Retail Electric Competition:

A Blueprint For Consumer Protection

October 1998

Office of Energy Efficiency and Renewable Energy
U.S. Department of Energy

Retail Electric Competition: A Blueprint for Consumer Protection

Barbara Reid Alexander
Consumer Affairs Consultant
15 Wedgewood Drive
Winthrop, Maine 04364

October 1998

This report was prepared for the U.S. Department of Energy, Chicago Regional Support Office (Purchase Order DE-AP45-97R553188). Funding was provided by the Department of Energy's Office of Power Technologies, Ofiice of Energy Efficiency and Renewable Energy.

Disclaimer

This report has been reproduced directly from the best available copy.

Available to DOE and DOE contractors from the Office of Scientific and Technical Information, P.B. Box 62, Oak Ridge, TN 37831; prices available from (423) 576-8401, FTS 626-8401

Available to the public from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161

Printed with soy ink on recycled paper

Table of Contents

Acknowledgments

The author gratefully acknowledges the following reviewers:

Diane Pirkey
Office of Utility Technologies,
U.S. Department of Energy

Cheryl Harrington
Regulatory Assistance Project

Matthew Brown
National Conference of State Legislatures

Deborah Schachter
Governor's Office of Energy
and Community Services,
State of New Hampshire

Joel Eisenberg
Office of State and Community Programs,
U.S. Department of Energy

Irwin "Sonny" Popowsky
Consumer Advocate,
State of Pennsylvania

Commissioner William Gilles
Washington Utilities and
Transportation Commission

Camie Swanson-Hull
Indiana Public Utilities Commission

Richard Scheer
Energetics, Incorporated

Jeannette Brinch
Energetics, Incorporated

Carole Reynolds, Mary Engle,
Janice Frankle, Gina Scharr Howard
Bureau of Consumer Protection
Federal Trade Commission

The author takes full responsibility for any errors or misstatements.

Consumer Protection Issues

Almost every state has a proceeding underway to study or implement the move to retail electric competition. While 12 states (California, New Hampshire, Rhode Island, Maine, Massachusetts, Pennsylvania, Nevada, Oklahoma, Montana, Illinois, Connecticut, and Virginia) have adopted legislation to mandate retail electric competition by a date certain, many other states have initiated regulatory proceedings to explore, and, in some cases, implement, retail competition. In every state that is exploring retail electric competition, legislators, state energy regulators and other state policymakers, business groups, environmental and consumer advocates, and customer groups are trying to determine how this new industry structure will work, what it should look like, and how consumers will be affected.

The adoption of retail electric competition will require states to rethink a broad range of issues concerning the provision of basic electric utility services to all customers. This *Blueprint for Consumer Protection* is intended to help state decision makers respond to one significant part of the overall agenda, referred to as "consumer protection" issues and concerns. Basically, this set of issues will redefine the consumer's relationship with his/her energy supplier and redefine his/her rights and remedies to obtain and maintain electric service. This document does not address market structure, stranded cost recovery, divestiture, the approval of mergers and acquisitions, the relationship between retail competition and the environment, or the terms and conditions governing the relationship between distribution companies and new competitive suppliers. While these issues are crucial to the ultimate outcome of any retail electric competition effort, they are beyond the scope of this *Blueprint*.

In general, "consumers" refer to residential and small commercial customers. These customer groups are typically not offered the opportunity to negotiate a customer-specific contract. Rather, they are typically low-usage customers who use less energy or electricity than larger customers. In addition, they typically are offered pre-printed "take it or leave" contracts by suppliers of mass-marketed products; it is likely that electricity will be no exception to this general practice. Finally, these customers typically shop for mass-marketed products without expert assistance and usually do not have legal or financial assistance or the necessary background to negotiate specific deals in the marketplace for such items in their budget.

While most observers would certainly acknowledge that residential customers should be provided some standardized consumer protections, others may question the inclusion of small commercial customers in this group. However, most states that have adopted retail electric competition have included small commercial customers, defined with respect to their electricity usage or demand criteria, within the consumer protections discussed in this *Blueprint*. Similar to residential customers, small commercial customers use less electricity than larger commercial or industrial customers and usually do not have the time or special skills required to obtain electricity on the basis of individually negotiated contracts. In many states, as well, policymakers have responded to the high incidence of telephone fraud and the unauthorized change of telephone supplier (referred to as "slamming") that has victimized small commercial, as well as residential, customers.

Consumer protection issues are crucial to the move from monopoly regulation of electricity and gas to a competitive market for generation services. Most participants in the restructuring debate agree that the general public will not consider the prospect of theoretically lower prices in the future as a sufficient tradeoff if the new market also means an increase in fraud, customer confusion, complaints, and inability to understand and participate in a new market structure. In short, consumer protection issues are crucial to the public's acceptance of competition.

This *Blueprint* is primarily aimed at state-level decision makers in states that have not yet adopted electric restructuring legislation, presenting examples from those states that have progressed to the implementation stage. For readers who may need a primer on the "whys and wherefores" of electric restructuring, Appendix A contains a short introduction to the forces that have stimulated the move to retail competition in the electric industry.

How The Blueprint Is Organized

The *Blueprint* is organized so that readers can quickly find specific issues and policy discussions. Each issue is presented with background information and a summary of recent state electric competition legislation or regulations on that topic. Key decisions and options are highlighted in text boxes that present examples from states that have already adopted legislation and regulations on these topics.

Chapter I presents an overview of consumer education and disclosure policies and programs. The purpose of these programs is to enable consumers to easily compare offers and to get them interested in shopping for electricity and electricity products. Because electric competition is not being undertaken in response to a grassroots effort (as explained more fully in Appendix A), it is important that residential and small commercial customers not be caught by surprise when these changes are implemented. In addition, a competitive market operates to keep prices as low as possible only when customers are knowledgeable about their options and can compare prices and select the product and price most beneficial to them.

Chapter II addresses the redefined role of the remaining monopoly, the electric distribution company. Every state that is moving to retail electric competition is adopting separate regulatory approaches for distribution and transmission and the generation or sale of electricity. This separation or "unbundling" of the current integrated utility, as well as the manner in which charges are presented on the customer's monthly utility bill, requires legislators to identify the public policy benefits that are built into the current regulatory structure and the regulated rates. Legislators must also determine whether existing or additional public policy benefits should be added to the new "unbundled" system. The distribution function will typically operate as a monopoly and the state utility commission will continue to regulate it as such. That means that the prices, services and consumer protections associated with the delivery of distribution services will continue to be regulated. However, the distribution company will have a different role from its current one. Its main obligation in the future will be to assure that customers are connected to the distribution system. This differs from the prior obligation of the electric monopoly supplier, which was to assure not only connection and delivery, but electricity services as well. The change in obligation has important implications for the historical state interest in assuring universal availability and affordability of electricity.

Chapter III focuses on regulation of the new actors in the competitive market: suppliers of electricity and electricity services. Suppliers will include new entities and new incarnations of current utilities. Their services and products will be competitive; that is, their prices will not be regulated. However, this does not mean that the competitive suppliers will be entirely free of regulation. Most states are creating licensing criteria and establishing minimum consumer protections, as well as prohibiting unfair trade practices. Such a regulatory approach is similar to other state-regulated businesses, such as consumer credit, banking, insurance and health care. Key issues with respect to the regulation of competitive suppliers include:

- how to prevent "slamming" (a change in the customer's supplier without permission);
- whether and how suppliers should be licensed;
- how to integrate the regulation of suppliers with existing state and federal consumer protection laws;
- what role suppliers will play in assuring that electricity is availability and affordable to all customers;
- how to prevent redlining; and
- how the supplier's contract terms and collection remedies should be regulated, if at all.

Chapter IV looks at a new opportunity that will arise with the onset of the electricity competition: the ability to aggregate or create customer pools based on political boundaries (municipal or county) or customer organizations or affinity groups. For example, some advocates for low-income customers point to the possibility of significant benefits for traditionally hard-to-serve customers by grouping them together into a single purchasing entity.

Chapter V explores the implications of the new industry structure on state approaches to regulation and on differences between utility regulation and the regulation of competitive business in general. In effect, the state regulatory approach will move from regulating prices to one that emphasizes consumer protection and fair trade practices. This fundamental change will require states to rethink the location of new regulatory duties, as well as the enforcement skills and resources that will be needed to accomplish new tasks.

Appendix A contains background information on the economic, technological and political forces that are driving the changes in the electric industry.

Appendix B contains examples of recently-enacted state legislation that addresses consumer protection issues associated with electric competition.

Appendix C contains a bibliography of useful reading materials on restructuring published by the National Council on Competition in the Electric Industry.

CHAPTER I

CONSUMER EDUCATION AND DISCLOSURE POLICIES

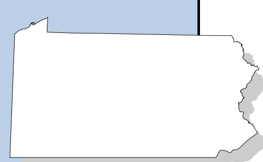
What if state and federal policymakers restructure the electric industry to create a competitive market, but participation by residential and small commercial customers is much lower than expected? A competitive market needs both willing buyers and sellers. If buyers don't participate in the competitive market, the ability of the competitive market to exert a better discipline on prices than traditional utility price regulation will be impaired. Indeed, if customers do not shop for electricity or suppliers do not market to residential customers, there is a real risk that the promise of competitive markets for electricity will not be realized. In a worst case scenario, the result may be the unintended creation of an unregulated monopoly or oligopoly.

While many key decisions that will impact the creation of a competitive market are not the subject of this *Blueprint*, two initiatives may go far to help stimulate customer interest in competition and help consumers develop the skills to shop for electricity. The first initiative focuses on how consumers learn about the move to electric competition. The second initiative focuses on giving consumers the tools to enter the competitive market and make an informed choice. The judicious use of disclosure requirements that enable customers to shop and compare offers, can help prevent fraud and abuse, and provide a form of regulatory investment that may prove cheaper than enforcement proceedings in a hearing or court room.

Consumer Education

Most residential and small business consumers routinely pay their monthly electric bill without much attention to regulated rates or usage patterns. Indeed, recent research reveals that most consumers do not know their annual energy usage or the price paid per kWh on their utility bill.[1] Residential households use far less energy than commercial or industrial customers and the annual residential energy bill (65% of which is electricity for households) typically

A customer who asked to be part of the **Pennsylvania** electric pilot programs in November, 1997, had this reaction to the offers that appeared in his mailbox from electricity suppliers,



"Each had different information, a different pitch--you couldn't compare apples to apples." The customer felt that participating in the pilot program took more time than it was worth in potential savings.

"The Outlook," Timothy Appell, *Wall Street Journal*, December 15, 1997.

consumes 5% or less of household income.[2] Even in states with higher than average electricity rates, such as the New England states where residential rates average 11-13 cents per kWh, the monthly electric bill is still a relatively small portion of a typical residential customer's monthly budget. While residential customers often are concerned about electricity prices, the move to retail electric competition is not being driven by their concerns. Because of this, some observers believe that residential customers will not participate extensively in the new competitive market, especially when their initial savings may be 10% or less compared to current annual costs. Will customers be naturally inclined to shop and compare prices when savings on their bills during the early years may not exceed $5 to $10 per month? Will low-income, elderly and non-English speaking customers obtain the information necessary to understand an issue that appears complex, with a daunting new vocabulary, and that at first glance appears to threaten the reliability of their electric service?

Even though the long distance telephone market was first opened to competition in 1984, AT&T still had over a 50% market share in 1996.

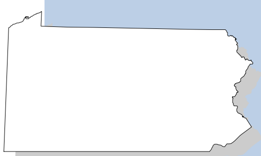
Telephone Restructuring: A Case Study

Policymakers are looking to lessons learned from restructuring of the telephone industry, which began with the break-up of AT&T and the onset of long distance telephone competition in 1984. In telephone industry restructuring, neither federal or state regulators undertook any significant public education campaign to prepare customers for changes. Once long distance telephone competition began, it produced a litany of complaints by residential and small business customers, alleging that their long distance service providers had been changed without their permission, a practice known as "slamming." Telephone customers also complained about aggressive marketing tactics, such as telemarketing calls during the dinner hour, or the high prices of some credit card and operator-assisted calls at pay phones. Many telephone customers also questioned the prices charged by some companies for pay-per-call services (1-900 calls) that appeared on their local phone bills and threatened the continuation of local phone service if the unregulated charges were not paid.

These developments have, in turn, resulted in legislative and regulatory efforts to belatedly address consumer protection and education issues associated with telephone restructuring. Customers have reacted to questions about electric restructuring by raising these same concerns and asking for protections to prevent their reoccurrence.

California's PUC has initiated a $90 million state-wide education program called "Plug In, California!" to stimulate customer awareness of competition. This program, funded by distribution utilities through rates charged to all customers, is designed to inform customers with TV and radio advertisements, followed by a direct mail campaign targeted to every household. In addition, more than $13 million is available to community-based organizations to focus on local education activities, especially for low-income, rural, and elderly customers.

The **Pennsylvania** PUC has ordered all distribution utilities to fund comprehensive consumer education programs with a statewide multi-media campaign and a local education effort that involves community organizations. The PUC has set program funding levels for each utility at $5 per customer over a 4-year period.



Careful attention to timing, educational messages, information disclosure, and assurance of consumer protections will accelerate the development of competitive retail markets for electricity and help ensure that the benefits of lower prices, more choices, and better service are available to all consumers.

The Implications for Electric Restructuring

Many states have concluded that the move to electric competition will require a larger educational effort than the traditional utility bill inserts or public hearings and workshops. Preparing customers to shop for electricity and then respond to marketing messages they receive will require a comprehensive and professional outreach and educational effort. Customers will need frequent messages from a variety of sources to understand their new rights, responsibilities, and opportunities. Outreach and education will probably require additional resources, since most state regulatory commissions have not had to conduct such efforts in the past. The dramatic change in relationship between customers and their electric utility cannot be accomplished by relying solely on the tools that have prevailed in a monopoly utility structure.

The purpose of a comprehensive public education program should be to maximize public participation in the implementation of retail competition, minimize customer confusion about the changes being undertaken, and equip *all* customers with the means to participate effectively in the competitive electric market. While any state-funded educational effort must be neutral and objective, it should not be confused with the promotional and brand name marketing efforts of competitive suppliers. Customer education and outreach programs in several states have been designed to motivate customers to learn about electric com-

The **Maine** Customer Education Advisory Board on Electricity Retail Access has recommended a $1.6 million education plan in four phases:

- Awareness
- Understanding
- Assurance
- Acceptance

petition with modern marketing techniques. Key components of a well designed electric competition education program have included:

- information dissemination by means of interactive activities, as well as brochures or other written materials, and use of a variety of mass media outlets, with the intent to motivate the public to become interested in, and learn more about, electric competition;

- explanations in clear language (and multiple languages in some states) of the basic concepts of electric restructuring, which include (1) information on how prices, consumer protections and low-income programs may be affected; (2) explanations of customer risks and responsibilities; (3) information about how to assess and make use of a household energy profile to shop for electricity; (4) how to compare offers from electric suppliers; (5) information about aggregation; and (6) information about dispute resolution mechanisms, including the role of state agencies in resolving disputes with retail electric suppliers;

- well-publicized public forums conducted in several geographical areas to obtain public input and provide opportunities for information exchange;

- active involvement of community organizations in developing messages and devising and implementing education strategies, particularly for low-income, elderly, foreign speaking, rural and other customers who may miss more traditional media-based efforts;

- use of focus groups and surveys to gather public input on both broad restructuring issues and concerns, as well as on public education needs and reaction to initial outreach initiatives;

- a toll-free hotline to provide guidance to consumers seeking advice about personal energy needs, the selection of a retail supplier, aggregation, or dispute resolution; and

- use of pre-established outcome measures of customer awareness, understanding and ability to act, which periodically evaluate education and outreach efforts.[3]

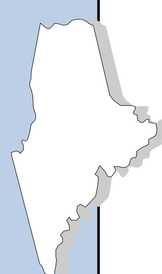
In states that have designed comprehensive electric restructuring education programs, the state public utility commission has taken a leadership role in coordinating, funding, and implementing the program, although usually with a broad-based advisory committee or other public involvement process. While there are several funding options, such as state tax appropriation, increased commission budget, or funding via the distribution utility's rates, most states have opted to fund their education program through imposition of transition costs on distribution utilities.

Shopping for Electricity

The arrival of customer choice carries with it the potential for customer confusion. If the experience in other industries is any guide, comparing electricity pricing offers will be especially confusing and difficult. Is $5 a month and 10¢ per kWh better than $10 a month and 8¢ per kWh? Or $6 and 12¢ per kWh with a 40% off-peak discount? Furthermore, the sale of electricity itself may be bundled with other products, such as alternative meters (which will offer additional energy management services or pricing options), or even other products, such as Internet access or telephone services. Product linkages may make comparisons among offers by multiple suppliers even more difficult.

In some industries, such as consumer credit, appliances, cars, and food,[4] uniform consumer disclosures have been developing for decades.[5] This author has suggested that the lack of uniform price disclosure on bills and other marketing materials in the long distance telephone industry may have contributed in part to the lack of significant gain in market share for AT&T competitors for over a decade.[6] This same development may occur with the move to electric competition unless there is a concerted effort to adopt a different approach. The primary problem is that consumers lack both critical information and skills to easily evaluate different price offers. Furthermore, consumers have a long-standing habit of receiving their electric bills and paying them automatically. Nothing more has been expected of customers in a regulated market. If consumers do not take the time to shop in a competitive market, they cannot fulfill their essential role in making competition work in favor of the most efficient suppliers (or those suppliers promoting attributes other than price which may be valued by some consumers, such as environmentally friendly products or energy sources located in the consumer's state). In the absence of key consumer information, the marketplace works on the basis of information manipulation rather than

Maine's Consumer Education Program Rule requires distribution utilities to fund a Commission-approved $1.6 million consumer education program for electric restructuring over a four-year period. The assessment will be recovered from ratepayers. "This funding determination is based on the principle that those consumers who benefit from a program should pay to support it." *Order Adopting Rule*, Docket No. 97-



efficiency. This is particularly true for consumers whose monthly bill for electricity or telephone is a modest part of the household budget.

Recognizing this, the National Association of Regulatory Utility Commissioners (NARUC) in July 1996 urged states adopting retail direct access programs to include enforceable standards of disclosure and labeling that would allow retail consumers to easily compare the price, price variability, resource mix, and environmental characteristics of their electricity purchases.

Among other purposes, NARUC announced its belief that **"the electric industry should facilitate informed customer choice that will promote efficient markets."**

What Should Be Disclosed

Consumer research has confirmed that the public wants comparative price information. Focus groups and surveys in New Hampshire and Massachusetts of customers who had participated in pilot electric competition programs, documented confusion with the lack of standardized pricing statements and called for state regulation to provide standard price disclosures.[7] As a result of this experience, utility commissions in New England have worked together to develop a model, uniform Electricity Disclosure Label and a more detailed *Terms of Service* document for the sale of electricity to residential and small commercial customers to be used by suppliers marketing in the New England region. The following discussion summarizes key recommendations of this collaborative effort:[8]

Price

Customers should be able to compare prices on an "apples-to-apples" basis. The most commonly recommended approach is to disclose the supplier's price structure in a cents per kWh for 3-4 common usage levels (i.e., 500, 1000 and 2000 kWh levels for residential customers). One key policy issue is whether a uniform price disclosure method should reflect only the competitive generation service offered by the supplier or include all other pieces of the customer's monthly electric bill, i.e., distribution charges and possibly other unregulated services. Limiting price disclosure to generation services allows suppliers selling across a wide geographical area to use a single label without regard to differences in distribution charges. If distribution costs are included, it is impossible to include a label, for example, in a *Boston Globe* ad that reaches consumers in other utility service areas.

If suppliers are required to provide average price information at several typical usage levels, most customers can identify a level most closely matching their own. One-time cash rebates or other price inducements should probably not be reflected in the disclosure of average electricity price. Prices for time-of-use (TOU) rates should be based on consistent load profiles for customers, with usage levels shown. If a supplier uses variable prices in which prices change according to an index, the disclosure could show prices reflecting a recent period or project under a uniform set of assumptions, much like variable rate consumer credit contracts (including mortgages) under the Truth in Lending Act rules.[9]

Contract Terms

In addition to price, consumers will need to know the contract duration and whether the price is fixed or variable over the term of the contract. Other important terms include penalties for early termination, late fees, or other extra charges. Because consumers are unlikely to actually sign a contract document to buy electricity, it will be important for consumers to know and understand the *material* terms of their agreement. After all, consumers will no longer be able to rely on the tariffs filed by their current utility with the public utility commission (a form of "master contract") for their purchase of electricity in a competitive market.

Supply Mix

Consumers are concerned about the environment, and want information about fuels used to generate electricity.[10] One supplier's electrons will not automatically flow only to the homes of its own customers. Rather, the local power pool will probably dispatch sufficient electricity to meet local demand based on cost and reliability factors of the total generation mix. Nonetheless, if more customers buy from "green" suppliers, renewable power will be an increasing part of the local power mix. Therefore, several states are working to develop a method of disclosing fuel mix on electricity product labels, showing major fuel types (coal, oil, nuclear, renewable energy) as a percent of the supplier's total generation mix. For example, California requires all suppliers to disclose their fuel mix based on an historical record.[11] If a supplier obtains "generic" power from the regional power pool, the fuel mix disclosure should reflect that power mix or a comparable substitute. If the supplier proposes to market power from a particular facility, the fuel source for that facility could be presented.

Emissions

Massachusetts has recently adopted regulations that require suppliers who market in that state to disclose price, fuel mix, and air emissions (sulfur dioxide, nitrogen oxides and carbon dioxide).[12] A supplier's generation source emissions must be expressed in a form which compares them to average regional emissions of all generating sources. This approach allows customers to compare a supplier's emissions profile with other power generators.

Labor

Massachusetts' electric restructuring law also requires suppliers to disclose the percentage of their generation mix that comes from power sources with employee union contracts and the percentage that comes from power sources that use replacement labor during labor disputes.

Terms of Service Document. In addition to price, contract length, supply mix, and emissions data, other key disclosures that states should consider requiring suppliers to highlight in a *Terms of Service* document include:

- All additional fees, including early termination penalties or late fees
- Deposit policy
- Collection procedures, including right to payment arrangements, and special programs available for low-income customers, if any
- Supplier's dispute or complaint handling policy, including the state commission's toll free complaint number
- Limitations and disclaimers of warranties
- If applicable, the customer's right of rescission and how to exercise this right

When Disclosures Should Be Provided

There are at least three distinct events or points of contact in a customer's relationship with an electricity supplier that suggests a need for different disclosures. Suppliers should disclose information to their customers (or potential customers) in (1) promotional materials; (2) *Terms of Service* documents or contract summaries; and (3) monthly bills.

The first point of contact is at the time a supplier advertises its electricity products. Drawing comparisons to a requirement of the Truth in Lending Act, some experts recommend development of an Electricity Facts Label with disclosures concerning price, fuel mix and emissions (or other required items), which should appear in a supplier's printed advertisements and written promotional materials.[13]

A second point of contact is at the point when a customer enters into a contractual relationship with the supplier. In contractual terms, the supplier has made an offer which the customer has accepted. After the agreement is made, the supplier must inform the customer about the material terms of the agreement in order to have a legally enforceable contract. This can be done in a *Terms of Service* document, which should contain all the material terms of the contract, including the supplier's pricing method, fees, and complaint procedure. In California, Pennsylvania and Maine, the *Terms of Service* disclosure must also offer customers a "right of rescission" to cancel the contract without penalty within 3-5 days. If this right is prominently disclosed in the *Terms of Service* document, customers may examine the price and other contract terms in detail before deciding to continue the contractual relationship.

The third point of contact during which information should be disclosed is in the supplier's bills. Customers will receive a bill either directly from the supplier (which may or may not include the distribution/transmission portion of the bill) or as part of the customers' distribution company bill. At this point, customers would want to know the actual cost per kWh for electricity used during that billing period. Doing so would require suppliers to divide their customers' charges for electricity by total kWh usage. Note that such a disclosure requirement is not a substantive regulation of a supplier's rate design or pricing method. This proposal would allow customers to see the effect of their suppliers' price design on their own usage patterns.

CHAPTER II

CONSUMER PROTECTION AND PUBLIC PURPOSE PROGRAMS:

The Role of The Local Distribution Utility

The move to retail electric competition will require each state to redefine the role of its local utilities. For over 100 years local electric utilities have had a monopoly on the generation, distribution, and transmission of electricity. Now policymakers must decide what portion of this vertically-integrated industry will remain subject to monopoly regulation and what portion should be open to competition. The distribution function will remain a monopoly in all states which have adopted electric restructuring legislation to date. This will mean that the local poles and wires used to deliver electricity will not be duplicated. In some states, the distribution function will continue to include billing, metering and customer service functions, but in other states these services will also be opened to competition. The consumer protection implications of billing and metering competition will be explored further in Chapter III.

Long distance transportation—or transmission--of electricity through high voltage transmission wires will continue to be regulated under the federal jurisdiction of the Federal Energy Regulatory Commission (FERC). This transmission system is used primarily for wholesale transactions between today's utilities but is now being opened to private transactions by generation plant owners to assure nondiscriminatory access under FERC-controlled policies and prices. This division between the state-controlled distribution system and the federally-controlled transmission system generally conforms with the historical jurisdiction of states over the retail sale of electricity and the authority of the federal government (FERC) over wholesale transactions.[14] Although not required to do so, some regions are forming an Independent System Operator (ISO) to govern access to the transmission system and to establish price and access rules which accommodate competitive generation suppliers. This is still an evolving issue in many states.

In general, states are deciding how to regulate the three major functions of the electric industry:

Generation: The generation and sale of electricity

Transmission: The long distance transportation of electricity between distribution utilities and generating sources

Distribution: The local delivery system, including poles and wires

The changing role for utility companies to a more limited distribution function has important implications for consumer protection and public purpose programs. States will need to analyze the comprehensive regulatory scheme that is applicable to today's public utilities and decide which policies and regulations should continue to apply to the distribution portion of the business; which should be changed or added to respond to the new industry structure; and which should be created to apply to the competitive generation portion of the business. With respect to distribution companies, the most important policies and issues that should be addressed include

- obligation to serve;
- default service;
- reliability of service and service quality;
- Universal Service programs;
- credit and collection policies; and
- privacy of customer information.

The remainder of this Chapter will address these issues.

Obligation to Serve

The duty of the distribution utility will change from an *obligation to serve* to *access* to the electric grid on a nondiscriminatory basis. Under this approach, the distribution utility will continue to provide line extensions and assure connection to the local distribution system. Indeed, the distribution utility will probably retain its right to use eminent domain power to assure the proper design and operation of the delivery system. This continued delegation of state authority is often viewed as justification for continued utility participation in the implementation of state policies, such as encouraging energy efficiency, and supporting renewable resources and universal service programs. What is clear from this altered mission is that state regulators may no longer count on the local utility alone to assure that all households have access to reasonably priced electricity service.

Default Service

Every state that has considered the implications of a move to retail competition has determined that a Default Service option (also referred to as a "Standard Offer" or "Basic Service") must be provided to customers who do not choose a competitive supplier for generation services. In other words, customers will be assured a continuous source of electricity even if they do not choose a new supplier. In addition to those customers who "choose not to choose," there are other customers who must be assured access to electricity, such as

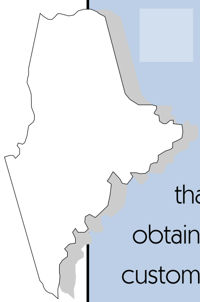
- those refused service by a retail supplier;
- customers whose supplier's electric service contract is canceled for any reason;

- customers who need supply during a transition to a new dwelling or who become new customers and have not yet chosen a supplier; and finally,
- those customers whose supplier stops doing business or whose license is revoked by a state agency.

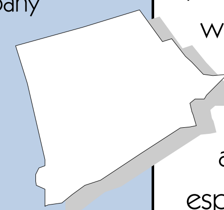
It is important to recognize that the Default Service option exists to serve two different groups of customers: (1) customers who choose not to select a competitive supplier; and (2) customers who are unable to select or retain service from a competing supplier. The purpose of Default Service for customers who have options, but do not exercise them, is different from the purpose of safety net service for those who are unable to obtain competitive electricity services with reasonable terms. With regard to the choose not-to-choose group, states will have to decide who will provide the generation portion of the service. This decision will have a significant impact on market power (that is, whether the incumbent will be awarded these customers) and customer acceptance of change. If there is too little change, customers may not see the point of entering the competitive market. If there is too much change (i.e., the adoption of a volatile market-based price as a substitute for an historically stable rate structure), customers may resist and threaten the political acceptance of the move to competition. As in all other aspects of restructuring, the market price and number of competitors will have a great deal to do with customer reaction to, and interest in participating in, the competitive market.

The purpose of ensuring a safety net for customers who cannot obtain generation service at a reasonable price is related to universal service policy goals and the need to assure access to the electricity system for all customers. Whether technically low-income or not, these customers have a basic need for continuous electric service, and society has an interest in preventing unnecessary risks to household health and safety that could be caused by significant interruptions in the supply of electricity. The alternative is physical disconnection of service. Nothing would do more to create adverse reaction to competition than a significant increase in customer disconnections as a result of difficulties working with competitive suppliers or the inability of customers to obtain service from suppliers. Even if most customers need Default Service for only short periods of time, some kind of Default Service will *always* be needed and should not be confused with what may be a short-term need for Default Service for customers who choose not-to-choose.

Even though Default Service serves multiple purposes, it is possible to devise one regulated service to respond to different needs. Alternatively, a state could authorize two different services, one for a transition period which is available to current customers who choose not-to-choose, and another which is permanently available to any customer in transition or who enters the



Both **Maine** and **Rhode Island** restructuring legislation mandate that the distribution company obtain Default Service for its customers via an open market bid supervised by the public utilities commission.



Several **Ohio** legislators have proposed that generation services for all customers be bid based on regional retail marketing areas. Customers could then opt out by choosing their own competitive supplier.

competitive market and seeks to return to regulated rates. Massachusetts has pursued this approach. Utilities in the state will offer a Standard Offer rate to existing customers for a seven-year period, which will be regulated based on rates in effect prior to the onset of retail competition. Safety Net service, a permanent service with more volatile market-based rates, will be available to any customer who enters the competitive market and then seeks to return to regulated rates.

The most controversial policy issue associated with Default Service has been its impact on the existing utility company, particularly with respect to customers who do not choose in the early years of retail competition. If customers can, by doing nothing, remain customers of their current utility, then the distribution utility (and its retail sales affiliate) has gained a tremendous competitive advantage. Competitors will have an uphill battle to penetrate this almost guaranteed market, which may, in turn, discourage them from incurring marketing expenses associated with gaining residential and small commercial customers, especially in relatively small markets. In most jurisdictions, incumbent utilities have argued strenuously for the right to provide electricity to these customers and to be clearly identified as their electricity source. Potential competitors have just as strenuously objected, pointing out that this approach "gives" a significant share of the emerging market to incumbents and will prevent, or at least delay, the development of a competitive market.

States have identified four ways to provide Default Service:

Create a Bid Process

This process allows one or more retail suppliers to provide Default Service through a competitive bidding process. The winning bidder (or perhaps two bidders offering different rate designs) obtains the right to serve customers for a set period of time. The state requires the distribution company to offer electricity service pursuant to the bid conditions and procedures or establishes new regional entities to conduct bids for such services, thereby entirely eliminating the distribution utility. In either case, customers see a change in their electricity supplier. The distribution company or regional entity is required to act in a fiduciary capacity on behalf of its customers in conducting the bid process so that their customers get the best deal possible, given the conditions of the stated offer. Under this approach, the state regulatory commission oversees the bid process and mandates key terms for Default Service: rate design, billing options, term of service, etc. This option has the advantage of providing a regulated service option with the least amount of change to customers but which builds upon the competitive aspects of the new electricity market.

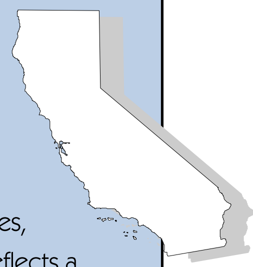
Require Distribution Utilities to Provide Default Service at Market-Based Rates

Some states have chosen to anoint the distribution company as the provider of Default Service and to mandate a market price, that is, the price any customer would pay for access to short-term supplies of electricity. This scenario is often accompanied by a requirement that utilities divest their generation facilities or sell their power output into a pool and then obtain market priced electricity for default customers. Because short term market rates are often volatile, this option is often accompanied by legislative requirements to cap rates at current levels or even decrease rates overall.

Require Distribution Utilities to Provide Default Service Under a Rate Cap or Rate Decrease

Another variation on Default Service requires distribution companies to continue supplying electricity to its customers using its own generation facilities or energy obtained from the wholesale market. This option is also typically accompanied by a requirement that the utility provide either a rate cap or rate decrease during the transition years (the years in which stranded costs are being recovered). This option allows customers to do nothing and continue to receive electricity from their current utility.

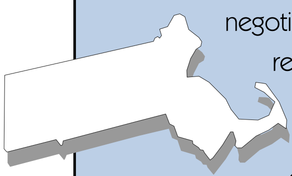
In **California** distribution utilities must sell all their power into the power pool (Power Exchange) and then obtain electricity for Default Service customers at the prevailing market price for a transitional period. This service is priced at market rates, but the customer's total bill reflects a 10% rate decrease in the early years, as mandated by the state's electric restructuring legislation.



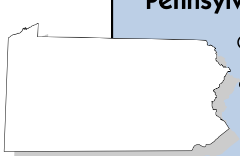
Ballot and Spread by Random Assignment

Prior to the implementation of customer choice, a state could mandate that customers choose an electricity supplier via a ballot system and randomly assign those who do not select a specific supplier to one of several suppliers who have registered and indicated a willingness to accept such customers. The commission would have the authority to mandate certain basic minimum terms which suppliers would have to meet as a condition of providing this service. This approach has the advantage of forcing the development of a competitive market, but customers may not be ready to accept this mandated change in their electricity supplier.

In fact, this approach was used in some states following implementation of competition in the interstate long distance telephone market. Customers complained and resisted automatic assignment to a supplier, referring to it as a form of "regulatory slamming" and triggering association with the particularly egregious practice of changing customers' telephone providers without permission.



Larger utilities in **Massachusetts** have negotiated settlements which require distribution companies to continue to provide a Standard Offer based on current rates with a 10-15% decrease for customers who do not choose. In addition, these utilities must also provide a Safety Net Service to customers who enter the competitive market and then seek to return to the distribution company for a short period of time. This service must be provided at short term market rates. Recently-enacted electric restructuring legislation in Massachusetts has adopted this approach.



Pennsylvania's electric restructuring law does not mandate divestiture and requires the local utilities to continue to provide generation services subject to various rate caps during the period in which stranded costs are being collected. The PUC may choose an alternative method for Default Service after the transition period.

Assuring Reliability of Service

Distribution utilities will remain responsible for most aspects of power quality because of their retained ownership of the distribution system, that is, the poles and wires that deliver electricity to each customer's home and place of business.[15] Therefore, distribution utilities will remain responsible for service reliability (outages, their frequency and duration), installation of service (service drops, as well as line extensions in previously unserved areas), service disconnection, complaint resolution, change-orders, and billing and collection.

Electric restructuring legislation passed in several states has reaffirmed the duty of distribution utilities to maintain service quality and reliability in the transition to a new industry structure and has linked that obligation to the use of Performance-Based Ratemaking (PBR) in setting rates for distribution services. PBR typically retains strict control over basic service rates for core customers by either freezing prices or revenues or establishing a formula that restricts utilities' ability to raise prices or revenues for these customer groups. Utilities are usually given significant pricing and marketing flexibility within limits set by either the rate freeze or the rate formula. In return, utilities assume more risk. Shareholders may retain earnings if the utility is efficient or if earnings increase, but must also assume the risk of loss if earnings drop during the term of the plan. Most of these alternative rate plans are multi-year in nature.

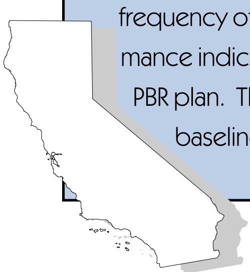
Utility commissions have struggled with how to assure adequate customer service and reliability through PBR. Commissions initially reasoned that they would rely on their existing rules and investigatory authority to monitor and respond to any deterioration in service quality or reliability. Many commissions dealing with deteriorating service quality in the telephone industry have found this approach to be insufficient.[16] More recent regulatory plans for both telephone and electric/gas utilities contain a specific customer service and reliability index that monitors selected attributes of service quality and establishes penalties in the form of customer rebates or earnings reductions if performance deteriorates during the term of the plan.[17]

Universal Service Programs

A thorny issue in every state is how to address the impacts of a competitive electricity market on vulnerable customers. Some customers are vulnerable because of their inability to afford utility services or because they are unable to read and comprehend their rights and responsibilities in a competitive market. Most states fund universal service programs through utility rates, either directly or indirectly, which are designed to assist low-income, elderly, or disabled customers with affordable electric service. These programs typically include

- shut-off or disconnection moratoria;
- flexible payment arrangements;
- ratemaking policies concerning how utilities are "made whole" for bad debt and customer service expenses;

Both the **California** and **Pennsylvania** utility commissions have initiated rulemakings that mandate reporting requirements for their distribution utilities which monitor service reliability and other attributes of customer service. These proposed rules typically require distribution utilities to report key indices of reliability, such as minutes of outage per customer and frequency of customer outages. The California PUC will continue to include these performance indicators in the distribution utilities' Service Quality Index included in its PBR plan. The indices include financial penalties for failure to meet historical baseline performance standards.



- requirements for budget billing and bill payment counseling;
- bill payment assistance programs, rate discounts, percentage of income payment plans, and arrearage forgiveness when customers make regular payments; and
- targeted energy efficiency and weatherization programs.

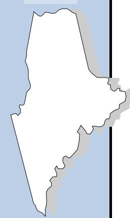
Direct costs associated with targeted discounts and energy management services are relatively easy to identify, but the indirect costs or benefits of certain programs are not as easily identified. Utilities have argued that these programs should not be funded through rates in a competitive environment. Of course, competitive suppliers will have no obligation to comply with these traditional public purpose programs without specific regulatory directives. Distribution companies, although regulated, will have a much narrower role. Policymakers have legitimately asked whether electricity should be treated like food or gasoline—where the government's role to assist those without sufficient resources is handled through the tax system. Most commissions and state legislatures that have taken action in this area have announced their support for continuation of programs and policies that address low-income customers and others with special needs. Legislation adopted in some states not only mandates the continuation of current programs, but allows for expansion or development of new programs by the public utilities commission.

State policymakers are confronting inadequate funding of traditional financial assistance programs for basic needs,[18] and a lack of certainty about the future price of electricity, particularly for low-income customers who may be faced with few or no supplier options. Bill assistance and other programs have been created via utility regulation, modest to be sure in some states, for vulnerable customers facing unaffordable electric or gas bills. Proponents of funding such obligations by means of the state's general tax system argue that utilities are not social welfare organizations and that it is more equitable to fund assistance programs through the tax structure based on a household's income and ability to pay. Those who support funding these programs via utility rates argue that the cost of these programs is already included in rates, that the creation of a new tax-supported energy assistance program is unlikely to occur in the near future, and that a small per-kilowatt hour charge is a relatively small price to pay for universal service programs when industrial customers stand to reap significant benefits through lower prices and increased service options. [19]

The design and funding of these programs will no doubt vary among the states. In Maine, each utility has designed different programs to respond to local concerns within the statutory expenditure guideline of .5% of jurisdictional revenues. The Maine PUC has initiated a rulemaking to determine whether the programs should be operated on a statewide or distribution utility-basis and whether existing programs, which are different at each utility, should follow a uniform approach.[20] The California Public Utility Commission has appointed a Low-Income Governing Board to recommend a statewide administrative structure for low-income programs funded through distribution utility rates.[21] The Pennsylvania PUC has ruled that existing utilities should maintain control and implementation of their low-income programs,[22] and has addressed the exact program design and funding level in each utility's restructuring plan. To date, the Commission has substantially increased the funding and eligibility for these programs.[23]

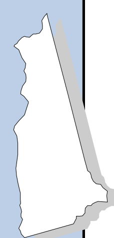
The role of competitive suppliers in funding and delivering universal service programs has been explored in some states, but no state has yet designed a system in which suppliers fund program benefits to low-income customers. However, the Pennsylvania PUC has ordered that bill payment assistance program credits, provided to qualified low-income customers, be "portable." That is, they must be applied in a pro-rata manner to both the distribution and the generation portions of the bill.[24] This will assure that low-income customers enter the competitive market with their bill credits (based on their total electric bill) intact.

Selected Universal Service Programs

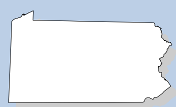


Maine: Distribution utilities must continue to fund low-income assistance programs up to .5% of jurisdictional revenues.

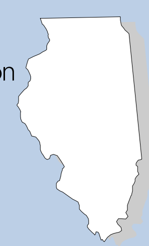
California: The existing 15% discount and access to no-cost weatherization programs for low-income customers will continue, funded by a Public Goods Charge applicable to all customers through their distribution companies.



New Hampshire: Based on the universal service directives in its electric restructuring legislation, the N.H. PUC approved a new low-income assistance program to be funded by distribution companies at a rate of 3 mills per kWh.



Pennsylvania: Electric restructuring legislation mandates, at a minimum, continuation of current programs and policies and requires such programs to be funded through a non-bypassable charge on customers. In the context of individual restructuring plans, the PUC has expanded both energy efficiency and bill payment assistance programs.



Illinois: Recent legislation authorizes a new $76 million low-income program to be funded by distribution utility ratepayers.

Credit and Collection Policies

Most states will continue to regulate the credit and collection practices of distribution utilities, much as they do today. These regulations typically include bill content and format requirements, credit and collection procedures, limitations on the disconnection of at-risk customers (particularly during extreme weather conditions), right to payment arrangements, and reconnection policies. Electric restructuring legislation in several states (Pennsylvania, Massachusetts, and Connecticut) has imposed some or all existing credit and collection rules on all competitive suppliers as well. Other states are creating separate rules of a less comprehensive nature. These issues will be explored in Chapter III of this *Blueprint*. However, with respect to distribution utilities, there are at least two issues that should be addressed in this chapter: physical disconnection of service and allocation of partial payments.

Disconnection of Service

In a competitive market, sellers usually do not have collection devices that prohibit non-paying customers from obtaining the same product from alternate sellers. Most state restructuring laws to date prohibit competitive suppliers from using the threat of physical disconnection at their customers' meters to collect unregulated charges. Of course, suppliers must be able to discontinue their services to nonpaying customers, but this can be accomplished by notice to customers (*Notice of Contract Cancellation*) and to the distribution company without physical disconnection of customers from the grid. If the distribution company fails to obtain specific instructions from its customers, the customer whose contract is canceled by a supplier will be provided with Default Service, which should be subject to actual disconnection according to commission-approved procedures. Competitive suppliers will be able to use standard collection options available to any competitive business, many of which are subject to state and federal consumer protection laws, discussed further in Chapter III. These options include contacting customers and attempting to directly collect unpaid bills, using debt collection agencies, Small Claims Court, and, in more serious cases, filing a civil complaint in a court of general jurisdiction. Suppliers will also be able to report customer credit histories to credit reporting agencies and make use of this information in determining credit terms for applicants.

Allocation of Partial Payments

Closely related to the discussion of service disconnection is the issue of allocating partial payments. If a customer pays only a portion of a total bill issued by a distribution company under contract with the customer's supplier, a rule must be established to determine how to allocate the partial payment between the regulated and non-regulated services. Because the distribution and transmission charges are regulated and the electricity sales are not, most states have determined that the customer's payment be first allocated to those services subject to disconnection (and for which there is no alternative). This is the same approach typically taken today when a regulated utility bills for non-regulated services, such as the sale or lease of water heaters by a gas utility. In addition, this approach also assures that customer payments will be allocated first to the nonbypassable charge which covers stranded costs included by distribution utilities on customer bills.

Customer Privacy

Consumers today should be able to expect that their utility billing and payment records are confidential. There is no federal law, however, that compels privacy, and in many states, there is no statute that specifically protects such records.

Typically, utilities protect this information from disclosure and do not routinely sell or make available customer-oriented research and survey results. In a retail competition scenario, the distribution company will have information concerning its customers that retail suppliers will want to obtain, such as usage profiles and billing and payment history. Allowing access to such information in a competitive market is complicated by the fact that regulated distribution companies will naturally want to give access and preferences to their unregulated retail sales affiliates. This may result in cross-subsidization of the utility's unregulated retail sales efforts by regulated rates for its monopoly distribution function, which, in turn, will hamper the development of a truly competitive market because other competitive suppliers will not have such an advantage. Indeed, because the distribution company and the marketing section of most current public utilities are one organization, this information is routinely exchanged now and, depending on who gets the billing and accounting computer, will continue in the future unless specifically prohibited.

States must strike a balance between the need for fair dealings in the use and access to customer information to enable development of a competitive market and customers' reasonable expectation that personal billing and

Unlike most states, **California** has a statutory policy to protect customer-specific information held by utilities. PUC Code §§585 and 588 establish a general policy that protects customer-specific information held by utilities without written authorization by the customer. Narrow exceptions for commission and law enforcement access to customer-specific billing and payment records require that any exception provide for "...protection of the reasonable expectation of customers of public utilities in the privacy of customer-specific records maintained by that utility." Even in providing for access to such information by law enforcement officials, a customer's usage is protected from access without a court order or subpoena.

payment information will remain private. Suppliers argue that customers benefit if, at least, their usage information is made available, because suppliers can better target their marketing offers based on usage profiles. However, most states have, to date, allowed the release of generic information (not customer-specific) without permission, and generally prohibited the release of customer-specific information without their permission. This requires the distribution company to obtain individual customer permission to release information to its retail sales affiliate or to any other supplier. In addition, states that have addressed this issue have required that distribution utilities provide their customers with historical usage history at least once per year at no cost.

State rules in this regard typically do not change the ability of the distribution utility or retail supplier to communicate customer-specific information to credit reporting agencies or debt collectors for lawful purposes as described in the *Fair Debt Collection Practices Act* or *Fair Credit Reporting Act* both of which are discussed further in Chapter III.

CHAPTER III

STATE REGULATION OF COMPETITIVE ENERGY SUPPLIERS

The Rationale for State Consumer Protection Regulation

While the move to retail electric competition is often referred to as "deregulation," this description is not entirely accurate. No state has proposed that the retail sale of electric or gas services be totally deregulated. Rather, this description is most often used to refer to the repeal of the state's traditional authority over prices charged for generation services. Traditionally, pricing authority has been exercised at the state level by a public utility commission which reviews and approves any rate or charge for services provided to retail customers. Rates, charges, and the terms of service are then set forth in "tariffs" that are mandatory terms or conditions of service under which utilities may provide services to customers.

While prices themselves will not be regulated, many other aspects of the bargain between the energy service provider and the customer, particularly the residential customer, will be subject to state regulation. State regulation will be based on consumer protection principles that form the basis for regulation of many products and services marketed to residential customers. State regulation is often justified by the importance of a particular product or service to consumer health and welfare. For example, housing prices are rarely regulated, but housing units must typically

> Retail electric and gas competition substitutes contracts between parties in place of traditional state-approved tariffs. The buying and selling of generation services is thus governed by the law of contracts and not the non-negotiable tariffs of a fully regulated public utility industry.

conform to state and local standards to prevent the sale or rental of substandard housing. State regulation also protects individual consumer bargaining power when dealing with sellers who seem to hold "all the cards" in the bargaining game. Consumers are often presented with "contracts of adhesion," which are pre-printed contracts that contain detailed terms that bind them after the deal is struck and over which they have little bargaining ability. In other words, while nominally competitive, the market may be one that favors one side of the bargain unduly even if the price is technically subject to competition. Rental housing, consumer credit, and insurance are examples of industries in which states have traditionally played an active role in regulating contract terms. Regulatory action may take the form of disclosure (uniform methods of price disclosure, plain language contract requirements) or outright regulation of certain terms (prohibiting certain practices, allowing a contract term only under certain conditions and with certain disclosures, providing a right of rescission or cancellation).

The sale of electricity is a prime candidate for this traditional form of state consumer protection and contract regulation for several reasons. First, electricity is a necessity of life. Most state and local housing laws include lack of electricity and heating in the definition of "substandard housing."[25] Second, consumers are not prepared to shop for electricity after almost a century of "cradle to grave" regulation over every aspect of their electric and gas utility services. Even in New Hampshire, after extensive publicity and marketing efforts by suppliers which began early in 1997, most residential and small commercial customers were not aware of retail electric competition or the probable impact of competition on their monthly electric bill in a survey conducted in the fall of that year.[26] Results such as these suggest that consumers are not prepared for dramatic changes and may need additional consumer protections during a transitional period.

And third, most contract terms offered to residential and small business consumers will not be subject to negotiation. They will resemble typical "contracts of adhesion," which have boilerplate provisions not subject to individual negotiation. Therefore, it is likely that states will seek to regulate some aspects of the contractual bargain between the sellers of competitive energy services and residential and small commercial customers. Such state regulations should be applicable to transactions by both distribution companies (with regard to the direct provision of generation services) and retail electric suppliers in their dealings with residential and small commercial customers. Most states to date have concluded that transactions by larger commercial and industrial customers do not need standardized protections.

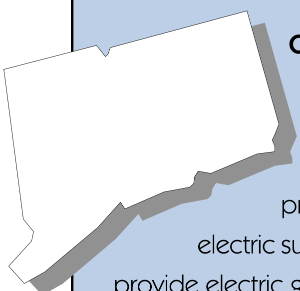
Finally, the need for state contract regulation and consumer protection reflects lessons learned during telephone deregulation. Many states have taken steps to regulate certain electric competition practices based on their experience with, and customer reaction to, long distance telephone competition.

Existing State and Federal Consumer Protection

The regulation of competitive energy suppliers should reflect existing state and federal consumer protection laws, the most important of which are briefly highlighted below.

Application for Credit

The federal Equal Credit Opportunity Act (ECOA)[27] applies to the granting of "credit," including credit for utility services.[28] The term "credit" in this federal statute is defined very broadly to include any agreement in which the obligation to pay is deferred, even when there is no finance charge and regardless of the number of installments required for repayment. The ECOA prohibits credit discrimination on the basis of race, color, sex, marital status, religion, national origin, age, handicap, receipt of public assistance (such as the receipt of Temporary Assistance for Needy Families (TANF), formerly the Assistance for Families with Dependent Children (AFDC) program, or food stamps) and exercise of dispute and enforcement rights under federal consumer protection statutes. The ECOA is particularly important to electricity sales because it may be an important tool to prevent the practice of "redlining." "Redlining" refers to the practice of denying credit or altering credit terms to residents, simply because they live in certain neighborhoods.[29]



Connecticut's policy concerning discrimination in the application for electricity service provides that... "No electric supplier...shall refuse to provide electric generation services to, or refuse to negotiate to provide such services to any customer because of age, race, creed, color, national origin, ancestry, sex, marital status, sexual orientation, lawful source of income, disability or familial status. No electric supplier shall decline to provide electric generation services to a customer for the sole reason that the customer is located in an economically distressed geographic area or the customer qualifies for hardship status....No electric supplier shall terminate or refuse to reinstate electric generation services except in accordance with the provisions of Title 16 of the General Statutes." *An Act Concerning Electric Restructuring, Public Act No. 98-28*, §29.

Furthermore, under the ECOA, a creditor may not alter deposit requirements or adopt different disconnection procedures based on race, receipt of public assistance, or because another family member owes a balance on a separate account. The ECOA incorporates the "effects test" used in housing and employment litigation to prevent discrimination that, while not intended to rely on an illegal basis for credit denial, has a demonstrated adverse effect on a minority group with racial, ethnic, or other characteristics listed in the ECOA.[30]

The Fair Credit Reporting Act (FCRA)[31] is a more specialized federal statute aimed primarily at the practices of organizations who maintain data on consumers and sell it to businesses, who then use it as part of their evaluation of applications for credit, insurance, or employment, or other transactions initiated by consumers. The statute was originally enacted in 1970, but was extensively amended in 1996 (Public Law 104-208). The FCRA requires that when a business relies on information in a consumer report to deny or alter credit terms, certain disclosures must be made in writing to the affected consumer. This law currently applies to public utilities and will apply as well to retail energy suppliers. A key change of the 1996 FCRA amendments requires that providers of credit information, such as stores, banks, insurers, energy suppliers, and others, report accurate information.

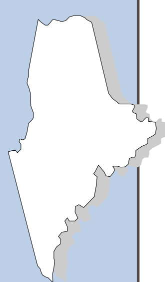
Both statutes are enforced by consumers (who may file for statutory damages and attorney fees), the state Attorneys General, and the Federal Trade Commission through cease and desist orders, court action, restitution, and injunctive relief, as well as other specialized agencies for creditors under their jurisdiction, such as banking authorities.

Credit Terms (Truth in Lending Act)

Both the state regulation of finance charges, consumer credit terms, and the federal Truth in Lending Act (TILA)[32] have not generally applied to public utilities because these laws apply to a narrow definition of credit. For the most part, the federal TILA and state consumer credit laws regulate transactions in which a finance charge is imposed, i.e., when a debt is deferred and an interest rate charged for installment payments. A credit transaction subject to the TILA triggers a host of disclosure, procedural,

Selected Services Subject to Competition

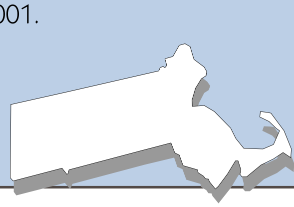
California has ordered that so-called "revenue cycle services" (billing, metering and consumer services) be subject to competition for large customers in 1998 and for residential and small commercial customers beginning in 1999.



Maine's electric restructuring legislation mandates that billing and metering competition commence no later than 2002, two years after full retail competition begins in 2000.

Pennsylvania's electric restructuring legislation does not specifically provide for competition in services other than generation. However, the recent PECO Energy restructuring plan settlement calls for billing and metering competition in that utility's service territory beginning in 1999.

Massachusetts' legislation requires a study of metering, customer billing and information services competition by January 2001.



and substantive requirements. It is possible that retail energy suppliers will devise payment plans that resemble credit sale transactions or sponsor open-end credit plans for the sale of electricity which will trigger the TILA disclosure and disputed bill procedures. It is more likely, however, that electricity sales will not fall under the TILA because sellers will typically not structure contracts to allow for extended payments, partial payments, or a finance charge as that term is defined in the TILA. Instead, retail electric sale contracts that require the customer to pay in full within a certain number of days or pay a specified late fee will be more common transactions. These terms, by themselves, usually do not qualify as "credit" within the meaning of the TILA.

Unfair and Deceptive Practices

The Federal Trade Commission (FTC) Act prohibits "unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce."[33] All states have adopted a similar statute, sometimes referred to as the "Unfair and Deceptive Practices Act" or UDPA, typically enforced by the state Attorney General. Under federal law the FTC has jurisdiction to define such practices in generic rules where deceptive practices are widespread, or to enforce the prohibition through individual adjudicatory proceedings, using cease and desist orders and taking businesses to federal court to obtain penalties and redress to affected consumers. Most state Attorneys General have similar remedies under UDPAs. While the FTC Act does not give consumers a private right of action, under some state laws individual consumers can sue businesses and seek actual damages (with a minimum amount), equitable relief, and attorney's fees. Class actions by consumers are also an option under some state laws. Historically, these statutes have been used to prevent unlawful and deceptive advertising, deceptive pricing, and unfair trade practices, and to regulate special sales approaches, such as door-to-door sales, multi-level marketing or pyramid selling schemes, and negative option plans.

The FTC Act exempts federal banking and insurance industries on the grounds that these industries are closely regulated by other federal and state authorities. Some state statutes also exempt state banking and insurance industries because unfair and deceptive practices are also tightly regulated by other state authorities. Some state UDPA laws specifically exempt public utilities[34] and about half of the state consumer protection laws have a provision which generally exempts transactions which are subject to some regulation by a state or federal administrative agency from regulation under the UDPA.[35] State courts have interpreted this exemption both narrowly (the specific conduct must be condoned by the state or federal agency) and broadly (the business is exempt if it is subject to regulation), depending on the nature of the state exemption statute and the nature of the regulatory scheme. This situation will need to be clarified with respect to the activities of retail energy suppliers, particularly the affiliates of regulated distribution companies.

Debt Collection

The Fair Debt Collection Practices Act[36] (FDCPA) regulates the conduct of debt collection agencies and others, including attorneys, who collect debts owed to a third party. Therefore, although an important consumer protection statute, the FDCPA does not directly apply to a seller or creditor, e.g., energy supplier, who collects debts owed directly to him or her under most circumstances. Third parties who collect debts owed to a utility or a competitive electric service provider would, however, be subject to the FDCPA.

Telemarketing and Consumer Fraud and Abuse Prevention Act

Congress enacted this legislation[37] to combat the growth of telemarketing fraud by providing law enforcement agencies with powerful new tools to provide consumers with new protections, and to provide guidance for lawful telemarketing activities. Under this Act, the FTC adopted the Telemarketing Sales Rule.[38] Key provisions of the Rule require specific disclosures by telemarketers, prohibit misrepresentations, set limits and times telemarketers may call consumers, prohibit calls after a consumer asks not to be called, and requires that specific business records be kept for two years. The Telemarketing Sales Rule also restricts telemarketing calls to the hours between 8 am and 9 pm. Utilities and competitive electric suppliers will be subject to this Act and the FTC Rule.

Cooling Off Rule

The FTC has also promulgated the Cooling Off Rule[39] which gives consumers three days in which to cancel and receive a full refund on sales of $25 or more when the sales transaction is made at the consumer's home, his/her workplace, or at facilities rented by the seller on a temporary basis, such as hotel rooms or convention centers. The Cooling Off Rule is relevant to electricity sales that occur in locations away from the seller's normal place of business. Sales that occur subject to this Rule require the seller to provide the buyer with a summary of the buyer's cancellation rights, and two copies of an actual cancellation form. Some states have extended their version of this rule to sales made over the telephone, thus triggering a 3-day right of cancellation for sales of electricity via telemarketing.

Definition of Services Subject to Competition

All state electric restructuring legislation adopted to date defines competitive services to include, at a minimum, the generation and sale of electricity. The most controversial issue surrounding the definition of competitive services has been whether they should include billing, metering, and associated consumer services.

Proponents of competition in billing and metering services point to the potential for customer savings if a competitive market is allowed to develop. Suppliers also argue that they need to be able to package these services with electricity sales so as to link the many products that may be bundled, thus emphasizing the key role played by the bill as a marketing tool. Other advocates for billing and metering competition point to the value of "real-time" meters that send proper price signals concerning customer electricity use at certain hours of the day or times of the year, a feature not available on most residential and small commercial customer meters today. Many suppliers have pointed out that their motivation to sell electricity to low-usage consumers may be greatly influenced by their ability to market additional (and perhaps more profitable) services to them. The impetus of technological developments in the metering industry in particular, coupled with lower costs, suggests that customers will have substantially more choices for metering and billing in the future.

Opponents of competitive billing and metering point out that customers will be confused enough with generation competition without allowing additional services to be unbundled from the current utility bill and subject to competitive marketing. In addition, union representatives in particular emphasize the impact on local jobs if billing and metering are suddenly subject to competition. Utilities themselves argue that these services are part of the natural delivery services monopoly and that some of these services cannot be provided more economically in a competitive market.

Whether states move to outright competition in these areas or allow developments to proceed at a slower pace, they will face the following concerns:

Should suppliers be able to offer alternative meters to their customers that allow for different pricing options, such as time-of-day and time-of-year prices?

Some higher-use customers may have a lower monthly bill with meters that allow more sophisticated pricing structures. Suppliers may also offer energy management or home energy systems with meters that allow integration of energy services with alarms, automatic appliance controls, and even telecommunications services. However, low-usage residential customers (who do not have electric hot water or heat or other high-use appliances) may not benefit from such oppor-

Norway's *Guidelines for Metering and Settlements of Electricity Trade* (November 5, 1994) require large customers to obtain real-time meters to allow billing on their actual hourly usage characteristics. Residential and small commercial customers with traditional meters are billed on the adjusted load profile of the network, or distribution area in question. The adjusted load profile is calculated as the difference between the network owner's system load profile, adjusted for network losses, and usage by end users with real-time meters. These load profiles are calculated quarterly. Most states in the U.S. have adopted Norway's approach.

tunities because both the equipment (meter) and billing costs are likely to be higher than the potential savings.

Who should be able to issue bills to customers?

Suppliers argue that it is unfair to allow distribution utilities to issue a combination bill that includes both regulated and competitive services without providing such an option to them as well. The California deregulation order, which allows suppliers to issue a unified bill, makes it clear that suppliers who negotiate such an option with distribution companies must assume the risk of collection for both the regulated and stranded cost charges. This will require suppliers to conduct their own collection programs without benefit of the distribution company's "threat of termination" or "disconnection" service policies.

How should these services be unbundled from current rates?

If suppliers can sell and bill separately for metering services, state regulators will then have to unbundle these charges from current rates and give customers who obtain them a credit on their distribution charges so that customers do not pay twice.

Should meter installation be tested differently?

Some states may want to separate physical installation of the meter from automatic meter reading options offered by some suppliers. This would allow utilities to maintain control over meter installation (with its safety considerations), but allow customers to have alternative meter usage data accessed directly by suppliers.

How should customers with standard meters be treated?

Customers who do not have or want a "high tech" meter should be able to participate in the competitive market with their standard mechanical meter. Although some states require that large industrial customers obtain "real time" meters to enable more accurate billing, all other customers should be billed on the basis of standard load profiles for the customer class in question, rather than on different rates for each hour of service. This approach was pioneered in Norway, a country that moved to retail electric competition several years ago.

Licensing Criteria for Suppliers

Many industries and businesses whose activities can affect public health and safety, such as hospitals, nursing homes, insurance companies, debt collection agencies, home repair contractors, and banks are required to meet minimum state requirements to conduct business in that state. In a similar vein, whether referred to as "registration," "certification," or "licensing," most state electric restructuring legislation requires prospective electricity suppliers to comply with minimum state requirements.

Typically, states require a form of security, or bond, to assure reimbursement of customer deposits, advance payments, or restitution ordered by a regulatory body. The amount of the bond is set high enough to compensate parties adversely affected by a firm's failure to perform. Requiring a bond (like a performance bond on a construction project) or a letter of credit has at least two beneficial consequences. First, a company's ability to obtain a bond or a letter of credit is proof of its financial soundness. Second, the bond provides a source of funds for compensation to individual parties. Most states require a bond as a condition of licensure, the amount of which reflects the different types of retail suppliers likely to emerge.

Typical state electric restructuring legislation requires the state regulatory authority, usually the public utility commission, to license retail electric or gas suppliers before conducting business within the state. Licensing requirements may include the following minimum criteria:

- Evidence of general financial integrity
- A bond or equivalent security in an amount based on the applicant's volume of sales
- Evidence that the firm is technically qualified to conduct its proposed business
- Information on disciplinary or enforcement actions in other states in which it operates
- Information concerning the applicant's consumer complaint history in other states
- Disclosure of its ownership structure and affiliates doing business in the state
- Location(s) of the applicant's office in the state, or, if no office, its agent for service of process and its geographic scope of business
- A description of services that will be offered
- The name and telephone number of a customer service individual for customers to contact the supplier

The licensing process should not be a barrier to entry, as is the typical Certificate of Convenience and Necessity used for most public utility licensing today. Rather, the role of the utility commission in the licensing process is to ensure financial safety, system reliability and basic consumer protections.

Disclosures

Specific disclosure requirements that a state should consider as part of its regulatory scheme for electric suppliers are described in detail in Chapter 1.

Regulation of Credit Practices

Most state electric restructuring legislation imposes only those credit-related rules on suppliers that already exist in state and federal consumer credit laws (such as the ECOA, discussed earlier in this Chapter). However, some states have recently required suppliers to comply with most or all credit and application-for-service rules currently applicable to utilities. The Massachusetts and Connecticut electric restructuring statutes require suppliers to comply with existing consumer protection rules with respect to credit and application-for-service. The Connecticut statute also requires suppliers to recognize a customer's right to a medical emergency, winter-based moratoria on cancellation, and payment arrangement requirements.

Regulation of Contract Terms

Suppliers typically include contract terms most favorable to them in their pre-printed contracts with residential and small commercial customers. While disclosure of these contract terms in a *Terms of Service* document, coupled with a right of rescission, is an important consumer protection tool, disclosure alone may not be sufficient remedy. It is unlikely that suppliers will compete on many of these pre-printed terms. Some suppliers may offer superior customer service (such as fast-acting 1-800 call centers, more billing options and fast response to disputes and questions). It is less likely that suppliers will compete to offer generous payment arrangements for those who cannot pay in full every month, waive contractual cancellation penalties for customers who need to move to Default Service, or waive collection costs for low-income customers. Therefore, the following substantive contract terms are candidates for state regulation:

- **Late Fees:** States may establish a maximum monthly late fee. No more than 1.5% per month is typical, but Massachusetts rules prohibit late fees for residential customer transactions.

- **Notice of Renewal:** Some states require suppliers to notify customers at least two billing periods in advance of the need to renew and the consequences of failure to renew.

- **Length of Contract Term:** Some states are considering whether residential and small commercial contracts should have a maximum term (1-2 years), at least during a transition period. This would allow customers to become more experienced prior to allowing door-to-door sales representatives to obtain customer signatures on 5-year agreements with excessive early termination penalties, a practice that occurred in Toronto, Canada, at the onset of retail gas competition.

- **Collection Costs:** Suppliers should be prohibited from charging collection costs or damages in addition to the overdue amount.

- **Payment Arrangements:** States have differed on whether suppliers must offer at least one reasonable payment arrangement to residential customers prior to contract cancellation.

- **Notice of Cancellation:** Suppliers should be required to provide a minimum notice period prior to cancellation of a contract for non-payment and establish the content of the notice.

- **Medical Emergency:** Most states (Connecticut is a notable exception) have not required suppliers to honor a medical emergency at the customer's household if declared by a registered physician for a minimum period, but this is a typical provision of state utility regulation.

- **Pre-Payment Meters:** Pre-payment meters are controversial because they allow customers to be disconnected from all electric service during extreme weather without notice or compliance with health and safety concerns. States may want to consider ruling against the use of such meters as a condition of service for low-income customers, unless suppliers require such meters as a condition of service for *all* its customers.

- **Deposits:** Several states regulate a maximum deposit amount for residential customers. In Pennsylvania, suppliers may not require the deposit unless customers have a history of failure to pay for electric service, thus prohibiting suppliers from basing their credit worthiness decisions on non-utility service history.

- **Right of Rescission:** Most states require suppliers to provide all new customers with a 3-day right of rescission that is triggered by their receipt of the *Terms of Service* brochure with its price and contract term disclosures.

- **Dispute Resolution:** Most states require suppliers to notify customers of their right to refer disputes to the state regulatory agency, if a supplier cannot resolve it satisfactorily. The ability to refer disputes to a neutral regulatory agency has an additional benefit beyond that offered to the individual consumer. Dispute resolution authority allows the regulatory commission to monitor sales practices as well as compliance with basic consumer protection rules.

Regulation of Unfair Trade and Marketing Practices

Most state electric restructuring legislation invests the state utility commission with authority to adopt regulations which prohibit unfair trade and marketing practices by energy suppliers. Other states may rely on their existing consumer protection laws and the jurisdiction of the Attorney General for this type of regulation. Regardless, every state so far has sought to adopt specific provisions to prevent slamming and to encourage renewable energy development.

Slamming

One potentially unfair trade practice that most states have already decided to regulate is "slamming," which is switching the customer's supplier without permission or with fraudulently-obtained permission, a practice that has been the subject of widespread complaint and condemnation in the telephone industry. This course of conduct is sufficiently likely to occur with competitive electric suppliers that state restructuring legislation has either prohibited the practice outright or authorized the regulatory commission to prevent it.

The most controversial issue associating with anti-slamming regulation has been whether customers must provide signed authorization before their distribution company switches suppliers. Proponents of such an approach view a signed authorization as the best method to prevent slamming. On the other hand, signature requirements provide an enormous advantage to existing utilities, as the signature acts as a barrier to contracts with competitive suppliers.

For example, if a customer personally communicates with a distribution company to authorize the switch and provides identifying information, such as his/her account number, additional barriers to finalizing this transaction should not be erected. After all, the contract to supply electricity is between the customer and the supplier. The distribution company's obligation is merely to record the change for billing purposes. Reliance on oral communication from the customer in such situations should be allowed. But what if the supplier has initiated contact with the customer (via telemarketing or mail) and has obtained valid consent over the telephone? Should the distribution company be allowed to switch the customer's supplier upon notice from the new supplier? What if the customer has cashed a check from the new supplier which states that cashing the check will cause the customer's electricity supplier to be changed?[40] Opening up the authorization to include anyone other than the consumer opens the door to fraud. Even requiring that the authorization be signed by the consumer (thus preventing telemarketing alone from finalizing the sale) is fraught with difficulty, as the check cashing scheme demonstrates.

Recent legislation in California,[41] Massachusetts,[42] and Connecticut[43] reflects a growing attempt to deal with this problem. Customers who are solicited by a supplier, or his agent, to switch companies must not be switched until the new supplier obtains authorization in one of three methods: oral verification by an independent third-party; electronic verification; or written authorization. These options have proven to be the least likely to result in slamming, but they are not foolproof if a supplier is determined to commit fraud. In addition, this approach is likely to be most successful if accompanied by a "right to rescind" any contract for electricity within three business days after a customer receives a written *Terms of Service* brochure. If state policy links the "right of rescission" with receipt of contractual disclosures, suppliers will be stimulated to confirm their sales promptly. This approach will also accommodate the expectations of most customers who do not currently sign written contracts to obtain electricity, natural gas, propane and fuel oil.

At their annual meeting in California in 1998, the National Association of Attorneys General (NAAG) formed a task force to study the marketing of "green" power and other claims by electricity marketers. The task force is working to develop a set of model marketing guidelines for consideration by states moving to retail electric competition.

Marketing Renewable Energy

A marketing and disclosure issue that is sure to remain controversial is the manner in which electricity sources should be advertised as "green," "renewable," "less polluting," or "environmentally-friendly," how such disclosures should be regulated and, if so, by who and how. Recent national and regional surveys have confirmed that many customers want to shop for electricity based on environmental criteria.[44] Marketing campaigns conducted as part of the New Hampshire electric competition pilot program in 1997 confirmed this trend. Suppliers used such phrases as "We donate 1% of your power bill to groups working to protect New Hampshire's environment" (Working Assets, Inc.) and "Now is the time to start saving money and saving the planet" (Green Mountain Energy Partners, selling Hydro Quebec power). Because customers want to include environmental criteria in making their electricity purchase decisions, suppliers will want to focus on these aspects of their service to obtain new customers.

There is risk associated with marketing renewable energy, particularly insofar as advertising is concerned. Both state and federal laws prohibit deceptive advertising. At the federal level, the Federal Trade Commission (FTC) enforces the Federal Trade Commission Act;[45] state Attorneys General typically have primary authority for implementing state consumer laws relating to deceptive advertising and marketing. The FTC has issued policy statements describing its policies with respect to unfair or deceptive advertising claims.[46] In addition, the FTC requires that all important marketing claims, whether expressed or implied, be substantiated.[47] The FTC has adopted specific guidance for environmental claims, *FTC Guides for the Use of Environmental Marketing Claims (16 CFR § 260)*. While these guidelines do not specifically mention electricity sales, general provisions, such as a requirement that sellers document their claims based on a reasonable interpretation by consumers, do apply. The *FTC Guides*, among other things, state that general environmental claims should be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit.

CHAPTER IV

THE MANY FACES OF CUSTOMER CHOICE:

Aggregation And Group Buying Power

Individual customers will be able to participate in competitive electric and gas markets in several ways. The most common is referred to as “direct access.” In this approach, customers enter into a bilateral contractual relationship with their chosen electric or gas supplier. The contract governs services, terms and conditions, and fees associated with provision of these services. Even though a distribution company may act as the billing agent for the supplier, the rights and remedies of the customer and the supplier will be established in the contract between them.[48] This chapter of the *Blueprint* addresses how the state may stimulate and regulate alternative approaches to electric competition that enhance its benefits to residential customers. These approaches, however, are not viewed as substitutes for consumer protection policies identified elsewhere in this document.

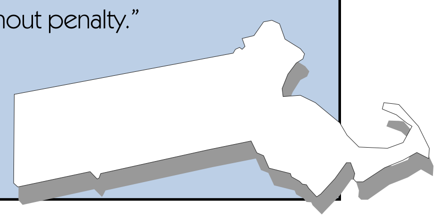
An alternative to direct access is a form of group buying that is generally referred to as “aggregation.”[49] Under this approach, the customer enters into a relationship with an entity that acts as a middleman between him/her and the retail energy supplier. The entity may be a political subdivision, such as a municipality or county, or a national, state, or local organization that seeks to obtain energy and other products on behalf of its members. Aggregation may be based on geographic location or non-geographic criteria, such as membership in a group, or employment. In some states, efforts

Excerpt from **Massachusetts** legislation:

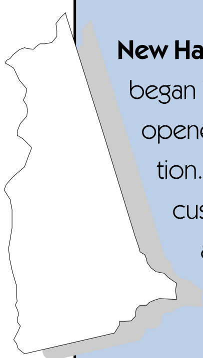
“Following adoption of aggregation through the votes specified above, such program shall allow any retail customer to opt-out and choose any supplier or provider such retail customer wishes.... Nothing in this section shall be construed as authorizing any city or town or any municipal retail load aggregator to restrict the ability of retail electric customers to obtain or receive service from any authorized provider thereof.

It shall be the duty of the aggregated entity to fully inform participating ratepayers in advance of automatic enrollment, that they are to be automatically enrolled and that they have the right to opt-out of the aggregated entity without penalty. In addition, such disclosure shall prominently state all charges to be made and shall include full disclosure of the standard offer rate, how to access it, and the fact that it is available to them without penalty.”

Section 247, adding Section 134 to Chapter 164.



are underway to create non-profit entities which aggregate the sale of electricity and energy management services to residential or low-income residential customers. Aggregation in particular is often viewed as a way to stimulate creation of a competitive market for low-use customers who may not otherwise be the target of marketing efforts by energy suppliers.



New Hampshire's electric pilot program began in April 1997, when the state PUC opened 3% of the state to competition. Half of the participating customers were picked by lottery and half participated by virtue of their location. Called "Geographic Areas of Choice," certain municipalities were chosen as targets for competition. These municipalities were allowed to determine how suppliers would be selected and how residents would be recruited to participate. When Peterborough, N.H., solicited proposals, 13 energy suppliers responded. Four public hearings were held. Once the supplier was selected, each citizen had to affirmatively choose to receive electricity from the winning bidder. Out of 5,000 residents, 1,400 actually participated. The resulting two-year, fixed-price contract was estimated to save participants 15-20% on their electric bill. The winning supplier also contributed $25,000 to the town's economic development fund.

Consumer Benefits From Aggregation

Both customers and power suppliers may benefit from aggregation:

- Low-use residential and small business customers may not benefit from direct access because their usage characteristics, coupled with a lack of advanced metering systems, may make them expensive to serve. Marketing costs to reach and consummate deals with these customers may exceed profit potential on electricity sales alone, unless the volume of sales is high. On the other hand, if a power supplier can negotiate one sale with an entity that represents a large group of customers with a similar energy profile, without incurring upfront marketing costs, lower prices may result.

- If Default Service is based on the market price or is priced below market rates by regulators, individual residential customers may not find energy any cheaper in the marketplace. However, an aggregator may be able to offer other valuable services and products, such as energy management or even telephone service, in a package deal that is desirable to customers.

- Aggregation may improve the market power of residential and small business customers. The aggregator that can deliver a significant energy load can bargain for a lower price and enhanced energy management services on behalf of group members.

- Aggregation may also be an important tool to achieve a state's Universal Service goals. In general, low-income customers use less energy than other residential customers. Furthermore, while most low-income customers do pay their bill, a high percentage of low-income customers cannot pay their electricity or gas bill in a timely manner because of its significant impact on household income (over 20% for some customers with higher-use and very low household income). Therefore, it is likely that low-income customers may need more customer service support, or carry a high risk of bad debt expense. Whether low-income customers should be the focus of aggregation efforts or whether they are better off in general as part of the residential class is a hotly debated topic among customer advocates. However, there is little debate about the notion that if suppliers do not market to residential customers in general, low-income customers will most likely be ignored.

Barriers to Effective Aggregation

Advocates have sought to remedy several potential barriers to aggregation in state electric restructuring legislation. Should customers be required to "opt in" to be bound to a contract for the sale of electricity negotiated by a group or organization? Or should customers be presumed to be bound and have the option to "opt out"? In other words, should a customer be bound to a contract with the aggregator in the same way that a customer can be bound in a contractual relationship with a direct access supplier? Proponents of aggregation argue that for benefits to be realized, membership in the group should signify that customers approve the group's power supplier; cost savings, due to economies of scale, may then, in fact, be realized.

Membership rights and responsibilities may affect supplier bids; suppliers may not bid on a group contract if the number of ultimate customers is unknown. However, aggregation proponents note that the "opt out" approach has not been successful in most states. Only Massachusetts has adopted legislation which allows a municipality, after a detailed public process, to presume that their residents' power supplier will be switched to the town's selection unless the customer opts out of the program. California's legislation specifically requires individuals to opt in to an aggregation plan, including one proposed by their local municipality.[50] No state legislation has allowed a private aggregator to group customers without specific affirmative approval from each customer in the group. This means that, for example, if the American Association of Retired Persons (AARP) seeks to aggregate customers in a state, the members who want to approve AARP's plan must *positively* approve it; membership alone will not suffice to presume supplier choice.

A second potential barrier to the use of aggregation, especially applicable in the municipal context, is the process a town must follow to solicit proposals and select a winning bidder. It is likely that in most states, a municipality will need legal authorization to initiate this type of activity. At the very least, the selection process requires public presentation of final bid offers, public meetings or hearings, and public comment and review of the town's proposed selection.

Municipalities and quasi-governmental agencies need to establish a framework within which an aggregation program is designed. This may present a third barrier. For example, Massachusetts requires that a municipality first devise an energy plan and establish criteria for selection of a power supplier. The state has also legislated minimum requirements for any municipal solicitation for power supply, which is designed to assure customer service and consumer protection provisions are not compromised for lower prices. A town may select a supplier on the basis of criteria that includes, but does not rely entirely on, price. This allows a municipality to choose a supplier that furthers environmental and energy efficiency goals, as well as price competitiveness. The town's plan and contract requirements may also be subject to approval by the state, which may impose additional requirements on the solicitation process.

Massachusetts legislation allows a town to run its own energy efficiency programs with a Systems Benefit Charge (up to 3 mills per kWh) and to directly invest (up to 1 mill per kWh) renewable energy funds in its own community.

In most states a private aggregator, doing business as an individual or an organization, must obtain a license to sell electricity and agree to comply with all appropriate state regulations. In other words, such issues as price and contract term disclosures, collection remedies, bill format, and other consumer protection procedures will also be applicable to contracts negotiated by aggregators. However, some state licensing requirements distinguish between suppliers and aggregators or brokers who do not take title to electricity. Such distinctions may impact requirements for bonding and other financial securitization. Substantial bonding requirements may act as a barrier for small non-profit groups attempting to provide aggregation services on behalf of its members.

The Consumer Electric Cooperative (CEC) proposes to deliver important services to low-income households, including

- aggregating the market power of low-income customers into larger groups for the purpose of negotiating better prices;
- delivering energy efficiency programs to reduce total bills; and
- pursuing bill minimization policies, such as switching customers from electric space heat to a less expensive fuel source.

Consumer Energy Cooperatives

Energy advocates in Vermont are designing a full-service consumer-owned energy cooperative whose mission is to lower members' energy bills by combining competitive energy pricing with comprehensive energy services. Its proponents differentiate their strategy from competitive energy suppliers as described below.

Most retail competitors are expected to offer primarily a single energy source and compete primarily on the basis of price. By contrast, the cooperative will feature value-added services designed to lower members' total energy bills. Bill savings will be achieved through competitive purchasing of energy and aggressive delivery of comprehensive energy-efficiency measures addressing all energy sources. The Consumer Energy Cooperative (CEC) will also lower bills by helping customers select the most cost-effective mix of energy sources for their individual energy service needs. CEC will offer its members the convenience of a single bill for all energy services.[51]

While the CEC states that it will target low-income customers with specific services that meet their needs, it will not focus exclusively on these customers, but seek a broad-based membership among residential customers. The CEC will seek to aggregate low-income customers through partnerships with existing community-based networks.

A Note on the "Muni-Lite" Concept

Some municipal aggregation models closely resemble municipal power districts or rural electric cooperatives. However, there is a significant difference. Unlike traditional municipal utilities or cooperatives, a municipal aggregator does not seek to own or control the local distribution system; the poles and wires remain the property of the local distribution utility. But what if a town seeks to gain access to the wholesale market on behalf of its residents and compete with the local utility without any changes to the state's electric power laws? This is what Palm Springs, California, sought to do in 1996. The City of Palm Springs applied to the Federal

Energy Regulatory Commission (FERC) for approval to purchase wholesale power, which would then be transported to customers by the local utility, Southern California Edison (SoCal Edison). SoCal Edison opposed the proposal, arguing that residents were attempting to avoid paying state-approved retail rates which included costs not reflected in the wholesale market price. In August 1996, FERC denied Palm Springs' claim and stated that its attempt to establish ownership of the distribution system by purchasing duplicate meters was not enough to trigger its access to the wholesale market.

As a result of this ruling, it is now likely that municipalities cannot obtain access to the wholesale market and escape their current franchise utility unless the state restructures its retail service or moves to create a new municipal utility with all the rights and duties of such an entity. This latter option would then require the municipality to contract with the local utility for use of the distribution system already in place, or seek to obtain such property from the utility by eminent domain and pay its fair market value.

CHAPTER V

THE NEW CONSUMER PROTECTION ROLE:

Jurisdictional And Enforcement Implications

This *Blueprint* highlights the policy implications of new relationships between consumers and their electric supplier and between retail suppliers and regulators. If the regulatory approach for public utilities has historically been dominated by a traditional model of total price and entry controls, the new regulatory model will rely instead on consumer protection and lower barriers to entry for new firms with little or no price regulation. Instead of monopoly power, with its focus on prices and rate design, the new competitive market structure will likely be accused of fostering "unfair" competition, caused by inadequate access to information by buyers and unequal bargaining power between buyers and sellers. These are crucial defects for a commodity widely regarded as a necessity.

If states are to transform their approach to a truly competitive market, they must acquire new tools for working effectively with the electric industry, and make innovative use of old ones. Examples of new tools include

- setting licensing criteria as a screening function to reinforce standards or norms defined in regulations;
- educating customers to participate in the competitive market based on informed choice;
- responding quickly to unfair and deceptive marketing and advertising practices;
- policing standards of conduct between holding companies and affiliates to assure the development of a competitive market structure; and
- umpiring disputes between competitors and between customers and their suppliers.

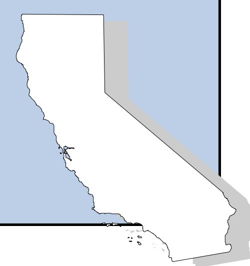
Jurisdiction of the State Utility Commission

The degree to which an existing state public utility commission will have jurisdiction over non-traditional suppliers of electricity, i.e., retail electric suppliers, will be decided by state legislation. Jurisdictional areas that might be addressed include

- licensing;
- disclosure requirements for advertising, terms of service contracts, and monthly bills;
- contract terms;
- prevention of unfair trade and marketing practices;

- authority to resolve customer disputes;
- the interaction of retail sales affiliates with parent utility holding companies or distribution utilities; and
- establishment of minimum billing, credit and collection practices.

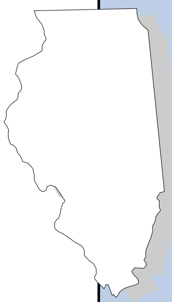
California's original electric restructuring legislation (AB 1890) granted the PUC jurisdiction over competitive suppliers for registration and certain complaints, but deferred to other state agencies for key consumer protection oversight. In August, 1997, a comprehensive consumer protection bill applicable to suppliers expanded the PUC's jurisdiction and required significantly more oversight in registration criteria and regulation of contract terms and disclosures. *SB 477 (Stats. 1997, ch. 275).*



In some states, the utility commission may share its jurisdiction with the Attorney General's office. However, no state has enacted retail electric competition by relying entirely on state and federal Unfair Trade Practice Acts or their equivalent. Nevada's electric restructuring law includes a reorganization of its consumer protection and public advocacy functions by combining them in one division of the Attorney General's office, while at the same time granting concurrent jurisdiction to the public utility commission to license and regulate the conduct and contract terms of competitive suppliers.

Whether state public utility statutes already contain sufficient jurisdictional authority for the commission to regulate retail electric suppliers, as well as aggregators and brokers who do not take title to electricity, will require detailed state analysis. Some jurisdictional statutes for public utilities link the state authority with ownership or control of property in the state or require utilities to own generating facilities to qualify. These restrictions do not allow jurisdiction over aggregators, brokers, or marketers without additional legislation. In addition, legislative guidance is necessary to establish policies for regulation of retail suppliers and the manner in which regulation should be different from traditional price and entry regulation applied to utilities and future distribution companies.

Because most states have assumed that some legislative changes will be required in any case to implement full retail competition, it will be important for such legislation to clarify the regulatory commission's role in licensing, monitoring, regulating, and enforcing minimum market standards of conduct on all major participants. Indeed, all state electric restructuring statutes enacted to date either assume or make clear commission jurisdiction over new market entrants for the purposes of registration or licensing and, at a minimum, consumer complaints.

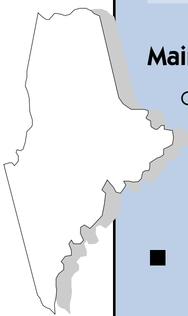


Recently enacted **Illinois** restructuring legislation created a separate unit within the Attorney General's office to handle consumer protection issues related to the electric industry. This action will concentrate resources and develop expertise that exists only at the utilities commission in other states.

The typical state approach to date has been to define "retail electric supplier" (or an equivalent term) to refer to those entities that will sell or offer to sell electricity to retail consumers. This definition of retail supplier includes the retail sales affiliates of traditional public utilities, newly formed entities which sell electricity from supplier-owned generation facilities located both in or out-of-state, as well as aggregators, marketers and brokers who market electricity from generation facilities which they do not directly own or operate. From the viewpoint of consumer protection, it will be important for a state to regulate any entity that seeks to promote or market the sale of electricity, whether or not the entity owns generation supplies. The term does not usually include entities which offer only to sell demand-side management or energy efficiency services, or metering equipment, or other enhancements to the sale of electricity.

Each state must also decide how the new competitive market will apply to publicly-owned utilities, such as municipal or rural electric cooperatives. Commission jurisdiction over these entities differs from state to state. However, policymakers involved in this debate will want to consider that exempting publicly-owned electric companies from licensing and consumer protection requirements imposed on other retail electric suppliers will grant them a more favorable market position. If publicly-owned electric departments or cooperatives seek to enter the competitive market to sell electricity to the general public, it seems reasonable to include

The **Pennsylvania** *Customer Choice Act, Section 2803* defines "electric generation supplier or electricity supplier" as "a person or corporation, including municipal corporations, which chooses to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter; brokers and marketers, aggregators or any other entities, that sell... electricity or related services, utilizing the jurisdictional, transmission, or distribution facilities; or an electric distribution company that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers, utilizing the jurisdictional, transmission and distribution facilities of an electric distribution company."



Maine's electric restructuring legislation clarifies the Public Utilities Commission's jurisdiction over retail electric suppliers to include

- licensing, including renewal and revocation;
- informational filings; public information disclosures;
- standard consumer protection provisions;
- penalties of up to $5,000 for each violation;
- dispute resolution;
- cease and desist orders;
- restitution; and
- court enforcement by the PUC directly or through the Attorney General.

them in the same overarching consumer protections adopted by the state for other competitive suppliers.

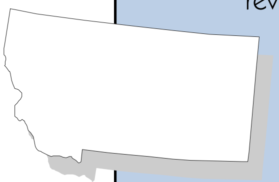
Access to Books and Records; Enforcement Tools

In addition to clarifying commission jurisdiction over competitive suppliers, state legislation may also need to make clear the extent of a commission's ability to obtain access to a supplier's books and records. As a practical matter, a commission is unlikely to conduct routine audits, but legislation should address regulatory authority to conduct investigations upon reasonable cause and to obtain access to books and records for enforcement purposes.

Furthermore, if a commission does not already have the authority to order restitution to affected consumers or levy fines or penalties, such authority should be considered as part of state restructuring legislation. While a commission without such authority may have wielded its regulatory powers via rate cases and other certification procedures required for traditional public utilities (such as providing a lower rate of return in response to inefficient management or poor service quality), these rate case tools will not be available to change the behavior of errant retail suppliers in a competitive market.

If a commission does not obtain authority to order restitution or fines, it will most likely be unable to respond promptly and forcefully to an emerging pattern of fraud or violation of consumer protection rules, and may be forced to make use of its license revocation authority when a lesser penalty might be more appropriate. For example, under current statutory authority, the New Jersey Board of Public Utilities may only seek a fine of up to $500 per violation against public utilities. While this may even be inadequate for enforcement against public utilities, the existence of ratemaking treatment amelio-

Montana's electric restructuring legislation specifies that the Commission may revoke or suspend the license of an electricity supplier, impose a penalty, or both, "for just cause on the commission's own investigation or upon the complaint of an affected party if it is established that the supplier



- intentionally provided false information to the commission;
- switched, or caused to be switched, the electricity supply for a customer without first obtaining the customer's written permission;
- failed to provide a reasonably adequate supply of electricity to its customers in Montana; or
- committed fraud or engaged in deceptive practices."

Fines are set at the range of $100 to $1,000 per day for each violation.

rates this defect to some extent. Without such rate case tools, this small penalty would probably be inadequate to prevent widespread abuse of consumer protection rules by competitive suppliers who are not subject to price regulation.

The Role of the Consumer Advocate

In most states, residential consumers are represented before the public utilities commission by independent legal consumer advocates. While commissions themselves are re-thinking their new regulatory roles, so are consumer advocates. State consumer advocates are often housed in the Attorney General's office or as part of the Executive Branch. Should the consumer advocate be given authority to participate in any commission rulemaking, licensing, or other policy decision with respect to supervision of retail electric suppliers? Should consumer complaints that find their way to the public advocate be coordinated with the utility commission or the Attorney General? States that have adopted legislation to date provide a continuing significant role for the consumer advocate with authority to participate in commission proceedings during the transition to competition.

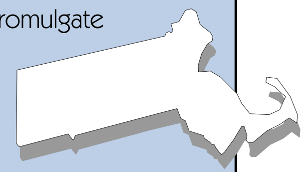
Public advocates are also exploring new roles as participants in statewide consumer education programs and have, in some states, taken a lead role in coordinating the exploration of innovative aggregation options for residential customers. Several consumer advocates have sought increased legislative appropriations to pay for intensive participation in key proceedings and customer outreach efforts that need to be quickly accomplished in preparation for retail competition. Furthermore, most consumer advocates expect to play an important role in monitoring commission compliance with statutory directives in a competitive marketplace, to use their authority to appeal commission decisions before the courts, and to seek customer restitution for violations.

The Role of the State Energy Office

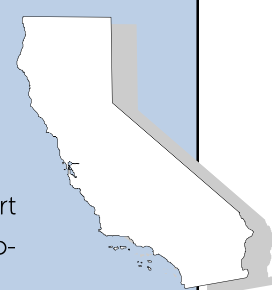
For states with a strong energy office, such as **Massachusetts** and **California**, electric restructuring legislation imposes important new authority with respect to energy efficiency, environmental disclosures associated with energy sales, and renewable energy development. In those two states, as in others, the state energy offices took a lead role in policy discussions leading to adoption of electric restructuring legislation. The Massachusetts Department of Energy Resources (DOER) proposed a complete plan to achieve customer choice in that state and submitted it to the Department of Public Utilities and to the State Legislature. The DOER and the Attorney General (within which the public advocate resides) then took the lead role in negotiating settlements with major utilities that ultimately formed the basis for many policies adopted by the State Legislature.

Similarly, the California Energy Commission played a key role in design and implementation of environmental disclosures, and has responsibility for the State Trust Fund to support "the operation of existing, and the development of new and emerging, in-state renewable resource technologies.[52]

Massachusetts' electric restructuring legislation authorizes the Department of Energy Resources to promulgate rules that define minimum demand-side efficiency programs operated by distribution utilities. The funding level for such programs starts at 3.3 mills per kWh in 1998 and phases down to 2.5 mills in 2002, with a total of about $500 million. Included in this funding amount is a permanent set-aside of .25 mills for low-income energy efficiency programs. Funding for renewable energy averages 0.7 mills per kWh for the first five years (about $150 million), and 0.5 mills thereafter.



California's *Senate Bill 1305* requires that all retail suppliers selling electricity in California disclose their sources of electricity, using a format developed by the California Energy Commission. The bill also requires suppliers to report fuel type and fuel consumption information to system operators and make such information available to the Commission to verify their customer disclosures.



CONCLUSION

The move to retail electric competition in states across the country will be accompanied by the review and revision of many existing public policies and regulatory approaches associated with our 100-year old system of regulating electric service to all homes and businesses. This *Blueprint for Consumer Protection* has explored many issues associated with consumer protection and universal service. States that have already adopted retail electric competition legislation have provided excellent models. They have recognized that consumer protections are vital to political acceptance of electricity competition. As one commissioner stated at a recent National Association of Regulatory Utility Commissioners meeting, "The safest job in my commission is the consumer complaint specialist!"

ENDNOTES

[1]. K. Winneg, M. Herrmann, A. Levy and B. Roe, *Baseline Survey, Consumer Knowledge, Practices and Attitude: Electric Utility Deregulation and Consumer Choice,* National Council on Competition and the Electric Industry (NCCEI), Consumer Information Disclosure Project, January, 1998. This and other NCCEI research can be obtained from their website: http://eetd.lbl.gov/NationalCouncil/ and at the Regulatory Assistance Project (RAP) website: http://www.rapmaine.org.

[2]. Baxter, Lester, *Low-Income Energy Policy in a Restructured Electricity Industry: An Assessment of Federal Options*, Oak Ridge National Laboratory, U.S. Department of Energy, ORNL/CON-443, July, 1997, Figure 1 at 6. Low-income households have a higher energy burden; that is, they spend 10% or more, over 20% in many cases, of their household income on energy compared to households with average income.

[3].Schachter, Deborah, "Public Outreach and Education in Electric Utility Restructuring," in Alexander, Barbara, *Consumer Protection Proposals for Retail Electric Competition: Model Legislation and Regulations*, Regulatory Assistance Project, Gardiner, Maine, October, 1996. Ms. Schachter's paper summarized the results of a study of California's Caller ID Education Program by Dr. Brenda Devlin of Ohio State University for the California PUC, and preliminary results of the New Hampshire Electric Pilot Program. These materials are also available at the RAP website.

[4]. In the *Fair Packaging and Labeling Act*, Congress declared that, "Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons." 15 U.S.C. §1451.

[5]. A reasonable consumer disclosure policy can overcome potential legal hurdles. This footnote summarizes a legal memo by Michael Stoddard of Conservation Law Foundation (May 20, 1997), which summary also appeared in Oppenheim and Alexander, *Model Electricity Consumer Protection Disclosures*, NCCEI, January, 1998; also available at the RAP website.

Commercial speech is that which is solely related to the economic interests of speaker and audience. It may be constitutionally regulated if it is misleading, unlawful (*e.g.*, promoting an unlawful service), or where the government has a substantial interest (such as consumer protection) that is directly advanced by the regulation and the regulation is narrowly tailored to the objective. Disclosures have been held to be a direct and narrowly tailored means of achieving consumer protection, although a demonstration that it is reasonable to expect deception may be required. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 2282, 85 L.Ed.2d 652 (1985), quoting In re R.M.J., 455 U.S. 191, 201, 102 S.Ct. 929, 936, 71 L.Ed.2d 64 (1982). Lack of standardization in the marketplace and public lack of knowledge are among the standards used in such an inquiry.

States may also regulate interstate commerce to further a legitimate state interest, such as protecting consumers and preventing deception or unfair competition. Such state regulation must not, on its face or in practice, discriminate against out-of-state products and services, and may not impose a burden on interstate commerce that is out of proportion to the state interest.

[6]. Alexander, Barbara, *The Transition to Local Telecommunications Competition: A New Challenge for Consumer Protection*, Public Counsel Section, Washington Attorney General, October, 1997. Available at http://wa.gov/ago/utility/alexander.html.

[7]. New Hampshire survey results are available from the New Hampshire PUC website: http://www.state.nh.us/puc; The national focus group research is summarized in Holt, Edward, *Information Consumers Want in Electricity Choice: Summary of Focus Group Research*, NCCEI, December, 1997.

[8]. T. Austin et al., *Uniform Consumer Disclosure Standards for New England: Report and Recommendations to the New England Utility Regulatory Commissions*, NCCEI, October, 1998.

[9]. *Truth in Lending Act*, 15 U.S.C. §1601, et seq. and its implementing Regulation Z, 12 C.F.R. Section 226. For example, for variable rate credit applications and solicitations, creditors must disclose the fact that the rate may vary and state how the rate will be determined, including identifying the index or formula and any margin or spread added to the index or formula. For introductory "teaser" rates that are temporary, the creditor must also disclose the annual percentage rate that will apply after the introductory rate expires. Special rules also govern the accuracy and currency of disclosed rates. See, e.g., 12 C.F.R. 226.5a(b)(1). Variable rate mortgages must disclose how the interest rate would change based on the prior 15-year history of the index used to trigger rate changes.

[10]. Both the previously cited New Hampshire survey and the NCCEI Report summarizing national focus group research have confirmed this desire for information on supply mix.

[11]. California Senate Bill 1305 (enacted October 8, 1997) requires all retail suppliers selling electricity in California to disclose the sources of electricity they sell, using a format developed by the California Energy Commission.

[12]. Investigation by the Massachusetts Department of Telecommunications and Energy upon its own motion, commencing a Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. §§ 2.00 et seq., establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L.C. 164, Docket 96-100 (February, 1998). Attachments B-1–B-4 contain sample labels.

[13]. The Truth in Lending disclosure requirements are not limited to printed materials, but the New England collaborative has recognized the difficulty of presenting information provided on the Electricity Label in an oral format.

[14]. FERC has adopted several criteria to assist in the determination of the boundary between state distribution jurisdiction and FERC transmission jurisdiction in its seminal decision on wholesale competition, Federal Energy Regulatory Commission, Order No. 888, Final Rule issued on April 24, 1996 (Docket Nos. RM95-8-000, *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities,* and RM94-7-001, *Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*).

[15]. The distribution system is the source of the vast majority of customer outages. Power reliability related to the long distance transmission system may be the subject of additional federal legislation.

[16]. Davis, Vivian, et al., *Telecommunications Service Quality,* National Regulatory Research Institute, Columbus, Ohio, March, 1996.

[17]. This section draws heavily on Alexander, Barbara, "How to Construct a Service Quality Index in Performance-Based Ratemaking Plans, *The Electricity Journal*, April, 1996. Additional materials on this topic may be found in a recent NARUC publication, "*Performance-Based Ratemaking Regulation in a Restructured Electric Industry,*" particularly the chapters on Quality of Service and Universal Service Indices (NARUC, Washington, D.C., 1998), available from the NARUC website: http://www.naruc.org.

[18]. Baxter, Lester, Op. cit. at 6. Even considering benefits under most common low-income programs, low-income households must allocate over 20% of their monthly budget to retain energy services in some states. Furthermore, targeted energy assistance funds, such as the Low-income Home Energy Assistance Program (LIHEAP) and DOE's Weatherization Assistance Program (WAP) have suffered significant program cuts in recent years.

[19]. In Massachusetts, for example, the largest electric utility, the New England Electric System (NEES), supports the continuation of low-income rate discounts as part of their support for electric restructuring. In Maine, the Industry Energy Consumer Group, representing the largest industrial customers, has supported the continuation of funding for low-income programs through the distribution service rate as a condition of the move to retail electric competition, albeit as part of a package of proposals negotiated with consumer and low-income advocates.

[20]. Maine PUC, *Inquiry Regarding Possible Low-income Assistance Legislation*, Docket No. 97-582, October 7, 1997.

[21]. California PUC, *Interim Opinion on Public Purpose Programs—Threshold Issues*, Decision 97-02-014, February 5, 1997.

[22]. Pennsylvania PUC, *Final Order Re: Guidelines for Universal Service and Energy Conservation Programs*, Docket No. M-00960890F0010, July 11, 1997.

[23]. The Pennsylvania PUC's recent Restructuring Orders for electric distribution companies have increased funding for both the rate payer assistance program (CAP) and the Low Income Usage Reduction Program (an energy management program) as follows:

PECO Energy: The Commission approved a settlement which calls for a $50 million universal service budget, of which $5.6 million is energy management.

PP&L: The CAP or rate assistance program was expanded from $2 million to $11.7 million; LIURP expanded from $4 million to $4.7 million with an added program targeted to baseload electricity usage.

West Penn Power: CAP expanded from $.9 million to $5.88 million; LIURP expanded from $.8 to $2.2 million.

Duquesne Light: CAP expanded from $.55 million to $5.3 million; LIURP expanded from $.7 million to $1.75 million.

Pennsylvania Electric Co. (**GPU Energy**): CAP expanded from $620,000 to $4.9 million over 4 years; LIURP expanded from $652,000 to $1.9 million.

Metropolitan Edison (**GPU Energy**): CAP expanded from $452,000 to $4.6 million over four years; LIURP expanded from $772,000 to $1.8 million.

[24]. Pennsylvania PUC, *PECO Energy Restructuring Order on Joint Petition for Full Settlement*, Docket No. R-973953, May 14, 1998.

[25].While electricity is not often used nationally as a primary heat source, most other forms of heat (fuel oil, natural gas) cannot operate without electricity to power their motors and exhaust fans.

[26]. RKM Applied Research, (Benchmark Research Summary presented to the N.H. Public Utilities Commission) *Residential Consumer and Small Business Study*, Portsmouth, N.H., October 15, 1997. Most residential and small business respondents had heard only a little (46%) or nothing at all (15%) about the introduction of competition in the electric industry. Fifty-five percent of the respondents said that they were unsure whether their monthly electric bill would increase or decrease under competition, but for those who stated their bill would likely decrease, the average customer thought their bill would decrease 17.6%, far higher than most observers estimate is likely to occur.

[27]. 15 U.S.C. §1691-1691f. The ECOA is implemented by Regulation B, 12 C.F.R. §202.

[28]. The Federal Reserve Board's Regulation B exempts public utilities from some specific provisions, such as those relating to the use of spousal credit history and spousal income, but even these exemptions are applicable only to public utilities whose rates are approved by a state regulatory agency. Reg. B, 12 C.F.R. §202.3(a).

[29]. Sheldon, Jonathan, *Credit Discrimination*, (National Consumer Law Center: Boston, 1993) at 59-60.

[30]. Regulation B explicitly incorporates the effects test as a basis for discriminatory conduct. Federal Reserve Board Official Staff Commentary, §202.6(a)-2.

[31]. 15 U.S.C.§§1681-1681u. There are no interpretive regulations, but the FTC has issued a Commentary, 16 C.F.R. Part 600, and Notices of Rights and Duties under the Fair Credit Reporting Act, 16 CFR Part 601.

[32]. 15 U.S.C.§§1601 et seq., Regulation Z, 12 C.F.R. Part 226.

[33]. 15 U.S.C. §45(a).

[34]. Delaware Code §2513(b); Louisiana-LSA-Rev. Stat. 51:1406(1); Maryland Code, Comm. Law, §13-104(2); Ohio Rev. Code §1346.10; West's Rev. Code Washington Ann. §19.86.170.

[35]. E.g., Maine, Massachusetts, Michigan, Rhode Island, South Carolina, cited in Alperin and Chase, *Consumer Law* (West Publishing Co., 1968), §114.

[36]. 15 U.S.C. §1692-1692o.

[37]. 15 U.S.C. §§6101-08, August 16, 1994.

[38]. 16 C.F.R. Part 310.

[39]. 16 C.F.R. Part 429.

[40]. This practice was started by telecommunications providers and copied by several energy suppliers in the New Hampshire and Pennsylvania retail competition pilot programs.

[41]. A.B. No. 1890, §366(e).

[42]. Chapter 164 of the Acts of 1997 (eff. November 25, 1997), Section 193.

[43]. *Connecticut Public Act No. 98-28*, eff. 4/29/98, §30.

[44]. See the NCCEI research cited in prior footnotes and available on their website.

[45].15 U.S.C. §45

[46]. See *Federal Trade Commission Policy Statement on Deception*, appended to Cliffdale Assocs., Inc.. 103 F.T.C.110, 174 (1984); *Federal Trade Commission Statement Regarding Advertising Substantiation*, appended to Thompson Medical Co., Inc., 104 F.T.C.648, 839 (1984); *Federal Trade Commission Unfairness Policy Statement*, appended to International Harvester Co., 104 F.T.C. 949 (1984).

[47]. 49 Fed. Reg. 30,999 (1984).

[48].The material terms of this contract will be disclosed in the *Terms of Service* brochure described in Chapter I and subject to the basic consumer protection provisions discussed in Chapter III.

[49]. The state's creation of a Default or Standard Offer, as discussed in Chapter II, is a form of aggregation for those customers who do not choose a supplier; this Chapter, however, focuses on customers who positively select an aggregator or power broker to obtain energy on their behalf.

[50]. This issue is closely related to the state's policy concerning how a customer provides authorization to select or change his or her electric supplier. At the very least, a customer's authorization to select an aggregator as the supplier, thus authorizing the aggregator to obtain electricity on the customer's behalf, should not be more difficult or require additional procedural hurdles, compared to customer selection of a supplier under direct access.

[51]. *Prospectus (DRAFT), Community Energy Cooperative*, Prepared by the Community Energy Cooperative Development Team, February 21, 1997, at 1.

[52]. AB 1890, §381, August 31, 1996.

APPENDIX A

A SHORT PRIMER ON RETAIL ELECTRIC RESTRUCTURING

Since the turn of the century, electric utilities have been viewed as "natural monopolies." Because of the tremendous costs involved in building power plants and transmission lines, electric utilities were assumed to provide a service that only one entity in a given area could deliver efficiently. Utilities were granted exclusive franchises in exchange for submitting to regulation, the purpose of which was, and has continued to be, to assure adequate service at reasonable cost. This traditional picture is changing and this vertically-integrated industry (production/generation, transmission, delivery and sale to retail customers) is being broken into pieces or "unbundled." Increased competition is coming to the electric industry, due to the interaction of five key factors:

- **New technologies in energy production, conservation and information systems are creating opportunities for more efficient production, delivery and consumption of electricity.** The most important development in this area has been rapid price reductions associated with the construction of new natural gas-fired turbine and combined cycle plants. This has meant that electricity can be generated at lower cost than at many older and more expensive power plants.

- **Federal laws have been changed to encourage new entrants in electricity generation and to create a competitive wholesale transmission market.** The Public Utility Regulatory Policies Act (PURPA) of 1978 requires utilities to buy power from independent power producers; this law initiated the growth of electricity generation outside the vertically-integrated public utilities. The 1992 Energy Policy Act (EPAct) authorized the Federal Energy Regulatory Commission (FERC) to order transmission-owning utilities to provide transmission service to any buyer or seller of wholesale electricity. Under this authority, FERC has issued a series of decisions designed to create a wholesale market in the sale of electricity.

- **New players are seeking to enter the industry at all levels: wholesale and retail sales, generation, transmission ownership, merchant and aggregation functions, and conservation services.** As these new players see opportunities for competition, they will create a significant political and economic force for change.

- **Industrial customers are insisting on lower rates and higher efficiencies from their utility suppliers, that has led the way in most states for development of a retail market.** These proponents of competition point to the positive benefits from increased competition in the airline, gas, trucking and telecommunications industries as a rationale for initiating electricity competition. Industrial customers are skilled and sophisticated; they understand the potential advantage in bargaining for their electricity needs in the open market.

- **Electricity production accounts for over 50% of key air pollution emissions, focusing attention on the industry.** Policymakers and consumer advocates are looking for the most efficient way to assign risks and costs to the production and use of electricity. The current regulatory structure provides an inherent incentive for electric utilities to increase their sales of kilowatt-hours because most state ratemaking policies encourage utilities to increase their profits by selling more electrons. Such regulatory imperatives, in turn, result in higher air emissions than might otherwise occur in a competitive market, as well as increased air pollution from older power plants which are required to comply with the more stringent emission standards of newer plants.

The call for increased competition in the electric industry has coincided with a push toward privatization in many other countries and with a political desire to decrease our reliance on regulation in favor of more competition in many industries. In the telecommunications industry, for example, Congress enacted the Telecommunications Act of 1996 which, among other requirements: (1) calls for competition in the local provision of telephone service; (2) opens up the previously separated cable and long distance telephone companies to competition from each other; and (3) replaces a long history of state and federal price regulation with calls for market fairness and consumer protection. The push for retail competition in the electric industry has not been far behind.

Twelve state legislatures have already mandated retail competition in their states with implementation dates that vary from 1998-2006 (See Appendix B). Almost every other state has initiated proceedings to examine whether retail competition is either an inevitable or desirable result. In addition, several federal legislative proposals that mandate retail competition are slated for serious attention in the near future.

Proponents of these changes emphasize that lower costs typically result from competitive, as opposed to regulated, markets. They theorize that allowing competition in at least the generation portion of the business will result in lower prices than under the traditional monopoly regulation approach. While it is undeniable that retail competition will create an opportunity for some customers to negotiate for lower prices, consumer advocates question whether this benefit will flow automatically to lower-use residential and small commercial customers in general or low-income customers in particular. These observers point to the airline industry in which prices have, in fact, dropped for customers who can travel at certain times but significantly increased for business customers traveling at peak days or times. This has come at a cost of reduced service and higher fares for small cities across America. Consumer advocates also point to the recently deregulated telecommunications industry where competition for basic exchange service has appeared in large cities and for large volume users, but not for rural or most residential customers.

As a result of these concerns, the debate about electric competition in many states has included an extensive analysis of the public benefits associated with traditional regulatory structures and efforts to either address those benefits directly in the new industry structure or transfer them to the new competitive retail market. These public benefits include

- conservation and demand-side management initiatives mandated by state policy makers;
- universal service and low-income programs;
- utility-sponsored research and development;
- consumer protection policies and programs associated with the sale of electricity to residential and small commercial customers; and
- support for renewable energy and environmentally beneficial energy sources as embodied in PURPA and least cost planning policies.

Overarching this debate about competing public policies and whether to protect or abandon them is the controversy surrounding "stranded costs." These costs dwarf those associated with public policy initiatives and may determine whether most customers see any reduction in prices as a result of the move to competition. Stranded costs represent the capital invested by utilities in power plants and power-purchasing contracts that will not be profitable in a competitive market. The difference between what the utilities invested in these plants and contracts and what they are worth on the open market in the next several years is the "stranded" portion of these costs. Utilities want to be reimbursed for these costs as part of the transition to competition. They argue that their shareholders had every reason to expect these costs to be recovered because they were incurred with the knowledge and blessing of state and federal regulators.

Opponents argue that the change to competition will produce winners and losers and that utility shareholders must share in the pain. Some states, like California, Maine, and Massachusetts, are allowing utilities to recover most or all of their stranded costs, but they are requiring them to sell some or all of their power plants. This "divestiture" approach prevents the old monopolies from putting their new competitors at a disadvantage, because, as continuing owners of the transmission and distribution system, they might give their own power plants special treatment. Divestiture is particularly important because of the increasing number of mergers among utilities in the last several years, which have set the stage for a potential reduction in competition in some regional electricity markets.

Readers interested in a more detailed discussion of the economic and public policy issues associated with the move to retail electric competition may find additional information from the National Council on Competition and the Electric Industry (NCCEI), a joint project of state utility regulators, through the National Association of Regulatory Utility Commissioners (NARUC), legislators, through the National Conference of State Legislatures (NCSL), and energy officials, through the National Association of State Energy Officials (NASEO). The National Council's website includes links to their publications **http://eetd.lbl.gov/nationalcouncil/.**

APPENDIX B

EXCERPTS FROM STATE ELECTRIC RESTRUCTURING LEGISLATION

AGGREGATION

California Senate Bill 477 (Stats. 1997, ch. 275).

Section 366 is added to the Public Utilities Code to read:

366. (a) The commission shall take actions as needed to facilitate direct transactions between electricity suppliers and end use customers. Customers shall be entitled to aggregate their electric loads on a voluntary basis, provided that each customer does so by a positive written declaration. If no positive declaration is made by a customer, that customer shall continue to be served by the existing electrical corporation or its successor in interest.

(b) Aggregation of customer electrical load shall be authorized by the commission for all customer classes, including, but not limited to small commercial or residential customers. Aggregation may be accomplished by private market aggregators, cities, counties, special districts or on any other basis made available by market opportunities and agreeable by positive written declaration by individual consumers.

(c) If a public agency seeks to serve as a community aggregator on behalf of residential customers, it shall be obligated to offer the opportunity to purchase electricity to all residential customers within its jurisdiction.

Massachusetts: Chapter 164 of the Acts of 1997, eff. November 25, 1997**.**

Section 134. (a) Any municipality or any group of municipalities acting together within the commonwealth is hereby authorized to aggregate the electrical load of interested electricity consumers within its boundaries; provided, however, that such municipality or group of municipalities shall not aggregate electrical load if such are served by an existing municipal lighting plant. Such municipality or group of municipalities may group retail electricity customers to solicit bids, broker, and contract for electric power and energy services for such customers. Such municipality or group of municipalities may enter into agreements for services to facilitate the sale and purchase of electric energy and other related services. Such service agreements may be entered into by a single city, town, county, or by a group of cities, towns, or counties.

A municipality or group of municipalities which aggregates its electrical load and operates pursuant to the provisions of this Section shall not be considered a utility engaging in the wholesale purchase and resale of electric power. Providing electric power or energy services to aggregated customers within a municipality or group of municipalities shall not be considered a wholesale utility transaction. The provision of aggregated electric power and energy services as authorized by this Section shall be regulated by any applicable laws or regulations which govern aggregated electric power and energy services in competitive markets.

A town may initiate a process to aggregate electrical load upon authorization by a majority vote of town meeting or town council. A city may initiate a process to authorize aggregation by a majority vote of the city council, with the approval of the mayor, or the city manager in a Plan D or Plan E city. Two or more municipalities may as a group initiate a process jointly to authorize aggregation by a majority vote of each particular municipality as herein required.

Upon an affirmative vote to initiate said process, a municipality or group of municipalities establishing load aggregation pursuant to this Section shall, in consultation with the division of energy resources, pursuant to Section 6 of Chapter 25A, develop a plan, for review by its citizens, detailing the process and consequences of aggregation. Any municipal load aggregation plan established pursuant to this Section shall provide for universal access, reliability, and equitable treatment of all classes of customers and shall meet any requirements established by law or the department concerning aggregated service. Said plan shall be filed with the department, for its final review and approval, and shall include, without limitation, an organizational structure of the program, its operations, and its funding; rate setting and other costs to participants; the methods for entering and terminating agreements with other entities; the rights and responsibilities of program participants; and termination of the program. Prior to its decision, the department shall conduct a public hearing. The department shall not approve any such plan if the price for energy would initially exceed the price of the standard offer, as established pursuant to Section 1B of this chapter, for such citizens in the municipality or group of municipalities, unless the applicant can demonstrate that the price for energy under the aggregation plan will be lower than the standard offer in the subsequent years or the applicant can demonstrate that such excess price is due to the purchase of renewable energy as described by the Division of Energy Resources pursuant to Chapter 25A.

Participation by any retail customer in a municipal or group aggregation program shall be voluntary. If such aggregated entity is not fully operational on the retail access date, any ratepayer to be automatically enrolled therein shall receive standard offer service unless affirmatively electing not to do so. Within 30 days of the date the aggregated entity is fully operational, such ratepayers shall be transferred to the aggregated entity according to an opt-out provision herein. Following adoption of aggregation through the votes specified above, such program shall allow any retail customer to opt-out and choose any supplier or provider such retail customer wishes. Once enrolled in the aggregated entity, any ratepayer choosing to opt-out within 180 days shall do so without penalty and shall be entitled to receive standard offer service as if he was originally enrolled therein. Nothing in this Section shall be construed as authorizing any city or town or any municipal retail load aggregator to restrict the ability of retail electric customers to obtain or receive service from any authorized provider thereof.

It shall be the duty of the aggregated entity to fully inform participating ratepayers in advance of automatic enrollment that they are to be automatically enrolled and that they have the right to opt-out of the aggregated entity without penalty. In addition, such disclosure shall prominently state all charges to be made and shall include full disclosure of the standard offer rate, how to access it, and the fact that it is available to them without penalty. The Division of Energy Resources shall furnish, without charge, to any citizen a list of all other supply options available to them in a meaningful format that shall enable comparison of price and product.

(b) A municipality or group of municipalities establishing a load aggregation program pursuant to Subsection (a) may, by a vote of its town meeting or legislative body, whichever is applicable, adopt an energy plan which shall define the manner in which the municipality or municipalities may implement demand side management programs and renewable energy programs that are consistent with any state energy conservation goals developed pursuant to Chapter 25A or Chapter 164. After adoption of the energy plan by such town meeting or other legislative body, the city or town clerk shall submit the plan to the department to certify that it is consistent with any such state energy conservation goals. If the plan is certified by the department, the municipality or group of municipalities may apply to the Massachusetts Technology Park Corporation for monies from the Massachusetts Renewable Energy Trust Fund, established pursuant to Subsection (a) of Chapter 40J, and receive, and if approved, expend moneys from the demand side management system benefit charges or line charges in an amount not to exceed that contributed by retail customers within said municipality or group municipalities. This will not prevent said municipality or municipalities from applying to the Massachusetts Technology Park Corporation for additional funds. If the department determines that the energy plan is not consistent with any such state-wide goals, it shall inform the municipality or group of municipalities within six months by written notice the reasons why it is not consistent with any such state-wide goals. The municipality or group of municipalities may re-apply at anytime with an amended version of the energy plan.

The municipality or group of municipalities shall not be prohibited from proposing for certification an energy plan which is more specific, detailed, or comprehensive or which covers additional subject areas than any such state-wide conservation goals. This subsection shall not prohibit a municipality or group of municipalities from considering, adopting, enforcing, or in any other way administering an energy plan which does not comply with any such state-wide conservation goals so long as it does not violate the laws of the commonwealth.

The municipality or group of municipalities shall, within two years of approval of its plan or such further time as the department may allow, provide written notice to the department that its plan is implemented. The department may revoke certification of the energy plan if the municipality or group of municipalities fails to substantially implement the plan or if it is determined by independent audit that the funds were misspent within the time allowed under this subsection.

CONSUMER PROTECTION POLICIES

California Senate Bill 477 (Stats. 1997, ch. 275).

Sec. 391: The Legislature finds and declares all of the following:

(a) Electricity is essential to the health, safety, and economic well-being of all California consumers.

(b) The restructuring of the electricity industry will create a new electricity market with new marketers and sellers offering new goods and services, many of which may not be readily evaluated by the average consumer.

(c) It is important that these customers be protected from unfair marketing practices and that market participants demonstrate their creditworthiness and technical expertise in order to engage in power sales to these members of the public.

(d) Larger commercial and industrial customers are sophisticated energy consumers that have adequate civil remedies and are adequately protected by existing commercial law, as demonstrated by the absence of significant amounts of contract litigation between commercial and industrial natural gas users and natural gas marketers in California.

(e) It is important to create a market structure that will not unduly burden new entrants into the competitive electric market, or California may not receive the full benefits of reduced electricity costs through competition.

(f) It is appropriate to create a system of registration and consumer protection for the electric industry, designed to ensure sufficient protection for residential and small commercial consumers while simplifying entry into the market for responsible entities serving larger, more sophisticated customers.

(g) It is the intent of the Legislature that:

(1) Electricity consumers be provided with sufficient and reliable information to be able to compare and select among products and services provided in the electricity market.

(2) Consumers be provided with mechanisms to protect themselves from marketing practices that are unfair or abusive.

(3) Pursuant to the authority granted to the commission in this part as to registration and consumer protection matters, the commission shall balance the need to maximize competition by reducing barriers to entry into the small retail electricity procurement market with the need to protect small consumers against deceptive, unfair, or abusive business practices, or insolvency of the entity offering retail electric service.

CONSUMER EDUCATION

Maine: Public Law 1997, ch 316 (May 29, 1997)

Sec. 35A § 3214: Bill Unbundling; Consumer Education

1. Unbundled bills. Beginning January 1, 1999, electric utilities shall issue bills that state the current cost of electric capacity and energy separately from transmission and distribution charges and other charges for electric service. By January 31, 1998, each electric utility shall file with the commission a bill unbundling proposal. The commission shall complete its review of those proposals and adopt a rule establishing unbundled bill requirements by July 1, 1998. Rules adopted under this subsection are routine technical rules pursuant to Title 5, Chapter 375, subchapter II-A.

2. Consumer education advisory board; rules. The commission shall adopt rules implementing a consumer education program in compliance with this subsection.

A. The commission shall immediately organize a consumer education advisory board to investigate and recommend methods to educate the public about the implementation of retail access and its impact on consumers. The commission shall ensure broad representation of residential, industrial and commercial electric consumers, public agencies and the electric industry on the advisory board. Members of the board shall serve without compensation.

B. In its recommendations, the advisory board shall address:

(1) The level of funding necessary for adequate educational efforts and the appropriate source of that funding;

(2) The aspects of retail access on which consumers need education;

(3) The most effective means of accomplishing the education of consumers;

(4) The appropriate entities to conduct the education effort; and

(5) Any other issue relevant to the education of consumers regarding the implementation of retail access and its impact on consumers.

C. The commission shall consider the recommendations of the advisory board when adopting rules to implement a consumer education program. Rules adopted under this subsection are major substantive rules pursuant to Title 5, Chapter 375, subchapter II-A. The commission shall provide these rules to the Legislature in accordance with Title 5, Chapter 375, subchapter II-A, no later than February 1, 1998.

Nevada: Assembly Bill 366, July 16, 1997.

Sec. 48

3. The commission, before the commencement of direct access to alternative sellers for an electric service, shall carry out an educational program for customers to:

(a) Inform customers of the changes in the provision of electric service, including, but not limited to, the availability of alternative sellers of electric service;

(b) Inform customers of the requirements relating to disclosures, explanations or sales information for sellers of competitive services; and

(c) Provide assistance to customers in understanding and using the information to make reasonably informed choices about which service to purchase and from whom to purchase it.

CONSUMER DISCLOSURES

California Senate Bill 477 (Stats. 1997, ch. 275).

Sec. 394.5

(a) Except for an electrical corporation as defined in Section 218, or a local publicly owned electric utility as defined in subdivision (d) of Section 9604 offering electrical service to residential and small commercial customers within its service territory, each entity offering electrical service to residential and small commercial customers shall, prior to the commencement of service, provide the potential customer with a written notice of the service describing the price, terms, and conditions of the service. The notices shall include all of the following:

(1) A clear description of the price, terms, and conditions of service, including:

(A) The price of electricity expressed in a format which makes it possible for residential and small commercial customers to compare and select among similar products and services on a standard basis. The commission shall adopt rules to implement this subdivision. The commission shall require disclosure of the total price of electricity on a cents-per-kilowatthour basis, including the costs of all electric services and charges regulated by the commission. The commission shall also require estimates of the total monthly bill for the electric service at varying consumption levels, including the costs of all electric services and charges regulated by the commission. In determining these rules, the commission may consider alternatives to the cent-per-kilowatthour disclosure if other information would provide the customer with sufficient information to compare among alternatives on a standard basis.

(B) Separate disclosure of all recurring and nonrecurring charges associated with the sale of electricity.

(C) If services other than electricity are offered, an itemization of the services and the charge or charges associated with each.

(2) An explanation of the applicability and amount of the competition transition charge, as determined pursuant to Sections 367 to 376, inclusive.

(3) A description of the potential customer's right to rescind the contract without fee or penalty as described in Section 395.

(4) An explanation of the customer's financial obligations, as well as the procedures regarding past due payments, discontinuance of service, billing disputes, and service complaints.

(5) The entity's registration number, if applicable.

(6) The right to change service providers upon written notice, including disclosure of any fees or penalties assessed by the supplier for early termination of a contract.

(7) A description of the availability of low-income assistance programs for qualified customers and how customers can apply for these programs.

(b) The commission may assist registered entities in developing the notice. The commission may suggest inclusion of additional information it deems necessary for the consumer protection purposes of this section. On at least a semiannual basis, registered entities shall provide the commission with a copy of the form of notice included in standard service plans made available to residential and small commercial customers as described in subdivision (a) of Section 392.1.

(c) Any entity offering electric services who declines to provide those services to a consumer shall, upon request of the consumer, disclose to that consumer the reason for the denial in writing within 30 days. At the time service is denied, the entity shall disclose to the consumer his or her right to make such a request. Consumers shall have at least 30 days from the date service is denied to make such a request.

Massachusetts: Chapter 164 of the Acts of 1997, eff. November 25, 1997.

Section 1F

(5)(i) Before service is initiated by a generation company, aggregator, or supplier to any customer, the generation company, aggregator, or supplier shall disclose information on rates and other information to a customer in a written statement which the customer may retain. The department shall promulgate rules and regulations prescribing the form, content, and distribution of such information to be disclosed, which shall include, but not be limited to, the following: the disclosure of the rate to be charged; whether the generation company or supplier operates under collective bargaining agreements and whether such generation company or supplier operates with employees hired as replacements during the course of a labor dispute; any charges, fees, penalties, or other conditions imposed upon a customer should he or she choose to purchase power from another generation company, aggregator, or supplier during the term specified in the contract; the fuel mix and emissions of the generation sources; whether a credit agency will be contacted; deposit requirements and the interest paid on deposits; due date of bills and all consequences of late payment; consumer rights where a bill is estimated; consumer rights of third-party billing and like arrangements; consumer rights to deferred payment arrangements; low-income rates; limits, if any, on warranty and damages; the applicable provisions of this section; the provisions for default service; a toll-free telephone number for service complaints; any other fees, charges, or penalties; and the methods by which a consumer shall be notified of any changes to any of these items. A generation company, a supplier, or an aggregator licensed by the department to do business in the commonwealth pursuant to this section shall prepare an information booklet describing a customer's rights under the provisions of this chapter. Such company, supplier, or aggregator shall annually mail this booklet to its customers.

(ii) A generation company, an aggregator, or a supplier shall be allowed to advertise the percentage of its power or energy portfolio that is generated by employers that operate under collective bargaining agreements or that operate with employees hired as replacements during the course of a labor dispute or that connotes or signifies to the ratepayer the relative environmentally beneficial effects of the power or energy sold by said generation company, an aggregator, or a supplier pursuant to rules and regulations promulgated by the department.

(iii) In addition to the disclosure requirements provided for in Subparagraphs (i) and (ii), the department shall promulgate such rules and regulations prescribing information to be disclosed by a generation company in any advertising or marketing of electricity rates, which regulations shall include, but not be limited to, disclosure of the rate to be charged in bold print in the case of print advertisements or through clear spoken language in the case of television or radio advertisements and on any monthly billing materials. The department shall coordinate with the attorney general to avoid duplication and to ensure consistency with the attorney general's regulations.

(6) The department shall promulgate uniform labeling regulations which shall be applicable to all suppliers as a condition of licensure pursuant to paragraph (1). Such information to be required by regulation in said labeling shall include price data, information on price variability, and customer service information and information about whether the generation company or supplier operates under collective bargaining agreements and whether such generation company or supplier operates with employees hired as replacements during the course of a labor dispute, fuel sources, and air emissions of sulfur dioxide, nitrogen dioxides, carbon dioxide, heavy metals, and any other emission which the department may determine causes significant health or environmental impact and for which sufficiently accurate and reliable data is available. The department shall require that such an electricity information label provide prospective and existing customers with adequate information by which to readily evaluate power supply options available in the market. Electricity suppliers shall be required to present such information, including information about the environmental characteristics of the sale of electric power products and services and whether the generation company or supplier operates under collective bargaining agreements and whether such generation company or supplier operates with employees hired as replacements during the course of a labor dispute to customers, in conformance with department requirements as to form and substance, and shall comply with federal and state laws governing unfair advertising and labeling.

CONSUMER COMPLAINTS

California Senate Bill 477 (Stats. 1997, ch. 275).

Sec. 392.1

(a) The commission shall compile and regularly update the following information: names and contact numbers of registered providers, information to assist consumers in making service choices, and the number of customer complaints against specific providers in relation to the number of customers served by those providers and the disposition of those complaints. To facilitate this function, registered entities shall file with the commission information describing the terms and conditions of any standard service plan made available to residential and small commercial customers. The commission shall adopt a standard format for this filing. The commission shall maintain and make generally available a list of entities offering electrical services operating in California. This list shall include all registered providers and those providers not required to be registered who request the commission to be included in the list. The commission shall, upon request, make this information available at no charge. Notwithstanding any other provision of law, public agencies which are registered entities shall be required to disclose their terms and conditions of service contracts only to the same extent that other registered entities would be required to disclose the same or similar service contracts.

(b) The commission shall issue public alerts about companies attempting to provide electric service in the state in an unauthorized or fraudulent manner as defined in subdivision (b) of Section 394.25.

(c) The commission shall direct the Office of Ratepayer Advocates to collect and analyze information provided pursuant to subdivision (a) for purposes of preparing easily understandable informational guides or other tools to help residential and small commercial customers understand how to evaluate competing electric service options. In implementing these provisions, the commission shall direct the Office of Ratepayer Advocates to pay special attention to ensuring that customers, especially those with limited-English-speaking ability or other disadvantages when dealing with marketers, receive correct, reliable, and easily understood information to help them make informed choices. The Office of Ratepayer Advocates shall not make specific recommendations or rank the relative attractiveness of specific service offerings of registered providers of electric services.

LICENSING:

California Senate Bill 477 (Stats. 1997, ch. 275).

Sec. 394.25

(a) The commission may enforce the provisions of Sections 2102, 2103, 2104, 2105, 2107, 2108, and 2114 against registered entities as if those entities were public utilities as defined in these code sections. Notwithstanding the above, nothing in this section shall grant the commission jurisdiction to regulate registered entities other than as specifically set forth in this part. Registered entities shall continue to be subject to the provisions of Sections 2111 and 2112. Upon a finding by the commission's executive director that there is evidence to support a finding that the entity has committed an act constituting grounds for suspension or revocation of registration as set forth in subdivision (b) of Section 394.25, the commission shall notify the entity in writing and notice an expedited hearing on the suspension or revocation of the entity's registration to be held within 30 days of the notification to the entity of the executive director's finding of evidence to support suspension or revocation of registration. The commission shall, within 45 days after holding the hearing, issue a decision on the suspension or revocation of registration, which shall be based on findings of fact and conclusions of law based on the evidence presented at the hearing. The decision shall include the findings of fact and the conclusions of law relied upon.

(b) A registered entity may have its registration suspended or revoked, immediately or prospectively, in whole or in part, for any of the following acts:

(1) Making material misrepresentations in the course of soliciting customers, entering into service agreements with those customers, or administering those service agreements.

(2) Dishonesty, fraud, or deceit with the intent to substantially benefit the registered entity or its employees, agents, or representatives, or to disadvantage retail

electric customers.

(3) Where the commission finds that there is evidence that the entity is not financially or operationally capable of providing the offered electric service.

(c) Pursuant to its authority to revoke or suspend registration, the commission may suspend a registration for a specified period or revoke the registration, or in lieu of suspension or revocation, impose a moratorium on adding or soliciting additional customers.

Any suspension or revocation of a registration shall require the entity to cease serving customers within the boundaries of investor-owned electric corporations, and the affected customers shall be served by the electrical corporation until such time as they may select service from another service provider. Customers shall not be liable for the payment of any early termination fees or other penalties to any entity under the service agreement in the event the serving electric service provider's registration is suspended or revoked.

Maine Public Law 1997, ch 316 (May 29, 1997)

Sec. 35A § 3203: Licensing of competitive electricity providers; consumer protections; enforcement

1. Authority. In order to provide effective competition in the market for the generation and sale of electricity in the State and to provide an orderly transition from the current form of regulation to retail access, the commission shall license competitive electricity providers in accordance with this section.

2. Requirements. A competitive electricity provider may not undertake the sale of electricity at retail in this State without first receiving a license from the commission. Before approving a license application, the commission must receive from the applicant:

   A. Evidence of financial capability sufficient to refund deposits to retail customers in the case of bankruptcy or nonperformance or for any other reason;

   B. Evidence of the ability to enter into binding interconnection arrangements with transmission and distribution utilities;

   C. Disclosure of all pending legal actions and customer complaints filed against the competitive electricity provider at a regulatory body other than the commission in the 12 months prior to the date of license application;

   D. Evidence of the ability to satisfy the renewable resource portfolio requirement established under Section 3210; and

   E. Disclosure of the names and corporate addresses of all affiliates of the applicant.

   The commission shall consider the need for requiring and, if it determines there is a need, may require a competitive electricity provider to file a bond with the commission as evidence of financial ability to withstand market disturbances or other events that may increase the cost of providing service or to provide for uninterrupted service to its customers if a competitive electricity provider stops service.

3. Informational filings; public information. The commission shall establish by rule information disclosure and filing requirements for competitive electricity providers. The rules must require generation providers to file their generally available rates, terms and conditions with the commission. The commission, subject to appropriate protective orders, may require the submission of individual service contracts or any other confidential information from a competitive electricity provider.

   The commission by rule shall establish standards for publishing and disseminating, through any means considered appropriate, information that enhances consumers' ability to effectively make choices in a competitive electricity market.

   Rules adopted under this subsection are major substantive rules as defined in Title 5, Chapter 375, subchapter II-A and must be provisionally adopted by March 1, 1999.

4. Standard consumer protection provisions. As a condition of licensing, a competitive electricity provider that provides or proposes to provide generation service to a customer, wherever located, with a demand of 100 kilowatts or less:

   A. May not terminate generation service without at least 30 day prior notice to the customer;

   B. Must offer service to the customer for a minimum period of 30 days;

   C. Must allow the customer to rescind selection of the competitive electricity provider orally or in writing within 5 days of initial selection;

   D. May not telemarket services to the customer if the customer has filed with the commission a written request not to receive telemarketing from competitive electricity providers;

   E. Must provide to the customer within 30 days of contracting for retail service a disclosure of information provided to the commission pursuant to rules adopted under Subsection 3 in a standard written format established by the commission; and

   F. Must comply with any other provisions adopted by the commission by rule or order.

5. Licensing renewals and revocations. Consistent with all applicable requirements of Title 5, Chapter 375, the commission may limit the duration and effectiveness of a license to a specified term, may conduct proceedings for the renewal of licenses and may conduct proceedings for the revocation of a license when a requirement of this section has not been complied with by a competitive electricity provider. The commission shall adopt rules governing the procedures for issuing or revoking a license under this section and related matters.

6. Consumer protection standards; rules. The commission shall establish by rule consumer protection standards and standards to protect and promote market competition in order to protect retail consumers of electricity from fraud and other unfair and deceptive

business practices.

7. Penalties. In an adjudicatory proceeding, the commission may impose a penalty of up to $5,000 for each violation of this section or any consumer protection rule adopted under this section. Each day a violation continues constitutes a separate offense. Penalties collected by the commission under this section must be deposited in the Public Utilities Commission Reimbursement Fund under Section 117.

8. Dispute resolution. The commission shall resolve disputes between competitive electricity providers and retail consumers of electricity concerning standards established pursuant to Subsection 6.

9. Additional actions. The commission may impose by rule any additional requirements necessary to carry out the purposes of this chapter, except that this section may not be construed to permit the commission to regulate the rates of any competitive electricity provider.

10. Cease and desist orders. The commission may issue a cease and desist order:

   A. Following an adjudicatory hearing held in conformance with Title 5, Chapter 375, subchapter IV, if the commission finds that any competitive electricity provider or transmission and distribution utility has engaged or is engaging in any act or practice in violation of any law or rule administered or enforced by the commission or any lawful order issued by the commission. A cease and desist order is effective when issued unless the order specifies a later effective date or is stayed pursuant to Title 5, Section 11004; or

   B. In an emergency, without hearing or notice, if the commission receives a written, verified complaint or affidavit showing that a competitive electricity provider or a transmission and distribution utility is selling electricity to retail consumers without being duly licensed or is engaging in conduct that creates an immediate danger to the public safety or is reasonably expected to cause significant, imminent and irreparable public injury. An emergency cease and desist order is effective immediately and continues in force and effect until further order of the commission or until stayed by a court of competent jurisdiction. In a subsequent hearing the commission shall in a final order affirm, modify or set aside the emergency cease and desist order and may employ simultaneously or separately any other enforcement or penalty provisions available to the commission.

11. Restitution. The commission may order restitution for any party injured by a violation for which a penalty may be assessed pursuant to this section.

12. Enforcement. The commission through its own counsel or through the Attorney General may apply to the Superior Court of any county of the State to enforce any lawful order made or action taken by the commission pursuant to this section. The court may issue such orders, preliminary or final, as it considers proper under the facts established before it.

13. Notice to Attorney General. If the commission has reason to believe that any competitive electricity provider or transmission and distribution utility has violated any provision of law

for which criminal prosecution is provided and would be in order or any antitrust law of this State or the United States, the commission shall notify the Attorney General. The Attorney General shall promptly institute any actions or proceedings the Attorney General considers appropriate.

14. Disconnection restricted. A transmission and distribution utility may not disconnect service to a consumer due to nonpayment of generation charges or any other dispute with a competitive electricity provider, except that the commission may permit disconnection of electric service to consumers of electricity based on nonpayment of charges for standard-offer service provided under Section 3212.

15. Standard billing. The commission shall consider requiring standard billing information on bills for electric power service. If standard billing information is required, the commission shall investigate the possibility of adopting standards consistent with other New England states. The commission may not prohibit transmission and distribution utilities from contracting with generation service providers to include both entities' charges on a single bill. The commission may not preclude the inclusion of other information on bills for electric power service.

16. Access to load data. Upon request from a competitive electricity provider, the commission shall provide load data on a class basis that is in the possession of a transmission and distribution utility, subject to reasonable protective orders to protect confidentiality, if considered necessary by the commission.

17. Rules. Except as otherwise provided in this section, rules adopted pursuant to this section are routine technical rules as defined by Title 5, Chapter 375, subchapter II-A.

Massachusetts: Chapter 164 of the Acts of 1997, eff. November 25, 1997.

Section 1F

The department shall promulgate rules and regulations to provide retail customers with the utmost consumer protections contained in law, including, but not limited to, the following provisions:

(1) The department shall license to do business in the commonwealth all generation companies, aggregators, suppliers, energy marketers, and energy brokers in accordance with the provisions of Subparagraphs (i), (ii), and (iii). The department shall maintain a list of all licensed generation companies, aggregators, energy brokers, energy marketers, and suppliers, which shall be available to any consumer requesting such information through the department for a reasonable fee.

(i) All generation companies shall submit a license application to the department for approval to sell electric power or provide generation services within the commonwealth. Such application shall include the following: the company's technical ability, as defined pursuant to regulations promulgated by the department, to generate or otherwise obtain and deliver electricity and provide any other proposed services; documentation of financial capability of the applicant to provide the proposed services; a description of the company's form of ownership; and documentation regarding any valid purchase power contracts between the company, the company's affiliates, or the company's parent or subsidiary, and any electric company formed pursuant to the provisions of this chapter. A license shall not be granted unless and until all of the above information is provided with the payment of a fee, the amount to be determined by the department.

(ii) All private, non-profit, or co-operative aggregators established pursuant to Sections 135 and 136 seeking to do business in the commonwealth shall submit a license application to the department, subject to rules and regulations promulgated by the department and subject to the payment of a fee, the amount to be determined by the department.

(iii) All energy brokers, energy marketers, and other suppliers seeking to do business in the commonwealth shall submit a license application to the department, subject to rules and regulations promulgated by the department and subject to the payment of a fee, the amount to be determined by the department.

Montana Senate Bill 390, Amending Title 69, Montana Code Annotated
(Eff. May 2, 1997)

25-8-404. Licensing.

(1) Except as provided in 69-8-311, an electricity supplier shall file an application with and obtain a license from the commission before offering electricity for sale to retail customers in the state of Montana.

(2) As a condition of licensing, an electricity supplier shall identify and describe its activities and purposes and the purposes of each of the electricity supplier's affiliates, if any, including whether an affiliate that owns or operates distribution facilities offers customer choice through open, fair, and nondiscriminatory access to the electricity supplier's or the electricity supplier's affiliates distribution facilities.

(3) The commission may require electricity suppliers that provide electricity supply service to small customers to make a standard service offer that ensures that those customers have access to affordable electricity.

(4) The commission may require:

(a) proof of financial integrity and a demonstration of adequate reserve margins or the ability to obtain those reserves; and

(b) a licensee to post a bond should an electricity supplier fail to supply electricity or lack financial integrity.

(5) An electricity supplier shall provide the commission and all distribution services providers with copies of all license applications pursuant to Subsection (2). Licensees shall update information and file annual reports with the commission and all distribution services providers.

(6) License applications are effective 30 days after filing with the commission unless the commission rejects the application during that period. If the commission rejects a license application, the commission shall specify the reasons in writing and, if practical, identify alternative ways to overcome deficiencies.

(7) Notwithstanding this chapter, a cooperative utility is not required to apply for a license from the commission to be an electricity supplier to customers served by that cooperative utility in its electric facilities service territory or to any customers served by another cooperative utility subject to the consent of the other cooperative utility's local governing body.

69-8-408. Penalties — license revocation.

(1) The commission may begin a proceeding to revoke or suspend a license of an electricity supplier, impose a penalty, or both, for just cause on the commission's own investigation or upon the complaint of an affected party if it is established that the electricity supplier:

(a) intentionally provided false information to the commission;

(b) switched, or caused to be switched, the electricity supply for a customer without first obtaining the customers written permission;

(c) failed to provide a reasonably adequate supply of electricity for its customers in Montana; or

(d) committed fraud or engaged in deceptive practices.

(2) Any person selling or offering to sell electricity in this state in violation of 69-8-404, 69-8-410, and this section is subject to a fine of not less than $100 or more than $1,000 for the violation or a license revocation or suspension. Each day of each violation constitutes a separate violation.

(3) The fine must be recovered in a civil action upon the complaint by the commission in any court of competent jurisdiction.

(4) A license revocation proceeding under this section is a contested case proceeding pursuant to the Montana Administrative Procedure Act, Title 2, Chapter 4, part 6.

LOW INCOME PROGRAMS

Maine: Public Law 1997, ch 316 (May 29, 1997)

35A § 3214. Needs-Based Low-income Assistance

1. Policy. In order to meet legitimate needs of electricity consumers who are unable to pay their electricity bills in full and who satisfy eligibility criteria for assistance, and recognizing that electricity is a basic necessity to which all residents of the State should have access, it is the policy of the State to ensure adequate provision of financial assistance.

2. Low-income assistance. In order to continue existing levels of financial assistance for low-income households and to meet future increases in need caused by economic exigencies, the commission shall:

A. Receive funds collected by all transmission and distribution utilities in the State at a rate set by the commission in periodic rate cases; and

B. Set initial funding for programs based on an assessment of aggregate customer need in periodic rate cases. The funding formula may not result in assistance being counted as income or as a resource in other means-tested assistance programs for low-income households. To the extent possible, assistance must be provided in a manner most likely to prevent the loss of other federal assistance.

3. Special rate. Nothing in this section may be construed to prohibit a transmission and distribution utility from offering any special rate or program for low-income customers that is not in effect as of the effective date of this chapter, subject to the approval of the commission.

4. Financial support. If the Legislature appropriates from the General Fund financial support for households and individuals receiving assistance under this section, the commission may not terminate the assistance provided by transmission and distribution utilities unless the General Fund source has completely replaced such assistance. The commission may adjust the assistance provided pursuant to this section based on the amount of any financial support from the General Fund and may reinstitute assistance subsequent to any termination of assistance if the commission finds that the General Fund source no longer completely replaces such assistance.

Massachusetts: Chapter 164 of the Acts of 1997, eff. November 25, 1997.

Section 1F

(4)(i) The department shall require that distribution companies provide discounted rates for low income customers comparable to the low-income discount rate in effect prior to March 1, 1998. Said discount shall be in addition to any reduction in rates that becomes effective pursuant to said Subsection (b) of said Section 1B on March 1, 1998, and to any subsequent rate reductions provided by a distribution company after said date pursuant to said subsection. The cost of such discounts shall be included in the rates charged to all other customers of a distribution company. Each distribution company shall guarantee payment to the generation supplier for all power sold to low-income customers at said discounted rates. Eligibility for the discount rates established herein shall be established upon verification of a low-income customer's receipt of any means tested public benefit, or verification of eligibility for the low-income home energy assistance program, or its successor program, for which eligibility does not exceed 175 per cent of the federal poverty level based on a household's gross income. Said public benefits may include, but are not limited to, assistance which provides cash, housing, food, or medical care, including, but not limited to, transitional assistance for needy families, supplemental security income, emergency assistance to elders, disabled, and children, food stamps, public housing, federally-subsidized or state-subsidized housing, the low-income home energy assistance program, veterans' benefits, and similar benefits. The Division of Energy Resources shall make available to distribution companies the eligibility guidelines for said public benefit programs. Each distribution company shall conduct substantial outreach efforts to make said low-income discount available to eligible customers and shall report to said division, at least annually, as to its outreach activities and results. Outreach may include establishing an automated program of matching customer accounts with lists of recipients of said means tested public benefit programs and based on the results of said matching program, to presumptively offer a low-income discount rate to eligible customers so identified; provided, however, that the distribution company, within 60 days of said presumptive enrollment, informs any such low-income customer of said presumptive enrollment and all rights and obligations of a customer under said program, including the right to withdraw from said program without penalty.

Not later than March 1, 1999 the department shall conduct an investigation and report to the joint committee on government regulations regarding the cost and benefits of expanding eligibility for the discount rates established in clause (i) of Subparagraph (4) of the first paragraph of Section 1F to any low-income customer who is eligible for any means tested public benefit for which eligibility does not exceed 175 per cent of the federal poverty level based on gross household income. The department shall further provide to said committee any legislative recommendations necessary to implement this section.

(ii) Prior to the termination of the seven year period of the standard service transition rate, the department shall, in consultation with said division, evaluate the effects of electricity restructuring on the affordability of electric power for low-income customers. The department shall make recommendations to the general court relative to the continuation of the low-income discount rate authorized pursuant to this subsection or to make modifications thereto. The department shall, in its recommendations, consider whether or not to modify said discount by establishing a sliding scale low-income discount program.

(iii) A residential customer eligible for low-income discount rates shall receive the service on demand and may return to standard offer service at any time including from default service. Each distribution company shall periodically notify all customers of the availability of and method of obtaining low-income discount rates and standard offer service. An existing residential customer eligible for low-income discount on the date of start of retail access who orders service for the first time from a distribution company shall be offered standard offer service by that distribution company. A residential customer eligible for low-income discount receiving standard offer service shall be allowed to retain standard offer service upon moving within the service territory of a distribution company.

(iv) There shall be no charge to any residential customer for initiating or terminating low-income discount rates, default service, or standard offer service when said initiation or termination request is made after a regular meter reading has occurred and the customer is in receipt of the results of said reading. A distribution company may impose a reasonable charge, as set by the department through regulation, for initiating or terminating low-income discount rates, default service, or standard offer service when a customer does not make such an initiation or termination request upon the receipt of said results and prior to the receipt of the next regularly scheduled meter reading. For purposes of this subsection, there shall be a regular meter reading conducted of every residential account no less often than once every two months. Notwithstanding the foregoing, there shall be no charge when the initiation or termination is involuntary on the part of the customer.

Montana Senate Bill 390, Amending Title 69, Montana Code Annotated
(Eff. May 2, 1997)

28) “Universal system benefits programs” means public purpose programs for:

(a) cost-effective local energy conservation;

(b) low-income customer weatherization;

(c) renewable resource projects and applications, including those that capture unique social and energy system benefits or provide transmission and distribution system benefits;

(d) research and development programs related to energy conservation and renewables;

(e) market transformation designed to encourage competitive markets for public purpose programs; and

(f) low-income energy assistance.

69-8-402. Universal system benefits programs.

(1) Universal system benefits programs are established for the state of Montana to ensure continued funding of and new expenditures for energy conservation, renewable resource projects and applications, and low-income energy assistance during the transition period and into the future.

(2) Beginning January 1, 1999, 2.4% of each utility’s annual retail sales revenue in Montana for the calendar year ending December 31, 1995, is established as the annual funding level for universal system benefits programs. Unless modified as provided in Subsection (7), this funding level remains in effect until July 1, 2003.

(a) The recovery of all universal system benefits programs costs imposed pursuant to this section is authorized through the imposition of a universal system benefits charge assessed at the meter for each local utility system customer as provided in this section.

(b) Utilities must receive credit toward annual funding requirements for a utility’s internal programs or activities that qualify as universal system benefits programs, including those portions of expenditures for the purchase of power that are for the acquisition or support of renewable energy, conservation-related activities, or low-income energy assistance, and for customers’ programs or activities as provided in Subsection (7).

(c) A utility at which the sale of power for final end-use occurs is the utility that receives credit for the universal system benefits program expenditure.

(d) For a utility to receive credit for low-income related expenditures, the activity must have taken place in Montana.

(e) If a utility’s or a customer’s credit for internal activities does not satisfy the annual funding provisions of Subsection (2), then the utility shall make a payment to the universal system benefits fund for any difference.

(3) Cooperative utilities may collectively pool their statewide credits to satisfy their annual funding requirements for universal system benefits programs and low-income energy assistance.

(4) A utility's transition plan must describe how the utility proposes to provide for universal system benefits programs, including the methodologies, such as cost-effectiveness and need determination, used to measure the utility's level of contribution to each program.

(5) A utility's minimum annual funding requirement for low-income energy and weatherization assistance is established at 17% of the utility's annual universal system benefits funding level and is inclusive within the overall universal system benefits funding level.

(a) A utility must receive credit toward the utility's low-income energy assistance annual funding requirement for the utility's internal low-income energy assistance programs or activities.

(b) If a utility's credit for internal activities does not satisfy its annual funding requirement, then the utility shall make a payment for any difference to the universal energy assistance fund.

(6) An individual customer may not bear a disproportionate share of the local utility's funding requirements, and a sliding scale must be implemented to provide a more equitable distribution of program costs.

(7) (a) A customer with loads greater than 1,000 kilowatts shall:

(i) pay a universal system benefits program charge equal to the lesser of:

(A) $500,000 less the customer credits provided for in this Subsection (7); or

(B) the product of 0.9 mills per kilowatt hour multiplied by the customer's kilowatt hour purchases, less customer credits provided for in this Subsection (7);

(ii) receive credit toward that customer's annual universal system benefits charge for internal expenditures and activities that qualify as a universal system benefits program expenditure and these internal expenditures must include but not be limited to:

(A) expenditures that result in a reduction in the consumption of electrical energy in the customer's facility; and

(B) those portions of expenditures for the purchase of power at retail or wholesale that are for the acquisition or support of renewable energy or conservation-related activities.

(b) Customers making these expenditures must receive a credit against the customer's annual universal system benefits charge, except that any of those amounts expended in a calendar year that exceed that customer's universal system benefits charge for the calendar year must be used as a credit against those charges in future years until the total amount of those expenditures has been credited against that customer's universal system benefits charges.

PERFORMANCE-BASED REGULATION AND SERVICE QUALITY

Massachusetts: Chapter 164 of the Acts of 1997, eff. November 25, 1997.

Section 1E

(a) The department is hereby authorized to promulgate rules and regulations to establish and require performance based rates for each distribution, transmission, and gas company organized and doing business in the commonwealth pursuant to the provisions of this chapter. In promulgating such performance based rate schemes, the department shall establish service quality standards each distribution, transmission, and gas company, including, but not limited to, standards for customer satisfaction service outages, distribution facility upgrades, repairs and maintenance, telephone service, billing service, and public safety provided, however, that such service quality standards shall include benchmarks for employee staff levels and employee training programs for each such distribution, transmission, and gas company.

(b) In complying with the service quality standards and employee benchmarks established pursuant to this section, a distribution, transmission, or gas company that makes a performance based rating filing after the effective date of this act shall not be allowed to engage in labor displacement or reductions below staffing levels in existence on November 1, 1997, unless such are part of a collective bargaining agreement or agreements between such company and the applicable organization or organizations representing such workers, or with the approval of the department following an evidentiary hearing at which the burden shall be upon the company to demonstrate that such staffing reductions shall not adversely disrupt service quality standards as established by the department herein. Nothing in this paragraph shall prevent reduction of forces below the November 1, 1997 level through early retirement and severances negotiated with labor organizations before said date.

(c) Each distribution, transmission, and gas company shall file a report with the department by March first of each year comparing its performance during the previous calendar year to the department's service quality standards and any applicable national standards as may be adopted by the department. The department shall be authorized to levy a penalty against any distribution, transmission, or gas company which fails to meet the service quality standards in an amount up to and including the equivalent of 2 per cent of such company's transmission and distribution service revenues for the previous calendar year.

(d) The department is authorized and directed to promulgate regulations relative to an alternative dispute resolution process for the handling of damage claims by customers in an amount under $100. The department shall establish a 60 day timeline for the resolution of all mediation claims. The department shall issue a biannual report to the house and senate clerks and the joint committee on government regulations which shall include, but not be limited to, the following information: nature of consumer claims, number of consumer claims and resolutions of consumer claims reviewed by the department during the previous six months. Said report shall be available for public review at the department.

SLAMMING

California Senate Bill 477 (Stats. 1997, ch. 275).

Section 366.5 is added to the Public Utilities Code, to read:

(a) No change in the aggregator or supplier of electric power for any small commercial customer may be made until one of the following means of confirming the change has been completed.

(1) Independent third-party telephone verification.

(2) Receipt of a written confirmation received in the mail from the consumer after the consumer has received an information package confirming the agreement.

(3) The customer signs a document fully explaining the nature and effect of the change in service.

(4) The customer's consent is obtained through electronic means, including but not limited to, computer transactions.

(b) No change in the aggregator or provider of electric power for any residential customer may be made until the change has been confirmed by an independent third-party verification company, as follows:

(1) The third-party verification company shall meet each of the following criteria:

(A) Be independent from the entity that seeks to provide the new service.

(B) Not be directly or indirectly managed, controlled, or directed, or owned wholly or in part, by an entity that seeks to provide the new service or by any corporation, firm, or person who directly or indirectly manages, controls, or directs, or owns more than 5 percent of the entity.

(C) Operate from facilities physically separate from those of the entity that seeks to provide the new service.

(D) Not derive commission or compensation based upon the number of sales confirmed.

(2) The entity seeking to verify the sale shall do so by connecting the resident by telephone to the third-party verification company or by arranging for the third-party verification company to call the customer to confirm the sale.

(3) The third-party verification company shall obtain the customer' s oral confirmation regarding the change, and shall record that confirmation by obtaining appropriate verification data. The record shall be available to the customer upon request.

Information obtained from the customer through confirmation shall not be used for marketing purposes. Any unauthorized release of this information is grounds for a civil suit by the aggrieved resident against the entity or its employees who are responsible for the violation.

(4) Notwithstanding paragraphs (1), (2), and (3), an aggregator or provider of electric power shall not be required to comply with these provisions when the customer directly calls an aggregator or provider of electric power to change service providers. However, an aggregator or provider of electric power shall not avoid the verification requirements by asking a customer to contact an aggregator or provider of electric power directly to make any change in the service provider.

(c) Any aggregator or provider of electric power offering electricity service to residential and small commercial customers that violates the verification procedures described in this section shall be liable to the aggregator or provider of electric power offering electricity services previously selected by the customer in an amount equal to all charges paid by the customer after the violation.

(d) A change in provider of electric power by an aggregator is not a change in provider of electric power for purposes of this section.

(e) Public agencies are exempt from this section to the extent they are serving customers within their jurisdiction.

(f) An electrical corporation is exempt from this section for customers which default to the service of the electrical corporation.

Massachusetts: Chapter 164 of the Acts of 1997, eff. November 25, 1997.

Section 1F.

(8)(a)

Each customer choosing a generation company or its affiliate, subsidiary, or parent company, or a supplier or aggregator shall be required to affirmatively choose such entity. It shall be unlawful for a generation company, supplier, or aggregator to provide power or other services to such a customer without first obtaining said affirmative choice from the customer. For the purposes of this section, the term "affirmative choice" shall mean the signing of a letter of authorization, third party verification, or the completion of a toll-free call made by the customer to an independent third party operating in a location physically separate from the telemarketing representative who has obtained the customer's initial oral authorization to change to a new electricity provider. For the purposes of this section, the term "third party verification" shall mean an appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative who has obtained the customer's oral authorization to change to a new electricity service provider, such authorization to include appropriate verification data, such as the customer's date of birth and social security number; provided, however, any such information or data in the possession of the third party verifier or the marketing company shall not be used, in any instance, for commercial or other marketing purposes, and shall not be sold, delivered, or shared with any other party for such purposes. Such authorization shall include appropriate verification data, such as the customer's date of birth and social security number; provided, however, any information or data in possession of the independent third party verifier or the marketing company shall not be used, in any instance, for commercial or other marketing purposes, and shall not be sold, delivered, or shared with any other party for such purposes.

For the purposes of this section, the term "letter of authorization" shall mean,

(i) a separate document, an easily separable document containing only the authorizing language described in paragraph (d), whose sole purpose is to authorize a generation company, aggregator, or supplier to initiate a primary generation company, aggregator, or supplier change. The letter of authorization must be signed and dated by the consumer requesting the primary generation company, aggregator, or supplier change.

(ii) The letter of authorization shall not be combined with inducements of any kind on the same document.

(iii) At a minimum, the letter of authorization must be printed with a readable type of sufficient size to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The consumer's billing name and address;

(2) The decision to change electricity service from the current generation company, aggregator, or supplier to the prospective generation company, aggregator or supplier;

(3) That the consumer understands that only one generation company, aggregator, or supplier may be designated as the consumer's electric company; and

(4) That the consumer understands that any primary generation company, aggregator, or supplier selection the consumer chooses may involve a charge to the consumer for changing the consumer's primary generation company, aggregator, or supplier.

(iv) Letters of authorization shall not suggest or require that a consumer take some action in order to retain the consumer's current generation company, aggregator, or supplier.

(v) If any portion of a letter of authorization is translated into another language, then all portions of the letter of authorization must be translated into that language.

Each customer choosing a generation company or its affiliate, subsidiary, or parent company, a supplier or aggregator shall have the right to rescind, without charge or penalty, his or her choice of generation company, aggregator, or supplier no later than midnight on the third day following the customer's receipt of a written confirmation of an agreement to purchase electricity. Upon the switching of a customer's service provider, there shall be included in the customer's first bill an acknowledgment to be completed by the customer agreeing to the service switch. Such bill shall also include all information mandated under clause (i) of Subparagraph (5).

Each customer choosing a generation company or its affiliate subsidiary, or parent company, a supplier or aggregator shall have the right to rescind, without charge or penalty, the choice of generation company, aggregator, or supplier no later than midnight on the third day following the customer's receipt of a written confirmation of an agreement to purchase electricity and a statement of the terms and conditions of service as described in Subsection (5)(i). Upon switching of a customer's service provider, there shall be included in the customer's bill for distribution service an acknowledgment of the service switch, along with information on how to file a complaint regarding an unauthorized switch.

(b) A customer may initiate a complaint that his retail electricity service has been switched by or to another service provider without his prior authorization. Said complainant shall file the complaint with the department within 30 days after the statement date of the notice indicating that the customer's retail electricity service has been switched. The department shall, within 10 business days of receiving the complaint, request from the customer a copy of the customer's electricity bill, the name of the original service provider, the name of the new service provider, and any other information the department may deem relevant. The customer shall, within 15 business days of the department's notifying the customer, submit to the department the requested information. Within 15 business days of receiving the request of information from the customer, the department shall send

(i) to the customer, a letter acknowledging receipt of the information;

(ii) to the original service provider, a letter informing it of the pending complaint and requesting it to provide information relevant to the service switch; and

(iii) to the new service provider, a letter informing it of the pending complaint, requesting the proof of the customer's affirmative choice to switch his service provider, and requesting it to provide other information the department deems relevant. The original service provider and the new service provider shall, within five business days of the department's request, return the requested information to the department. Within 25 business days after receiving a copy of the customer's third party verification and all relevant information as required herein, the department shall determine if the customer authorized the new service provider to switch the customer's service.

(c) If the department determines that the new service provider does not possess the required proof of the customer's affirmative choice, the department shall calculate and require the new service provider to refund the following: (i) to the customer, the difference between what the customer would have paid to the previous service provider and actual charges paid to the new service provider; (ii) to the customer, any reasonable expense the customer incurred in switching back to the original service provider; and (iii) to the original service provider, any lost revenue, which shall consist of the amount of money the original service provider would have received for the service used by the customer during the time the customer received services from the new service provider if the customer's service had not been switched. This amount shall gross, irrespective of expenses, what the original service provider would have reasonably incurred providing the services to the customer. The department shall promulgate rules and regulations for the implementation of this subsection.

(d) Any generation company, supplier, or aggregator determined by the department to have switched any customer's service provider without proper authorization from the customer one or more times in a 12 month period shall be subject to a civil penalty not to exceed $1,000 for the first offense and not less than $2,000 nor more than $3,000 for any subsequent offense per customer. In determining the amount of the civil penalty, the department shall consider the nature, circumstances, and gravity of the violation, the degree of the respondent's culpability, and the respondent's history of prior offenses.

(e) Any generation company, supplier, or aggregator determined to have switched any customer's service provider without proper authorization more than 20 times in a 12 month period may, after a full hearing and determination by the department that such generation company supplier or aggregator intentionally, maliciously or fraudulently switched the service or more than 20 customers in a 12 month period, be prohibited from selling electricity in the commonwealth for a period of up to one year. In determining the length of suspension, the department shall consider the nature, circumstances and gravity of each violation and the degree of the culpability of the generation company, supplier or aggregator.

(f) The department shall track instances in which a generation company, supplier, or aggregator switched a customer's electricity service without the customer's prior authorization. The department shall keep a record of all unauthorized switches which occurred during a calendar year. Beginning with calendar year 1999, the department shall, by March 31 of each year, file an annual report with the joint committee on government regulations and the house and senate committees on ways and means detailing the total number of unauthorized switches, enforcement procedures undertaken by the department against such slamming tactics, so-called, the total amount of dollars returned to customers, the total amount of dollars collected in civil penalties pursuant to Subsection (c), and the overall impact of the provisions of this section.

STANDARD OFFER/DEFAULT SERVICE

Maine: Public Law 1997, ch 316 (May 29, 1997)

Sec. 35A § 3214

When retail access begins, the commission shall ensure that standard-offer service is available to all consumers of electricity.

1. Establishment of terms and conditions. The commission shall open a rule-making proceeding no later than October 1, 1997 to establish terms and conditions for standard-offer service that include, but are not limited to:

    A. Entry and exit restrictions;

    B. Protection against a standard-offer service provider's failure to provide service as contracted for;

    C. Appropriate rate design issues;

    D. Retaining averaged prices for all customers in the same class; and

E. Credit, collection and disconnection practices.

By February 15, 1998, the commission shall provisionally adopt rules establishing terms and conditions for standard-offer service. Rules adopted under this Subsection are major substantive rules pursuant to Title 5, Chapter 375, subchapter II-A.

2. Selection of standard-offer service providers. After terms and conditions for standard-offer service have been established under Subsection 1, the commission shall administer a bid process to select a standard-offer service provider for that transmission and distribution utility's service territory. By July 1, 1999, the commission shall review the bid submissions for each transmission and distribution utility and select the standard-offer service provider or providers for that utility's service territory.

A. The commission shall determine the general credit data and specific information from general load and usage data that transmission and distribution utilities must provide to potential standard-offer service bidders, including, but not limited to, monthly demand and energy consumption and the number of customers in each customer class. The commission shall ensure that individual customer confidentiality is preserved in this process and that a transmission and distribution utility releases customer-specific data only with the customer's permission. If the transmission and distribution utility incurs additional costs to develop and produce the required data, the commission shall permit that utility to recover those costs through transmission and distribution rates.

B. The commission shall establish the maximum duration of a standard-offer service contract after considering all relevant factors, including, but not limited to, market risks and the need for price stability and contract flexibility.

C. A competitive electricity provider that is an affiliate of a large investor-owned transmission and distribution utility may submit bids to provide standard-offer service for up to 20% of the electric load within the service territory of the large investor-owned transmission and distribution utility with which it is affiliated. To prevent the unfair use of information possessed by a large investor-owned transmission and distribution utility, the commission shall ensure that a utility seeking to bid on standard-offer service has no greater access to relevant information than is provided to other potential bidders.

D. A consumer-owned transmission and distribution utility and a small investor-owned transmission and distribution utility may submit bids to provide standard-offer service for that utility's service territory. To prevent the unfair use of information possessed by a consumer-owned transmission and distribution utility or a small investor-owned transmission and distribution utility, the commission shall ensure that a utility seeking to bid on standard-offer service has no greater access to relevant information than is provided to other potential bidders.

By February 15, 1998, the commission shall provisionally adopt rules establishing a methodology for structuring the bidding process for standard-offer service in order to implement the provisions of this subsection. In adopting rules, the commission shall consider methods to ensure, to the extent possible, at least 3 providers of standard-offer service in each transmission and distribution utility service territory, as long as the method does not result in any significant adverse impacts on rates paid by consumers. Rules adopted under this subsection are major substantive rules pursuant to Title 5, Chapter 375, subchapter II-A.

3. Price cap; investigation. If the qualifying bids under Subsection 2 for standard-offer service in any service territory, when combined with the regulated rates of transmission and distribution service and any stranded costs charge, exceed, on average, the total rate for electricity immediately before the implementation of retail access, the commission shall investigate whether the implementation of retail access remains in the public interest or whether other mechanisms to achieve the public interest and to adequately protect consumer interests need to be put in place. Pursuant to Section 3217, the commission shall notify the Legislature of the results of its investigation and its determination.

4. Implementation period. Standard-offer service must be available until March 1, 2005. By January 1, 2004, the commission shall begin an investigation to determine whether the continued availability of standard-offer service is necessary and in the public interest. The commission shall conclude the investigation by June 30, 2004 and report its results to the Legislature pursuant to Section 3217.

5. Territorial and rate class application. Nothing in this section precludes the commission from permitting or requiring different terms and conditions for standard-offer service in different utility service territories or for different customer classes.

Nevada: Assembly Bill 366, July 16, 1997.

Sec. 45.

1. The commission shall designate a vertically integrated electric utility to provide electric service to customers who are unable to obtain electric service from an alternative seller or who fail to select an alternative seller. The provider so designated by the commission is obligated to provide electric service to the customers. Electric service provided by the utility pursuant to this section shall be deemed to be a noncompetitive service for which the utility may recover its costs pursuant to NRS 704.001 to 704.655, inclusive, 704.701 to 704.751, inclusive, 704.800 to 704.900, inclusive.

2. Upon a finding by the commission that the public interest will be promoted, the commission may prescribe alternate methods for providing electric service to those customers described in Subsection 1. The alternate methods may include, but are not limited to, the direct assignment of customers to alternative sellers or electric distribution utilities or a process of competitive bidding for the right to provide electric service to the designated customers.

3. The commission shall establish minimum terms and conditions under which electric service must be provided pursuant to this section, including a minimum period during which a customer must be obligated to pay for the electric service from the assigned provider. The price charged for electric service for a particular group of customers must reflect the incremental cost of serving the group.

4. If the designated provider of the electric service is a vertically integrated electric utility, the utility shall provide the electric service through an affiliate whose sole business activity is the provision of electric service.

5. Except as otherwise provided in this Subsection and Subsection 6, the rate charged for residential service provided pursuant to Subsection 1 must not exceed the rate charged for that service on July 1, 1997. The limitation set forth in this subsection is effective until 2 years after the date upon which, in accordance with Section 39 of this act, the commission repeals the regulations which established the pricing method for that service and the terms and conditions for providing that service.

6. The commission may, in accordance with NRS 704.110, 704.120 and 704.130, approve an increase in the rate charged for residential service provided pursuant to Subsection 1 in an amount that does not exceed the increase necessitated, if any, to ensure the recovery by the vertically integrated electric utility of its just and reasonable costs. The provisions of this section do not limit or prohibit in any manner the operation of any order issued by the commission before July 1, 1997.

APPENDIX C

NATIONAL COUNCIL PUBLICATIONS ON ELECTRIC INDUSTRY RESTRUCTURING

Research Reports

Federal, State, and Local Tax Implications of Electric Industry Restructuring (Deloitte & Touche, 1996)

Assessing Impacts of Restructuring on Small Business, Residential, and Low-Income Customers (Roger D. Colton, 1996)

The Unintended Impacts of Restructuring (Dave Schoengold, 1996)

The Organization of Competitive Wholesale Power Markets and Spot Price Pools (Paul A. Centolella, 1996)

Stranded Benefits in Electric Utilities Restructuring (Nancy Brockway & Michael Sherman, 1996)

The British Electric Utility Restructuring Experience: History and Lessons for the U.S. (Michael C. Brower, Stephen D. Thomas, & Catherine Mitchell, 1996)

Regulation and Competition Without Privatization: Norway's Experience (Jan Moen & Jan Hamrin, Printed in *The Electricity Journal*, March 1996)

Public-Interest Research and Development in the Electric and Gas Utility Industries (Carl Blumstein, Richard Scheer, and Stephen Wiel, 1998)

Briefing Papers

Customer Choice (Cheryl Harrington, 1996)

Electric Utility Transition Costs (Eric Hirst & Lester Baxter, 1996)

Market Power in the Electric Utility Industry; An Overview (William Shepherd, 1997)

Restructuring Issues Associated with Nuclear Power Plants (William B. Marcus, 1997)

Regional issues in Restructuring the Electric Industry (Sue Tierney, 1998)

Disclosure Series

Full Environmental Disclosure for Electricity: Tracking and Reporting Key Information (David Moskovitz et al., July 1997)

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups (Alan S. Levy et al., July 1997)

Disclosure of Fuel Mix and Emissions by Retail Electric Service Providers: Issues of Confidentiality vs. Public Right to Know (Scott Hempling, July 1997)

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups, Report 2 -- West Coast (Mario Teisl et al., 1997)

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups, Report 3-- Rocky Mountain West (Lynn Halverson & Edward Holt, 1997)

Uniform Consumer Disclosure Standards for New England: Report and Recommendations to the New England Utility Regulatory Commissions (Tom Austin et al., January 1998)

Information Consumers Want in Electricity Choice: Summary of Focus Group Research (Edward Holt, January 1998)

Summary Report: Baseline Survey — Consumer Knowledge, Practices, and Attitudes: Electric Utility Deregulation and Consumer Choice (Kenneth Winneg, et al., January 1998)

Model Electricity Consumer Protection Disclosures (Jerrold Oppenheim & Barbara Alexander, April 1998)

Label Testing: Results of Mall Intercept Study (Kenneth Winneg, et al., April 1998)

Other

Council Design Criteria List
(Jan Hamrin, 1995)

Six Generic Restructuring Models
(Jan Hamrin, 1995)

A Glossary of Restructuring Terms
(Jan Hamrin, 1995)

National Council Publications can be downloaded from its website http://eetd.lbl.gov/NationalCouncil/

Barbara R. Alexander is an attorney and former Director of the Consumer Assistance Division of the Maine Public Utilities Commission. She conducts research and training for regulators and legislators on the development of consumer protection and service quality programs associated with competitive electric, gas and telephone service. She may be reached by e-mail at barbalex@ctel.net.

This report was prepared for the U.S. Department of Energy, Chicago Regional Support Office (Purchase Order DE-AP45-97R553188). Funding was provided by the Department of Energy's Office of Power Technologies, Ofiice of Energy Efficiency and Renewable Energy.