ANALYSIS OF A FEDERAL POLICY OBJECTIVE: THE ABSENCE OF STATE REGULATORY AUTHORITY OVER PRIVATIZED MILITARY BASE UTILITY SYSTEMS

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I. INTRODUCTION

In 1997, Congress enacted the Defense Reform Initiative requiring the privatization of utility systems on federal military installations using competitive bidding procedures.[1] The Department of Defense (DoD) has since issued Requests for Proposals (RFP) with respect to privatization of electric distribution facilities located at various defense installations.[2] The RFP terms typically dictate that the successful bidder will operate and maintain the facilities for a significant number of years.[3] The successful

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1. 10 U.S.C.A. § 2688 (West 1998 & Supp. 2002). In this paper, "privatization" is the shorthand expression used to signify a change from Federal Government operation of the utility systems to operation by private entities under contract with the Federal Government.

2. *See* Defense Energy Support Center, A Utility Privatization Initiative, *available at* http://www.desc.dla.mil/PublicPages/a/priv/priv.cfm (last modified Sept. 12, 2001).

3. *See* Defense Energy Support Center, A Utility Privatization Initiative, Request for Proposal SP0600-01-R-0067 at 28, *available at* http://www.desc.dla.mil/PublicPages/a/priv/FortRucker/sol.pdf

bidder will typically not take title to any electricity flowing over the facilities but will be obligated simply to ensure that the facilities continue to operate in a manner that ensures reliable flow of electricity across those facilities.[4] Through such facilities, electricity may be provided by the government to non-governmental entities—for example, to parties who lease property on a DoD facility from the government.[5]

Privatization of federal utility facilities raises an obvious question: by operating the facilities at a defense installation, will the successful bidder become a utility subject to regulation by the public utility regulatory commission in the state in which the installation is located?

This is an important question because it will significantly affect a business entity's decision regarding whether to submit a bid to take over operation of facilities that the government seeks to privatize. Certain entities might choose not to bid if it is clear that the successful bidder will become a regulated utility. Thus, the specter of regulation could substantially reduce the pool of willing bidders, frustrating the government's privatization efforts.

In many instances, the state in which the defense facility is located has ceded jurisdiction over the defense facility property to the United States.[6] Such cession of jurisdiction is one indicator that bidders in privatization projects might reasonably expect that their activities will not trigger state regulation. Furthermore, Congress has expressly stated that DoD facilities are to be privatized competitively, so that both regulated and unregulated entities may participate in that process without regard to local franchise regulation.[7] Thus, as a general matter it is reasonable to conclude that ownership and operation of privatized facilities would not subject the successful bidder to regulation as a utility by the state regulatory commission.[8] Such a result will promote more diverse participation in the American electric industry and should certainly facilitate the Federal Government's privatization efforts.

II. FEDERAL ENCLAVES GENERALLY

A federal enclave is territory acquired by the Federal Government, with the consent of the state or a territory, over which the state has ceded to the Federal Government exclusive or partial jurisdiction pursuant to the Federal

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(Sept. 28, 2001) (last visited Oct. 12, 2001).

4. *See id.* at 13-14.

5. *See id.* at 13, 15.

6. *See* Balt. Gas & Elec. Co. v. United States, 133 F. Supp. 2d 721, 742 (D. Md. 2001).

7. 10 U.S.C.A. § 2688(b) (West 1998 & Supp. 2002).

8. Because the circumstances regarding the jurisdictional status of each federal enclave are specific to the enclave in question, the general rule that states do not have jurisdiction over privatized facilities on defense installations may not be the case in all instances. This article presents an analysis that may be applied as part of the necessary detailed examination of the specific facts.

Enclave Clause of the United States Constitution.[9] The Federal Enclave Clause gives Congress the power "[t]o exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings."[10]

The power conferred upon the Federal Government by the Federal Enclave Clause is broad. For example, the phrase "other needful Buildings" is broadly construed "as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government."[11] Moreover, "the acquisition by consent or cession of exclusive or partial jurisdiction over properties for any legitimate governmental purpose beyond those itemized is permissible."[12]

In general, the Federal Government possesses exclusive jurisdiction over a federal enclave.[13] Except to the extent state jurisdiction, consistent with federal uses, has been reserved in the deed of cession, a state may not exercise jurisdiction over a federal enclave unless expressly permitted by Congress.[14] However, state laws in effect at the time of the cession are deemed part of the federal law applicable to the enclave (unless later abrogated by Congress) so long as they are consistent with federal law and policy.[15]

III. A FUNDAMENTAL CONSIDERATION—STATE RELINQUISHMENT OF JURISDICTION

The DoD has recently issued a RFP concerning privatization of the electric utility facilities at Fort Leavenworth in Kansas.[16] The Fort Leavenworth military installation is a federal enclave over which the State of

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9. U.S. CONST. art. I, § 8, cl. 17.

10. *Id.*

11. James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

12. Kleppe v. New Mexico, 426 U.S. 529, 542 n.11 (1976) (citation omitted).

13. U.S. CONST. art. I, § 8, cl. 17.

14. Paul v. United States, 371 U.S. 245, 268 (1963); *see also* Fort Leavenworth Ry. Co. v. Lowe, 114 U.S. 525, 528 (1885).

15. When a state has ceded exclusive jurisdiction to the United States over property acquired by the Federal Government, the Constitution "bars state regulation [over that property] without specific congressional action." *Paul*, 371 U.S. at 263. "[S]tate laws which have not been explicitly or implicitly adopted by the United States . . . are ineffective over persons or property on the enclave." United States v. Lewisburg Area Sch. Dist., 539 F.2d 301, 306 (3d Cir. 1976). Nonetheless, "a State may condition its [cession] upon its retention of jurisdiction over the lands consistent with the federal use." *Paul*, 371 U.S. at 265 (citation omitted). In addition, the Federal Enclave Clause has long been interpreted as permitting the continued applicability, as part of the federal law governing the enclave (unless abrogated by later congressional action), of state laws in effect at the time the state surrendered sovereignty so long as the laws are not inconsistent with federal law or policy. *Id.* at 268.

16. Defense Energy Support Center, A Utility Privatization Initiative, Solicitation SP0600-01-R-0026, *available at* http://www.desc.dla.mil/PublicPages/a/priv/priv.cfm (last modified July 13, 2001).

Kansas has ceded jurisdiction to the Federal Government.[17] Consequently, the Fort Leavenworth privatization effort is a helpful platform for analysis of the state regulatory issues raised by such privatization efforts on federal enclaves.

In February of 1875, the Legislature of the State of Kansas passed an act entitled "An Act to cede jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation."[18] In pertinent part, the 1875 Act states as follows:

> That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation.[19]

That Act ceded to the Federal Government jurisdiction over the Fort Leavenworth installation.[20] In a subsequent decision, the Supreme Court clarified that the United States has exclusive jurisdiction over the entire Fort Leavenworth military reservation, even those portions that are used for agricultural (*i.e.*, ostensibly non-military) purposes.[21] The Court's rationale was that the entire tract of land that constitutes Fort Leavenworth had been legally reserved by the Federal Government for military purposes; thus, the State of Kansas had no jurisdiction, even over a crime that was committed on property used for agricultural purposes within Fort Leavenworth.[22] Since the 1875 Act reserved to the State of Kansas "the right to tax railroad, bridge and other corporations," the Supreme Court did uphold the State of Kansas' reservation to impose franchise and property taxes within Fort Leavenworth because that act of state regulation did not interfere with the Federal Government's use of the fort for military purposes.[23]

Notably, the State of Kansas did not reserve jurisdiction within Fort Leavenworth for the purpose of regulating the provision of utility services.[24]

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17. *Lowe*, 114 U.S. at 527-28.
18. *Id.* at 528.
19. *Id.* (citation omitted) (internal quotations omitted).
20. *Id.*
21. Benson v. United States, 146 U.S. 325, 331 (1892); *see also* Hayes v. United States, 367 F.2d 216, 217-18, 220 (10th Cir. 1966) (finding that the United States had exclusive jurisdiction over a crime which was committed in a penitentiary on the grounds of Fort Leavenworth).
22. *Benson*, 146 U.S. at 331.
23. *Lowe*, 114 U.S. at 528, 542.
24. *Id.* at 528.

Therefore, there is little basis for the State of Kansas to assert jurisdiction over utility distribution services within the Fort Leavenworth federal enclave.[25]

IV. ANOTHER FUNDAMENTAL CONSIDERATION—SUPREMACY (FEDERAL PREEMPTION)

The Federal Enclave Clause is not the only portion of the Constitution that bears on the question of whether a state retains jurisdiction to regulate the operator of privatized federal utility facilities. The Federal Government possesses the authority to purchase or condemn land without state consent, and when it does so it does not obtain the benefits of the Federal Enclave Clause but instead possesses the land in the capacity of an "ordinary proprietor."[26] "Such ownership and use [by the Federal Government] without more do not withdraw the lands from the jurisdiction of the State."[27] However, the Supremacy Clause and the Property Clause combine to give the Federal Government broad authority and potentially a preemptive effect on attempted state regulation.[28]

The Property Clause of the United States Constitution declares that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[29] And, of course, the Supremacy Clause declares the supremacy of federal law over state law.[30] The combined effect of those clauses is that a state may enforce its laws on federal lands "so long as those laws do not conflict with federal law."[31]

The United States Supreme Court has provided a more thorough discussion of the impact of federal property ownership on state regulation of activities on that property:

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25. It is interesting to note that a federal district court has upheld an ordinance of the City of Leavenworth, Kansas pursuant to which the City imposed a three percent franchise fee on sales by Kansas Power and Light Company (KP&L) to Fort Leavenworth. United States v. City of Leavenworth, 443 F. Supp. 274, 280, 287 (D. Kan. 1977). In that case, the court held that imposition of the franchise fee on KP&L was not a direct taxation on the Federal Government nor a regulation of the Fort Leavenworth distribution facilities. *Id.* at 282-83. It was merely a tax imposed upon an entity that provides service to the Federal Government. *Id.* at 283. The court was not concerned by the fact that KP&L effectively passed the three percent charge on to the Federal Government through the rates that the Federal Government paid to KP&L for electricity. *Id.* at 284. Although not specifically mentioned in the case, it is noteworthy that the points of delivery from KP&L to the Federal Government are apparently at the boundaries of Fort Leavenworth, so it would be possible to construe the *City of Leavenworth* case as merely regulating services provided by KP&L at the boundary of the federal enclave and not affecting any services or facilities within the fort boundaries.

26. *Paul*, 371 U.S. at 264.

27. James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937).

28. U.S. CONST. art. IV, § 3, cl. 2; U.S. CONST. art. VI, cl. 2.

29. U.S. CONST. art. IV, § 3, cl. 2.

30. U.S. CONST. art. VI, cl. 2.

31. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987) (citation omitted).

> [T]he presence or absence of such jurisdiction [under the Federal Enclave Clause] has nothing to do with Congress' powers under the Property Clause. Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[32]

V. RECENT CASES CONCERNING FEDERAL PRIVATIZATION—THE EFFECT OF CONGRESSIONAL INTENT, FEDERAL ENCLAVE STATUS, AND FEDERAL PREEMPTION

Several recent cases in Maryland, Colorado, and New York indicate that a successful bidder would probably not be subject to the regulatory jurisdiction of the state utility regulatory commission by owning and operating the privatized utility facilities on a federal enclave.

Of particular note, the Federal District Court for the District of Maryland issued a decision on March 12, 2001 in which it soundly rejected a local utility's claim that the successful bidder for privatization of the Fort Meade utility distribution system would be subject to the jurisdiction of the Maryland Public Service Commission and would have to hold franchise rights and a utility license in order to own and operate the Fort Meade system.[33]

In *Baltimore Gas & Electric Co.*, the local utility (Baltimore Gas and Electric Company) and the Maryland Public Service Commission (PSC) argued that the solicitation issued by the government was improper because it did "not specify that the PSC [would] have jurisdiction over the successful bidder" and because it did "not require that [the] bidder hold franchise rights and a utility license issued by the PSC."[34] The district court granted summary judgment to the Federal Government and entered a declaratory judgment allowing the government to proceed with the privatization.[35]

A. Congressional Intent

The *Baltimore Gas & Electric Co.* court focused its analysis of Congressional intent on two principal statutes.[36] First, the court looked at 10 U.S.C.A. § 2688, which was enacted by Congress to govern the privatization of utility systems.[37] The statute states in pertinent part that when the government conducts a privatization effort, "[i]f more than one utility or entity

32. *Kleppe*, 426 U.S. at 542-43.
33. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 724-25.
34. *Id.* at 724.
35. *Id.* at 746-47.
36. *Id.* at 734.
37. *Id.*; 10 U.S.C.A. § 2688 (West 1998 & Supp. 2002).

. . . notifies the Secretary concerned of an interest in a conveyance . . . , the Secretary shall carry out the conveyance through the use of competitive procedures."[38] The second statute that the court looked at was part of the Department of Defense Appropriations Act of 1988, which provided that:

> [n]one of the funds appropriated . . . may be used by [the government] to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.[39]

The court characterized these two statutes as "potentially conflicting."[40] The potential conflict, in the court's rationale, was that the directive for the use of competitive bidding for privatization could collide with the mandate to conform to state utility commission rulings and franchises or service territories, since that mandate might indicate that only the utility authorized by the state to serve the area in which the federal facility is located could properly bid for acquisition of the federal facilities.[41] The Federal Government argued to the court that the provision in the 1988 Appropriations Act governs the acquisition of the electricity itself, the "commodity," and not the disposition of physical facilities nor the acquisition of distribution services across those facilities.[42] The court agreed that it was a reasonable interpretation by the Army "to require competition in the conveyance of the electric and natural gas utility systems regardless of state franchise rights, and to continue the requirement . . . that the acquisition of the commodity electricity, but not electricity distribution services, comply with state utility law and franchise grants."[43]

It is noteworthy that the court based its decision on the content of the privatization statute as it existed prior to October of 2000.[44] In October 2000, Congress amended the statute to expressly prohibit "the application of state public utility law from serving as a basis for curtailing competitive bidding for the Army's privatization contracts."[45] The new section of the statute states as follows:

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38. 10 U.S.C.A. § 2688(b)(1).

39. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 735, quoting Dep't of Def. Appropriations Act of 1988, Pub. L. No. 100-202 § 8093, 101 Stat. 1329, 1, 79 (1987) (codified with some differences in language at 48 C.F.R. § 41.201(d)(1) (2000)) (this provision of the Department of Defense Appropriations Act of 1988 continues to govern appropriations by the Department of Defense).

40. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 738.

41. *Id.*

42. *Id.* at 740.

43. *Id.* at 741.

44. *Id.* at 739 n.20.

45. *Id.*

> With respect to the solicitation process used in connection with the conveyance of a utility system (or part of a utility system) under subsection (a), the Secretary concerned shall ensure that the process is conducted in a manner consistent with the laws and regulations of the State in which the utility system is located to the extent necessary to ensure that all interested regulated and unregulated utility companies and other interested entities receive an opportunity to acquire and operate the utility system to be conveyed.[46]

The conference committee report issued in conjunction with that change in the law stated "that the amendments were intended to ensure that all interested regulated and unregulated entities have the opportunity to acquire and operate utility systems on military installations regardless of franchise rights in the area of the installation concerned."[47] That language is strong support for an argument that the state is without jurisdiction to regulate the successful bidder in a federal privatization effort because the purpose of the federal law is to ensure that any entity—whether regulated or unregulated—has the opportunity to successfully bid on military privatization projects and thereafter *operate* the distribution system.

B. Federal Enclave Jurisdiction

The *Baltimore Gas & Electric Co.* court also analyzed the federal enclave issue as it specifically applies to Fort Meade.[48] In 1906, the State of Maryland ceded jurisdiction over Fort Meade pursuant to a statutory provision that is quite similar to the provision by which the State of Kansas ceded jurisdiction over Fort Leavenworth to the U.S. government.[49] In pertinent part, that Maryland statute states as follows:

> 1. Be it enacted by the General Assembly of Maryland, That the consent of the State of Maryland is hereby given in accordance with [the Enclave Clause] . . . by purchase, condemnation of [sic] otherwise of any land in this State required for sites for custom houses, courthouses, post offices, arsenals or other public buildings whatever, or for any other purposes of the government.
> 2. That exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State, but the

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46. 10 U.S.C.A. § 2688(b)(3) (West 1998 & Supp. 2001).

47. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 739 n.20 (quoting Conference Report 106-945, 683-84) (internal quotations omitted).

48. *Id.* at 741-44.

49. *Id.* at 742; *Lowe*, 114 U.S. at 528.

> jurisdiction so ceded shall continue no longer than the United States shall own such lands.[50]

The court concluded, based on the cession of jurisdiction by the State of Maryland, "that Fort Meade is a federal enclave and that the operation of its electricity and natural gas distribution infrastructures is not subject to the PSC's jurisdiction."[51] That conclusion is not surprising, since the proposition that a state may not exercise jurisdiction over a federal enclave (except as specifically reserved or expressly permitted by Congress) has been established federal law since 1885.[52] The significance of *Baltimore Gas & Electric Co.* is that it addresses the issue precisely in the context of federal privatization efforts for utility facilities and now appears to leave little room for argument that a state retains any regulatory authority over privatized utility facilities on a federal enclave.[53]

C. Federal Preemption

Finally, the *Baltimore Gas & Electric Co.* court addressed the issue from a federal preemption perspective.[54] In general, pursuant to the Supremacy Clause of the Federal Constitution, federal law will preempt state law that is in conflict with the federal law.[55] State law may also be preempted if it "is generally inconsistent with federal law, or poses an obstacle to the full realization of Congressional objectives."[56] The court provided the following discussion of the preemption argument:

> [Section] 2688 expressly mandates that privatization is to be carried out by competitive bidding without regard to utility franchise rights. Specifically, say defendants, state public utility laws which restrict the provision of electricity distribution services to companies holding franchises are preempted because they conflict with both the requirements for competition set forth in § 2688, and the general law requiring competition for all federal contracting. 10 U.S.C. § 2305(b)(4)(C). I find the defendants' arguments persuasive.[57]

The court went on to say:

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50. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 742.
51. *Id.*
52. *Lowe*, 114 U.S. at 526-28; *Paul*, 371 U.S. at 268.
53. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 741-44.
54. *Id.* at 745-46.
55. *Id.* at 746.
56. *Id.* (citation omitted).
57. *Id.*

> Clearly, were the Army to honor [Baltimore Gas and Electric's] franchise rights by resorting to sole source negotiations against its desire to do so, the Army would aid in the frustration of the federal mandate for competition. Likewise, if the Army were to allow competitive bidding to proceed, only later to allow the state a veto power over the firm that prevails in that process, by requiring the successful bidder to obtain franchise rights after obtaining the bid, it would potentially mire its procurement proceedings in state regulatory processes and [would] thereby frustrate the federal aim of determining for itself the "most advantageous bidder." 10 U.S.C. § 2305(b)(4)(C). Accordingly, because state public utility franchise law directly conflicts with federal law governing privatization of electric utilities, it is preempted.[58]

D. Utility Regulatory Commission Decisions in Colorado and New York

The clear conclusion from *Baltimore Gas & Electric Co.*, that the owner and operator of a privatized federal electricity distribution system is not subject to regulation by the state utility regulator, is bolstered by at least two state utility commission decisions.[59] In July of 2000, the Colorado Public Utility Commission found that it would not have authority to regulate the activities of the successful bidder for privatization of facilities at the Fort Carson military reservation if the successful bidder was not already a regulated utility.[60] The Colorado Public Utility Commission based its decision on the constitutional rationale underlying jurisdiction over federal enclaves and the doctrine of federal preemption, much as the United States District Court did in *Baltimore Gas & Electric Co.*[61]

Similarly, the New York Public Service Commission determined in March of 1999 that it would not have jurisdiction over the successful bidder in the Fort Hamilton privatization because state jurisdiction within a federal enclave is limited; the New York Public Service Commission also found that jurisdiction over the provision of utility services at Fort Hamilton had not been ceded back to New York by the Federal Government.[62] Thus, at least two state utility regulatory commissions have recognized their own inability to successfully assert jurisdiction over the operators of privatized utility systems on federal enclaves.[63]

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58. *Id.*

59. *Id.* at 724-25; Re Enron Fed. Solutions, Inc., 202 Pub. Util. Rep. 4th 519 (PUR) (Colo. P.U.C. July 21, 2000); Enron Fed. Solutions, Inc., 1999 New York PUC LEXIS 178 (N.Y. P.U.C. March 23, 1999).

60. *Re Enron Fed. Solutions, Inc.*, 202 Pub. Util. Rep. at 526.

61. *Id.* at 522-26; *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d. at 736-46.

62. *Enron Fed. Solutions, Inc.*, 1999 New York PUC LEXIS 178, at *4-5.

63. *Re Enron Fed. Solutions, Inc.*, 202 Pub. Util. Rep. 4th 519; *Enron Fed. Solutions, Inc.*, 1999 New York PUC LEXIS 178.

Finally, it is interesting to note that in the case of the Fort Carson privatization effort, the Army's initial efforts to solicit bids for privatization were contested in a lawsuit filed by Colorado Springs Utilities.[64] Colorado Springs Utilities is the utility certificated by the state commission to provide service in the area in which Fort Carson is located.[65] Colorado Springs Utilities argued that it was therefore the only entity qualified to own and operate those facilities, and a competitive bidding process was unlawful.[66] However, when President Clinton signed the amendments to the privatization statute (10 U.S.C.A. § 2688) into law on October 30, 2000, Colorado Springs Utilities dropped its lawsuit.[67] Colorado Springs Utilities admitted that the change to the statute, which now requires the Federal Government to ensure that all interested regulated and unregulated companies and other interested entities have an opportunity to acquire and operate the federal utilities system, completely undercut its position in that lawsuit.[68]

VI. CONCLUSION

There is a very strong argument that the successful bidder in a federal privatization effort will not be subject to regulation as a utility by the state. One Federal District Court and two state utility commissions have examined the governing federal statutes and have interpreted those statutes in light of the Federal Enclave Clause, the Property Clause, and the Supremacy Clause of the United States Constitution.[69] An analysis of those decisions shows that states are generally without jurisdiction to regulate the successful bidder in a federal privatization offering for utility facilities on a federal enclave. Consequently, the pool of interested bidders should expand and federal policy to accelerate privatization will be facilitated.

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64. Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief at 1-2, Colorado Springs v. Caldera, No. 95-M-1567 (D. Colo. 2001) (order of dismissal granted without prejudice on March 9, 2001).

65. *Id.* at 7.

66. *Id.* at 22-23.

67. 10 U.S.C.A. § 2688 (West 1998 & Supp. 2002); Motion to Dismiss Without Prejudice at 4-5, *Caldera*, No. 99-M-1567.

68. Motion to Dismiss Without Prejudice at 4-5, *Caldera*, No. 99-M-1567.

69. *Balt. Gas & Elec. Co.*, 133 F. Supp. 2d at 721; Re Enron Fed. Solutions, Inc., 202 Pub. Util. Rep. 4th 519 (PUR) (Colo. P.U.C. July 21, 2000); Enron Fed. Solutions, Inc., 1999 New York PUC LEXIS 178 (N.Y. P.U.C. March 23, 1999).