph (1), in the second sentence of section 112(a), and in sections 121 and 122, the procedures for the consideration and determination referred to in subsection (a) shall be those established by the State regulatory authority or the nonregulated electric utility.

(c) IMPLEMENTATION.--(1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility may, to the extent consistent with otherwise applicable State law--

(A) implement any such standard determined under subsection (a) to be appropriate to carry out the purposes of this title, or

(B) decline to implement any such standard.

(2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) which is determined under subsection (a) to be appropriate to carry out the purposes of this title, such authority or nonregulated electric utility shall state in writing the reasons therefor. Such statement of reasons shall be available to the public.

(3) If a State regulatory authority implements a standard established by subsection (d)(7) or (8), such authority shall--

(A) consider the impact that implementation of such standard would have on small businesses engaged in the design, sale, supply, installation or servicing of energy conservation, energy efficiency or other demand side management measures, and

(B) implement such standard so as to assure that utility actions would not provide such utilities with unfair competitive advantages over such small businesses.

(d) ESTABLISHMENT.--The following Federal standards are hereby established:

[Only the new EPACT/PURPA standards are listed here]

(7) INTEGRATED RESOURCE PLANNING.--Each electric utility shall employ integrated resource planning. All plans or filings before a State regulatory authority to meet the requirements of this paragraph must be updated on a regular basis, must provide the opportunity for public participation and comment, and contain a requirement that the plan be implemented.

(8) INVESTMENTS IN CONSERVATION AND DEMAND MANAGEMENT.--The rates allowed to be charged by a State regulated electric utility shall be such that the utility's investment in and expenditures for energy conservation, energy efficiency resources, and other demand side management measures are at least as profitable, giving appropriate consideration to income lost from reduced sales due to investment in and expenditures for conservation and efficiency, as its investments in and expenditures for the construction of new generation, transmission, and distribution equipment. Such energy conservation, energy efficiency resources and other demand side management measures shall be appropriately monitored and evaluated.

(9) ENERGY EFFICIENCY INVESTMENT IN POWER GENERATION AND SUPPLY.--The rates charged by any electric utility shall be such that the utility is encouraged to make investments in, and expenditures for, all cost-effective improvements in the energy efficiency of power generation, transmission and distribution. In considering regulatory changes to achieve the objectives of this paragraph, State regulatory authorities and nonregulated electric utilities shall consider the disincentives caused by existing ratemaking policies, and practices,

and consider incentives that would encourage better maintenance, and investment in more efficient power generation, transmission and distribution equipment.

(10) CONSIDERATION OF THE EFFECTS OF WHOLESALE POWER PURCHASES ON UTILITY COST OF CAPITAL; EFFECTS OF LEVERAGED CAPITAL STRUCTURES ON THE RELIABILITY OF WHOLESALE POWER SELLERS; AND ASSURANCE OF ADEQUATE FUEL SUPPLIES.--(A) To the extent that a State regulatory authority required or allows electric utilities for which it has ratemaking authority to consider the purchase of long-term wholesale power supplies as a means of meeting electric demand, such authority shall perform a general evaluation of:

(i) the potential for increases or decreases in the costs of capital for such utilities, and any resulting increases or decreases in the retail rates paid by electric consumers, that may result from purchases of long-term wholesale power supplies in lieu of the construction of new generation facilities by such utilities;

(ii) whether the use by exempt wholesale generators (as defined in section 32 of the Public Utility Holding Company Act of 1935) of capital structures which employ proportionally greater amounts of debt than the capital structures of such utilities threatens reliability or provides an unfair advantage for exempt wholesale generators over such utilities;

(iii) whether to implement procedures for the advance approval or disapproval of the purchase of a particular long-term wholesale power supply; and

(iv) whether to require as a condition for the approval of the purchase of power that there be reasonable assurances of fuel supply adequacy.

(B) For purposes of implementing the provisions of this paragraph, any reference contained in this section to the date of enactment of the Public Utility Regulatory Policies Act of 1978 shall be deemed to be a reference to the date of enactment of this paragraph.

(C) Notwithstanding any other provision of Federal law, nothing in this paragraph shall prevent a State regulatory authority from taking such action, including action with respect to the allowable capital structure of exempt wholesale generators, as such State regulatory authority may determine to be in the public interest as a result of performing evaluations under the standards of subparagraph (A).

(D) Notwithstanding section 124 and paragraphs (1) and (2) of section 112(a), each State regulatory authority shall consider and make a determination concerning the standards of subparagraph (A) in accordance with the requirements of subsections (a) and (b) of this section, without regard to any proceedings commenced prior to the enactment of this paragraph.



(E) Notwithstanding subsections (b) and (c) of section 112, each State regulatory authority shall consider and make a determination concerning whether it is appropriate to implement the standards set out in subparagraph (A) not later than one year after the date of enactment of this paragraph.

## **Sec. 112. Obligations to Consider and Determine.**

(a) REQUEST FOR CONSIDERATION AND DETERMINATION.--Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility may undertake the consideration and make the determination referred to in section 111 with respect to any standard established by section 111(d) in any proceeding respecting the rates of the electric utility. Any participant or intervenor (including an intervenor referred to in section 121) in such a proceeding may request, and shall obtain, such consideration and determination in such proceeding. In undertaking such consideration and making such determination in any such proceeding with respect to the application to any electric utility of any standard established by section 111(d), a State regulatory authority (with respect to any electric utility for which it has ratemaking authority) or nonregulated electric utility may take into account in such proceeding--

(1) any appropriate prior determination with respect to such standard--

(A) which is made in a proceeding which takes place after the date of the enactment of this Act, or

(B) which was made before such date (or is made in a proceeding pending on such date) and complies, as provided in section 124, with the requirement of this title; and

(2) the evidence upon which such prior determination was based (if such evidence is referenced in such proceeding).

(b) TIME LIMITATIONS.--(1) Not later than two years after the date of the enactment of this Act (or after the enactment of the Comprehensive National Energy Policy Act in the case of standards under paragraphs (7), (8), and (9) of section 111(d)), each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 111, or set a hearing date for such consideration, with respect to each standard established by section 111(d).

(2) Not later than three years after the date of the enactment of this Act (or after the enactment of the Comprehensive National Energy Policy Act in the case of standards under paragraphs (7), (8), and (9) of section 111(d)), each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated

electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to each standard established by section 111(d).

(c) FAILURE TO COMPLY.--Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall undertake the consideration, and make the determination, referred to in section 111 with respect to each standard established by section 111(d) in the first rate proceeding commenced after the date three years after the date of enactment of this Act respecting the rates of such utility if such State regulatory authority or nonregulated electric utility has not, before such date, complied with subsection (b)(2) with respect to such standard.

### **Sec. 117. Relationship to State Law.**

(a) REVENUE AND RATE OF RETURN.--Nothing in this title shall authorize or require the recovery by an electric utility of revenues, or of a rate of return, in excess of, or less than, the amount of revenues or the rate of return determined to be lawful under any other provision of law.

(b) STATE AUTHORITY.--Nothing in this title prohibits any State regulatory or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subtitle.

(c) FEDERAL AGENCIES.--With respect to any electric utility which is a Federal agency, and with respect to the Tennessee Valley Authority when it is treated as a State regulatory authority as provided in section 3(17), any reference in section 111 or 113 to State law shall be treated as a reference to Federal law.

### **Subtitle C--Intervention and Judicial Review**

#### **Sec. 121. Intervention in Proceedings.**

(a) AUTHORITY TO INTERVENE AND PARTICIPATE.--In order to initiate and participate in the consideration of one or more of the standards established by subtitle B or other concepts which contribute to the achievement of the purposes of this title, the Secretary, any affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by a nonregulated electric utility.

(b) ACCESS TO INFORMATION.--Any intervenor or participant in a proceeding described in subsection (a) shall have access to information available to other parties to the

proceeding if such information is relevant to the issues to which his intervention or participation in such proceeding relates. Such information may be obtained through reasonable rules relating to discovery of information prescribed by the State regulatory authority (in the case of proceedings concerning electric utilities for which it has ratemaking authority) or by the nonregulated electric utility (in the case of a proceeding conducted by a nonregulated electric utility).

(c) EFFECTIVE DATE; PROCEDURES.--Any intervention or participation under this section, in any proceeding commenced before the date of the enactment of this Act but not completed before such date, shall be permitted under this section only to the extent such intervention or participation is timely under otherwise applicable law.

### **Sec. 122. Consider Representation.**

(a) COMPENSATION FOR COSTS OF PARTICIPATION OR INTERVENTION.--(1) If no alternative means of assuring representation of electric consumers is adopted in accordance with subsection (b) and if an electric consumer of an electric utility substantially contributed to the approval, in whole or in part, of a position advocated by such consumer in a proceeding concerning such utility, and relating to any standard set forth in subtitle B, such utility shall be liable to compensate such consumer (pursuant to paragraph (2)) for reasonable attorney's fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of such position in such proceeding (including fees and costs of obtaining judicial review of any determination made in such proceeding with respect to such position).

(2) A consumer entitled to fees and costs under paragraph (1) may collect such fees and costs from an electric utility by bringing a civil action in any State court of competent jurisdiction, unless the State regulatory authority (in the case of proceeding concerning a State regulated electric utility) or nonregulated electric utility (in the case of a proceeding concerning such nonregulated electric utility) has adopted a reasonable procedure pursuant to which such authority or nonregulated electric utility--

- (A) determines the amount of such fees and costs, and
- (B) includes an award of such fees and costs in the proceeding.

(3) The procedure adopted by such State regulatory authority or nonregulated utility under paragraph (2) may include a preliminary proceeding to require that--

(A) as a condition of receiving compensation under such procedure such consumer demonstrate that, but for the ability to receive such award, participation or intervention may be a significant financial hardship for such consumer, and

(B) persons with the same or similar interests have a common legal representative in the proceeding as a condition to receiving compensation.

(b) ALTERNATIVE MEANS.--Compensation shall not be required under subsection (a) if the State, the State regulatory authority, or the nonregulated electric utility have provided an alternative means for providing adequate compensation to persons

(1) who have, or represent, an interest--

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(2) who are, or represent an interest which is, unable to effectively participate or intervene in the proceeding because such person cannot afford to pay reasonable attorneys' fees, except witness fees, and other reasonable costs of preparing for, and participating or intervening in, such proceeding (including fees and costs of obtaining judicial review of such proceeding).

### TITLE III--RETAIL POLICIES FOR NATURAL GAS UTILITIES

#### Sec. 301. Purposes; Coverage.

(a) PURPOSES.--The purposes of this title are to encourage--

(1) conservation of energy supplied by gas utilities;

(2) the optimization of the efficiency of use of facilities and resources by gas utility systems; and

(3) equitable rates to gas consumers of natural gas.

#### Sec. 302. Definitions.

For purposes of this title--

(9) The term "integrated resource planning" means, in the case of a gas utility, planning by the use of any standard, regulation, practice, or policy to undertake a systematic comparison between demand-side management measures and the supply of gas by a gas utility to minimize life-cycle costs of adequate and reliable utility services to gas consumers.

Integrated resource planning shall take into account necessary features for system operation such as diversity, reliability, dispatchability, and other factors of risk and shall treat demand and supply to gas consumers on a consistent and integrated basis.

(10) The term "demand-side management" includes energy conservation, energy efficiency, and load management techniques.

### **Sec. 303. Adoption of Certain Standards.**

(a) ADOPTION OF STANDARDS.--Not later than 2 years after the date of the enactment of this Act (or after enactment of the Energy Policy act of 1992 in the case of standards under paragraphs (3) and (4) of subsection (b)), each State regulatory authority (with respect to each gas utility for which it has ratemaking authority) and each nonregulated gas utility shall provide public notice and conduct a hearing respecting the standards established by subsection (b) and, on the basis of such hearing, shall--

(2) adopt the standards established by paragraphs (2), (3) and (4) of subsection (b) if, and to the extent, such authority or nonregulated utility determines that such adoption is appropriate to carry out the purposes of this title, is otherwise appropriate, and is consistent with otherwise applicable State law.

For purposes of any determination under paragraphs (1) and (2) and any review of such determination in any court under section 307, the purposes of this title supplement State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

(b) ESTABLISHMENT.--The following Federal standards are hereby established:

(3) INTEGRATED RESOURCE PLANNING.--Each gas utility shall employ, in order to provide adequate and reliable service to its gas customers at the lowest system cost. All plans or filings of a State regulated gas utility before a State regulatory authority to meet the requirements of this paragraph shall (A) be updated on a regular basis, (B) provide the opportunity for public participation and comment, (C) provide for methods of validating predicted performance, and (D) contain a requirement that the plan be implemented after approval of the State regulatory authority. Subsection (c) shall not apply to this paragraph to the extent that it could be construed to require the State regulatory authority to extend the record of a State proceeding in submitting reports to the Federal Government.

(4) INVESTMENTS IN CONSERVATION AND DEMAND MANAGEMENT.--The rates charged by any State regulated gas utility shall be such that the utility's prudent investment in, and expenditures for, energy conservation and load shifting programs and for other

demand-side management measures which are consistent with the findings and purposes of the Energy Policy act of 1992 are at least as profitable (taking into account the income lost due to reduced sales resulting from such programs) as prudent investment in, and expenditures for, the acquisition or construction of supplies and facilities. This objective requires that (A) regulators link the utility's net revenues, at least in part, to the utility's performance in implementing cost-effective programs promoted by this section; and (B) regulators ensure that, for purposes of recovering fixed costs, including its authorized return, the utility's performance is not affected by reductions in its retail sales volumes.

(c) PROCEDURAL REQUIREMENTS.--Each State regulatory authority (with respect to each gas utility for which it has ratemaking authority) and each nonregulated gas utility, within the two-year period specified in subsection (a), shall adopt, pursuant to subsection (a), each of the standards established by subsection (b) or, with respect to any such standard which is not adopted, such authority or nonregulated gas utility shall state in writing that it has determined not to adopt such standard, together with the reasons for such determination. Such statement of reasons shall be available to the public.

(d) SMALL BUSINESS IMPACTS.--If a State regulatory authority implements a standard established by subsection (b)(3) or (4), such authority shall--

(1) consider the impact that implementation of such standard would have on small businesses engaged in the design, sale, supply, installation, or servicing of energy conservation, energy efficiency, or other demand-side management measures, and

(2) implement such standard so as to assure that utility actions would not provide such utilities with unfair competitive advantages over such small businesses.

## Selected Bibliography

- Anton, Thomas J. *American Federalism and Public Policy: How the System Works*. New York: Random House, 1989, 244 pp.
- Bernt, Phyllis, Hans Kruse, and David Landsbergen. *The Impact of New Technologies on Universal Service and Competition in the Local Loop*. Columbus, Ohio: The National Regulatory Research Institute, 1992, 151 pp.
- Burns, Robert E. with Mark Eifert. *A White Paper on the Energy Policy Act of 1992: An Overview for State Commissions of New PURPA Statutory*. Columbus, Ohio: The National Regulatory Research Institute, 1993, 36 pp.
- Corwin, E. D. "The Passing of Dual Federalism." *Virginia Law Review* 36 (February 1950): 19.
- Davis, Vivian Witkind. *Breaking Away from Franchises and Rate Cases: A Perspective on the Evolution of State Telecommunications Policy*. Columbus, OH: The National Regulatory Research Institute, November 12, 1994.
- Fairfield, Roy P. (ed.) *The Federalism: Studies in Intergovernment Relations*. Washington, D.C.: Congressional Quarterly Press, 1984.
- Jones, Douglas N. "The National Energy Act and State Commission Regulation." *Case Western Reserve Law Review* 30, No. 2, Winter 1980, pp. 324-356.
- \_\_\_\_\_. "The Rational Division of Regulatory Authority Between the States and the Federal Agencies." *Public Utility Regulation in an Environment of Change*. East Lansing, Michigan: The Institute of Public Utilities, 1987, pp. 324-356.
- Jones, Douglas N., Robert E. Burns, Frank P. Darr, Mark Eifert, Robert G. Granieri, Reinier H. J. H. Lock, and Robert Poling. *Regional Regulation of Public Utilities: Opportunities and Obstacles*. Columbus, Ohio: The National Regulatory Research Institute, 1992, 336 pp.
- Lane, Frederick S. *Current Issues in Public Administration*, second ed. New York: St. Martin's Press, 1982, 526 pp.
- Lineberry, Ralph L. with George C. Edwards III. *Government in America: People, Politics, and Policy*, fourth ed. Glenview, Illinois: Scott, Foresman and Company, 1989, 676 pp.

- Rivlin, Alice M. *Reviving the American Dream: The Economy, the States, and the Federal Government*. Washington, D.C.: The Brookings Institute, 1992, 196 pp.
- Walker, David B. *Toward a Functioning Federalism*. Cambridge, Mass.: Winthrop Publishers, Inc., 1981, 267 pp.
- Weinhaus, Carol, et al.. "Beyond Future Stock: The Need for Regulatory Response to Technological Change," David Wirick, ed. *Proceedings of the Ninth NARUC Biennial Regulatory Information Conference*. Columbus, OH: The National Regulatory Research Institute, 1994, 175-200.
- Wright, Deil S. "Intergovernmental Relations: An Analytical Overview" in *Current Issues in Public Administration*, second ed., Frederick Lane, ed. New York: St. Martin's Press, 1982.