THE FEDERAL POWER COMMISSION, JOB BIAS, AND
NAACP v. FPC

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For good thoughts, though God accept them, yet towards men are little better than good dreams, except they be put in act; and that cannot be done without power and place, as the vantage and commanding ground.

Sir Francis Bacon†

FREE ENTERPRISE SYSTEM has long been used to describe the structure of the American economy. Yet in a critical sense this characterization is a misnomer, because for many Americans the system has always been anything but free. Indeed, racial and sex discrimination are commonplace even today among the employment practices of a frightening number of employers. Gradually, however, the justice of equal employment opportunity is at last beginning to be recognized, even if it is not yet being universally administered, and many Americans are fast becoming genuinely committed to its realization. Because of this, a recent decision by the United States Supreme Court takes on special significance.

In NAACP v. FPC the Court gamely grappled with a previously unaddressed issue in the area of equal employment opportunity. The Court attempted for the first time to resolve the question of whether a federal regulatory agency other than the Equal Employment Opportunity Commission, in this case the Federal Power Commission, possesses the requisite jurisdiction to regulate employment discrimination by its regulatees. The Court determined that the FPC does possess such jurisdiction, but only to a very limited, circumscribed degree. Unfortunately, in light of the pervasiveness of job bias by FPC-regulated natural gas and electric power companies and the FPC’s unique ability and untapped authority to deal with

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such discrimination, the Court's holding is unnecessarily narrow, rendering its decision less than satisfactory.

This article will carefully examine the holding and reasoning of *NAACP v. FPC* in light of the serious absence of equal employment opportunity in the natural gas and electric power industries. It will consider how and why comprehensive FPC regulation of job bias would likely be effective both in furthering the national goal of equal employment opportunity and in effectuating the purposes for which the FPC was created. Finally, it will demonstrate that the Supreme Court's failure to recognize a statutory requirement that the FPC affirmatively prescribe and extensively regulate the employment practices of its regulatees is unwarranted.

I. THE PROBLEM

Employment in the natural gas and electric power industries is characterized by relatively high pay, job stability, a low level of training required for initial hire in most nonprofessional jobs, on-the-job training, and a significant amount of promotion from within. Thus, it would seem that employment and advancement of minority and female employees would be considerable. Such is not the case.  

A congressional committee has observed that "[d]iscriminatory employment practices based on race, color, religion, sex, or national origin, are more prevalent in the utilities industry than in most other major industries." The EEOC has found, for example, that black employment by natural gas and electric power companies is the lowest (6.1 percent compared to the 10.1 percent average for all major industries) among the twenty-three major industries reporting employment of 500,000 employees or more. Statistics demonstrate that discrimination against Spanish-surnamed Ameri-

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5 CIVIL RIGHTS ENFORCEMENT EFFORT—1974, supra note 3, at 129-32; Hearings Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary, Responsibilities of the Federal Power Commission in the Area of Civil Rights, 92d Cong., 2d Sess. 1, 3, 121, 122 (1972) [hereinafter cited as Hearings]. Natural gas and electric power companies employ almost 70 percent of their black employees in less desirable low-paying service and laborer positions. Less than four percent of the industries' white collar workers are black and 80 percent of these are office and clerical workers. Less than one percent of the industries' managerial and professional personnel are black. One-half of the natural gas and electric power companies filing EEO-1 reports with the EEOC in 1970 reported no black employees. *Id.* For a discussion of trends in black employment by public utilities, see B. ANDERSON, NEGRO EMPLOYMENT IN PUBLIC UTILITIES chs. III-V (1970).
cans and women is equally extensive. It is not surprising, then, that former EEOC Chairman William H. Brown, III has testified:

Employment discrimination is not new to us. The people who serve this Commission have spent most of their adult lives working on problems of human rights. We deal with discrimination every day.

Yet we are shocked. We are astounded in the face of testimony which indicates actual systems of repression by gas and electric utility companies. Not only are women and minority individuals now working in the lowest job classifications, it appears that they are locked into these undesirable jobs for the rest of their working lives.

Numerous documents, statutes, and executive orders attest to the fact that in theory and in principle equal employment opportunity is supposed to be the law of the land. Moreover, the Court on numerous occasions has parroted the oft-spoken rhetoric that the elimination of employment discrimination is a national policy of the highest order. Commendable as this is, it is against the harsh backdrop of reality, as described by former EEOC Chairman Brown, that NAACP v. FPC must be considered.

II. THE PROCEDURAL HISTORY OF NAACP v. FPC

Plaintiffs in NAACP v. FPC were the NAACP and twelve other civil rights organizations representing the interests of black, Spanish-surnamed,

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6 Spanish-surnamed Americans represent 3.6 percent of the national labor force, but hold only 1.6 percent of the jobs in the natural gas and electric power industries. They hold only 1.4 percent of the white collar positions, and 67 percent of these positions are office and clerical jobs. Less than one percent of the industries' managerial and professional personnel are Spanish-surnamed Americans. While women constitute 38 percent of the national labor force, they hold only 14.8 percent of the jobs in the natural gas and electric power industries. These industries relegate nine out of 10 of their female employees to office and clerical positions. Female employment in upper level white collar jobs is also minimal (1.3 percent of the managerial personnel, 2.5 percent of the professional personnel, and 1.5 percent of the technicians). Civil Rights Enforcement Effort—1974, supra note 3, at 129-32; Hearings, supra note 5, at 1, 3, 121, 122.

7 Hearings, supra note 5, at 153.


native, and female Americans. The NAACP alleged widespread employment discrimination against minorities and women by natural gas and electric power companies and petitioned the FPC to adopt a rule prohibiting discrimination on the basis of race, color, religion, sex, or national origin in the employment practices of its regulatees. The NAACP attached a proposed rule to its petition. The FPC issued a declaratory order refusing to initiate the requested rulemaking proceedings on the ground that the Commission allegedly has no jurisdiction to regulate the employment practices of its regulatees. After the FPC denied a petition for rehearing, the NAACP sought direct review of the FPC order in the United States Court of Appeals for the District of Columbia Circuit. Both the NAACP and the FPC then petitioned the Supreme Court to hear the controversy and the Court granted certiorari.

III. THE HOLDING OF NAACP v. FPC

The NAACP asserted both a statutory and a constitutional basis for FPC jurisdiction to regulate employment discrimination. The NAACP's statutory argument was two-pronged. First, the NAACP argued that the FPC must involve itself in such regulation because Congress through the Commission's enabling acts directed the FPC to advance the "public interest." Second, the NAACP argued that the Commission must regulate job bias because Congress through these acts also directed the FPC to ensure "just and reasonable" rates for the consumer in the transmission and sale of electric energy and natural gas. Refusal by the Commission to regulate job bias, argued the NAACP, would thus allow the unnecessary and illegitimate costs of employment discrimination to continue to be passed along to the consumer.

10 The rule would have empowered the FPC "to prescribe personnel practices in detail and to receive complaints, adjudicate them and punish directly infractions of those practices." It also would have required regulatees to adopt affirmative action programs. NAACP v. FPC, 520 F.2d 432, 433, 435 (D.C. Cir. 1975), aff'd, 425 U.S. 662 (1976). For the provisions of the proposed rule see the appendix to the opinion of the D.C. Circuit, id. at 448.


14 The NAACP argued on the basis of the "state action doctrine" that the FPC has a constitutional duty under the fifth amendment to regulate its regulatees' job bias. The Court found it unnecessary to address this issue because the Court was able to ground its holding on language in the Commission's enabling acts. NAACP v. FPC, 425 U.S. 662, 665 n.2 (1976).

15 This statutory command appears throughout the Federal Water Power Act, 16 U.S.C. §§ 791-823 (1970), the Federal Power Act, id. §§ 824-825, and the Natural Gas Act, 15 U.S.C. §§ 717 et seq. (1970). See 15 U.S.C. §§ 717(a), 717f(a), 717f(b), 717f(c), 717f(e), 717n (1970); 16 U.S.C. §§ 797(a), 797(e), 797(g), 800(a), 803(j), 806, 815 (1970); id. §§ 824(a), 824(b), 824(c), 824(e), 824a(a); 824a(b), 824a(c), 824a(e), 824b(a), 824b(b), 824c(a) (1970).

The Court rejected the first prong of the statutory argument. "This Court's cases," stated Justice Stewart, writing for the majority, "have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." Then, looking to the purposes for which Congress passed the FPC's enabling acts, the Court held:

The use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but rather is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.\(^{18}\)

The Court found it instructive to analogize to federal labor law:

No less than in the federal legislation defining the national interest in ending employment discrimination, Congress in its earlier labor

\(^{17}\) Justices Brennan, Blackmun, Powell, Rehnquist, Stevens, and White joined Justice Stewart in the majority opinion. Justice Powell also filed a concurring opinion and Chief Justice Burger filed an opinion concurring in the judgment. Justice Marshall took no part in the consideration or decision of the case.

\(^{18}\) 425 U.S. at 669.

\(^{19}\) See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974), quoting Nebbia v. New York, 291 U.S. 502, 536 (1934) ("In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria . . . , it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . ."); New Haven Inclusion Cases, 399 U.S. 392, 432 (1970) (Under the Bankruptcy Act "'public interest' . . . does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system . . . ."); McLean Trucking Co. v. United States, 321 U.S. 67, 81-82 (1944) (ICC's "guide to the public interest" is the explicit congressional objectives expressed in the agency's enabling act); National Broadcasting Co. v. United States, 319 U.S. 190, 216, 219 (1943) (FCC not empowered by "public interest" criterion to act upon "generalities unrelated to the living problems of radio communication."); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) (meaning of public interest "to be interpreted by its context, by the nature of radio transmission and reception, [and] by the scope, character, and quality of services . . . ."); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932) ("[T]he term 'public interest' . . . is not a concept without ascertainable criteria, but has direct relation to" the purposes of the Interstate Commerce Act); O-J Transport Co. v. United States, 530 F.2d 126 (6th Cir. 1976); City of Lafayette v. SEC, 454 F.2d 941, 948 (D.C. Cir. 1971), aff'd sub nom., Gulf States Util. Co. v. FPC, 411 U.S. 747 (1973) ("[T]hough its public interest language is broad its meaning in context warrants a relatively restricted meaning."); Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968) ("Especially with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards."); City of Chicago v. FPC, 385 F.2d 629, 635 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968) ("A regulatory agency may, should, and in some instances must, give consideration to objectives expressed by Congress in other legislation, assuming they can be related to the objectives of the statute administered by the agency."); Alabama Elec. Cooper Inc. v. SEC, 353 F.2d 905, 907 (D.C. Cir. 1965), cert. denied, 383 U.S. 968 (1966) ("Words like 'public interest' . . . , though of wide generality, take their meaning and definition from the substantive provisions and purposes of the [Public Utility Holding Company Act].") But see Local 880, Retail Clerks Int'l Ass'n v. FCC, 436 F.2d 248 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951); FCC Notice of Proposed Rulemaking, 33 Fed. Reg. 9960, 9962-64 (1968).
legislation unmistakably defined the national interest in free collective bargaining. Yet it could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest," Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees.20

The Court accepted the fundamental premise of the NAACP's "just and reasonable" rates argument, however. On this point the Court agreed with the "basic conclusion" of the D.C. Circuit:

The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility.21

The Court thus held that Congress' directive to the FPC to ensure just and reasonable rates gives rise to a type of Commission jurisdiction to regulate job bias.22 This jurisdiction, however, is much more limited in scope than that for which the NAACP argued. It extends only to the prevention of Commission regulatees "from charging rates based on illegal, duplicative, or unnecessary labor costs" incurred as a result of employment discrimination:

For example, when a company complies with a backpay award resulting from a finding of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, . . . it pays twice for work that was performed only once. The amount of the backpay award, therefore, can and should be disallowed as an unnecessary cost in a ratemaking proceeding.23

20 425 U.S. at 671.
21 Id. at 666-67, quoting NAACP v. FPC, 520 F.2d 432, 444 (D.C. Cir. 1975). The FPC disallows unreasonable costs through its uniform accounting requirements. See General Instructions, 2E of 18 C.F.R. Parts 101, 104, 201, and 204 (1976). See also Account 426.3 of 18 C.F.R. Parts 101, 104, 201, and 204 (1975), which states that regulatees must deduct from income penalties or fines for violations of any regulatory statutes or other laws.
22 See, e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 770 (1968) ("Accordingly, there can be no constitutional objection if the Commission, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile."); FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154 (1962); Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378, 388 (1959) ("The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas . . . and to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges . . . ."); Pennsylvania Water and Power Co. v. FPC, 343 U.S. 414, 418 (1952) ("A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices."); Acker v. United States, 298 U.S. 426, 430-31 (1936) ("[R]egulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs . . . ."); FPC v. Hope Natural Gas, 320 U.S. 591, 610 (1944) (Commission's task under the Natural Gas Act is to "protect consumers against exploitation at the hands of natural gas companies . . . ."); Cities Serv. Gas Co. v. FPC, 424 F.2d 411 (10th Cir. 1970); Safe Harbor Water Power Corp. v. FPC, 179 F.2d 179 (3d Cir. 1949); S. REP. No. 621, 74th Cong., 1st Sess. 17 (1938).
23 425 U.S. at 668.
This article will term such narrow court-sanctioned regulation “limited flow-through regulation.” It is important to distinguish limited flow-through regulation from “regulation per se”—the term used by the D.C. Circuit for the more expansive type of supervision supported by the NAACP’s proposed rule. According to the Court, regulation per se has no statutory basis, and for this reason it not only is not required but probably is prohibited as well.

IV. THE MERITS OF FPC REGULATION

The scope of regulation notwithstanding, FPC involvement in the equal employment opportunity enforcement effort has never been more appropriate. As previously emphasized, employment discrimination among public utilities is alarmingly pervasive. Moreover, the Equal Employment Opportunity Commission is floundering. The EEOC labors under a tremendous backlog of complaints, presently over the 100,000 mark, which is increasing so rapidly that eventually it could take up to five years to process a charge of discrimination. Furthermore, between March 1972, when the Commission obtained the authority to bring civil suits to enforce Title VII, and March 1975, the EEOC filed only 290 civil actions.

The EEOC’s poor record is attributable in large part to problems from within. The Commission lacks internal coordination and cohesiveness.
agency communication of policy is inadequate and the responsibility and accountability of each agency office remains undefined.31 A high attrition rate among the Commission's managerial personnel, which includes frequent turnover of both the EEOC chairmanship and membership on the five-person Commission, at least partially explains this indirection.32 One authority, a former EEOC consultant, has warned that the Commission is succumbing to "creeping bureaucratization," which, unless remedied, will eventually lead to near complete paralysis.33

The administratively bankrupt EEOC cannot alone meet the challenge of eliminating employment discrimination. Of course, under Title VII a victim of employment discrimination can file a private suit against an alleged employment discriminator if the EEOC does not act within 180 days.34 But private enforcement of equal employment opportunity is not a complete answer either, as evidenced by the amount of employment discrimination that still exists, over twelve years after Congress passed the Civil Rights Act of 1964, in the natural gas and electric power industries. One viable alternative is FPC regulation. That a regulatory agency other than the EEOC can have a positive impact in the enforcement of equal employment opportunity was demonstrated by the January 1973 settlement between the EEOC and American Telephone and Telegraph Company, a past employment discriminator.35 The timely influence of the FCC, which regulates AT&T, was instrumental in achieving this settlement.36

The FPC potentially could be just as effective. Considering the large number of natural gas and electric power companies that the Commission regulates, FPC influence would be substantial.37 The Commission has estab-

31 V CIVIL RIGHTS ENFORCEMENT EFFORT—1974, supra note 27, at 501-03, 643; REASSESSMENT, supra note 29, at 82.
32 Blumrosen, supra note 28, at 48. See Chapman, supra note 28; House Panel May Conduct EEOC Probe, supra note 27.
33 Blumrosen, supra note 28, at 49. In addition to its many other problems, the Commission recently was charged with fiscal irresponsibility. The Equal Opportunities Subcommittee of the House Committee on Education and Labor may launch a major congressional investigation into charges that the EEOC spent almost $1 million over its fiscal year 1974 budget and that its fiscal records for 1974 are "chaotic". The subcommittee may also investigate charges that EEOC employees in two district offices mismanaged funds. House Panel May Conduct EEOC Probe, supra note 27.
35 The agreement called for an estimated $15 million in backpay settlements by AT&T and an estimated $23 million to be spent by the corporation in the implementation of a promotion pay plan. This settlement affected an estimated one thousand pending charges with the EEOC against AT&T. Note, Regulatory Agencies and Equal Employment Opportunity—Implications of the AT&T Settlement, 6 CONN. L. REV. 86, 94 n.37, 95 n.40 (1973).
37 The FPC's jurisdiction under the Natural Gas Act extends to approximately 6,200 natural gas producers, of which 82 are considered large, each selling more than 10 billion cubic feet
lished an intimate working relationship with its regulatees. Such a relationship itself would facilitate greater as well as easier compliance with the law of equal employment opportunity. It also makes the Commission eminently qualified to know precisely when discrimination is occurring. Further, the FPC's control over its regulatees' sustenance—licenses, certificates of public convenience and necessity, and rates (including rate of return on investment) —would be a more powerful influence than any EEOC or judicial sanction in encouraging the abandonment of discriminatory employment practices.

Of course, Commission regulation would not provide private remedies such as backpay awards, for those individuals discriminated against. But these persons could still file civil actions under Title VII and perhaps use an FPC finding of discrimination as res judicata for a speedy recovery. Private remedy or not, however, the long term effect of sincere and committed FPC involvement would surely be less employment discrimination.

per year. The FPC has certificate and rate jurisdiction over 123 interstate natural gas pipelines. The Commission's rate jurisdiction under the Federal Power Act extends to approximately 200 public utilities selling electric energy at wholesale in interstate commerce. Brief for Petitioner FPC at 29, 30, NAACP v. FPC, 425 U.S. 662 (1976).


But see J. LANDIS, THE ADMINISTRATIVE PROCESS 12-18 (1938), which discusses the meaning of a "captured agency." A "captured agency" is an agency that is under the influence of its regulatees to the point that it favors only their position. See Nader Unit Asks End of ICC, Calls It "Captive" of Industry, The Washington Post, March 17, 1970, A1, col. 5.

Note, supra note 35, at 114-23; Comment, Administrative Agencies, The Public Interest, and National Policy: Is A Marriage Possible?, 59 Geo. L.J. 420, 431, 433-34 (1970) [hereinafter cited as The Public Interest and National Policy]. See also Agencies Hit As Ineffective Against Bias, The Washington Post, Nov. 12, 1975, at A2, col. 1. In this article Chairman Arthur S. Fleming of the U.S. Commission on Civil Rights suggests that the Office of Management and Budget would be a more effective enforcement agency than the Justice Department in the regulation of racial and sex discrimination in federally funded programs. Fleming suggests that as a sanction the OMB could cut the budgets of agencies that fail to enforce anti-bias regulations, an enforcement mechanism that is not available to the Justice Department. Similarly, it has been suggested that the FCC should be funded only upon a showing that it has complied with national policy. Comment, National Policy and the "Public Interest" —A Marriage of Necessity in the Communications Act of 1934, 114 U. Pa. L. Rev. 386 (1966).

There are other advantages of FPC regulation. It may be less expensive and faster than alternative enforcement mechanisms. The Commission could regulate through rules and administrative hearings, while the EEOC and private plaintiffs must seek compliance through costly and time-consuming civil litigation. Commission proscription of job bias is also desirable because whenever the FPC lacked the expertise to deal with a particular instance of employment discrimination, the Commission could request the EEOC to intervene. As the AT&T settlement indicates, such intervention likely would lessen rather than increase the present EEOC backlog.

Two final considerations argue for FPC regulation. If the Commission

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42 Two of the most important advantages of Commission regulation of job bias—consumer protection against unjust and unreasonable rates and against discrimination in the provision of services—will be discussed in later sections.


45 In Note, EEOC Regulatory Intervention: An Undeveloped Means of Enforcing Title VII, 62 Geo. L.J. 1753 (1974), the author argues that the EEOC's investigative resources and legal expertise in the area of employment discrimination, when coupled with the expansive regulatory control that most administrative agencies exercise over their regulatees, would lead to considerable success in the elimination and prohibition of job bias by regulatees.

46 See note 35 and accompanying text supra.
were even moderately successful in combatting employment discrimination, perhaps those regulatory agencies that have considered the promulgation of an equal employment opportunity rule, and even those that have not, would actively join in the effort to end job bias. Additionally, FPC regulation is probably the only practical means by which consumers could vindicate their contempt for the invidious discrimination of an FPC regulatee. It is difficult for consumers to exert financial pressure to indicate their dissatisfaction with the policies of Commission regulatees. These companies enjoy at least partial monopolies, and an essential product such as electricity or natural gas cannot be boycotted as easily as grapes or lettuce.

In his opinion concurring in the judgment in *NAACP v. FPC*, Chief Justice Burger argued that one of the reasons the FPC cannot regulate employment discrimination through regulation per se is because Congress centralized such responsibility in the EEOC alone. The legislative histories of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 indicate that Chief Justice Burger was not completely correct, however. Congress did not mean that the EEOC should be the only Federal agency to concern itself with job bias.

A memorandum by Senators Joseph Clark and Clifford Case, co-floor managers in the Senate for the 1964 Civil Rights Act legislation, evidences congressional intent to preserve other existing and potential mechanisms for combatting employment discrimination:

Nothing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act . . . . Of course, Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes.

Moreover, in 1964 Congress soundly defeated a proposed amendment to Title VII that would have forbidden "any independent agency of the United States" other than the EEOC to "pursue any remedy with respect to an employment practice . . . covered by this title." A similar amendment intended to make Title VII the exclusive remedy for employment discrimination was introduced in the course of congressional consideration of the Equal Employment Opport-

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48 Note, supra note 35, at 102-103.

49 425 U.S. at 674.

50 110 CONG. REC. 7207 (1964).

51 Id. at 13650, 13652.
tunity Act of 1972. Congress also defeated this proposed amendment in the face of criticism that it would preclude other independent federal agencies, such as the NLRB and the FCC, as well as the Office of Federal Contract Compliance, from taking action against employment discrimination.\textsuperscript{52}

V. THE FPC'S STATUTORY JURISDICTION TO REGULATE EMPLOYMENT DISCRIMINATION

The reasoning of the Supreme Court in \textit{NAACP v. FPC} is, for the most part, fundamentally sound. A number of the conclusions that the Court drew from its reasoning are also well-founded.\textsuperscript{53} Others, however, which will be discussed here, are neither correct nor justified. Unfortunately, the result of such a mix is an unnecessarily narrow holding concerning the FPC's statutory jurisdiction to regulate employment discrimination—a holding that falls short of the more rational result that the Court's basically well-considered analysis commands.

A. Regulation and Consumer Protection Against Unjust and Unreasonable Rates

As previously noted, the Court in \textit{NAACP v. FPC} endorsed limited flow-through regulation of the costs of employment discrimination.\textsuperscript{54} These costs of job bias, which the D.C. Circuit in its opinion accurately and exhaustively defined, are both numerous and varied.\textsuperscript{55}

Some are readily apparent. Duplicative labor costs in the form of backpay recoveries by employees who have proven through civil litigation that they were discriminatorily denied employment or promotion,\textsuperscript{56} the costs of


\textsuperscript{53} See, \textit{e.g.}, notes 15 and 17-20 and accompanying text \textit{supra}.

\textsuperscript{54} See notes 21-26 and accompanying text \textit{supra}.

\textsuperscript{55} See 520 F.2d at 444.

\textsuperscript{56} The EEOC can file civil actions under Title VII. 42 U.S.C. \$ 2000e-5(e) (1970, Supp. V, 1975). A person discriminated against or a group in that person's behalf may file a private civil action under Title VII if the EEOC does not act within 180 days after the individual or group registers a charge. \textit{Id}. A victim of employment discrimination may also bring a private suit under the Civil Rights Act of 1866, 42 U.S.C. \$§ 1981, 1982 (1970), or the Civil Rights Act of 1871, 42 U.S.C. \$ 1983 (1970).

Backpay awards often involve large sums of money. In fiscal year 1975, the EEOC and state and local fair employment agencies achieved conciliation settlements amounting to nearly $111 million. \textit{LAB. L. REP. (CCH)} No. 96 (Nov. 20, 1975). In one not atypical case, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), the Fifth Circuit awarded black victims of employment discrimination more than $2,000,000, including $1,750,000 in back wages, over $90,000 in compensatory per diem payments for travel and living expenses, and over $200,000 in additional pension benefits. See Re Southern Bell Tel. & Tel. Co., 4 P.U.R. 4th 542 (Fla. Pub. Serv. Comm'n 1973); V \textit{CIVIL RIGHTS ENFORCEMENT EFFORT—1974, supra} note 27, at 441 n. 1366, 456; G. GINSBURG, CASES AND MATERIALS ON EQUAL 

losing government contracts terminated because of employment discrimina-
tion,\textsuperscript{57} the costs of attorneys fees and legal proceedings incurred by regula-
tees through the litigation of employment discrimination suits and govern-
ment contract terminations,\textsuperscript{58} and the costs of strikes, demonstrations, and
boycotts against regulatees because they practice job bias are obvious
examples of illegitimate expenditures.\textsuperscript{59}

Other costs are more subtle. When a regulatee discriminates, excessive
labor costs result because job applicants who are discriminated against are
eliminated from the job market. Such employer selectivity is grossly inefficient
because it alters the job search behavior of the victims of discrimination by
discouraging them from seeking other employment. This in turn makes it
more difficult and therefore more expensive for employers as a whole to find
qualified personnel.\textsuperscript{60} More importantly, it fosters inefficiency because many
of these victims, who often are more qualified than the employees actually
hired, are never employed.\textsuperscript{61}

Perhaps the most significant yet subtle costs of job bias are demoraliza-
tion costs. When a minority or female employee is discriminated against in
the form of wages, promotion, underemployment, working conditions, and
the like, that employee is seriously affected psychologically. Discouragement

10294, requires the termination of a federal contract if the private contractor fails to comply
with the nondiscrimination clauses of the contract.

\textsuperscript{58} See, e.g., 520 F.2d at 444; Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir.
Comm'n 1948).

\textsuperscript{59} See 520 F.2d at 444; American Overseas Airlines v. CAB, 254 F.2d 744, 750 (D.C. Cir.
1958); Re Iowa-Illinois Gas & Elec. Co., 100 P.U.R. 3d 1, 11 (Iowa St. Commerce Comm'n
1952).

\textsuperscript{60} B. ANDERSON, NEGRO EMPLOYMENT IN PUBLIC UTILITIES 219 (1970). \textit{See also} B. SCHILLER,

\textsuperscript{61} \textit{See Equal Employment Opportunity and the AT&T Case} 162 (P. Wallace ed. 1976);
J. McCall, \textit{Income Mobility, Racial Discrimination, and Economic Growth} 178 (1973);
2d Sess. (Additional Views on H.R. 7152 of Congressmen William M. McCullock,
John V. Lindsay, Garner S. Schriver, William T. Cahill, Clark MacGregor, Charles Mathias,

The exclusion of a substantial portion of the labor force, regardless of qualification, also
will be less efficient in the long run than using all available manpower resources. See G.
BECKER, \textit{The Economics of Discrimination} ch. 3 (2d ed. 1971); M. FRIEDMAN, \textit{Capitalism
and Freedom} 108-10 (1962); P. SAMUELSEN, \textit{Economics—An Introductory Analysis}
chs. 25, 27 (6th ed. 1964). \textit{See also} Contractors Ass'n v. Secretary of Labor, 442 F.2d 159,
171 (3d Cir. 1971), \textit{cert. denied}, 404 U.S. 854 (1971); United States v. Mississippi River &
Light Co., 10 FEP Cases 1084 (S.D. Miss. 1975); L. THUROW, \textit{supra}, at 158; Boyle, \textit{Equal
Opportunity for Women is Smart Business}, 51 Harv. Bus. Rev. 85 (May-June 1973); \textit{Business
in Brief} (Feb. 1973), quoted in R. COVINGTON, \textit{Labor Relations and Social Problems,
ensues and morale plummets, the ramifications of which can be devastating in terms of increased costs. Individual on-the-job efficiency diminishes, employee unity and employee relationships deteriorate, and absenteeism and turnover increase, all of which reduces productivity.

The Court acknowledged these many illegitimate costs of employment discrimination but expressly refused to hold that all of them are "arguably within" the Commission's "range of concern." Instead, the Court endorsed limited flow-through regulation of only those costs such as backpay awards and attorneys' fees that "are demonstrably the product of a regulatee's discriminatory employment practices . . .".

To the extent that these and other similar costs . . . can be or have been demonstrably quantified by judicial decree or the final action of an administrative agency charged with consideration of such matters, the Commission clearly should treat these costs as it treats any other illegal, unnecessary, or duplicative costs.

Thus the Court held that the FPC should concern itself only with those costs that can be or already have been measured in dollars and cents. This would appear to exclude demoralization costs and the costs incurred from eliminating minority and female employees from the job market, both of which are

62 Elmo Roper, nationally known for his analyses of employee attitudes, has stated:

[W]hen the frustration of discrimination is experienced in a man's job, a whole and permanent part of his personality is eroded. His will and ambition to be useful, to do significant work, his need for stability and security, his full growth into a full human personality are stunted.

An EEOC study of employment discrimination by American Telephone & Telegraph found that "Operators, Service Representatives and clerks, whose expectation for promotion is slim," were "less interested in maintaining a high level of performance. . . ." The vast majority of the employees in these job classifications were female. The study concluded that its findings were consistent with the "Expectancy-Value Theory" that an individual who greatly desires to achieve a goal but realizes that the chances of such achievement are minimal will put forth little effort. EEOC, "A Unique Competence": A Study of Equal Employment Opportunity in the Bell System, in 118 CONG. REC. 4507, 4519 (1972) [hereinafter cited as A Unique Competence]. See EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE, supra note 61, at 140.

63 E. ROPER, supra note 62, at 9, 10-12.

64 A 1969 report by AT&T indicated that in nineteen major metropolitan areas, turnover among telephone operators with less than six months service, most of whom were women, had increased from 80 percent in 1964 to 120 percent in 1968. In many areas turnover among short-term operators had reached 200 percent. A 1970 turnover study by AT&T indicated that 69 percent of all terminating service representatives, most of whom were also women, were not satisfied with their chances for promotion. The EEOC in its own study concluded that much of the blame for such "intolerable turnover" among AT&T's female employees could be traced to the absence of promotional opportunities. A Unique Competence, supra note 62, at 4508, 4518.

65 See NAACP v. FPC, 520 F.2d 432, 444 (D.C. Cir. 1975); E. ROPER, supra note 62, at 7-13; A Unique Competence, supra note 62, at 4518-19.

66 425 U.S. at 668.

67 Id. (emphasis added).
less subject to quantification than the other costs of job bias.  

In one respect the Court's holding is confusing. The majority suggested at one point that its limited flow-through regulation is required; later it suggested that its holding is merely that the FPC has the jurisdiction to regulate in this manner, implying that the Commission may or may not choose to do so. This apparent ambiguity can be reconciled.

Most public utilities, including natural gas and electric power companies, have a legal duty to charge rates that are just and reasonable. Basically, this means that a natural gas or electric power company can charge rates that generate revenue sufficient to meet the company's operating costs and provide a fair return on investment. A utility company may lawfully pass on to the consumer only those operating costs that are "necessary, usual, reasonable and recurring." The FPC normally enjoys considerable discretion in ratemaking and the determination of which costs a company may pass on. Absent arbitrariness, capriciousness, abuse of authority, or lack of supporting substantial evidence, the courts have been reluctant to second-guess the Commission. Justice Harlan, in *Permian Basin Area Rate Cases*, one of the

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68 Justice Powell was obviously troubled that the NAACP v. FPC majority was not sufficiently explicit in limiting its holding to quantifiable costs. In a concurring opinion, he stated: Although implicit in what the Court says, I think it important to emphasize that the costs identified in the opinion of the Court of Appeals as categories (4) [the costs of strikes, demonstrations, and boycotts aimed against discriminatory regulatees], (5) [the costs incurred from the elimination of minority and female employees from the job market], and (6) [demoralization costs] could not be quantified.... In view of the inherently amorphous nature of these categories of costs, it would not be in the public interest to allow intervenors to delay the orderly progress of rate proceedings in the vain hope that such costs might, after protracted litigation, be quantified. I do not read the Court's opinion as requiring any such encumbering of the Commission's prescribed statutory authority and discretion.

425 U.S. at 672 (Powell, J., concurring).

69 The Commission clearly has the duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs. To the extent that such costs are demonstrably the product of a regulatee's discriminatory employment practices, the Commission should disallow them. *Id.* at 668 (emphasis added).

70 We agree, in short, with the Court of Appeals that the Federal Power Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest.

*Id.* at 671 (emphasis added).

71 *Mello, Public Utility Rate Increases: A Practice Manual for Administrative Litigation,* 8


73 *Mello, supra* note 71, at 412, 413.


cases that established this role of the courts in reviewing FPC ratemaking decisions, stated:

[T]he Court must determine whether the order may be reasonably expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The Court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. 8

The Court in NAACP v. FPC cited Permian Basin Area Rate Cases decision 7 and thus must have been aware of its earlier directives concerning judicial review. NAACP v. FPC should be read, therefore, as holding not only that the FPC has the jurisdiction for limited flow-through regulation, but that the Commission must exercise that jurisdiction as well. 8 In other words, the Court apparently gave its own "reasoned consideration" to the "pertinent factors" of ratemaking delineated in Permian Basin Area Rate Cases and itself determined that the economic costs of employment discrimination are unnecessary and illegitimate. In this respect, then, it seems that the FPC no longer enjoys its traditional ratemaking discretion, and the Commission may never pass on to the consumer those costs of job bias that are demonstrably quantifiable. Nevertheless, the opinion is ambiguous.

Notwithstanding this confusion, the Court's reasoning in NAACP v. FPC is clear and in large part persuasive. The Court's insistence that any regulation be reasonably related to the FPC's statutorily defined objectives is analytically sound. Its holding, however, is narrow beyond justification. Limited flow-through regulation—defined by the Court as the regulation of costs that are demonstrably quantifiable—perhaps would result in more just and reasonable rates if each of the costs of employment discrimination could be quantified. As the Court itself recognized, such is not the case. 9 Backpay recoveries, loss of government contracts, and litigation expenses may readily yield to measurement, 10 but other costs—demoralization costs and the

76 Id. at 792.
77 The Court cited Permian Basin Area Rate Cases in its opinion. 425 U.S. at 670 n.5. Both the NAACP and the FPC cited the case in their briefs to the Court. Brief for Petitioner FPC at 17, 30; Brief for Petitioners NAACP et al. at 39, n.42, NAACP v. FPC, 425 U.S. 662 (1976).
78 The FPC recognizes its responsibility to determine which costs it may appropriately pass on to the consumer, and has promulgated a regulation that requires regulatees to deduct from income penalties or fines for violations of any regulatory statutes or other laws. See note 21 supra.
79 See 425 U.S. at 668.
80 See notes 56-58 and accompanying text supra. Despite Justice Powell's reservations, note 68 supra, the costs of strikes, demonstrations, and boycotts would also appear to be reasonably subject to quantification. See note 59 and accompanying text supra.
excessive labor costs incurred when minorities and women are eliminated through discrimination from the prospective labor force—quite obviously do not.\textsuperscript{81}

Consider the conclusion of one EEOC study of employment discrimination:

It is difficult to quantify all of the effects of . . . [employment] discrimination. Statistical measures omit the real, human tragedies testified to by Ms. Weeks and Ms. Roig. Sterile, economic measures cannot be ignored, however, for if they indicate enormous financial deprivation, surely the intangible consequences of discrimination are severe.\textsuperscript{82}

Another authority, testifying before a Senate subcommittee on equal employment opportunity legislation, framed the problem of quantification this way:

Here we are speculating about a Negro's lack of motivation. We might just as well tie a man's legs together and then wonder how fast he can run.

This is a very complex problem. The lack of motivation is caused by lack of success. Life for most Negroes is just a vicious circle that keeps grinding down and down and deeper and deeper. The question you ask, Senator [How do we provide the motivation?], will never be answered until the Negro is given an equal opportunity with the whites and until he has some time to make up for gross injustices done in the past.\textsuperscript{83}

\textsuperscript{81} The quantification problem notwithstanding, several economists have advanced economic theories of discrimination that successfully demonstrate the effect of job bias on consumer prices. The pioneer in this development was Gary Becker. See G. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971). Although important contributions to the study of the economics of discrimination, Becker's theory, and the theories of his disciples, are not relevant here. These theories are grounded in the study of discrimination and its effect on wage differentials and do not expressly account for or even mention the costs of job bias discussed in this article. See EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE, supra note 61, at 11-22; B. SCHILLER, THE ECONOMICS OF POVERTY AND DISCRIMINATION (1973). See also R. TSUCHIGANE & N. DODGE, ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES 40-41 (1974); ARROW, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS (O. Ashenfelter & A. Rees eds. 1973).

It should also be noted that in 1950, one authority, Elmo Roper, asserted that each year the total cost of discrimination to American business and industry is at least $10 out of every $75 paycheck, or $30 billion annually. Unfortunately, Roper did not explain in any detail how he reached these figures or what specific costs of discrimination they reflect. E. ROPER, supra note 62, at 5, 13.

\textsuperscript{82} A Unique Competence, supra note 62, at 4522 (footnote omitted) (emphasis in original). See also G. BECKER, THE ECONOMICS OF DISCRIMINATION chs. 10-11 (2d ed. 1971); B. SCHILLER, THE ECONOMICS OF POVERTY AND DISCRIMINATION 133 (2d ed. 1976); Hearings, supra note 5, at 150.

\textsuperscript{83} Hearings on S. 773 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 383 (1963) (Statement of Herman P. Miller, Special Ass't, Office of the Director, Bureau of the Census).
The difficulties inherent in measuring these costs of employment discrimination do not make them any less real or substantial, however. This is especially true with respect to demoralization costs. The D.C. Circuit has observed that Senate and House hearings on equal employment bills are laced with references to the degradation, disillusionment, lack of motivation, and lessening of incentive to improve which result from racial discrimination in employment. 84

Congressman Jacob H. Gilbert of New York made one such reference in his testimony on equal employment opportunity legislation before a House subcommittee:

The malicious, destructive, discriminatory practices which now abound in all fields of employment throughout our country, affecting millions of our people, must be brought to an abrupt halt. We must not continue to ignore the terrible degradation suffered by those who are victims of discrimination in employment . . . , for this anguish is visited upon their children and continues on and on. All hope is killed in the very young; they know that although they have a high degree of intelligence, are ambitious and industrious, . . . they will be denied advancements to which they are entitled in any job they hold, because they are of a minority group. 85

The EEOC has also documented the existence of widespread demoralization costs. One of its studies reports that in a 1970 turnover study conducted by an employment discriminator, typical employee comments were:

"There is no real chance for advancement in the Company;" "I would not have terminated my employment with the Company if I felt I would have advanced within a year;" "I was impressed with the fact that women are discriminated against." 86

While the Court in NAACP v. FPC did not dwell upon the magnitude of demoralization costs or the costs incurred when minorities and women are eliminated through job bias from the labor market, it did recognize

86 A Unique Competence, supra note 62, at 4507, 4518. See note 64 supra. The study revealed that 69 percent of all terminating employees in a particular job classification (most of whom were women) were not satisfied with their opportunity for promotion. Id. at 4518.
the difficulty of quantifying these costs. Yet the Court endorsed Commission regulation anyway, and sought to circumvent the quantification dilemma by limiting such regulation to costs that can be demonstrably measured. In this way the Court apparently hoped to strike a balance between what it perceived to be reasonable regulation and the congressional requirement of just and reasonable rates. However, the FPC enabling acts require just and reasonable rates in unequivocal and categorical terms. By its choice of language Congress prohibited all costs determined by the courts or the FPC to be illegitimate, not just such of those illegitimate costs as can be conveniently quantified. This congressional mandate cannot and should not be compromised. The NAACP v. FPC definition of limited flow-through regulation, however, does precisely that. By determining that those costs of job bias that "are demonstrably the product of a regulatee's discriminatory employment practices" are "illegal, duplicative, [and] unnecessary," but then in a second breath prohibiting only such of those costs that can be or have been "demonstrably quantified," the Court violated the very statutory mandate that it so painstakingly sought to follow throughout its opinion. Demoralization costs and the costs of eliminating those discriminated against from the job market are "demonstrably the product" of job bias, even if they do defy ready quantification. And particularly in the case of demoralization costs, this "product" is quite a large one indeed. For this reason the Court's limited flow-through regulation is unacceptable.

The Court's holding in NAACP v. FPC might be more palatable if the only means of curtailing these unquantifiable costs were their quantification followed by their elimination through limited flow-through regulation. But another unexplored avenue exists. The FPC can prevent these costs, as well as those costs that can be measured, from being borne by the consumer by preventing them from ever arising. This requires the eradication of the costs' root cause—employment discrimination itself—

87 See note 16 and accompanying text supra. The Federal Water Power Act states:
[T]he rates charged and the service rendered ... [by regulated electric power companies] ... shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable, discriminatory and unjust rates or services are prohibited and declared to be unlawful ... 16 U.S.C. § 813 (1970).

The Federal Power Act states:
All rates and charges ... shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

88 See note 22 supra.
89 425 U.S. at 668.
90 See notes 21-22 and accompanying text supra. See also notes 15 & 17-20 and accompanying text supra.
which can only be accomplished through what this article will term "preventive flow-through regulation." 91

Preventive flow-through regulation would be much like the antidiscrimination measures currently used by the FCC, with several improvements. 92 The FPC would prescribe in detail the minimum requirements to which its regulatees must adhere in their personnel practices. The Commission then would receive or, after Commission investigation, would itself raise complaints, adjudicate them, and punish infractions. 93 The Commission could adjudicate these complaints through an independent administrative hearing or through a subhearing when a regulatee applies for a license or license renewal, a certificate or certificate renewal, a rate renewal...

91 At this juncture, several points deserve emphasis. First, it is important to realize that on the basis of a purely economic analysis, if all of the costs of job bias could be accurately quantified, and these costs proved to be less than the cost of FPC regulation, either preventive or limited, the Commission would better serve the consumer by allowing the costs of job bias to continue to be passed along. If this were in fact the case, perhaps FPC regulation not only would not be required, but it also would be prohibited.

Second, one may legitimately ask whether preventive flow-through regulation is or should be required for all types of unnecessary yet unquantifiable costs. For example, if the natural gas and electric power industries were characterized by widespread theft of company stamps by assistant vice-presidents, and although it was clear that such thefts were occurring, the costs involved could not be accurately measured, would or should some type of preventive flow-through regulation of stamp theft be required? In other words, why should preventive regulation be required for the costs of employment discrimination and not for other illegitimate costs? The answer lies in the importance of equal employment opportunity as a social policy. Both the prohibition of employment discrimination and the prohibition of stamp theft make good sense economically, but the prohibition of employment discrimination, unlike the prohibition of stamp theft, is also a social goal of the highest priority. See note 9 and accompanying text supra. Congressman William McCulloch made the point well when he stated:

Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.


Finally, this article discusses preventive flow-through regulation in the context of a judicial road not taken, Congress should also rethink the FPC's enabling acts and consider passing legislation that expressly provides for preventive regulation of job bias. President Carter's energy reorganization bill, which would abolish the FPC and transfer its functions and programs into a new Department of Energy, should provide Congress with such an opportunity. See Carter Sends Energy Unit Plan to Hill, The Washington Post, March 2, 1977, at A1, col. 6.


93 Before it would act, the Commission would refer any complaints of noncompliance involving an alleged violation of Title VII to the EEOC. If the EEOC did not act or did not satisfactorily resolve the complaint, then the FPC could invoke its jurisdiction. In some instances, because of the FPC's expertise or likely effectiveness, see notes 37-44 and accompanying text supra, or because of problems that the EEOC is facing, see notes 27-33 and accompanying text supra, the EEOC may wish to request that the FPC proceed in lieu of EEOC action. See also notes 45-46 and accompanying text supra.
or increase, or any other FPC-controlled benefit.94 Punishment for infractions of prescribed personnel practices could take the form of an FPC corrective order to the regulatee to comply within a reasonable period of time in order to receive or keep its license or certificate.95 An alternative sanction would be the denial of the regulatee's application for a rate renewal or the adjustment of its rate levels according to the gravity and extent of the discrimination involved.96 The Commission also could vary the regulatee's rate of return on investment.97

Preventive flow-through regulation also would require the regulatee to file with the FPC a copy of its EEO-1 form, a report that many regulatees must file annually with the EEOC. This would assist the Commission in supervision of regulatees' affirmative action programs, another suggested requirement of preventive flow-through regulation. Affirmative action would be necessary for effective FPC preventive regulation. Consider the observations of one authority:

Of all the types of discrimination which the Civil Rights Act prohibits, the most difficult to detect and to enforce is discrimination in employment. This is "an area in which subtleties of conduct play no small part." It is relatively easy for an employer... to set up artificial barriers where it is exceedingly difficult for the law to penetrate.98

94 In adjudicating complaints the FPC should consider several approaches that may facilitate more effective and efficient adjudication. The Commission should consider treating EEOC and judicial decisions in employment discrimination cases as binding in its own proceedings. See Daly, supra note 36, at 682-87. The FPC should consider allowing the use of statistical evidence to prove and disprove employment discrimination. Id. at 669-73. See Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC, 492 F.2d 656 (D.C. Cir. 1974); Stone v. FCC, 466 F.2d 316, 325-326 (D.C. Cir. 1972). The Commission also should consider allowing the use of the "prima facie case" in its proceedings. Federal court Title VII litigation involves this approach. Once a complainant proves that he or she is qualified and that statistically his or her minority group or sex is significantly underrepresented in the employer's work force, a prima facie case of discrimination is made. The burden of production then shifts to the employer to demonstrate that no discrimination occurred. This approach is especially important where a complainant encounters difficulty in proof because of problems in obtaining evidence of the employer's hiring practices. See NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984 (1971). See also Fiss, A Theory of Employment Laws, 38 U. Chi. L. Rev. 235, 270-73 (1971).

95 See 15 U.S.C. §§ 717f(e), 717o (1970); 16 U.S.C. §§ 797(e), 797(f), 798, 799, 800, 820, (1970); note 40 supra and accompanying text. The FPC should use revocation sparingly, only as the ultimate penalty in cases of severe or repeated noncompliance when no other sanction would be appropriate or has been effective. Despite its draconian effect, however, the Commission should resort to revocation when necessary.


97 Id. Basically, rate of return on investment is that portion of a regulatee's rate set by a regulatory agency to allow the regulatee "to support its credit and to raise required supplies of new equity capital on terms fair to the old investors..." J. BONBRIGHT, supra note 72 at 257-58. See note 72 and accompanying text supra.

Affirmative action is needed to penetrate such artificial barriers. Clifford Alexander, a former chairman of the EEOC, has noted that "it has been the experience of the EEOC that a periodic showing of affirmative action is usually necessary to effectively eliminate discrimination . . . ."\textsuperscript{99}

The details of affirmative action plans should be left to the FPC's informed discretion, but as a minimum such plans should require regulatees to implement continuing employment practices designed to assure equal job opportunity. Recruiting qualified personnel through schools and colleges with substantial minority group enrollments, encouraging present employees to refer qualified minority and female applicants for employment consideration, and avoiding the use of culturally biased employment tests and other inherently discriminatory hiring techniques are representative.\textsuperscript{100} Any type of quota system in employment or promotion would, of course, be undesirable as well as illegal.\textsuperscript{101}

Preventive flow-through regulation may be more necessary today than ever before. The United States is currently facing a serious energy shortage. The FPC has recognized that the financial health of utility companies is "the greatest electric power problem confronting the industry and the nation."\textsuperscript{102} Considering the costs associated with the extensive employment discrimination by natural gas and electric power companies, the financial health of these companies would likely be improved by preventive flow-through regulation. The curtailment of these unnecessary costs by the curtailment of job bias itself would mean not only that consumers would not have to shoulder higher than necessary rates, but it would also mean that such costs would not have to be absorbed by the companies either. Profits would likely increase, dividends would grow larger, and bond ratings would improve, attracting new investment capital for expansion, exploration, and the development of energy reserves. Of course, the cost of preventive flow-through regulation may itself appear large in the short run. But over time, as the Commission and its regulatees together reduced employment discrimination and its associated costs, the long run financial benefits to natural gas and electric power companies would likely be worth it.

As a final point, it is important to note that in spite of its pervasiveness,
preventive flow-through regulation is not analytically inconsistent with \textit{NAACP v. FPC}. The Court required limited flow-through regulation only because the task of ensuring that the illegitimate costs of job bias are not passed along to the consumer is synonymous with the FPC's statutory mandate to protect that consumer against unjust and unreasonable rates. In this respect preventive flow-through regulation is no different from limited flow-through regulation. Authority for preventive regulation, like authority for limited regulation, can be traced directly to the Commission's enabling acts. Preventive regulation, like limited regulation, is designed to eliminate the unlawful effect of the costs of job bias on regulatees' rates. As Judge McGowan noted in the D.C. Circuit opinion in \textit{NAACP v. FPC}, the truly pivotal distinction to be made is "between regulation reasonably related to the Commission's central functions, and regulation of employment discrimination for its own sake." Preventive flow-through regulation, it is contended, is of the former variety.

B. Regulation and Consumer Protection Against Service Discrimination

Through Sections 205(b) and 206(a) of the Federal Power Act and Sections 5(a) and 4(b) of the Natural Gas Act, Congress expressly charged the FPC to prohibit discrimination by regulatees in the provision of their services. The Court in \textit{NAACP v. FPC} did not mention this requirement, but the D.C. Circuit in its opinion did. The circuit court suggested that, unlike the case with FCC regulatees, "the likelihood that... discrimination in employment might work its way into the provision of [FPC regulatees'] services seems to us a slight one." For this reason, the D.C. Circuit found that Congress' prohibition against service discrimination does not require FPC regulation of job bias.

Many of the decisions by natural gas and electric power companies, while of little consequence to other consumers, may particularly affect members of minority groups. This results in part from the nation's extensive residential segregation. When a natural gas or electric power company

\begin{footnotes}
\item[103] 520 F.2d at 444.
\item[104] 16 U.S.C. §§ 824d(b), 824e(a) (1970). This statutory instruction to prohibit service discrimination by regulatees has prompted the Commission to proscribe discrimination on the basis of race, color, religious creed, and national origin in the use of recreational facilities at licensed hydroelectric projects. See 18 C.F.R. §8.3 (1967). The Commission has enforced this regulation through field inspections and by entertaining complaints in connection with license renewal proceedings. \textit{Hearings, supra} note 5, at 60-61, 73-74. The regulation of discrimination, then, is not new to the FPC.
\item[106] 520 F.2d at 443.
\end{footnotes}
decides to construct, \textsuperscript{108} improve, \textsuperscript{109} extend, \textsuperscript{110} or abandon\textsuperscript{111} a facility, such decisions could significantly affect the quality or even the continued existence of services to minorities.\textsuperscript{112} Rate structure decisions could also favor or disadvantage those residing in neighborhoods of predominantly minority group composition,\textsuperscript{113} as could decisions by natural gas and electric power companies concerning the resolution of environmental problems.\textsuperscript{114}

If there is to be proper sensitivity to the effects of these decisions on minority populations, and if, as the statutes clearly require, there is to be adequate assurance the minorities will not be discriminated against as a result of these decisions, members of minority groups must be parties to the decision-making process. Natural gas and electric power companies can fully and effectively ensure such input only by hiring qualified minorities and placing them in positions of corporate responsibility. This requires equal employment opportunity, which, considering the magnitude of job bias in these industries, necessitates FPC preventive flow-through regulation.\textsuperscript{115} While the primary purpose of such regulation is, of course, the eradication

\begin{thebibliography}{99}
\bibitem{112} See Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) (Mississippi town held to be discriminating against black residents by not providing certain municipal services); Abascal, \textit{Municipal Services and Equal Protection: Variations on a Theme by Griffin v. Illinois}, 20 \textit{Hasting} L. REV. 1367, 1369 (1969); Comment, \textit{Equal Protection in the Urban Environment: The Right to Equal Municipal Services}, 46 \textit{Tul. L. Rev.} 496 (1972). Abascal writes of a group of impoverished Mexican-American farmworkers from Wasco, California, who filed a complaint with the California Public Utilities Commission. The group alleged that a private water company served their Mexican-American residential area of Wasco, while a municipal water company served the rest of Wasco. According to the complaint, the water received by the Mexican-Americans was oily, turgid, bacteria-ridden, and unpalatable, while the rate they were charged was higher than the rate charged by the municipal system.
\bibitem{113} For a discussion of the impact of rate structure decisions on minority neighborhoods, see Memorandum of David J. Bardin, former Deputy General counsel of the FPC, in \textit{Hearings, supra} note 5, at 89-91, 97-98.
\bibitem{114} In FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1, 5,30 (1961), respondents alleged that by permitting the Consolidated Edison Company in New York City to use natural gas would significantly reduce air pollution. As American cities become increasingly populated by blacks and other minority groups who cannot afford the “flight to the suburbs,” environmental decisions by natural gas and electric power companies could significantly affect racial and ethnic minorities concentrated in urban areas. See generally Note, \textit{Application of the Preemption Doctrine to State Laws Affecting Nuclear Power Plants}, 62 \textit{Va. L. Rev.} 738, 756 (1976).
\end{thebibliography}
of the costs of job bias, it necessarily involves the elimination of job bias itself.\textsuperscript{116}

One commentator argues from a somewhat different perspective that the nondiscrimination in services requirement implicitly mandates Commission regulation of job bias.\textsuperscript{117} He asserts that natural gas and electric power companies occupy privileged positions. As regulatees, they are granted at least partial monopolies as well as the use of limited public resources in order to provide their services to the public. These industries benefit handsomely in the sale of their services from such protection against free market competition and the use of limited public resources. In return, the public is entitled to expect adequate services \textit{and} the opportunity for employment that arises out of the provision of these services. Moreover, \textit{both} benefits, it is argued, should be equally accessible to all. To ensure such accessibility, however, necessitates extensive FPC regulation of employment discrimination, which preventive flow-through regulation would provide.

\textbf{CONCLUSION}

In \textit{NAACP v. FPC} the Court held that the FPC must initiate limited flow-through regulation of the costs of employment discrimination. The Court charged the Commission to prevent only the quantifiable costs of job bias from being passed along to the consumer of natural gas and electric power. The Court's analysis is basically sound, as evidenced by the Commission's enabling acts, their legislative histories, and judicial construction of these statutes. The Federal Water Power Act, the Federal Power Act, and the Natural Gas Act direct the FPC to ensure just and reasonable rates by its regulatees. The courts have construed two of these acts—the Federal Power Act and the Natural Gas Act—as being primarily concerned with the protection of the natural gas and electric power consumer against economic exploitation. Hence, FPC regulation of employment discrimination is proper.

\textsuperscript{116} The D.C. Circuit in \textit{NAACP v. FPC} implied that if service discrimination by FPC regulatees were ever found to be "so subtle and unsusceptible of direct remedy as to require the eradication of its root cause," extensive FPC regulation of employment discrimination would be proper. 520 F.2d at 443. \textit{See Pennsylvania Water and Power Co. v. FPC}, 193 F.2d 230, 234 (D.C. Cir. 1951), \textit{aff'd}, 343 U.S. 414 (1952), which also suggests that preventive flow-through regulation would be appropriate:

\begin{quote}
In place of competition as a generalized and indirect regulator of prices and services in the field of interstate transmission of electric energy at wholesale, Congress has substituted a regulatory agency authorized to supervise almost every phrase of the regulated company's business. Rates charged by such utilities, as well as the services and contractual provisions affecting them, must be "just and reasonable." And what is "just and reasonable" is . . . determined . . . by the adequacy of the service to the public . . . . [footnote omitted].
\end{quote}

\textsuperscript{117} Note, \textit{supra} note 35, at 102. \textit{See generally The Public Interest and National Policy}, \textit{supra} note 40, at 435 n.74.
The Court's analysis may be sound, but its result is less than satisfactory. Many of the costs of employment discrimination, although real and substantial, are difficult, if not impossible, to measure in dollars and cents. The answer, however, is not limited flow-through regulation. Congress in the FPC's enabling acts expressly and unequivocally required just and reasonable rates, thus prohibiting all costs determined to be illegitimate, unnecessary, and duplicative, not just such of those costs that are demonstrably quantifiable. The only effective approach, therefore, and the approach the Court should have sanctioned, is the eradication of all illegitimate costs of job bias before they arise. This requires the elimination of employment discrimination itself through preventive flow-through regulation.

Although much more extensive than limited flow-through regulation, preventive regulation is still consistent with the *NAACP v. FPC* analysis. The primary purpose of preventive regulation is the regulation of the costs of job bias; its jurisdiction, therefore, is firmly established in the Commission's enabling acts. Moreover, regulation as extensive as preventive flow-through regulation is necessary to prevent service discrimination by regulatees, a practice that the FPC enabling acts also expressly forbid.

*NAACP v. FPC* and the questions that it poses should also be viewed in light of other legitimate considerations. Employment discrimination in the natural gas and electric power industries is alarmingly pervasive. The EEOC, plagued by a myriad of internal problems and floundering badly, has been ineffective in combatting this discrimination. Private enforcement of equal employment opportunity, though helpful, is alone not an adequate solution either. Proper FPC regulation of employment discrimination could be a worthwhile addition to the EEOC and private enforcement efforts, because of the FPC's special relationship with its regulatees and the powerful regulatory sanctions at the Commission's disposal. Unfortunately, limited flow-through regulation does not take advantage of this unique potential. Preventive flow-through regulation would.

These criticisms notwithstanding, some may legitimately view *NAACP v. FPC* as a modest first step. Limited regulation is, after all, better than no regulation. But if it is a beginning, it is an unnecessarily small one. "Equal employment opportunity is the law of the land" has long been an empty and unfulfilled promise, especially in the natural gas and electric power industries. *NAACP v. FPC* is not likely to change that significantly.