(c) UNBUNDLING.— Any stranded cost recovery charge authorized by the Commission to be assessed by the Tennessee Valley Authority shall be unbundled from the otherwise applicable rates and charges to such customer and separately stated on the bill of such customer. The Tennessee Valley Authority shall not recover wholesale stranded costs from any customer through any other rate, charge, or mechanism.

(d) REPORT.—Beginning in fiscal year 2001, as part of the annual management report submitted by the Tennessee Valley Authority to Congress, the Tennessee Valley Authority shall also specifically report:

(1) the status of the Tennessee Valley Authority's long-range financial plans and the progress toward its goal of competitively priced electric power, and a general discussion of the Tennessee Valley Authority's prospects on meeting the objectives of the Ten Year Business Outlook issued on July 22, 1997;

(2) any changes in assumptions since the previous report that may have a material effect on the Tennessee Valley Authority's long-range financial plans;

(3) the source of funds used for any generation and transmission capacity additions;

(4) the use or other disposition of amounts recovered by the Tennessee Valley Authority under the Tennessee Valley Authority Act and this Act;

(5) the amount by which the Tennessee Valley Authority's publicly-held debt was reduced; and

(6) the projected amount by which the Tennessee Valley Authority's publicly held debt will be reduced.

SEC. 609. APPLICATION OF ANTITRUST LAW

(a) IN GENERAL.—The Tennessee Valley Authority shall be subject to the antitrust laws of the United States with respect to the operation of its electric power and transmission systems. For purposes of this section, the term ''antitrust laws'' has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(b) DAMAGES.—No damages, interest on damages, costs, or attorneys' fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from the Tennessee Valley Authority.

(c) Nothing in this Act shall diminish or impair any privileges, immunities or exemptions prior to enactment that would have been accorded any person by virtue of their association together in advocating their cause and points of view to the Tennessee Valley Authority or any other agency or branch of federal, state or local government.

SEC. 610. SAVINGS PROVISION.

Nothing in this subtitle shall affect section 15d(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n–4(b)), providing that bonds issued by the Tennessee Valley Authority shall not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 824k of this title; title 7 section 904; title 20 section 7702; title 28 section 1491; title 33 sections 558b, 558c.

§ 831. Creation; short title

For the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the National defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This chapter may be cited as the "Tennessee Valley Authority Act of 1933."

(May 18, 1933, ch. 32, § 1, 48 Stat. 58.)

CROSS REFERENCES

Financial control of Government Corporations, see section 9101 et seq. of Title 31, Money and Finance.

§ 831a. Directors of the Authority

(a) Composition of board; appointment and designation

The board of directors of the Corporation (hereinafter referred to as the "board") shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and employees shall be designated and selected by the board.

(b) Terms of office; successors

The terms of office of the members first taking office after May 18, 1933, shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year, and one at the end of the ninth year, after May 18, 1933. A successor to a member of the board shall be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

(c) Vacancies

Any member appointed to fill a vacancy in the board occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(d) Quorums

Vacancies in the board, so long as there shall be two members in office, shall not impair the powers of the board to execute the functions of the Corporation, and two of the members in office shall constitute a quorum for the transaction of the business of the board.

(e) Citizenship; compensation; Government housing; reimbursement for expenses; outside business

Each of the members of the board shall be a citizen of the United States. The compensation of each member of the board shall be paid by the Corporation as current expenses. Each member of the board, in addition to his salary, shall be permitted to occupy as his residence one of the dwelling houses owned by the Government in the vicinity of Muscle Shoals, Alabama, the same to be designated by the President of the United States. Members of the board shall be reimbursed by the Corporation for actual expenses (including traveling and subsistence expenses) incurred by them in the performance of the duties vested in the board by this chapter. No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

(f) Conflicts of interest

No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

(g) Function of board

The board shall direct the exercise of all the powers of the Corporation.

(h) Confidence in the Authority

All members of the board shall be persons who profess a belief in the feasibility and wisdom of this chapter.

(May 18, 1933, ch. 32, § 2, 48 Stat. 59.)

CODIFICATION

Provisions covering the compensation of members of the board have been omitted as compensation of the Chairman and members of the board is covered by sections 5314 and 5315 of Title 5, Government Organization and Employees.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to Board of Directors of Tennessee Valley Authority, see Parts 1, 2, and 24 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of Title 42, The Public Health and Welfare.

§ 831b. Officers and employees; wages of laborers and mechanics; application of employees' compensation provisions

The board shall without regard to the provisions of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents as are necessary for the transaction of its business, fix their compensation, define their duties, and provide a system of organization to fix responsibility and promote efficiency. Any appointee of the board may be removed in the discretion of the board. No regular officer or employee of the Corporation shall receive a salary in excess of that received by the members of the board.

All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreement by representatives of employers and employees.

Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.

Insofar as applicable, the benefits of subchapter I of chapter 81 of title 5 shall extend to persons given employment under the provisions of this chapter.

(May 18, 1933, ch. 32, § 3, 48 Stat. 59; June 6, 1972, Pub. L. 92-310, title II, § 225(a), 86 Stat. 206.)

REFERENCES IN TEXT

The Civil Service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5. Offices and positions in the Tennessee Valley Authority were specifically excepted from the provisions of the Ramspeck Act (act Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211), which authorized the President to cover into the classified (competitive) civil service any offices or positions in the executive branch.

CODIFICATION

In the last par., "subchapter I of chapter 81 of title 5" substituted for "the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916, as amended" on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

AMENDMENTS

1972—Pub. L. 92-310 struck out provisions which permitted the board to require bonds from managers, assistant managers, officers, employees, attorneys, and agents.

PAYMENT OF PHYSICIANS ALLOWANCES

Pub. L. 102-377, title IV, Oct. 2, 1992, 106 Stat. 1342, provided: "That this appropriation and other moneys available to the Tennessee Valley Authority may be used hereafter for payment of the allowances authorized by section 5948 of title 5, United States Code".

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 102-104, title IV, Aug. 17, 1991, 105 Stat. 535.
Pub. L. 101-514, title IV, Nov. 5, 1990, 104 Stat. 2097.
Pub. L. 101-101, title IV, Sept. 29, 1989, 103 Stat. 665.
Pub. L. 100-371, title IV, July 19, 1988, 102 Stat. 873.
Pub. L. 100-202, § 101(d) [title IV], Dec. 22, 1987, 101 Stat. 1329-104, 1329-129.
Pub. L. 99-500, § 101(e) [title IV], Oct. 18, 1986, 100 Stat. 1783-194, 1783-212, and Pub. L. 99-591, § 101(e) [title IV], Oct. 30, 1986, 100 Stat. 3341-194, 3341-212.

LEGAL REPRESENTATION

Customs Courts Act of 1980 as not affecting authority of Tennessee Valley Authority under this chapter to represent itself by attorneys of its choosing, see Pub. L. 96-417, title VII, § 705, Oct. 10, 1980, 94 Stat. 1748, set out as a note under section 251 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 sections 5373, 5948.

§ 831b-1. Acceptance of services of volunteers

The Tennessee Valley Authority may on and after September 29, 1989, accept the services of volunteers and, from any funds available to it, provide for their incidental expenses to carry out any activity of the Tennessee Valley Authority except policymaking or law or regulatory enforcement. Such volunteers shall not be deemed employees of the United States Government, except for the purposes of chapter 81 of title 5 relating to compensation for work injuries, and shall not be deemed employees of the Tennessee Valley Authority except for the purposes of tort claims to the same extent as a regular employee of the Tennessee Valley Authority would be under identical circumstances.

(Pub. L. 101-101, title IV, Sept. 29, 1989, 103 Stat. 665.)

CODIFICATION

Section was enacted as part of the Energy and Water Development Appropriations Act, 1990, and not as part of the Tennessee Valley Authority Act of 1933 which comprises this chapter.

§ 831c. Corporate powers generally; eminent domain; construction of dams, transmission lines, etc.

Except as otherwise specifically provided in this chapter, the Corporation—

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper: *Provided*, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this chapter.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this chapter, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings: *Provided*, That nothing contained herein or elsewhere in this chapter shall be construed to deprive the Corporation of the rights conferred by sections 258a to 258e-1 of title 40.

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: *Provided*, That no transfer authorized herein in (b) shall be made without the approval of Congress: *And provided further*, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: *Provided, however*, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: *And provided further*, That no transfer authorized herein in (a) or (c) except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon

which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the Department of the Army and the President.

(*l*) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the chapter; and may cooperate with Federal, State, and local agencies to that end.

(May 18, 1933, ch. 32, § 4, 48 Stat. 60; Aug. 31, 1935, ch. 836, §§ 1-3, 13, 49 Stat. 1075, 1076, 1080; July 18, 1941, ch. 309, 55 Stat. 599; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; June 6, 1972, Pub. L. 92-310, title II § 225(b), 86 Stat. 206.)

CODIFICATION

Subsec. (*j*), last sentence, directed the directors of the Authority to report their recommendations to Congress not later than April 1, 1936, and has been omitted as executed.

AMENDMENTS

1972—Subsec. (*f*). Pub. L. 92-310 struck out provisions which required the treasurer and assistant treasurers to give bonds for the safekeeping of securities and moneys of the Corporation.

1941—Subsec. (*k*). Act July 18, 1941, amended subsec. (*k*) generally.

1935—Subsec. (*i*). Act Aug. 31, 1935, § 1, inserted proviso.

Subsec. (*j*). Act Aug. 31, 1935, § 2, amended subsec. (*j*) generally.

Subsec. (*k*). Act Aug. 31, 1935, § 3, added subsec. (*k*).

Subsec. (*l*). Act Aug. 31, 1935, § 13, added subsec. (*l*).

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

DELEGATION OF FUNCTIONS

Authority of President under subsec. (*k*) of this section to approve transfers under subsecs. (*a*) and (*c*) of this section, other than leases for terms of less than 20 years and conveyances of property having a value not in excess of $500, delegated to Administrator of General Services, see section 1(16) of Ex. Ord. No. 11609, July 22, 1971, 36 F.R. 13747, set out as a note under section 301 of Title 3, The President.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 831c-2 of this title.

§ 831c-1. Bridges endangered or damaged by dams, etc.: compensation of and contracts with owner for protection, replacement, etc.

(a) Structures on Tennessee River or tributaries

Whenever, as the result of the construction of any dam, reservoir, or other improvement under the provisions of this chapter, or amendments thereto, including any improvement of the navigable channel to accommodate the growth of navigation or changes in navigation requirements within the reservoir created by any dam in the custody of the Tennessee Valley Authority, any bridge, trestle, or other highway or railroad structure located over, upon, or across the Tennessee River or any of its navigable tributaries, including approaches, fenders and appurtenances thereto, is endangered or otherwise adversely affected and damaged, including any interference with or impairment of its use, or, in the judgment of the Board of Directors of the Tennessee Valley Authority, needs to be raised, widened, or otherwise altered to provide the navigation clearances required for completion of the navigable channel to be provided by such improvement, to the extent that protection, alteration, reconstruction, relocation, or replacement is necessary or proper to preserve its safety or utility or to meet the requirements of navigation or flood control, or both, the owner or owners of such bridge, trestle, or structure shall be compensated by the Tennessee Valley Authority in the sum of the reasonable actual cost of such protection, alteration, reconstruction, relocation, or replacement: *Provided*, That in arriving at the amount of such compensation the bridge owner shall be charged with a sum which shall equal the net value to the owner of any direct and special benefits accruing to the owner from any improvement or addition or betterment of the altered, reconstructed, relocated, or replaced bridge, trestle, or structure. The Tennessee Valley Authority is empowered to contract with such owner with respect to any such protection, alteration, reconstruction, relocation, or replacement, the payment of the cost thereof and its proper division, which contract may provide either for money compensation or for the performance of all or any part of the work by the Tennessee Valley Authority.

(b) Suit on contracts

In the event of a failure to agree upon the terms and conditions of any such contract, or upon any default in the performance of any contract entered into pursuant to this section, the bridge owner or the Tennessee Valley Authority shall have the right to bring suit to enforce its right or for a declaration of its rights under this section, or under any such contract, in the district court of the United States for the district in which the property in question is located. In any such proceeding the court shall apportion the total cost of the work between the Tennessee Valley Authority and the owner in accord with the provisions contained in this section. The Tennessee Valley Authority's share of the cost of any such protection, alteration, reconstruction, relocation, or replacement, under any contract made or judgment, award, or decree rendered under the provisions of this section may be paid out of any funds available for carrying out the provisions of this chapter, and appropriations for that purpose are hereby authorized: *Provided*, That, prior to such alteration, reconstruction, or relocation of

said bridges, the location and plans shall be submitted to and approved by the Secretary of Transportation in accordance with existing laws.

(Nov. 21, 1941, ch. 480, 55 Stat. 773; Sept. 26, 1968, Pub. L. 90-524, 82 Stat. 876.)

CODIFICATION

Section was not enacted as part of the Tennessee Valley Authority Act which comprises this chapter.

AMENDMENTS

1968—Pub. L. 90-524 permitted the Authority to use appropriated funds to cover the Federal share of the cost of necessary bridge alterations where the alterations are obtained by agreement with the bridge owner, made this section applicable to alterations required by new reservoir projects and by realignment or other changes of the navigation channel to accommodate the growth of traffic or changes in navigation requirements within existing reservoirs, and substituted the Secretary of Transportation for the Chief of Engineers and the Secretary of the Army as the approving official.

§ 831c-2. Civil actions for injury or loss of property or personal injury or death

(a) Exclusiveness of remedy

(1) An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of this office or employment is exlusive [1] of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages for a violation of the Constitution of the Untied States.

(b) Representation and removal

(1) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding heretofore or hereafter commenced upon such claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831c(b) and the Tennessee Valley Authority shall be substituted as the party defendant.

(2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title [2] and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be substituted as the party defendant. A copy of the petition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(Pub. L. 100-694, § 9(a), (b), Nov. 18, 1988, 102 Stat. 4566.)

REFERENCES IN TEXT

This title, referred to in subsec. (b)(2), probably should be this section, as Pub. L. 100-694, which enacted this section, did not contain titles.

The Federal Rules of Civil Procedure, referred to in subsec. (b)(3), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

CODIFICATION

Section was enacted as part of the Federal Employees Liability Reform and Tort Compensation Act of 1988, and not as part of the Tennessee Valley Authority Act of 1933, which comprises this chapter.

EFFECTIVE DATE

Section effective Nov. 18, 1988, and applicable to all claims, civil actions, and proceedings pending on, or filed on or after Nov. 18, 1988, see section 8 of Pub. L. 100-694, set out as an Effective Date of 1988 Amendment note under section 2679 of Title 28, Judiciary and Judicial Procedure.

[1] So in original. Probably should be "exclusive".

[2] See References in Text note below.

§ 831c-3. Law enforcement

(a) Designation of law enforcement agents

The Board may designate employees of the corporation to act as law enforcement agents in the area of jurisdiction described in subsection (c) of this section.

(b) Duties and powers

(1) Duties

A law enforcement agent designated under subsection (a) of this section shall maintain law and order and protect persons and property in the area of jurisdiction described in subsection (c) of this section and protect property and officials and employees of the corporation outside that area.

(2) Powers

In the performance of duties described in paragraph (1), a law enforcement agent designated under subsection (a) of this section may—

(A) make arrests without warrant for any offense against the United States committed in the agent's presence, or for any felony cognizable under the laws of the United States if the agent has probable cause to believe that the person to be arrested has committed or is committing such a felony;

(B) execute any warrant or other process issued by a court or officer of competent jurisdiction for the enforcement of any Federal law or regulation issued pursuant to law in connection with the investigation of an offense described in subparagraph (A);

(C) conduct an investigation of an offense described in subparagraph (A) in the absence of investigation of the offense by any Federal law enforcement agency having investigative jurisdiction over the offense or with the concurrence of that agency; and

(D) carry firearms in carrying out any activity described in subparagraph (A), (B), or (C).

(c) Area of jurisdiction

A law enforcement agent designated under subsection (a) of this section shall be authorized to exercise the law enforcement duties and powers described in subsection (b) of this section—

(1) on any lands or facilities owned or leased by the corporation or within such adjoining areas in the vicinities of such lands or facilities as may be determined by the board under subsection (e) of this section; and

(2) on other lands or facilities—

(A) when the person to be arrested is in the process of fleeing from such lands, facilities, or adjoining areas to avoid arrest;

(B) in conjunction with the protection of property or officials or employees of the corporation on or within lands or facilities other than those owned or leased by the corporation; or

(C) in cooperation with other Federal, State, or local law enforcement agencies.

(d) Federal investigative jurisdiction and State civil and criminal jurisdiction not preempted

Nothing in this section shall be construed to—

(1) limit or restrict the investigative jurisdiction of any Federal law enforcement agency; or

(2) affect any right of a State or a political subdivision thereof to exercise civil and criminal jurisdiction on or within lands or facilities owned or leased by the corporation.

(e) Determination of adjoining areas

(1) In general

The board shall determine and may from time-to-time modify the adjoining areas for each facility or particular area of land, or for individual categories of such facilities or lands, for the purposes of subsection (c)(1) of this section.

(2) Notice

A notice and description of each adjoining area determination or modification of a determination made under paragraph (1) shall be published in the Federal Register.

(f) Qualifications and training

The board, in consultation with the Attorney General, shall adopt qualification and training standards for law enforcement agents designated under subsection (a) of this section.

(g) Relation to other law

A law enforcement agent designated under subsection (a) of this section shall not be considered to be a law enforcement officer of the United States for the purposes of any other law, and no law enforcement agent designated under subsection (a) of this section or other employee of the corporation shall receive an increase in compensation solely on account of this section.

(h) Relationship with Attorney General

The duties and powers of law enforcement agents designated under subsection (a) of this section that are described in subsection (b) of this section shall be exercised in accordance with guidelines approved by the Attorney General.

(May 18, 1933, ch. 32, § 4A, as added Sept. 13, 1994, Pub. L. 103-322, title XXXII, § 320929, 108 Stat. 2133.)

§ 831d. Directors; maintenance and operation of plant for production, sale, and distribution of fertilizer and power

The board is authorized—

(a) To contract with commercial producers for the production of such fertilizers or fertilizer materials as may be needed in the Government's program of development and introduction in excess of that produced by Government plants. Such contracts may provide either for outright purchase of materials by the board or only for the payment of carrying charges on special materials manufactured at the board's request for its program.

(b) To arrange with farmers and farm organizations for large-scale practical use of the new forms of fertilizers under conditions permitting an accurate measure of the economic return they produce.

(c) To cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners, for the use of new forms of fertilizer or fertilizer practices during the initial or experimental period of their introduction, and for promoting the prevention of soil erosion by the use of fertilizers and otherwise.

(d) The board, in order to improve and cheapen the production of fertilizer, is authorized to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients at Muscle Shoals by the employment of existing facilities, by modernizing existing plants, or by any other process or processes that in its judgment shall appear wise and profitable for the fixation of atmospheric nitrogen or the cheapening of the production of fertilizer.

(e) Under the authority of this chapter the board may make donations or sales of the product of the plant or plants operated by it to be fairly and equitably distributed through the agency of county demonstration agents, agricultural colleges, or otherwise as the board may direct, for experimentation, education, and introduction of the use of such products in cooperation with practical farmers so as to obtain information as to the value, effect, and best methods of their use.

(f) The board is authorized to make alterations, modifications, or improvements in existing plants and facilities, and to construct new plants.

(g) In the event it is not used for the fixation of nitrogen for agricultural purposes or leased, then the board shall maintain in stand-by condition nitrate plant numbered 2, or its equivalent, for the fixation of atmospheric nitrogen, for the production of explosives in the event of war or a national emergency, until the Congress shall by joint resolution release the board from this obligation, and if any part thereof be used by the board for the manufacture of phosphoric acid or potash, the balance of nitrate plant numbered 2 shall be kept in stand-by condition.

(h) To establish, maintain, and operate laboratories and experimental plants, and to undertake experiments for the purpose of enabling the Corporation to furnish nitrogen products for military purposes, and nitrogen and other fertilizer products for agricultural purposes in the most economical manner and at the highest standard of efficiency.

(i) To request the assistance and advice of any officer, agent, or employee of any executive department or of any independent office of the United States, to enable the Corporation the better to carry out its powers successfully, and as far as practicable shall utilize the services of such officers, agents, and employees, and the President shall, if in his opinion the public interest, service, or economy so require, direct that such assistance, advice, and service be rendered to the Corporation, and any individual that may be by the President directed to render such assistance, advice, and service shall be thereafter subject to the orders, rules, and regulations of the board: *Provided*, That any invention or discovery made by virtue of and incidental to such service by an employee of the Government of the United States serving under this section, or by any employee of the Corporation, together with any patents which may be granted thereon, shall be the sole and exclusive property of the Corporation, which is authorized to grant such licenses thereunder as shall be authorized by the board: *Provided further*, That the board may pay to such inventor such sum from the income from sale of licenses as it may deem proper.

(j) Upon the requisition of the Secretary of the Army or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.

(k) Upon the requisition of the Secretary of the Army, the Corporation shall allot and deliver without charge to the Department of the Army so much power as shall be necessary in the judgment of said Department for use in operation of all locks, lifts, or other facilities in aid of navigation.

(l) To produce, distribute, and sell electric power, as herein particularly specified.

(May 18, 1933, ch. 32, § 5, 48 Stat. 61; Aug. 31, 1935, ch. 836, § 4, 49 Stat. 1076; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; July 3, 1952, ch. 570, § 2(a), 66 Stat. 334; Aug. 6, 1959, Pub. L. 86-137, § 3, 73 Stat. 285; Sept. 14, 1976, Pub. L. 94-412, title V, § 501(d), 90 Stat. 1258.)

CODIFICATION

Former subsec. (n) authorized President within twelve months after May 18, 1933, to lease nitrate plant numbered 2 and Waco Quarry for production of fertilizer, and has been omitted as executed.

AMENDMENTS

1976—Subsec. (m). Pub. L. 94-412 struck out subsec. (m) which barred sale of TVA products outside United States except to Government for military use or its allies in case of war or until six months after termination of Korean emergency.

1959—Subsec. (m). Pub. L. 86-137 excepted ferrophosphorus.

1952—Subsec. (m). Joint Res. July 3, 1952, inserted "or, until six months after the termination of the national emergency proclaimed by the President on December 16, 1950, or until such earlier date or dates as the Congress by concurrent resolution or the President may provide but in no event after April 1, 1953, to nations associated with the United States in defense activities".

1935—Subsec. (c). Act Aug. 31, 1935, inserted "with farmers, landowners, and associations of farmers and landowners," after "demonstration farms" and "and for promoting the prevention of soil erosion by the use of fertilizers and otherwise" after "period of their introduction".

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sec-

tions 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

EFFECTIVE DATE OF 1952 AMENDMENT

Section 7 of Joint Res. July 3, 1952, provided that the amendment is effective June 16, 1952.

REPEAL OF PRIOR ACTS CONTINUING SUBSECTION (m)

Section 6 of Joint Res. July 3, 1952, ch. 570, 66 Stat. 334, repealed Joint Res. Apr. 14, 1952, ch. 204, 66 Stat. 54, as amended by Joint Res. May 28, 1952, ch. 339, 66 Stat. 96; Joint Res. June 14, 1952, ch. 437, 66 Stat. 137; Joint Res. June 30, 1952, ch. 526, 66 Stat. 296, which continued provisions of subsection (m) relating to sales to allies until July 3, 1952. This repeal was to take effect as of June 16, 1952, by section 7 of Joint Res. July 3, 1952.

SAVINGS PROVISION

Repeal of subsec. (m) of this section by Pub. L. 94-412, not to affect any action taken or proceeding pending at the time of repeal, see section 501(h) of Pub. L. 94-412, set out as a note under section 1601 of Title 50, War and National Defense.

SECRETARY OF THE AIR FORCE

For transfer of certain functions insofar as they pertain to Air Force, and to extent that they were not previously transferred to Secretary of the Air Force from Secretary of the Army, see Secretary of Defense Transfer Order No. 40 [App. A(40)], July 22, 1949.

TERMINATION OF FOREIGN SALES

Section 1 of Joint Res. Mar. 31, 1953, ch. 13, 67 Stat. 18, provided for the extension of certain emergency provisions (previously extended to April 1, 1953, by Joint Res. July 3, 1952, ch. 570, § 2(a), 66 Stat. 334) until July 1, 1953. Section 2 of said Joint Res. Mar. 31, 1953, provided that such extension did not apply to the provisions of this section.

§ 831e. Officers and employees; nonpolitical appointment; removal for violation

In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board.

(May 18, 1933, ch. 32, § 6, 48 Stat. 63.)

§ 831f. Control of plants and property vested in Corporation; transfer of other property to Corporation

In order to enable the Corporation to exercise the powers and duties vested in it by this chapter—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama, together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and plants used as auxiliaries thereto; the fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Numbered 2, located at Muscle Shoals, its power house, and all hydroelectric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are intrusted to the Corporation for the purposes of this chapter.

(b) The President of the United States is authorized to provide for the transfer to the Corporation of the use, possession, and control of such other real or personal property of the United States as he may from time to time deem necessary and proper for the purposes of the Corporation as herein stated.

(May 18, 1933, ch. 32, § 7, 48 Stat. 63.)

DELEGATION OF FUNCTIONS

Authority of President under subsection (b) of this section to provide for transfer to Tennessee Valley Authority of use, possession, and control of real or personal property of United States deemed by Administrator of General Services to be necessary and proper for purposes of that Authority as provided for in this section, delegated to Administrator of General Services, see section 1(17) of Ex. Ord. No. 11609, July 22, 1971, 36 F.R. 13747, set out as a note under section 301 of Title 3, The President.

§ 831g. Principal office of Corporation; books; directors' oath

(a) Location

The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits.

(b) Account books

The Corporation shall at all times maintain complete and accurate books of accounts.

(c) Oath of office

Each member of the board, before entering upon the duties of his office, shall subscribe to an oath (or affirmation) to support the Constitution of the United States and to faithfully and impartially perform the duties imposed upon him by this chapter.

(May 18, 1933, ch. 32, § 8, 48 Stat. 63.)

§ 831h. Annual financial statement; purchases and contracts; audit by Comptroller General

(a) Financial statement and report

The board shall file with the President and with the Congress, in March of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year. This report shall include an itemized statement of the cost of power at each power station, the total number of employees and the names, salaries,

and duties of those receiving compensation at the rate of more than $1,500 a year.

(b) Bids; audits; settlements; accounts; contracts

All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: *Provided*, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $25,000; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

The Comptroller General of the United States shall audit the transactions of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property, and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: *Provided*, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. Nothing in this chapter shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to sections 3526(a) and 3702(a) of title 31, and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: *Provided*, That, subject only to the provisions of this chapter, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary, including the final settlement of all claims and litigation by or against the Corporation; and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office, in the settlement of the accounts of the Treasurer or other accountable officer or employee of the Corporation, shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said chapter.

The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in this chapter.

(May 18, 1933, ch. 32, § 9, 48 Stat. 63; Aug. 31, 1935, ch. 836, § 14, 49 Stat. 1080; Nov. 21, 1941, ch. 485, 55 Stat. 775; Aug. 30, 1954, ch. 1076, § 1 (32), 68 Stat. 968; July 25, 1974, Pub. L. 93-356, § 5, 88 Stat. 390; Apr. 21, 1976, Pub. L. 94-273, § 5(1), 90 Stat. 377; Dec. 1, 1983, Pub. L. 98-191, § 9(d), 97 Stat. 1332.)

CODIFICATION

In the second par. of subsec. (b), "sections 3526(a) and 3702(a) of title 31" substituted for "section 236, Revised Statutes, as amended by section 305 of the Budget and Accounting Act, 1921 (42 Stat. 24 [31 U.S.C. 71])" on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

1983—Subsec. (b)(3). Pub. L. 98-191 substituted "$25,000" for "$10,000".

1976—Subsec. (a). Pub. L. 94-273 substituted "March" for "December".

1974—Subsec. (b)(3). Pub. L. 93-356 substituted "$10,000" for "$500".

1954—Subsec. (b). Act Aug. 30, 1954, in second paragraph, repealed a sentence requiring the Comptroller General to make special reports of any transactions or conditions found to be in conflict with the powers or duties entrusted to the Tennessee Valley Authority by law, such provision now being covered by section 9101 et seq. of Title 31, Money and Finance.

1941—Subsec. (b). Act Nov. 21, 1941, inserted last paragraph and last sentence of next to last paragraph.

1935—Subsec. (b). Act Aug. 31, 1935, amended subsec. (b) generally.

SINGLE AUDIT REQUIREMENTS

Tennessee Valley Authority audits unaffected by single audit requirements of chapter 75 (§ 7501 et seq.) of Title 31, Money and Finance, see section 2(b) of Pub. L. 98-502, set out as a note under section 7501 of Title 31.

AUDIT OF GOVERNMENT CORPORATIONS

Section 9105(f) of Title 31, Money and Finance, provides that the audit provided in section 9105(a) of

Title 31 shall be in lieu of any audit of the financial transactions of any Government corporation required to be made by the General Accounting Office for the purpose of a report to the Congress or to the President under any existing law.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 831m, 831n-4 of this title; title 26 section 6402; title 31 sections 3720, 3720A; title 41 section 612.

§ 831h-1. Operation of dams primarily for promotion of navigation and controlling floods; generation and sale of electricity

The Board is directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this chapter provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority.

(May 18, 1933, ch. 32, § 9a, as added Aug. 31, 1935, ch. 836, § 5, 49 Stat. 1076.)

§ 831h-2. Repealed. Pub. L. 86-137, § 1, Aug. 6, 1959, 73 Stat. 280

Section, act July 30, 1947, ch. 358, title II, § 201, 61 Stat. 574, placed a limitation on use of power revenues of the Tennessee Valley Authority. See section 831n-4 of this title.

§ 831i. Sale of surplus power; preferences; experimental work; acquisition of existing electric facilities

The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided*, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further*, That the Board is authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further*, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further*, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further*, That the terms "States", "counties", and "municipalities" as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction.

(May 18, 1933, ch. 32, § 10, 48 Stat. 64; Aug. 31, 1935, ch. 836, § 6, 49 Stat. 1076.)

AMENDMENTS

1935—Act Aug. 31, 1935, inserted last three provisos.

§ 831j. Equitable distribution of surplus power among States and municipalities; improvement in production of fertilizer

It is declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and

cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this chapter.

(May 18, 1933, ch. 32, § 11, 48 Stat. 64.)

§ 831k. Transmission lines; construction or lease; sale of power over other than Government lines; rates when sold for resale at profit

In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided*, That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further*, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further*, That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further*, That the board is authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief.

(May 18, 1933, ch. 32, § 12, 48 Stat. 65.)

§ 831k–1. Extension of credit to States, municipalities and nonprofit organizations to assist in operation of existing facilities

In order (1) to facilitate the disposition of the surplus power of the Corporation according to the policies set forth in this chapter; (2) to give effect to the priority herein accorded to States, counties, municipalities, and nonprofit organizations in the purchase of such power by enabling them to acquire facilities for the distribution of such power; and (3) at the same time to preserve existing distribution facilities as going concerns and avoid duplication of such facilities, the Board is authorized to advise and cooperate with and assist, by extending credit for a period of not exceeding five years to, States, counties, municipalities and nonprofit organizations situated within transmission distance from any dam where such power is generated by the Corporation in acquiring, improving, and operating (a) existing distribution facilities and incidental works, including generating plants; and (b) interconnecting transmission lines; or in acquiring any interest in such facilities, incidental works, and lines.

(May 18, 1933, ch. 32, § 12a, as added Aug. 31, 1935, ch. 836, § 7, 49 Stat. 1076.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 831n–1, 831n–3 of this title.

§ 831*l*. Financial assistance to States and local governments in lieu of taxation; apportionment; limitation on contracts for sale of power to municipalities; report to Congress

In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power

operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds", as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: *Provided*, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: *Provided further*, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case: *Provided further*, That the corporation [1] shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation.

(May 18, 1933, ch. 32, § 13, 48 Stat. 66; June 26, 1940, ch. 432, § 39, 54 Stat. 626.)

AMENDMENTS

1940—Act June 26, 1940, amended section generally.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 831n–4 of this title; title 20 section 7702.

§ 831m. Allocation and charge of value and cost of plants to particular objects; cost accounting; reports of costs of operation; sale of surplus power at profit

The Board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants at nitrate plant numbered 1, and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the Board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam

[1] So in original. Probably should be capitalized.

plants, or other similar improvements hereafter constructed and turned over to said Board for the purpose of control and management shall be ascertained and allocated. The Board shall, on or before January 1, 1937, file with Congress a statement of its allocation of the value of all such properties turned over to said Board, and which have been completed prior to the end of the preceding fiscal year, and shall thereafter in its annual report to Congress file a statement of its allocation of the value of such properties as have been completed during the preceding fiscal year.

For the purpose of accumulating data useful to the Congress in the formulation of legislative policy in matters relating to the generation, transmission, and distribution of electric energy and the production of chemicals necessary to national defense and useful in agriculture, and to the Federal Power Commission and other Federal and State agencies, and to the public, the Board shall keep complete accounts of its costs of generation, transmission, and distribution of electric energy and shall keep a complete account of the total cost of generating and transmission facilities constructed or otherwise acquired by the Corporation, and of producing such chemicals, and a description of the major components of such costs according to such uniform systems of accounting for public utilities as the Federal Power Commission has, and if it have none, then it is empowered and directed to prescribe such uniform system of accounting, together with records of such other physical data and operating statistics of the Authority as may be helpful in determining the actual cost and value of services, and the practices, methods, facilities, equipment, appliances, and standards and sizes, types, location, and geographical and economic integration of plants and systems best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy. Such data shall be reported to the Congress by the Board from time to time, with appropriate analyses and recommendations, and, so far as practicable, shall be made available to the Federal Power Commission and other Federal and State agencies which may be concerned with the administration of legislation relating to the generation, transmission, or distribution of electric energy and chemicals useful to agriculture. It is declared to be the policy of this chapter that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating, the surplus power shall be sold at rates which, in the opinion of the Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power and in addition to the statement of the cost of power at each power station as required by section 831h of this title, the Board shall file with each annual report, a statement of the total cost of all power generated by it at all power stations during each year, the average cost of such power per kilowatt hour, the rates at which sold, and to whom sold, and copies of all contracts for the sale of power.

(May 18, 1933, ch. 32, § 14, 48 Stat. 66; Aug. 31, 1935, ch. 836, § 8, 49 Stat. 1077.)

AMENDMENTS

1935—Act of Aug. 31, 1935, inserted provision requiring the Board to report to Congress on the allocation of the value of the properties turned over to the Board and paragraph requiring the Board to keep complete accounts on the cost of generation, transmission and distribution of electric energy and production of chemicals necessary to national defense and useful to agriculture and to report to Congress the total cost of all power generated by all power stations and authorized the sale of surplus power.

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 831m-1. Tennessee Valley Authority least-cost planning program

(a) In general

The Tennessee Valley Authority shall conduct a least-cost planning program in accordance with this section.

(b) Conduct of program

(1) In general

In conducting a least-cost planning program under subsection (a) of this section, the Tennessee Valley Authority shall employ and implement a planning and selection process for new energy resources which evaluates the full range of existing and incremental resources (including new power supplies, energy conservation and efficiency, and renewable energy resources) in order to provide adequate and reliable service to electric customers of the Tennessee Valley Authority at the lowest system cost.

(2) Planning and selection process

The planning and selection process referred to in paragraph (1) shall—

(A) take into account necessary features for system operation, including diversity, reliability, dispatchability, and other factors of risk;

(B) take into account the ability to verify energy savings achieved through energy conservation and efficiency and the projected durability of such savings measured over time; and

(C) treat demand and supply resources on a consistent and integrated basis.

(3) "System cost" defined

As used in paragraph (1), the term "system cost" means all direct and quantifiable net costs for an energy resource over its available life, including the cost of production, transportation, utilization, waste management, environmental compliance, and, in the case of imported energy resources, maintaining access to foreign sources of supply.

(c) Participation by distributors

(1) In general

In conducting a least-cost planning program under subsection (a) of this section, the Tennessee Valley Authority shall—

(A) provide an opportunity for distributors of the Tennessee Valley Authority to recommend cost-effective energy efficiency opportunities, rate structure incentives, and renewable energy proposals for inclusion in such program; and

(B) encourage and assist such distributors in the planning and implementation of cost-effective energy efficiency options.

(2) Assistance

The Tennessee Valley Authority shall provide appropriate assistance to distributors under paragraph (1)(B). Such assistance shall, where cost effective, be provided by the Tennessee Valley Authority acting through, or in cooperation with, an association of distributors. Such assistance may include publications, workshops, conferences, one-on-one assistance, financial assistance, equipment loans, technology assessment studies, marketing studies, and other appropriate mechanisms to transfer information on energy efficiency and renewable energy options and programs to customers.

(d) Public review and comment

Before the selection and addition of a major new energy resource on the Tennessee Valley Authority system, the Tennessee Valley Authority shall provide an opportunity for public review and comment and shall include a description of any such action in an annual report to the President and Congress.

(e) Exemption from certain requirements

The Tennessee Valley Authority shall not be subject to the least-cost planning requirements contained in section 2621(d) of this title or any similar requirement which might arise out of the Tennessee Valley Authority's electric power transactions with the Southeastern Power Administration.

(Pub. L. 102-486, title I, § 113, Oct. 24, 1992, 106 Stat. 2798.)

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Tennessee Valley Authority Act of 1933 which comprises this chapter.

§ 831n. Bonds for future construction; amount, terms, and conditions

In the construction of any future dam, steam plant, or other facility, to be used in whole or in part for the generation or transmission of electric power the board is authorized and empowered to issue on the credit of the United States and to sell serial bonds not exceeding $50,000,000 in amount, having a maturity not more than fifty years from the date of issue thereof, and bearing interest not exceeding 3½ per centum per annum. Said bonds shall be issued and sold in amounts and prices approved by the Secretary of the Treasury, but all such bonds as may be so issued and sold shall have equal rank. None of said bonds shall be sold below par, and no fee, commission, or compensation whatever shall be paid to any person, firm, or corporation for handling, negotiating the sale, or selling the said bonds. All of such bonds so issued and sold shall have all the rights and privileges accorded by law to Panama Canal bonds, authorized by section 8 of the Act of June 28, 1902, chapter 1302, as amended by the Act of December 21, 1905 (ch. 3, sec. 1, 34 Stat. 5). All funds derived from the sale of such bonds shall be paid over to the Corporation.

(May 18, 1933, ch. 32, § 15, 48 Stat. 66.)

REFERENCES IN TEXT

Section 8 of the Act of June 28, 1902, chapter 1302, as amended by the Act of December 21, 1905 (ch. 3, sec. 1, 34 Stat. 5), referred to in text, was classified to sections 743, 744, and 744 note of former Title 31 and was repealed in part by Pub. L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068, the first section of which enacted Title 31, Money and Finance, and in part by Pub. L. 97-452, § 4(b), Jan. 12, 1983, 96 Stat. 2480.

CROSS REFERENCES

Bonds not to be issued under this section, see section 831n-2 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 831n-2 of this title.

§ 831n-1. Bonds to carry out provisions of section 831k-1; amount, terms, and conditions

With the approval of the Secretary of the Treasury, the Corporation is authorized to issue bonds not to exceed in the aggregate $50,000,000 outstanding at any one time, which bonds may be sold by the Corporation to obtain funds to carry out the provisions of section 831k-1 of this title. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury: *Provided*, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds

issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. No bonds shall be issued hereunder to provide funds or bonds necessary for the performance of any proposed contract negotiated by the Corporation under the authority of section 831k-1 of this title until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds hereunder shall expire at the end of five years from the date when this section as amended herein becomes law, except that such bonds may be issued at any time after the expiration of said period to provide bonds or funds necessary for the performance of any contract entered into by the Corporation, prior to the expiration of said period, under the authority of section 831k-1 of this title.

(May 18, 1933, ch. 32, § 15a, as added Aug. 31, 1935, ch. 836, § 9, 49 Stat. 1078.)

REFERENCES IN TEXT

The date when this section as amended herein becomes law, referred to in text, probably means August 31, 1935.

CODIFICATION

"Chapter 31 of title 31" and "such chapter" substituted in text for "the Second Liberty Bond Act, as amended" and "such Act, as amended,", respectively, on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

CROSS REFERENCES

Bonds not to be issued under this section, see section 831n-2 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 831n-2 of this title.

§ 831n-2. Bonds: limitation of issuance under sections 831n and 831n-1

No bonds shall be issued by the Corporation after the date of enactment of this section under section 831n or 831n-1 of this title.

(May 18, 1933, ch. 32, § 15b, as added July 26, 1939, ch. 366, 53 Stat. 1083.)

REFERENCES IN TEXT

The date of enactment of this section, referred to in text, probably means July 26, 1939.

§ 831n-3. Use of funds; limitation of issuance

With the approval of the Secretary of the Treasury the Corporation is authorized, after the date of enactment of this section, to issue bonds not to exceed in the aggregate $61,500,000. Such bonds may be sold by the Corporation to obtain funds which may be used for the following purposes only:

(1) Not to exceed $46,000,000 may be used for the purchase of electric utility properties of the Tennessee Electric Power Company and Southern Tennessee Power Company, as contemplated in the contract between the Corporation and the Commonwealth and Southern Corporation and others, dated as of May 12, 1939.

(2) Not to exceed $6,500,000 may be used for the purchase and rehabilitation of electric utility properties of the Alabama Power Company and Mississippi Power Company in the following named counties in northern Alabama and northern Mississippi: The counties of Jackson, Madison, Limestone, Lauderdale, Colbert, Lawrence, Morgan, Marshall, De Kalb, Cherokee, Cullman, Winston, Franklin, Marion, and Lamar in northern Alabama, and the counties of Calhoun, Chickasaw, Monroe, Clay, Lowndes, Oktibbeha, Choctaw, Webster, Noxubee, Winston, Neshoba, and Kemper in northern Mississippi.

(3) Not to exceed $3,500,000 may be used for rebuilding, replacing, and repairing electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section.

(4) Not to exceed $3,500,000 may be used for constructing electric transmission lines, substations, and other electrical facilities necessary to connect the electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section with the electric power system of the Corporation.

(5) Not to exceed $2,000,000 may be used for making loans under section 831k-1 of this title to States, counties, municipalities, and nonprofit organizations to enable them to purchase any electric utility properties referred to in the contract between the Corporation and the Commonwealth and Southern Corporation and others, dated as of May 12, 1939, or any electric utility properties of the Alabama Power Company or Mississippi Power Company in any of the counties in northern Alabama or northern Mississippi named in paragraph (2) of this section.

The Corporation shall file with the President and with the Congress in December of each year a financial statement and complete report

as to the expenditure of funds derived from the sale of bonds under this section covering the period not covered by any such previous statement or report. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation with the approval of the Secretary of the Treasury: *Provided*, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. None of the proceeds of the bonds shall be used for the performance of any proposed contract negotiated by the Corporation under the authority of section 831k–1 of this title until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds under this section shall expire January 1, 1941, except that if at the time such authority expires the amount of bonds issued by the Corporation under this section is less than $61,500,000, the Corporation may, subject to the foregoing provisions of this section, issue, after the expiration of such period, bonds in an amount not in excess of the amount by which the bonds so issued prior to the expiration of such period is less than $61,500,000, for refunding purposes, or, subject to the provisions of paragraph (5) of this section (limiting the purposes for which loans under section 831k–1 of this title of funds derived from bonds proceeds may be made) to provide funds found necessary in the performance of any contract entered into by the Corporation prior to the expiration of such period, under the authority of section 831k–1 of this title.

(May 18, 1933, ch. 32, § 15c, as added July 26, 1939, ch. 386, 53 Stat. 1083.)

REFERENCES IN TEXT

The date of enactment of this section, referred to in text, probably means July 26, 1939.

CODIFICATION

"Chapter 31 of title 31" and "such chapter" substituted in text for "the Second Liberty Bond Act, as amended" and "such Act, as amended,", respectively, on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 831n–4. Bonds for financing power program

(a) Authorization; amount; use of proceeds; restriction on contracts for sale or delivery of power; exchange power arrangements; payment of principal and interest; bond contracts

The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $30,000,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this chapter, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other

purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however*, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further*, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: *Provided further*, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 831y of this title or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this chapter, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law.

(b) Bonds not obligations of or guaranteed by United States; apportionment of proceeds

Bonds issued by the Corporation hereunder shall not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States. Proceeds realized by the Corporation from issuance of such bonds and from power operations and the expenditure of such proceeds shall not be subject to apportionment under the provisions of subchapter II of chapter 15 of title 31.

(c) Sale; terms and conditions; method; limitation on amount; statement in annual report

Bonds issued by the Corporation under this section shall be negotiable instruments unless otherwise specified therein, shall be in such forms and denominations, shall be sold at such times and in such amounts, shall mature at such time or times not more than fifty years from their respective dates, shall be sold at such prices, shall bear such rates of interest, may be redeemable before maturity at the option of the Corporation in such manner and

at such times and redemption premiums, may be entitled to such relative priorities of claim on the Corporation's net power proceeds with respect to principal and interest payments, and shall be subject to such other terms and conditions, as the Corporation may determine: *Provided*, That at least fifteen days before selling each issue of bonds hereunder (exclusive of any commitment shorter than one year) the Corporation shall advise the Secretary of the Treasury as to the amount, proposed date of sale, maturities, terms and conditions and expected rates of interest of the proposed issue in the fullest detail possible and, if the Secretary shall so request, shall consult with him or his designee thereon, but the sale and issuance of such bonds shall not be subject to approval by the Secretary of the Treasury except as to the time of issuance and the maximum rates of interest to be borne by the bonds: *Provided further*, That if the Secretary of the Treasury does not approve a proposed issue of bonds hereunder within seven working days following the date on which he is advised of the proposed sale, the Corporation may issue to the Secretary interim obligations in the amount of the proposed issue, which the Secretary is directed to purchase. In case the Corporation determines that a proposed issue of bonds hereunder cannot be sold on reasonable terms, it may issue to the Secretary interim obligations which the Secretary is authorized to purchase. Notwithstanding the foregoing provisions of this subsection, obligations issued by the Corporation to the Secretary shall not exceed $150,000,000 outstanding at any one time, shall mature on or before one year from date of issue, and shall bear interest equal to the average rate (rounded to the nearest one-eighth of a percent) on outstanding marketable obligations of the United States with maturities from dates of issue of one year or less as of the close of the month preceding the issuance of the obligations of the Corporation. If agreement is not reached within eight months concerning the issuance of any bonds which the Secretary has failed to approve, the Corporation may nevertheless proceed to sell such bonds on any date thereafter without approval by the Secretary in amount sufficient to retire the interim obligations issued to the Treasury and such interim obligations shall be retired from the proceeds of such bonds. For the purpose of any purchase of the Corporation's obligations the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under chapter 31 of title 31 are extended to include any purchases of the Corporation's obligations hereunder. The Corporation may sell its bonds by negotiation or on the basis of competitive bids, subject to the right, if reserved, to reject all bids; may designate trustees, registrars, and paying agents in connection with said bonds and the issuance thereof; may arrange for audits of its accounts and for reports concerning its financial condition and operations by certified public accounting firms (which audits and reports shall be in addition to those required by sections 9105 and 9106 of title 31, may, subject to any covenants contained in any bond contract, invest the proceeds of any bonds and other funds under its control which derive from or pertain to its power program in any securities approved for investment of national bank funds and deposit said proceeds and other funds, subject to withdrawal by check or otherwise, in any Federal Reserve Bank or bank having membership in the Federal Reserve System; and may perform such other acts not prohibited by law as it deems necessary or desirable to accomplish the purposes of this section. Bonds issued by the Corporation hereunder shall contain a recital that they are issued pursuant to this section, and such recital shall be conclusive evidence of the regularity of the issuance and sale of such bonds and of their validity. The annual report of the Board filed pursuant to section 831h of this title shall contain a detailed statement of the operation of the provisions of this section during the year.

(d) Lawful investment; exemption from taxation

Bonds issued by the Corporation hereunder shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of any officer or agency of the United States. The Secretary of the Treasury or any other officer or agency having authority over or control of any such fiduciary, trust, or public funds, may at any time sell any of the bonds of the Corporation acquired by them under this section. Bonds issued by the Corporation hereunder shall be exempt both as to principal and interest from all taxation now or hereafter imposed by any State or local taxing authority except estate, inheritance, and gift taxes.

(e) Payment of excess power proceeds into Treasury; deferral

From net power proceeds in excess of those required to meet the Corporation's obligations under the provisions of any bond or bond contract, the Corporation shall, beginning with fiscal year 1961, make payments into the Treasury as miscellaneous receipts on or before September 30, of each fiscal year as a return on the appropriation investment in the Corporation's power facilities, plus a repayment sum of not less than $10,000,000 for each of the first five fiscal years, $15,000,000 for each of the next five fiscal years, and $20,000,000 for each fiscal year thereafter, which repayment sum shall be applied to reduction of said appropriation investment until a total of $1,000,000,000 of said appropriation investment shall have been repaid. The said appropriation investment shall consist, in any fiscal year, of that part of the Corporation's total investment assigned to power as of the beginning of the fiscal year (including both completed plant and construction in progress) which has been provided from appropriations or by transfers of property from other Government agencies without reimbursement by the Corporation, less repayments of such appropriation investment made under title II of the Government Corporations Appropriation Act, 1948, this chapter, or other applicable

legislation. The payment as a return on the appropriation investment in each fiscal year shall be equal to the computed average interest rate payable by the Treasury upon its total marketable public obligations as of the beginning of said fiscal year applied to said appropriation investment. Payments due hereunder may be deferred for not more than two years when, in the judgment of the Board of Directors of the Corporation, such payments cannot feasibly be made because of inadequacy of funds occasioned by drought, poor business conditions, emergency replacements, or other factors beyond the control of the Corporation.

(f) Rates for sale of power; application of net proceeds

The Corporation shall charge rates for power which will produce gross revenues sufficient to provide funds for operation, maintenance, and administration of its power system; payments to States and counties in lieu of taxes; debt service on outstanding bonds, including provision and maintenance of reserve funds and other funds established in connection therewith; payments to the Treasury as a return on the appropriation investment pursuant to subsection (e) of this section; payment to the Treasury of the repayment sums specified in subsection (e) of this section; and such additional margin as the Board may consider desirable for investment in power system assets, retirement of outstanding bonds in advance of maturity, additional reduction of appropriation investment, and other purposes connected with the Corporation's power business, having due regard for the primary objectives of the chapter, including the objective that power shall be sold at rates as low as are feasible. In order to protect the investment of holders of the Corporation's securities and the appropriation investment as defined in subsection (e) of this section, the Corporation, during each successive five-year period beginning with the five-year period which commences on July 1 of the first full fiscal year after the effective date of this section, shall apply net power proceeds either in reduction (directly or through payments into reserve or sinking funds) of its capital obligations, including bonds and the appropriation investment, or to reinvestment in power assets, at least to the extent of the combined amount of the aggregate of the depreciation accruals and other charges representing the amortization of capital expenditures applicable to its power properties plus the net proceeds realized from any disposition of power facilities in said period. As of October 1, 1975, the five-year periods described herein shall be computed as beginning on October 1 of that year and of each fifth year thereafter.

(g) Power property; lease and lease-purchase agreements

Power generating and related facilities operated by the Corporation under lease and lease-purchase agreements shall constitute power property held by the Corporation within the meaning of section 831*l* of this title, but that portion of the payment due for any fiscal year under said section 831*l* of this title to a State where such facilities are located which is determined or estimated by the Board to result from holding such facilities or selling electric energy generated thereby shall be reduced by the amount of any taxes or tax equivalents applicable to such fiscal year paid by the owners or others on account of said facilities to said State and to local taxing jurisdictions therein. In connection with the construction of a generating plant or other facilities under an agreement providing for lease or purchase of said facilities or any interest therein by or on behalf of the Corporation, or for the purchase of the output thereof, the Corporation may convey, in the name of the United States by deed, lease, or otherwise, any real property in its possession or control, may perform necessary engineering and construction work and other services, and may enter into any necessary contractual arrangements.

(h) Congressional declaration of intent

It is declared to be the intent of this section to aid the Corporation in discharging its responsibility for the advancement of the national defense and the physical, social and economic development of the area in which it conducts its operations by providing it with adequate authority and administrative flexibility to obtain the necessary funds with which to assure an ample supply of electric power for such purposes by issuance of bonds and as otherwise provided herein, and this section shall be construed to effectuate such intent.

(May 18, 1933, ch. 32, § 15d, as added Aug. 6, 1959, Pub. L. 86–137, § 1, 73 Stat. 280; amended Aug. 14, 1959, Pub. L. 86–157, 73 Stat. 338; Aug. 12, 1966, Pub. L. 89–537, 80 Stat. 346; Oct. 14, 1970, Pub. L. 91–446, 84 Stat. 915; Nov. 28, 1975, Pub. L. 94–139, § 1, 89 Stat. 750; Apr. 21, 1976, Pub. L. 94–273, §§ 2(30), 35(a), 90 Stat. 376, 380; Oct. 31, 1979, Pub. L. 96–97, 93 Stat. 730.)

REFERENCES IN TEXT

The effective date of this Act, referred to in subsec. (a), and "the effective date of this section", referred to in subsec. (f), probably means the effective date of Pub. L. 86–137, which was approved Aug. 6, 1959.

Title II of the Government Corporations Appropriation Act, 1948, referred to in subsec. (e), means title II of act July 30, 1947, ch. 358, 61 Stat. 576, which was not classified to the Code.

CODIFICATION

In subsecs. (b) and (c), "subchapter II of chapter 15 of title 31", "chapter 31 of title 31", and "sections 9105 and 9106 of title 31" substituted for "Revised Statutes 3679, as amended (31 U.S.C. 865)", "the Second Liberty Bond Act, as amended", and "sections 105 and 106 of the Act of December 8, 1945 (59 Stat. 599; 31 U.S.C. 850–851)", respectively, on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

1979—Subsec. (a). Pub. L. 96–97 substituted "$30,000,000,000" for "$15,000,000,000".

1976—Subsec. (c). Pub. L. 94–273, § 2(30), substituted "September" for "June".

Subsec. (f). Pub. L. 94–273, § 35(a), inserted provision relating to computation of five-year periods as of Oct. 1, 1975.

1975—Subsec. (a). Pub. L. 94–139, § 1(a), substituted "$15,000,000,000" for "$5,000,000,000".

Subsec. (e). Pub. L. 94-139, § 1(b), struck out "December 31 and" before "June 30".

1970—Subsec. (a). Pub. L. 91-446 substituted "$5,000,000,000" for "$1,750,000,000".

1966—Subsec. (a). Pub. L. 89-537 increased the limitation on the amount of revenue bonds the TVA may issue and sell from $750,000,000 to $1,750,000,000.

1959—Subsec. (a). Pub. L. 86-157 struck out proviso relating to the transmission of the power construction program to the Congress by the President with the budget estimates, and the provision for withholding initiation of construction of new power producing projects until the construction program of the Corporation has been before Congress in session for ninety calendar days.

TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of Title 42. The Public Health and Welfare. See also Transfer of Functions notes set out under those sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 824k of this title.

§ 831o. Completion of unfinished plants authorized

The board, whenever the President deems it advisable, is empowered and directed to complete Dam Numbered 2 at Muscle Shoals, Alabama, and the steam plant at nitrate plant numbered 2, in the vicinity of Muscle Shoals, by installing in Dam Numbered 2 the additional power units according to the plans and specifications of said dam, and the additional power unit in the steam plant at nitrate plant numbered 2.

(May 18, 1933, ch. 32, § 16, 48 Stat. 67.)

§ 831p. Repealed. Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 648

Section, act May 18, 1933, ch. 32, § 17, 48 Stat. 67, authorized construction of the Cove Creek Dam across Clinch River.

§ 831q. Eminent domain; contracts for relocation of railroads, highways, industrial plants, etc.

In order to enable and empower the Secretary of the Army, the Secretary of the Interior, or the board to carry out the authority conferred in this chapter, in the most economical and efficient manner, he or it is authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this chapter, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this chapter. When said Cove Creek Dam, transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River.

(May 18, 1933, ch. 32, § 18, 48 Stat. 67; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

COMPLETION OF DAM

The site for the Cove Creek Dam has been obtained and the dam completed.

§ 831r. Patents; access to Patent and Trademark Office and right to copy patents; compensation to patentees

The Corporation, as an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers, shall have access to the Patent and Trademark Office of the United States for the purpose of studying, ascertaining, and copying all methods, formula, and scientific information (not including access to pending applications for patents) necessary to enable the Corporation to use and employ the most efficacious and economical process for the production of fixed nitrogen, or any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydroelectric power, and any owner of a patent whose patent rights may have been thus in any way copied, used, infringed, or employed by the exercise of this authority by the Corporation shall have as the exclusive remedy a cause of action against the Corporation to be instituted and prosecuted on the equity side of the appropriate district court of the United States, for the recovery of reasonable compensation for such infringement. The Commissioner of Patents and Trademarks shall furnish to the Corporation, at its request and without payment of fees, copies of documents on file in his office: *Provided*, That the benefits of this section shall not apply to any art, machine, method of manufacture, or composition of matter, discovered or invented by such employee during the time of his employment or service with the Corporation or with the Government of the United States.

(May 18, 1933, ch. 32, § 19, 48 Stat. 68; Jan. 2, 1975, Pub. L. 93-596, § 3, 88 Stat. 1949.)

CHANGE OF NAME

"Patent and Trademark Office" and "Commissioner of Patents and Trademarks" substituted in text for "Patent Office" and "Commissioner of Patents", re-

spectively, pursuant to section 3 of Pub. L. 93-596, set out as a note under section 1 of Title 35, Patents.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of Commerce, with certain exceptions, to Secretary of Commerce, with power to delegate, see Reorg. Plan No. 5 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

FEDERAL RULES OF CIVIL PROCEDURE

Abolition of distinction between actions at law and suits in equity, see rule 2, and note of Advisory Committee thereto, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 831s. Possession by Government in time of war; damages to contract holders

The Government of the United States reserves the right, in case of war or national emergency declared by Congress, to take possession of all or any part of the property described or referred to in this chapter for the purpose of manufacturing explosives or for other war purposes; but, if this right is exercised by the Government, it shall pay the reasonable and fair damages that may be suffered by any party whose contract for the purchase of electric power or fixed nitrogen or fertilizer ingredients is violated, after the amount of the damages has been fixed by the United States Court of Federal Claims in proceedings instituted and conducted for that purpose under rules prescribed by the court.

(May 18, 1933, ch. 32, § 20, 48 Stat. 68; Apr. 2, 1982, Pub. L. 97-164, title I, § 161(2), 96 Stat. 49; Oct. 29, 1992, Pub. L. 102-572, title IX, § 902(b)(1), 106 Stat. 4516.)

AMENDMENTS

1992—Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Pub. L. 97-164 substituted "Claims Court" for "Court of Claims".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

TERMINATION OF WAR AND EMERGENCIES

Joint Res. July 25, 1947, ch. 327, § 3, 61 Stat. 451, provided that in the interpretation of this section, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

§ 831t. Offenses; fines and punishment

(a) Larceny, embezzlement and conversion

All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use, or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

(b) False entry, report or statement

Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United States (1) makes any false entry in any book of the Corporation, or (2) makes any false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) Conspiracy to defraud

Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than $5,000 or imprisoned not more than five years, or both.

(May 18, 1933, ch. 32, § 21, 48 Stat. 68.)

§ 831u. Surveys; cooperation with States or other agencies

To aid further the proper use, conservation, and development of the natural resources of the Tennessee River drainage basis and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter, and to provide for the general welfare of the citizens of said areas, the President is authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end.

(May 18, 1933, ch. 32, § 22, 48 Stat. 69.)

EX. ORD. NO. 6161. CONSERVATION AND DEVELOPMENT OF THE NATURAL RESOURCES OF THE TENNESSEE RIVER DRAINAGE BASIN

Ex. Ord. No. 6161, June 8, 1933, provided:

In accordance with the provisions of section 22 and section 23 of the Tennessee Valley Authority Act of 1933 (sections 831u and 831v of this title), the President hereby authorizes and directs the Board of Directors of the Tennessee Valley Authority to make such surveys, general plans, studies, experiments, and demonstrations as may be necessary and suitable to aid

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the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin, and of such adjoining territory as may be related to or materially affected by the development consequent to this act, and to promote the general welfare of the citizens of said area; within the limits of appropriations made therefor by Congress.

FRANKLIN D. ROOSEVELT.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 831v of this title.

§ 831v. Legislation to carry out purposes of chapter; recommendation by President

The President shall, from time to time, as the work provided for in section 831u of this title progresses, recommend to Congress such legislation as he deems proper to carry out the general purposes stated in said section, and for the especial purpose of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin.

(May 18, 1933, ch. 32, § 23, 48 Stat. 69.)

§ 831w. Acquisition of real or personal property; payment by delivery of power; sale or lease of vacant land for industrial purposes

For the purpose of securing any rights of flowage, or obtaining title to or possession of any property, real or personal, that may be necessary or may become necessary, in the carrying out of any of the provisions of this chapter, the President of the United States for a period of three years from May 18, 1933, is authorized to acquire title in the name of the United States to such rights or such property, and to provide for the payment for same by directing the board to contract to deliver power generated at any of the plants now owned or hereafter owned or constructed by the Government or by said Corporation, such future delivery of power to continue for a period not exceeding thirty years. Likewise, for one year after May 18, 1933, the President is further authorized to sell or lease any parcel or part of any vacant real estate now owned by the Government in said Tennessee River Basin, to persons, firms, or corporations who shall contract to erect thereon factories or manufacturing establishments, and who shall contract to purchase of said Corporation electric power for the operation of any such factory or manufacturing establishment. No contract shall be made by the President for the sale of any of such real estate as may be necessary for present or future use on the part of the Government for any of the purposes of this chapter. Any such contract made by the President of the United States shall be carried out by the board: *Provided*, That no such contract shall be made that will in any way abridge or take away the preference right to purchase power given in this chapter to States, counties, municipalities, or farm organizations: *Provided further*, That no lease shall be for a term to exceed fifty years: *Provided further*, That any sale shall be on condition that said land shall be used for industrial purposes only.

(May 18, 1933, ch. 32, § 24, 48 Stat. 69.)

§ 831x. Condemnation proceedings; institution by Corporation; venue

The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Corporation, are necessary to carry out the provisions of this chapter. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right-of-way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

(May 18, 1933, ch. 32, § 25, 48 Stat. 70; July 12, 1952, ch. 700, 66 Stat. 591; Sept. 28, 1968, Pub. L. 90-536, § 1, 82 Stat. 885.)

AMENDMENTS

1968—Pub. L. 90-536 repealed six paragraphs following initial paragraph which provided as follows: appointment of three commissioners, oath as to absence of interest, and per diem for services and subsistence, and transportation expenses; duties of commissioners as to valuation of lands, conduct of hearings, taking of evidence, administration of oaths, subpoena of witnesses, submission of report as to value of land, and notice of award to parties; hearing de novo of exceptions to award by three Federal district judges and judicial award; disposition upon record after appeal from decision of judges; passage of title and possession to property and enforcement by writ of dispossession; and legal representatives for minors, insane or incompetents, and estates of deceased, or guardians ad litem for wards.

1952—Act July 12, 1952, increased the commissioners' per diem from $15 to $30, their sustenance from $5 to $10 a day, and allowed them 7 cents mileage.

EFFECTIVE DATE OF 1968 AMENDMENT

Section 2 of Pub. L. 90-536 provided that: "The amendment made by this Act [amending this section] shall be effective only with respect to condemnation proceedings initiated after thirty days following the date of enactment of this Act [Sept. 28, 1968]."

FEDERAL RULES OF CIVIL PROCEDURE

Procedure in condemnation proceedings, see rule 71A, Title 28, Appendix, Judiciary and Judicial Procedure. Effect of this rule upon this section, see Advisory Committee note under such rule.

§ 831y. Net proceeds over expense payable into Treasury

Commencing July 1, 1936, the proceeds for each fiscal year derived by the Board from the sale of power or any other products manufactured by the Corporation, and from any other activities of the Corporation including the disposition of any real or personal property, shall

be paid into the Treasury of the United States on March 31 of each year, save and except such part of such proceeds as in the opinion of the Board shall be necessary for the Corporation in the operation of dams and reservoirs, in conducting its business in generating, transmitting, and distributing electric energy and in manufacturing, selling, and distributing fertilizer and fertilizer ingredients. A continuing fund of $1,000,000 is also excepted from the requirements of this section and may be withheld by the Board to defray emergency expenses and to insure continuous operation: *Provided*, That nothing in this section shall be construed to prevent the use by the Board, after June 30, 1936, of proceeds accruing prior to July 1, 1936, for the payment of obligations lawfully incurred prior to such latter date.

(May 18, 1933, ch. 32, § 26, 48 Stat. 71; Aug. 31, 1935, ch. 836, § 10, 49 Stat. 1079; Apr. 21, 1976, Pub. L. 94-273, § 35(b), 90 Stat. 380.)

AMENDMENTS

1976—Pub. L. 94-273 substituted "on March 31 of each year" for "at the end of each calendar year".

1935—Act Aug. 31, 1935, amended section generally.

CROSS REFERENCES

Consideration of budget programs, this section as not affected, see section 9104 of Title 31, Money and Finance.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 831n-4 of this title; title 31 section 9104.

§ 831y-1. Approval of plans by Board as condition precedent to construction and operation; restraining action without approval; other laws unaffected

The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

In the event the Board shall, within sixty days after their formal submission to the Board, fail to approve any plans or modifications, as the case may be, for construction, operation, or maintenance of any such structures on the Little Tennessee River, the above requirements shall be deemed satisfied, if upon application to the Secretary of the Army, with due notice to the Corporation, and hearing thereon, such plans or modifications are approved by the said Secretary of the Army as reasonably adequate and effective for the unified development and regulation of the Tennessee River system.

Such construction, commencement of construction, operation, or maintenance of any structures or parts thereof in violation of the provisions of this section may be prevented, and the removal or discontinuation thereof required by the injunction or order of any district court exercising jurisdiction in any district in which such structures or parts thereof may be situated, and the Corporation is authorized to bring appropriate proceedings to this end.

The requirements of this section shall not be construed to be a substitute for the requirements of any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of this section.

(May 18, 1933, ch. 32, § 26a, as added Aug. 31, 1935, ch. 836, § 11, 49 Stat. 1079; amended July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 33 section 2106.

§ 831z. Authorization of appropriations

All appropriations necessary to carry out the provisions of this chapter are authorized.

(May 18, 1933, ch. 32, § 27, 48 Stat. 71.)

§ 831aa. Laws repealed

All acts or parts of acts in conflict with this chapter are repealed, so far as they affect the operations contemplated by this chapter.

(May 18, 1933, ch. 32, § 28, 48 Stat. 71.)

§ 831bb. Reservation of right to amend or repeal

The right to alter, amend, or repeal this chapter is expressly declared and reserved, but no such amendment or repeal shall operate to impair the obligation of any contract made by said Corporation under any power conferred by this chapter.

(May 18, 1933, ch. 32, § 29, 48 Stat. 72.)

§ 831cc. Separability

The sections of this chapter are declared to be separable, and in the event any one or more sections of this chapter be held to be unconstitutional, the same shall not affect the validity of other sections of this chapter.

(May 18, 1933, ch. 32, § 30, 48 Stat. 72; Aug. 31, 1935, ch. 836, § 15, 49 Stat. 1081.)

AMENDMENTS

1935—Act Aug. 31, 1935, reenacted provisions of this section without change.

§ 831dd. Liberal construction of chapter; sale of surplus lands

This chapter shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: *Provided*, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder.

(May 18, 1933, ch. 32, § 31, as added Aug. 31, 1935, ch. 836, § 12, 49 Stat. 1080.)

CODIFICATION

As originally enacted, the last sentence of this section contained, at the end thereof, the words "or at private sale as provided in section 3 of this amendatory Act." Section 3 of the amendatory act of Aug. 31, 1935, added subsec. (k) to section 831c of this title.

CHAPTER 12B—BONNEVILLE PROJECT

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 839c, 839e, 837f of this title; title 40 section 474; title 42 section 7152.

§ 832. Completion and maintenance of project; generation of electricity

For the purpose of improving navigation on the Columbia River, and for other purposes incidental thereto, the dam, locks, power plant, and appurtenant works under construction on August 20, 1937, at Bonneville, Oregon and North Bonneville, Washington (called Bonneville project in this chapter), shall be completed, maintained, and operated under the direction of the Secretary of the Army and the supervision of the Chief of Engineers, subject to the provisions of this chapter relating to the powers and duties of the Bonneville power administrator provided for in section 832a(a) of this title (called the administrator in this chapter) respecting the transmission and sale of electric energy generated at said project. The Secretary of the Army shall provide, construct, operate, maintain, and improve at Bonneville project such machinery, equipment, and facilities for the generation of electric energy as the administrator may deem necessary to develop such electric energy as rapidly as markets may be found therefor. The electric energy thus generated and not required for the operation of the dam and locks at such project and the navigation facilities employed in connection therewith shall be delivered to the administrator, for disposition as provided in this chapter.

(Aug. 20, 1937, ch. 720, § 1, 50 Stat. 731; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of a Secretary of the Army.

appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part,[1] such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(6)(A) Notwithstanding the provisions of title 28 or of this chapter, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

(June 10, 1920, ch. 285, pt. I, § 31, as added Oct. 16, 1988, Pub. L. 99-495, § 12, 100 Stat. 1255.)

EFFECTIVE DATE

Section applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99-495, set out as an Effective Date of 1986 Amendment note under section 797 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 825d-1 of this title.

[1] So in original. Probably should not be capitalized.

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 803, 824a-3 of this title; title 42 section 7172; title 43 section 1761.

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [15 U.S.C. 79 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Nov. 9, 1978, Pub. L. 95-617, title II, § 204(b), 92 Stat. 3140; Oct. 24, 1992, Pub. L. 102-486, title VII, § 714, 106 Stat. 2911.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (g)(5), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 838, as amended, which is classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 79 of Title 15 and Tables.

AMENDMENTS

1992—Subsec. (g). Pub. L. 102-486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95-617, § 204(b)(1), designated existing provisions as par. (1), inserted "except as provided in paragraph (2)" after "in interstate commerce, but", and added par. (2).

Subsec. (e). Pub. L. 95-617, § 204(b)(2), inserted "(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)" after "under this subchapter".

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Section 214 of Pub. L. 95-617 provided that:

"(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission before the date of the enactment of this Act [Nov. 9, 1978].

"(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 839e of this title; title 15 section 79z–5a.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy: regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (c) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

(June 10, 1920, ch. 285, pt. II, § 202, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 848; amended Aug. 7, 1953, ch. 343, 67 Stat. 461; Nov. 9, 1978, Pub. L. 95-617, title II, § 206(a), 92 Stat. 3141.)

AMENDMENTS

1978—Subsec. (g). Pub. L. 95-617 added subsec. (g).
1953—Subsec. (f). Act Aug. 7, 1953, added subsec. (f).

EFFECTIVE DATE OF 1978 AMENDMENT

Section 206(b) of Pub. L. 95-617 provided that: "The amendment made by subsection (a) [adding subsec. (g) of this section] shall not affect any proceeding of the Commission pending on the date of the enactment of this Act [Nov. 9, 1978] or any case pending on such date respecting a proceeding of the Commission."

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter and interconnection, under this section, of facilities for generation, transmission, and sale of electric energy, other than emergency interconnection, transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

DELEGATION OF FUNCTIONS

Functions of President respecting certain facilities constructed and maintained on United States borders delegated to Secretary of State, see Ex. Ord. No. 11423, Aug. 16, 1968, 33 F.R. 11741, set out as a note under section 301 of Title 3, The President.

PERFORMANCE OF FUNCTIONS RESPECTING ELECTRIC POWER AND NATURAL GAS FACILITIES LOCATED ON UNITED STATES BORDERS

For provisions relating to performance of functions by Secretary of Energy respecting electric power and natural gas facilities located on United States borders, see Ex. Ord. No. 10485, Sept. 8, 1953, 18 F.R. 5397, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, set out as a note under section 717b of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824a-1, 824a-2, 824a-4 of this title; title 42 section 7172.

§ 824a-1. Pooling

(a) State laws

The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. No such exemption may be granted if the Commission finds that such provision of State law, or rule or regulation—

(1) is required by any authority of Federal law, or

(2) is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages.

(b) Pooling study

(1) The Commission, in consultation with the reliability councils established under section 202(a) of the Federal Power Act [16 U.S.C. 824a], the Secretary, and the electric utility industry shall study the opportunities for—

(A) conservation of energy,

(B) optimization in the efficiency of use of facilities and resources, and

(C) increased reliability,

through pooling arrangements. Not later than 18 months after November 9, 1978, the Commis-

sion shall submit a report containing the results of such study to the President and the Congress.

(2) The Commission may recommend to electric utilities that such utilities should voluntarily enter into negotiations where the opportunities referred to in paragraph (1) exist. The Commission shall report annually to the President and the Congress regarding any such recommendations and subsequent actions taken by electric utilities, by the Commission, and by the Secretary under this Act, the Federal Power Act [16 U.S.C. 791a et seq.], and any other provision of law. Such annual reports shall be included in the Commission's annual report required under the Department of Energy Organization Act [42 U.S.C. 7101 et seq.].

(Pub. L. 95-617, title II, § 205, Nov. 9, 1978, 92 Stat. 3140.)

REFERENCES IN TEXT

The Commission, referred to in text, means the Federal Energy Regulatory Commission. See section 2602(3) of this title

The Secretary, referred to in subsec. (b), means the Secretary of Energy. See section 2602(14) of this title.

This Act, referred to in subsec. (b)(2), means Pub. L. 95-617, Nov. 9, 1978, 92 Stat. 3117, known as the "Public Utility Regulatory Policies Act of 1978". For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

The Federal Power Act, referred to in subsec. (b)(2), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 791a of this title and Tables.

The Department of Energy Organization Act, referred to in subsec. (b)(2), is Pub. L. 95-91, Aug. 4, 1977, 91 Stat. 565, as amended, which is classified principally to chapter 84 (§ 7101 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of Title 42 and Tables.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

§ 824a-2. Reliability

(a) Study

(1) The Secretary, in consultation with the Commission, shall conduct a study with respect to—

(A) the level of reliability appropriate to adequately serve the needs of electric consumers, taking into account cost effectiveness and the need for energy conservation,

(B) the various methods which could be used in order to achieve such level of reliability and the cost effectiveness of such methods, and

(C) the various procedures that might be used in case of an emergency outage to minimize the public disruption and economic loss that might be caused by such an outage and the cost effectiveness of such procedures.

Such study shall be completed and submitted to the President and the Congress not later than 18 months after November 9, 1978. Before such submittal the Secretary shall provide an opportunity for public comment on the results of such study.

(2) The study under paragraph (1) shall include consideration of the following:

(A) the cost effectiveness of investments in each of the components involved in providing adequate and reliable electric service, including generation, transmission, and distribution facilities, and devices available to the electric consumer;

(B) the environmental and other effects of the investments considered under subparagraph (A);

(C) various types of electric utility systems in terms of generation, transmission, distribution and customer mix, the extent to which differences in reliability levels may be desirable, and the cost-effectiveness of the various methods which could be used to decrease the number and severity of any outages among the various types of systems;

(D) alternatives to adding new generation facilities to achieve such desired levels of reliability (including conservation);

(E) the cost-effectiveness of adding a number of small, decentralized conventional and nonconventional generating units rather than a small number of large generating units with a similar total megawatt capacity for achieving the desired level of reliability; and

(F) any standards for electric utility reliability used by, or suggested for use by, the electric utility industry in terms of cost-effectiveness in achieving the desired level of reliability, including equipment standards, standards for operating procedures and training of personnel, and standards relating the number and severity of outages to periods of time.

(b) Examination of reliability issues by reliability councils

The Secretary, in consultation with the Commission, may, from time to time, request the reliability councils established under section 202(a) of the Federal Power Act [16 U.S.C. 824a(a) of this title] or other appropriate persons (including Federal agencies) to examine and report to him concerning any electric utility reliability issue. The Secretary shall report to the Congress (in its annual report or in the report required under subsection (a) of this section if appropriate) the results of any examination under the preceding sentence.

(c) Department of Energy recommendations

The Secretary, in consultation with the Commission, and after opportunity for public comment, may recommend industry standards for reliability to the electric utility industry, including standards with respect to equipment, operating procedures and training of personnel, and standards relating to the level or levels of reliability appropriate to adequately and reliably serve the needs of electric consumers. The Secretary shall include in his annual report—

(1) any recommendations made under this subsection or any recommendations respecting electric utility reliability problems under any other provision of law, and

(2) a description of actions taken by electric utilities with respect to such recommendations.

(Pub. L. 95–617, title II, § 209, Nov. 9, 1978, 92 Stat. 3143.)

REFERENCES IN TEXT

The Secretary and the Commission, referred to in subsecs. (a)(1), (b), and (c), mean the Secretary of Energy and the Federal Energy Regulatory Commission, respectively. See section 2602(3) and (14) of this title.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

§ 824a–3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities [1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 U.S.C. 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may

[1] So in original. Probably should be followed by a comma.

be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section [1] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) New dams and diversions

Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by

[1] So in original. Probably should be followed by a comma.

means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C. 803] (whichever is appropriate as required by that Act [16 U.S.C. 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)].

(k) "New dam or diversion" defined

For purposes of this section, the term "new dam or diversion" means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices).

(l) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

(Pub. L. 95–617, title II, § 210, Nov. 9, 1978, 92 Stat. 3144; Pub. L. 96–294, title VI, § 643(b), June 30, 1980, 94 Stat. 770; Pub. L. 99–495, § 8(a), Oct. 16, 1986, 100 Stat. 1249; Pub. L. 101–575, § 2, Nov. 15, 1990, 104 Stat. 2834.)

REFERENCES IN TEXT

The Commission, referred to in subsecs. (a), (e)(1), (2), (f), (h), and (j)(1), (2), means the Federal Energy Regulatory Commission. See section 2602(3) of this title.

The Secretary, referred to in subsec. (g)(2), means the Secretary of Energy. See section 2602(14) of this title.

The Federal Power Act, referred to in subsecs. (e), (h), and (j)(1), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter (§ 791a et seq.). Part I of the Federal Power Act is classified generally to subchapter I (§ 791a et seq.) of this chapter. Part II of the Federal Power Act is classified generally to this subchapter (§ 824 et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

The Public Utility Holding Company Act, referred to in subsec. (e), probably means the Public Utility Holding Company Act of 1935, act Aug. 26, 1935, ch. 687, title 1, 49 Stat. 838, as amended, which is classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 79 of Title 15 and Tables.

The Electric Consumers Protection Act of 1986, referred to in subsec. (j)(1), is Pub. L. 99–495, Oct. 16, 1986, 100 Stat. 1243. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

AMENDMENTS

1990—Subsec. (e)(2). Pub. L. 101–575 inserted "(other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act)" after first reference to "facility".

1986—Subsecs. (j) to (l). Pub. L. 99–495 added subsecs. (j) and (k) and redesignated former subsec. (j) as (l).

1980—Subsec. (a). Pub. L. 96–294, § 643(b)(1), inserted provisions relating to encouragement of geothermal small power production facilities.

Subsec. (e)(1). Pub. L. 96–294, § 643(b)(2), inserted provisions relating to applicability to geothermal small power production facilities.

Subsec. (e)(2). Pub. L. 96–294, § 643(b)(3), inserted provisions respecting a qualifying small power production facility using geothermal energy as the primary energy source.

EFFECTIVE DATE OF 1986 AMENDMENT

Section 8(b) of Pub. L. 99–495 provided that:

"(1) Subsection (j) of section 210 of the Public Utility Regulatory Policies Act of 1978 (as amended by subsection (a) of this section) [16 U.S.C. 824a–3(j)] shall apply to any project for which benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 are sought and for which a license or exemption is issued by the Federal Energy Regulatory Commission after the enactment of this Act [Oct. 16, 1986], except as otherwise provided in paragraph (2), (3) or (4) of this subsection.

"(2) Subsection (j) shall not apply to the project if the application for license or exemption for the project was filed, and accepted for filing by the Commission, before the enactment of this Act [Oct. 16, 1986].

"(3) Paragraphs (1) and (3) of such subsection (j) shall not apply if the application for the license or exemption for the project was filed before the enactment of this Act [Oct. 16, 1986] and accepted for filing

by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to the requirement for environmental consultation) within 3 years after such enactment.

"(4)(A) Paragraph (3) of subsection (j) shall not apply for projects where the license or exemption application was filed after enactment of this Act [Oct. 16, 1986] if, based on a petition filed by the applicant for such project within 18 months after such enactment, the Commission determines (after public notice and opportunity for public comment of at least 45 days) that the applicant has demonstrated that he had committed (prior to the enactment of this Act) substantial monetary resources directly related to the development of the project and to the diligent and timely completion of all requirements of the Commission for filing an acceptable application for license or exemption. Such petition shall be publicly available and shall be filed in such form as the Commission shall require by rule issued within 120 days after the enactment of this Act. The public notice required under this subparagraph shall include written notice by the petitioner to affected Federal and State agencies.

"(B) In the case of any petition referred to in subparagraph (A), if the applicant had a preliminary permit and had completed environmental consultations (required by Commission regulations and procedures in effect on January 1, 1986) prior to enactment, there shall be a rebuttable presumption that such applicant had committed substantial monetary resources prior to enactment.

"(C) The applicant for a license or exemption for a project described in subparagraph (A) may petition the Commission for an initial determination under paragraph (1) of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3(j)(1)] prior to the time the license or exemption is issued. If the Commission initially finds that the project will have substantial adverse effects on the environment within the meaning of such paragraph (1), prior to making a final finding under that paragraph the Commission shall afford the applicant a reasonable opportunity to provide for mitigation of such adverse effects. The Commission shall make a final finding under such paragraph (1) at the time the license or exemption is issued. If the Federal Energy Regulatory Commission has notified the State of its initial finding and the State has not taken any action described in paragraph (2) of section 210(j) before such final finding, the failure to take such action shall be the basis for a rebuttable presumption that there is not a substantial adverse effect on the environment related to natural, recreational, cultural, or scenic attributes for purposes of such finding.

"(D) If a petition under subparagraph (A) is denied, all provisions of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3(j)] shall apply to the project regardless of when the license or exemption is issued."

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

CALCULATION OF AVOIDED COST

Pub. L. 102–486, title XIII, § 1335, Oct. 24, 1992, 106 Stat. 2984, provided that: "Nothing in section 210 of the Public Utility Regulatory Policies Act of 1978 (Public Law 95–617) [16 U.S.C. 824a–3] requires a State regulatory authority or nonregulated electric utility to treat a cost reasonably identified to be incurred or to have been incurred in the construction or operation of a facility or a project which has been selected by the Department of Energy and provided Federal funding pursuant to the Clean Coal Program authorized by Public Law 98–473 (see Tables for classification) as an incremental cost of alternative electric energy."

APPLICABILITY OF 1980 AMENDMENT TO FACILITIES USING SOLAR ENERGY AS PRIMARY ENERGY SOURCE

Pub. L. 100–202, § 101(d) [title III, § 310], Dec. 22, 1987, 101 Stat. 1329–104, 1329–126, provided that:

"(a) The amendments made by section 643(b) of the Energy Security Act (Public Law 96–294) (amending this section) and any regulations issued to implement such amendment shall apply to qualifying small power production facilities (as such term is defined in the Federal Power Act [16 U.S.C. 791a et seq.]) using solar energy as the primary energy source to the same extent such amendments and regulations apply to qualifying small power production facilities using geothermal energy as the primary energy source, except that nothing in this Act [see Tables for classification] shall preclude the Federal Energy Regulatory Commission from revising its regulations to limit the availability of exemptions authorized under this Act as it determines to be required in the public interest and consistent with its obligations and duties under section 210 of the Public Utility Regulatory Policies Act of 1978 [this section].

"(b) The provisions of subsection (a) shall apply to a facility using solar energy as the primary energy source only if either of the following is submitted to the Federal Energy Regulatory Commission during the two-year period beginning on the date of enactment of this Act [Dec. 22, 1987]:

"(1) An application for certification of the facility as a qualifying small power production facility.

"(2) Notice that the facility meets the requirements for qualification."

STUDY AND REPORT TO CONGRESSIONAL COMMITTEES ON APPLICATION OF PROVISIONS RELATING TO COGENERATION, SMALL POWER PRODUCTION, AND INTERCONNECTION AUTHORITY TO HYDROELECTRIC POWER FACILITIES

Section 8(d) of Pub. L. 99–495 provided that:

"(1) The Commission shall conduct a study (in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332(2)(C)]) of whether the benefits of section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3] and section 210 of the Federal Power Act [16 U.S.C. 824i] should be applied to hydroelectric power facilities utilizing new dams or diversions (within the meaning of section 210(k) of the Public Utility Regulatory Policies Act of 1978).

"(2) The study under this subsection shall take into consideration the need for such new dams or diversions for power purposes, the environmental impacts of such new dams and diversions (both with and without the application of the amendments made by this Act to sections 4, 10, and 30 of the Federal Power Act [16 U.S.C. 797, 803, 823a] and section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3]), the environmental effects of such facilities alone and in combination with other existing or proposed dams or diversions on the same waterway, the intent of Congress to encourage and give priority to the application of section 210 of Public Utility Regulatory Policies Act of 1978 to existing dams and diversions rather than such new dams or diversions, and the impact of such section 210 on the rates paid by electric power consumers.

"(3) The study under this subsection shall be initiated within 3 months after enactment of this Act [Oct. 16, 1986] and completed as promptly as practicable.

"(4) A report containing the results of the study conducted under this subsection shall be submitted to the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate while both Houses are in session.

"(5) The report submitted under paragraph (4) shall include a determination (and the basis thereof) by the Commission, based on the study and a public hearing

and subject to review under section 313(b) of the Federal Power Act [16 U.S.C. 825l(b)], whether any of the benefits referred to in paragraph (1) should be available for such facilities and whether applications for preliminary permits (or licenses where no preliminary permit has been issued) for such small power production facilities utilizing new dams or diversions should be accepted by the Commission after the moratorium period specified in subsection (e). The report shall include such other administrative and legislative recommendations as the Commission deems appropriate.

"(6) If the study under this subsection has not been completed within 18 months after its initiation, the Commission shall notify the Committees referred to in paragraph (4) of the reasons for the delay and specify a date when it will be completed and a report submitted."

MORATORIUM ON APPLICATION OF THIS SECTION TO NEW DAMS

Section 8(e) of Pub. L. 99–495 provided that: "Notwithstanding the amendments made by subsection (a) of this section [amending section 824a–3 of this title], in the case of a project for which a license or exemption is issued after the enactment of this Act [Oct. 16, 1986], section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3] shall not apply during the moratorium period if the project utilizes a new dam or diversion (as defined in section 210(k) of such Act) unless the project is either—

"(1) a project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, or

"(2) a project described in paragraphs (2), (3), or (4) of subsection (b) [set out as a note above].

For purposes of this subsection, the term 'moratorium period' means the period beginning on the date of the enactment of this Act and ending at the expiration of the first full session of Congress after the session during which the report under subsection (d) [set out as a note above] has been submitted to the Congress."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 136; title 42 section 6807.

§ 824a–4. Seasonal diversity electricity exchange

(a) Authority

The Secretary may acquire rights-of-way by purchase, including eminent domain, through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada if he determines—

(1) after opportunity for public hearing—

(A) that the exchange is in the public interest and would further the purposes referred to in section 2611(1) and (2) of this title and that the acquisition of such rights-of-way and the construction and operation of such transmission facilities for such purposes is otherwise in the public interest,

(B) that a permit has been issued in accordance with subsection (b) of this section for such construction, operation, maintenance, and connection of the facilities at the border for the transmission of electric energy between the United States and Canada as is necessary for such exchange of electric power, and

(C) that each affected State has approved the portion of the transmission route located in each State in accordance with applicable State law, or if there is no such applicable State law in such State, the Governor has approved such portion; and

(2) after consultation with the Secretary of the Interior and the heads of other affected Federal agencies, that the Secretary of the Interior and the heads of such,[1] other agencies concur in writing in the location of such portion of the transmission facilities as crosses Federal land under the jurisdiction of such Secretary or such other Federal agency, as the case may be.

The Secretary shall provide to any State such cooperation and technical assistance as the State may request and as he determines appropriate in the selection of a transmission route. If the transmission route approved by any State does not appear to be feasible and in the public interest, the Secretary shall encourage such State to review such route and to develop a route that is feasible and in the public interest. Any exercise by the Secretary of the power of eminent domain under this section shall be in accordance with other applicable provisions of Federal law. The Secretary shall provide public notice of his intention to acquire any right-of-way before exercising such power of eminent domain with respect to such right-of-way.

(b) Permit

Notwithstanding any transfer of functions under the first sentence of section 301(b) of the Department of Energy Organization Act [42 U.S.C. 7151(b)], no permit referred to in subsection (a)(1)(B) may be issued unless the Commission has conducted hearings and made the findings required under section 202(e) of the Federal Power Act [16 U.S.C. 824a(e)] and under the applicable execution order respecting the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country. Any finding of the Commission under an applicable executive order referred to in this subsection shall be treated for purposes of judicial review as an order issued under section 202(e) of the Federal Power Act.

(c) Timely acquisition by other means

The Secretary may not acquire any rights-of-day[2] under this section unless he determines that the holder or holders of a permit referred to in subsection (a)(1)(B) of this section are unable to acquire such rights-of-way under State condemnation authority, or after reasonable opportunity for negotiation, without unreasonably delaying construction, taking into consideration the impact of such delay on completion of the facilities in a timely fashion.

(d) Payments by permittees

(1) The property interest acquired by the Secretary under this section (whether by eminent domain or other purchase) shall be transferred by the Secretary to the holder of a permit referred to in subsection (b) of this section if such

[1] So in original. Comma probably should be deleted.

[2] So in original. Probably should be "rights-of-way".

holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs. The Secretary may accept, and expend, for purposes of such acquisition, amounts from any such person before acquiring a property interest to be transferred to such person under this section.

(2) If no payment is made by a permit holder under paragraph (1), within a reasonable time, the Secretary shall offer such rights-of-way to the original owner for reacquisition at the original price paid by the Secretary. If such original owner refuses to reacquire such property after a reasonable period, the Secretary shall dispose of such property in accordance with applicable provisions of law governing disposal of property of the United States.

(e) Federal law governing Federal lands

This section shall not affect any Federal law governing Federal lands.

(f) Reports

The Secretary shall report annually to the Congress on the actions, if any, taken pursuant to this section.

(Pub. L. 95-617, title VI, § 602, Nov. 9, 1978, 92 Stat. 3164.)

REFERENCES IN TEXT

The Secretary, referred to in subsecs. (a), (c), (d), and (f), means the Secretary of Energy. See section 2602(14) of this title.

The Commission, referred to in subsec. (b), means the Federal Energy Regulatory Commission. See section 2602(3) of this title.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

§ 824b. Disposition of property; consolidations; purchase of securities

(a) Authorizations

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) Orders of Commission

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

(June 10, 1920, ch. 285, pt. II, § 203, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 849.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes

to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Nov. 9, 1978, Pub. L. 95-617, title II, §§ 207(a), 208, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95-617, § 207(a), substituted "sixty" for "thirty" in two places.

Subsec. (f). Pub. L. 95-617, § 208, added subsec. (f).

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 808, 824e, 824m of this title; title 15 section 79z-5a; title 42 section 13234.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to re-

cover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Oct. 6, 1988, Pub. L. 100–473, § 2, 102 Stat. 2299.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 838, as amended, which is classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade. The terms "electric utility company" and "registered holding company" are defined in section 79b(a)(3), (12) of Title 15. For complete classification of this Act to the Code, see section 79 of Title 15 and Tables.

AMENDMENTS

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100–473 provided that: "The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice."

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100–473 provided that: "Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.]."

STUDY

Section 5 of Pub. L. 100–473 directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property

of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 839f of this title.

§ 824i. Interconnection authority

(a) Powers of Commission; application by State regulatory authority

(1) Upon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring—

(A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant,

(B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability,

(C) such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A) or (B), or

(D) such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B).

(2) Any State regulatory authority may apply to the Commission for an order for any action referred to in subparagraph (A), (B), (C), or (D) of paragraph (1). No such order may be issued by the Commission with respect to a Federal power marketing agency upon application of a State regulatory authority.

(b) Notice, hearing and determination by Commission

Upon receipt of an application under subsection (a) of this section, the Commission shall—

(1) issue notice to each affected State regulatory authority, each affected electric utility, each affected Federal power marketing agency, each affected owner or operator of a cogeneration facility or of a small power production facility, and to the public,

(2) afford an opportunity for an evidentiary hearing, and

(3) make a determination with respect to the matters referred to in subsection (c) of this section.

(c) Necessary findings

No order may be issued by the Commission under subsection (a) of this section unless the Commission determines that such order—

(1) is in the public interest,

(2) would—

(A) encourage overall conservation of energy or capital,

(B) optimize the efficiency of use of facilities and resources, or

(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and

(3) meets the requirements of section 824k of this title.

(d) Motion of Commission

The Commission may, on its own motion, after compliance with the requirements of paragraphs (1) and (2) of subsection (b) of this section, issue an order requiring any action described in subsection (a)(1) of this section if the Commission determines that such order meets the requirements of subsection (c) of this section. No such order may be issued upon the Commission's own motion with respect to a Federal power marketing agency.

(e) Definitions

(1) As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

(2) With respect to an order issued pursuant to an application of a qualifying cogenerator or qualifying small power producer under subsection (a)(1) of this section, the term "facilities of such applicant" means the qualifying cogeneration facilities or qualifying small power production facilities of the applicant, as specified in the application. With respect to an order issued pursuant to an application under subsection (a)(2) of this section, the term "facilities of such applicant" means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the application. With respect to an order issued by the Commission on its own motion under subsection (d) of this section, such term means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the proposed order.

(June 10, 1920, ch. 285, pt. II, § 210, as added Pub. L. 95-617, title II, § 202, Nov. 9, 1978, 92 Stat. 3135; amended June 30, 1980, Pub. L. 96-294, title VI, § 643(a)(2), 94 Stat. 770.)

AMENDMENTS

1980—Subsec. (a)(1). Pub. L. 96-294 added applicability to geothermal power producers.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STUDY AND REPORT TO CONGRESSIONAL COMMITTEES ON APPLICATION OF PROVISIONS RELATING TO COGENERATION, SMALL POWER PRODUCTION, AND INTERCONNECTION AUTHORITY TO HYDROELECTRIC POWER FACILITIES

For provisions requiring the Federal Energy Regulatory Commission to conduct a study and report to Congress on whether the benefits of this section and section 824a-3 of this title should be applied to hydroelectric power facilities utilizing new dams or diversions, within the meaning of section 824a-3(k) of this title, see section 8(d) of Pub. L. 99-495, set out as a note under section 824a-3 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824j, 824k of this title.

§ 824j. Wheeling authority

(a) Transmission service by any electric utility; notice, hearing and findings by Commission

Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the re-

quirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) Reliability of electric service

No order may be issued under this section or section 824i of this title if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c) Replacement of electric energy

(1) Repealed. Pub. L. 102-486, title VII, § 721(4)(A), Oct. 24, 1992, 106 Stat. 2915.

(2) No order may be issued under subsection (a) or (b) of this section which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: *Provided*, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of [1] modification of an existing rate schedule: *Provided*, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(d) Termination or modification of order; notice, hearing and findings of Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties

(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 824k of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or [2]

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall—

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) "Facilities" defined

As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

(June 10, 1920, ch. 285, pt. II, § 211, as added Pub. L. 95-617, title II, § 203, Nov. 9, 1978, 92 Stat. 3136; amended June 30, 1980, Pub. L. 96-294, title VI, § 643(a)(3), 94 Stat. 770; Oct. 16, 1986, Pub. L. 99-495, § 15, 100 Stat. 1257; Oct. 24, 1992, Pub. L. 102-486, title VII, § 721, 106 Stat. 2915.)

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-486, § 721(1), amended first sentence generally. Prior to amendment, first sentence read as follows: "Any electric utility, geothermal power producer (including a producer which is not an electric utility), or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant (including

[1] So in original. Probably should be "or".

[2] So in original. The word "or" probably should not appear.

any enlargement of transmission capacity necessary to provide such services)."

Pub. L. 102-486, § 721(2), in second sentence, substituted "the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order." for "the Commission may issue such order if it finds that such order—

"(1) is in the public interest,

"(2) would—

"(A) conserve a significant amount of energy,

"(B) significantly promote the efficient use of facilities and resources, or

"(C) improve the reliability of any electric utility system to which the order applies, and

"(3) meets the requirements of section 824k of this title."

Subsec. (b). Pub. L. 102-486, § 721(3), amended subsec. (b) generally, substituting provisions relating to reliability of electric service for provisions which related to transmission service by sellers of electric energy for resale and notice, hearing, and determinations by Commission.

Subsec. (c). Pub. L. 102-486, § 721(4), struck out pars. (1), (3), and (4), and substituted "which requires the transmitting" for "which requires the electric" in introductory provisions of par. (2). Prior to amendment, pars. (1), (3), and (4) read as follows:

"(1) No order may be issued under subsection (a) of this section unless the Commission determines that such order would reasonably preserve existing competitive relationships.

"(3) No order may be issued under the authority of subsection (a) or (b) of this section which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

"(4) No order may be issued under subsection (a) or (b) of this section which provides for the transmission of electric energy directly to an ultimate consumer."

Subsec. (d). Pub. L. 102-486, § 721(5), in first sentence substituted "transmitting" for "electric" before "utility" in two places, in second sentence inserted "each affected transmitting utility," before "and each affected electric utility", in par. (1) substituted ", or" for period at end of subpar. (B) and added subpar. (C), and in par. (3)(B) substituted "transmitting" for "electric" before "utility".

1986—Subsec. (c)(2)(B). Pub. L. 99-495 inserted provisions that nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination or modification of an existing rate schedule, provided that such order shall not become effective until termination of such rate schedule or the modification becomes effective.

1980—Subsec. (a). Pub. L. 96-294 added applicability to geothermal power producers.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824k, 825n, 825o, 825o-1 of this title; title 26 section 142.

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub. L. 102-486, title VII, § 722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agree-

ment, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Savings provisions

(1) No provision of section 824i, 824j, 824m of this title, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 824i, 824j, 824m of this title, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of title 15, except that such term includes section 45 of title 15 to the extent that such section relates to unfair methods of competition.

(f) Effective date of order; hearing; notice; review

(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 824i or of section 824j of this title requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4), hereinafter in this subsection referred to as the TVA Act [16 U.S.C. 831 et seq.].

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 824i or 824j of this title until whichever of the following dates is applicable—

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n-4(a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 824i or section 824j of this title requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n-4(a)].

(g) Prohibition on orders inconsistent with retail marketing areas

No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C. 901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or con-

trols to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

(i) Laws applicable to Federal Columbia River Transmission System

(1) The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that—

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, section 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this chapter with respect to the procedures for the determination of terms and conditions for transmission service—

(A) when the Administrator of the Bonneville Power Administration either (i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or (ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River Transmission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall—

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 839e(i) of this title, except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section; and

(B) if application is made to the Commission under section 824j of this title for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination and in accordance with Commission procedures, the Commission shall—

(i) in the event the Administrator has conducted a hearing as herein provided for (I) accord parties to the Administrator's hearing the opportunity to offer for the Commission record materials excluded by the Administrator from the hearing record, (II) accord such parties the opportunity to submit for the Commission record comments on appropriate terms and conditions, (III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and (IV) establish terms and conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 824j of this title and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 825l(b) of this title which designate the court in which review may be obtained, any party to a proceeding concerning transmission service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific Northwest, as that region is defined by section 839a(14) of this title.

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 824j of this title, as a result of the Administrator's other statutory mandates, either to (A) provide transmission service to an applicant which the Commission would otherwise order, or (B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 824i of this title, section 824j of

this title, this section, or section 824*l* of this title requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in the Pacific Northwest, as that region is defined in section 839a(14) of this title, as is needed to assure adequate and reliable service to loads in that region.

(j) Equitability within territory restricted electric systems

With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 824j of this title may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: *Provided, however*, That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on October 24, 1992, and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k) ERCOT utilities

(1) Rates

Any order under section 824j of this title requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a) of this section, on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

(2) Definitions

For purposes of this subsection—

(A) the term "ERCOT" means the Electric Reliability Council of Texas; and

(B) the term "ERCOT utility" means a transmitting utility which is a member of ERCOT.

(June 10, 1920, ch. 285, pt. II, § 212, as added Pub. L. 95-617, title II, § 204(a), Nov. 9, 1978, 92 Stat. 3138; amended Oct. 24, 1992, Pub. L. 102-486, title VII, § 722, 106 Stat. 2916.)

REFERENCES IN TEXT

The TVA Act, referred to in subsec. (f)(1), means act May 18, 1933, ch. 32, 48 Stat. 58, as amended, known as the Tennessee Valley Authority Act of 1933, which is classified generally to chapter 12A (§ 831 et seq.) of this title. For complete classification of this Act to the Code, see section 831 of this title and Tables.

The Rural Electrification Act of 1936, referred to in subsec. (h)(2)(A), is act May 20, 1936, ch. 422, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Energy Policy Act of 1992, referred to in subsec. (i)(2)(A)(iii), (B)(i), is Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2776. For complete classification of this Act to the Code, see Short Title note set out under section 13201 of Title 42, The Public Health and Welfare and Tables.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-486, § 722(1), added subsec. (a) and struck out former subsec. (a) which related to determinations by Commission.

Subsec. (b). Pub. L. 102-486, § 722(1), struck out subsec. (b) which required applicants for orders to be ready, willing, and able to reimburse parties subject to such orders.

Subsec. (e). Pub. L. 102-486, § 722(2), amended subsec. (e) generally. Prior to amendment, subsec. (e) related to utilization of interconnection or wheeling authority in lieu of other authority and limitation of Commission authority.

Subsecs. (g) to (k). Pub. L. 102-486, § 722(3), added subsecs. (g) to (k).

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824*l*, 824j, 825n, 825*o*, 825*o*-1 of this title.

§ 824*l*. Information requirements

(a) Requests for wholesale transmission services

Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints

Not later than 1 year after October 24, 1992, the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission

customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

(June 10, 1920, ch. 285, pt. II, § 213, as added Oct. 24, 1992, Pub. L. 102-486, title VII, § 723, 106 Stat. 2919.)

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824k, 825n, 825o, 825o-1 of this title; title 26 section 142.

§ 824m. Sales by exempt wholesale generators

No rate or charge received by an exempt wholesale generator for the sale of electric energy shall be lawful under section 824d of this title if, after notice and opportunity for hearing, the Commission finds that such rate or charge results from the receipt of any undue preference or advantage from an electric utility which is an associate company or an affiliate of the exempt wholesale generator. For purposes of this section, the terms "associate company" and "affiliate" shall have the same meaning as provided in section 79b(a) of title 15.

(June 10, 1920, ch. 285, pt. II, § 214, as added Oct. 24, 1992, Pub. L. 102-486, title VII, § 724, 106 Stat. 2920.)

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824k, 825n, 285o, 825o-1 of this title.

SUBCHAPTER III—LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 824 of this title; title 43 section 1761.

§ 825. Accounts and records

(a) Duty to keep

Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and examination by the Commission

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) Controlling individual

The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.

(June 10, 1920, ch. 285, pt. III, § 301, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 854.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions which were transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

as to the expenditure of funds derived from the sale of bonds under this section covering the period not covered by any such previous statement or report. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation with the approval of the Secretary of the Treasury: *Provided*, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. None of the proceeds of the bonds shall be used for the performance of any proposed contract negotiated by the Corporation under the authority of section 831k-1 of this title until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds under this section shall expire January 1, 1941, except that if at the time such authority expires the amount of bonds issued by the Corporation under this section is less than $61,500,000, the Corporation may, subject to the foregoing provisions of this section, issue, after the expiration of such period, bonds in an amount not in excess of the amount by which the bonds so issued prior to the expiration of such period is less than $61,500,000, for refunding purposes, or, subject to the provisions of paragraph (5) of this section (limiting the purposes for which loans under section 831k-1 of this title of funds derived from bonds proceeds may be made) to provide funds found necessary in the performance of any contract entered into by the Corporation prior to the expiration of such period, under the authority of section 831k-1 of this title.

(May 18, 1933, ch. 32, § 15c, as added July 26, 1939, ch. 366, 53 Stat. 1083.)

REFERENCES IN TEXT

The date of enactment of this section, referred to in text, probably means July 26, 1939.

CODIFICATION

"Chapter 31 of title 31" and "such chapter" substituted in text for "the Second Liberty Bond Act, as amended" and "such Act, as amended,", respectively, on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 831n–4. Bonds for financing power program

(a) Authorization; amount; use of proceeds; restriction on contracts for sale or delivery of power; exchange power arrangements; payment of principal and interest; bond contracts

The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $30,000,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this chapter, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other

purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: *Provided further,* That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 831y of this title or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this chapter, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law.

(b) Bonds not obligations of or guaranteed by United States; apportionment of proceeds

Bonds issued by the Corporation hereunder shall not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States. Proceeds realized by the Corporation from issuance of such bonds and from power operations and the expenditure of such proceeds shall not be subject to apportionment under the provisions of subchapter II of chapter 15 of title 31.

(c) Sale; terms and conditions; method; limitation on amount; statement in annual report

Bonds issued by the Corporation under this section shall be negotiable instruments unless otherwise specified therein, shall be in such forms and denominations, shall be sold at such times and in such amounts, shall mature at such time or times not more than fifty years from their respective dates, shall be sold at such prices, shall bear such rates of interest, may be redeemable before maturity at the option of the Corporation in such manner and

at such times and redemption premiums, may be entitled to such relative priorities of claim on the Corporation's net power proceeds with respect to principal and interest payments, and shall be subject to such other terms and conditions, as the Corporation may determine: *Provided*, That at least fifteen days before selling each issue of bonds hereunder (exclusive of any commitment shorter than one year) the Corporation shall advise the Secretary of the Treasury as to the amount, proposed date of sale, maturities, terms and conditions and expected rates of interest of the proposed issue in the fullest detail possible and, if the Secretary shall so request, shall consult with him or his designee thereon, but the sale and issuance of such bonds shall not be subject to approval by the Secretary of the Treasury except as to the time of issuance and the maximum rates of interest to be borne by the bonds: *Provided further*, That if the Secretary of the Treasury does not approve a proposed issue of bonds hereunder within seven working days following the date on which he is advised of the proposed sale, the Corporation may issue to the Secretary interim obligations in the amount of the proposed issue, which the Secretary is directed to purchase. In case the Corporation determines that a proposed issue of bonds hereunder cannot be sold on reasonable terms, it may issue to the Secretary interim obligations which the Secretary is authorized to purchase. Notwithstanding the foregoing provisions of this subsection, obligations issued by the Corporation to the Secretary shall not exceed $150,000,000 outstanding at any one time, shall mature on or before one year from date of issue, and shall bear interest equal to the average rate (rounded to the nearest one-eighth of a percent) on outstanding marketable obligations of the United States with maturities from dates of issue of one year or less as of the close of the month preceding the issuance of the obligations of the Corporation. If agreement is not reached within eight months concerning the issuance of any bonds which the Secretary has failed to approve, the Corporation may nevertheless proceed to sell such bonds on any date thereafter without approval by the Secretary in amount sufficient to retire the interim obligations issued to the Treasury and such interim obligations shall be retired from the proceeds of such bonds. For the purpose of any purchase of the Corporation's obligations the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under chapter 31 of title 31 are extended to include any purchases of the Corporation's obligations hereunder. The Corporation may sell its bonds by negotiation or on the basis of competitive bids, subject to the right, if reserved, to reject all bids; may designate trustees, registrars, and paying agents in connection with said bonds and the issuance thereof; may arrange for audits of its accounts and for reports concerning its financial condition and operations by certified public accounting firms (which audits and reports shall be in addition to those required by sections 9105 and 9106 of title 31, may, subject to any covenants contained in any bond contract, invest the proceeds of any bonds and other funds under its control which derive from or pertain to its power program in any securities approved for investment of national bank funds and deposit said proceeds and other funds, subject to withdrawal by check or otherwise, in any Federal Reserve Bank or bank having membership in the Federal Reserve System; and may perform such other acts not prohibited by law as it deems necessary or desirable to accomplish the purposes of this section. Bonds issued by the Corporation hereunder shall contain a recital that they are issued pursuant to this section, and such recital shall be conclusive evidence of the regularity of the issuance and sale of such bonds and of their validity. The annual report of the Board filed pursuant to section 831h of this title shall contain a detailed statement of the operation of the provisions of this section during the year.

(d) Lawful investment; exemption from taxation

Bonds issued by the Corporation hereunder shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of any officer or agency of the United States. The Secretary of the Treasury or any other officer or agency having authority over or control of any such fiduciary, trust, or public funds, may at any time sell any of the bonds of the Corporation acquired by them under this section. Bonds issued by the Corporation hereunder shall be exempt both as to principal and interest from all taxation now or hereafter imposed by any State or local taxing authority except estate, inheritance, and gift taxes.

(e) Payment of excess power proceeds into Treasury; deferral

From net power proceeds in excess of those required to meet the Corporation's obligations under the provisions of any bond or bond contract, the Corporation shall, beginning with fiscal year 1961, make payments into the Treasury as miscellaneous receipts on or before September 30, of each fiscal year as a return on the appropriation investment in the Corporation's power facilities, plus a repayment sum of not less than $10,000,000 for each of the first five fiscal years, $15,000,000 for each of the next five fiscal years, and $20,000,000 for each fiscal year thereafter, which repayment sum shall be applied to reduction of said appropriation investment until a total of $1,000,000,000 of said appropriation investment shall have been repaid. The said appropriation investment shall consist, in any fiscal year, of that part of the Corporation's total investment assigned to power as of the beginning of the fiscal year (including both completed plant and construction in progress) which has been provided from appropriations or by transfers of property from other Government agencies without reimbursement by the Corporation, less repayments of such appropriation investment made under title II of the Government Corporations Appropriation Act, 1948, this chapter, or other applicable

legislation. The payment as a return on the appropriation investment in each fiscal year shall be equal to the computed average interest rate payable by the Treasury upon its total marketable public obligations as of the beginning of said fiscal year applied to said appropriation investment. Payments due hereunder may be deferred for not more than two years when, in the judgment of the Board of Directors of the Corporation, such payments cannot feasibly be made because of inadequacy of funds occasioned by drought, poor business conditions, emergency replacements, or other factors beyond the control of the Corporation.

(f) Rates for sale of power; application of net proceeds

The Corporation shall charge rates for power which will produce gross revenues sufficient to provide funds for operation, maintenance, and administration of its power system; payments to States and counties in lieu of taxes; debt service on outstanding bonds, including provision and maintenance of reserve funds and other funds established in connection therewith; payments to the Treasury as a return on the appropriation investment pursuant to subsection (e) of this section; payment to the Treasury of the repayment sums specified in subsection (e) of this section; and such additional margin as the Board may consider desirable for investment in power system assets, retirement of outstanding bonds in advance of maturity, additional reduction of appropriation investment, and other purposes connected with the Corporation's power business, having due regard for the primary objectives of the chapter, including the objective that power shall be sold at rates as low as are feasible. In order to protect the investment of holders of the Corporation's securities and the appropriation investment as defined in subsection (e) of this section, the Corporation, during each successive five-year period beginning with the five-year period which commences on July 1 of the first full fiscal year after the effective date of this section, shall apply net power proceeds either in reduction (directly or through payments into reserve or sinking funds) of its capital obligations, including bonds and the appropriation investment, or to reinvestment in power assets, at least to the extent of the combined amount of the aggregate of the depreciation accruals and other charges representing the amortization of capital expenditures applicable to its power properties plus the net proceeds realized from any disposition of power facilities in said period. As of October 1, 1975, the five-year periods described herein shall be computed as beginning on October 1 of that year and of each fifth year thereafter.

(g) Power property; lease and lease-purchase agreements

Power generating and related facilities operated by the Corporation under lease and lease-purchase agreements shall constitute power property held by the Corporation within the meaning of section 831l of this title, but that portion of the payment due for any fiscal year under said section 831l of this title to a State where such facilities are located which is determined or estimated by the Board to result from holding such facilities or selling electric energy generated thereby shall be reduced by the amount of any taxes or tax equivalents applicable to such fiscal year paid by the owners or others on account of said facilities to said State and to local taxing jurisdictions therein. In connection with the construction of a generating plant or other facilities under an agreement providing for lease or purchase of said facilities or any interest therein by or on behalf of the Corporation, or for the purchase of the output thereof, the Corporation may convey, in the name of the United States by deed, lease, or otherwise, any real property in its possession or control, may perform necessary engineering and construction work and other services, and may enter into any necessary contractual arrangements.

(h) Congressional declaration of intent

It is declared to be the intent of this section to aid the Corporation in discharging its responsibility for the advancement of the national defense and the physical, social and economic development of the area in which it conducts its operations by providing it with adequate authority and administrative flexibility to obtain the necessary funds with which to assure an ample supply of electric power for such purposes by issuance of bonds and as otherwise provided herein, and this section shall be construed to effectuate such intent.

(May 18, 1933, ch. 32, § 15d, as added Aug. 6, 1959, Pub. L. 86–137, § 1, 73 Stat. 280; amended Aug. 14, 1959, Pub. L. 86–157, 73 Stat. 338; Aug. 12, 1966, Pub. L. 89–537, 80 Stat. 346; Oct. 14, 1970, Pub. L. 91–446, 84 Stat. 915; Nov. 28, 1975, Pub. L. 94–139, § 1, 89 Stat. 750; Apr. 21, 1976, Pub. L. 94–273, §§ 2(30), 35(a), 90 Stat. 376, 380; Oct. 31, 1979, Pub. L. 96–97, 93 Stat. 730.)

REFERENCES IN TEXT

The effective date of this Act, referred to in subsec. (a), and "the effective date of this section", referred to in subsec. (f), probably means the effective date of Pub. L. 86–137, which was approved Aug. 6, 1959.

Title II of the Government Corporations Appropriation Act, 1948, referred to in subsec. (e), means title II of act July 30, 1947, ch. 358, 61 Stat. 576, which was not classified to the Code.

CODIFICATION

In subsecs. (b) and (c), "subchapter II of chapter 15 of title 31", "chapter 31 of title 31", and "sections 9105 and 9106 of title 31" substituted for "Revised Statutes 3679, as amended (31 U.S.C. 665)", "the Second Liberty Bond Act, as amended", and "sections 105 and 106 of the Act of December 6, 1945 (59 Stat. 599; 31 U.S.C. 850–851)", respectively, on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

1979—Subsec. (a). Pub. L. 96–97 substituted "$30,000,000,000" for "$15,000,000,000".

1976—Subsec. (e). Pub. L. 94–273, § 2(30), substituted "September" for "June".

Subsec. (f). Pub. L. 94–273, § 35(a), inserted provision relating to computation of five-year periods as of Oct. 1, 1975.

1975—Subsec. (a). Pub. L. 94–139, § 1(a), substituted "$15,000,000,000" for "$5,000,000,000".

(B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability,

(C) such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A) or (B), or

(D) such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B).

(2) Any State regulatory authority may apply to the Commission for an order for any action referred to in subparagraph (A), (B), (C), or (D) of paragraph (1). No such order may be issued by the Commission with respect to a Federal power marketing agency upon application of a State regulatory authority.

(b) Notice, hearing and determination by Commission

Upon receipt of an application under subsection (a) of this section, the Commission shall—

(1) issue notice to each affected State regulatory authority, each affected electric utility, each affected Federal power marketing agency, each affected owner or operator of a cogeneration facility or of a small power production facility, and to the public.

(2) afford an opportunity for an evidentiary hearing, and

(3) make a determination with respect to the matters referred to in subsection (c) of this section.

(c) Necessary findings

No order may be issued by the Commission under subsection (a) of this section unless the Commission determines that such order—

(1) is in the public interest,

(2) would—

(A) encourage overall conservation of energy or capital,

(B) optimize the efficiency of use of facilities and resources, or

(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and

(3) meets the requirements of section 824k of this title.

(d) Motion of Commission

The Commission may, on its own motion, after compliance with the requirements of paragraphs (1) and (2) of subsection (b) of this section, issue an order requiring any action described in subsection (a)(1) of this section if the Commission determines that such order meets the requirements of subsection (c) of this section. No such order may be issued upon the Commission's own motion with respect to a Federal power marketing agency.

(e) Definitions

(1) As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

(2) With respect to an order issued pursuant to an application of a qualifying cogenerator or qualifying small power producer under subsection (a)(1) of this section, the term "facilities of such applicant" means the qualifying cogeneration facilities or qualifying small power production facilities of the applicant, as specified in the application. With respect to an order issued pursuant to an application under subsection (a)(2) of this section, the term "facilities of such applicant" means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the application. With respect to an order issued by the Commission on its own motion under subsection (d) of this section, such term means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the proposed order.

(June 10, 1920, ch. 285, pt. II, § 210, as added Pub. L. 95-617, title II, § 202, Nov. 9, 1978, 92 Stat. 3135; amended June 30, 1980, Pub. L. 96-294, title VI, § 643(a)(2), 94 Stat. 770.)

AMENDMENTS

1980—Subsec. (a)(1). Pub. L. 96-294 added applicability to geothermal power producers.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STUDY AND REPORT TO CONGRESSIONAL COMMITTEES ON APPLICATION OF PROVISIONS RELATING TO COGENERATION, SMALL POWER PRODUCTION, AND INTERCONNECTION AUTHORITY TO HYDROELECTRIC POWER FACILITIES

For provisions requiring the Federal Energy Regulatory Commission to conduct a study and report to Congress on whether the benefits of this section and section 824a-3 of this title should be applied to hydroelectric power facilities utilizing new dams or diversions, within the meaning of section 824a-3(k) of this title, see section 8(d) of Pub. L. 99-495, set out as a note under section 824a-3 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824j, 824k of this title.

§ 824j. Wheeling authority

(a) Transmission service by any electric utility: notice, hearing and findings by Commission

Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the re-

quirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) Reliability of electric service

No order may be issued under this section or section 824i of this title if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c) Replacement of electric energy

(1) Repealed. Pub. L. 102-486, title VII, § 721(4)(A), Oct. 24, 1992, 106 Stat. 2915.

(2) No order may be issued under subsection (a) or (b) of this section which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: *Provided*, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of [1] modification of an existing rate schedule: *Provided*, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(d) Termination or modification of order; notice, hearing and findings of Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties

(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 824k of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or [2]

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall—

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) "Facilities" defined

As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

(June 10, 1920, ch. 285, pt. II, § 211, as added Pub. L. 95-617, title II, § 203, Nov. 9, 1978, 92 Stat. 3136; amended June 30, 1980, Pub. L. 96-294, title VI, § 643(a)(3), 94 Stat. 770; Oct. 16, 1986, Pub. L. 99-495, § 15, 100 Stat. 1257; Oct. 24, 1992, Pub. L. 102-486, title VII, § 721, 106 Stat. 2915.)

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-486, § 721(1), amended first sentence generally. Prior to amendment, first sentence read as follows: "Any electric utility, geothermal power producer (including a producer which is not an electric utility), or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant (including

[1] So in original. Probably should be "or".

[2] So in original. The word "or" probably should not appear.

any enlargement of transmission capacity necessary to provide such services)."

Pub. L. 102-486, § 721(2), in second sentence, substituted "the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order." for "the Commission may issue such order if it finds that such order—

"(1) is in the public interest,

"(2) would—

"(A) conserve a significant amount of energy,

"(B) significantly promote the efficient use of facilities and resources, or

"(C) improve the reliability of any electric utility system to which the order applies, and

"(3) meets the requirements of section 824k of this title."

Subsec. (b). Pub. L. 102-486, § 721(3), amended subsec. (b) generally, substituting provisions relating to reliability of electric service for provisions which related to transmission service by sellers of electric energy for resale and notice, hearing, and determinations by Commission.

Subsec. (c). Pub. L. 102-486, § 721(4), struck out pars. (1), (3), and (4), and substituted "which requires the transmitting" for "which requires the electric" in introductory provisions of par. (2). Prior to amendment, pars. (1), (3), and (4) read as follows:

"(1) No order may be issued under subsection (a) of this section unless the Commission determines that such order would reasonably preserve existing competitive relationships.

"(3) No order may be issued under the authority of subsection (a) or (b) of this section which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

"(4) No order may be issued under subsection (a) or (b) of this section which provides for the transmission of electric energy directly to an ultimate consumer."

Subsec. (d). Pub. L. 102-486, § 721(5), in first sentence substituted "transmitting" for "electric" before "utility" in two places, in second sentence inserted "each affected transmitting utility," before "and each affected electric utility", in par. (1) substituted ", or" for period at end of subpar. (B) and added subpar. (C), and in par. (3)(B) substituted "transmitting" for "electric" before "utility".

1986—Subsec. (c)(2)(B). Pub. L. 99-495 inserted provisions that nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination or modification of an existing rate schedule, provided that such order shall not become effective until termination of such rate schedule or the modification becomes effective.

1980—Subsec. (a). Pub. L. 96-294 added applicability to geothermal power producers.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824k, 825n, 825o, 825o-1 of this title; title 26 section 142.

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub. L. 102-486, title VII, § 722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824j of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agree-

any enlargement of transmission capacity necessary to provide such services)."

Pub. L. 102-486, § 721(2), in second sentence, substituted "the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order." for "the Commission may issue such order if it finds that such order—

"(1) is in the public interest,

"(2) would—

"(A) conserve a significant amount of energy,

"(B) significantly promote the efficient use of facilities and resources, or

"(C) improve the reliability of any electric utility system to which the order applies, and

"(3) meets the requirements of section 824k of this title."

Subsec. (b). Pub. L. 102-486, § 721(3), amended subsec. (b) generally, substituting provisions relating to reliability of electric service for provisions which related to transmission service by sellers of electric energy for resale and notice, hearing, and determinations by Commission.

Subsec. (c). Pub. L. 102-486, § 721(4), struck out pars. (1), (3), and (4), and substituted "which requires the transmitting" for "which requires the electric" in introductory provisions of par. (2). Prior to amendment, pars. (1), (3), and (4) read as follows:

"(1) No order may be issued under subsection (a) of this section unless the Commission determines that such order would reasonably preserve existing competitive relationships.

"(3) No order may be issued under the authority of subsection (a) or (b) of this section which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

"(4) No order may be issued under subsection (a) or (b) of this section which provides for the transmission of electric energy directly to an ultimate consumer."

Subsec. (d). Pub. L. 102-486, § 721(5), in first sentence substituted "transmitting" for "electric" before "utility" in two places, in second sentence inserted "each affected transmitting utility," before "and each affected electric utility", in par. (1) substituted ", or" for period at end of subpar. (B) and added subpar. (C), and in par. (3)(B) substituted "transmitting" for "electric" before "utility".

1986—Subsec. (c)(2)(B). Pub. L. 99-495 inserted provisions that nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination or modification of an existing rate schedule, provided that such order shall not become effective until termination of such rate schedule or the modification becomes effective.

1980—Subsec. (a). Pub. L. 96-294 added applicability to geothermal power producers.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824k, 825n, 825o, 825o-1 of this title; title 26 section 142.

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub. L. 102-486, title VII, § 722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agree-

ment, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Savings provisions

(1) No provision of section 824i, 824j, 824m of this title, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 824i, 824j, 824m of this title, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of title 15, except that such term includes section 45 of title 15 to the extent that such section relates to unfair methods of competition.

(f) Effective date of order; hearing; notice; review

(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 824i or of section 824j of this title requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4), hereinafter in this subsection referred to as the TVA Act [16 U.S.C. 831 et seq.].

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 824i or 824j of this title until whichever of the following dates is applicable—

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n-4(a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 824i or section 824j of this title requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n-4(a)].

(g) Prohibition on orders inconsistent with retail marketing areas

No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C. 901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or con-

trols to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

(i) Laws applicable to Federal Columbia River Transmission System

(1) The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that—

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, section 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this chapter with respect to the procedures for the determination of terms and conditions for transmission service—

(A) when the Administrator of the Bonneville Power Administration either (i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or (ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River Transmission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall—

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 839e(i) of this title, except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section; and

(B) if application is made to the Commission under section 824j of this title for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination and in accordance with Commission procedures, the Commission shall—

(i) in the event the Administrator has conducted a hearing as herein provided for (I) accord parties to the Administrator's hearing the opportunity to offer for the Commission record materials excluded by the Administrator from the hearing record, (II) accord such parties the opportunity to submit for the Commission record comments on appropriate terms and conditions, (III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and (IV) establish terms and conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 824j of this title and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 825l(b) of this title which designate the court in which review may be obtained, any party to a proceeding concerning transmission service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific Northwest, as that region is defined by section 839a(14) of this title.

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 824j of this title, as a result of the Administrator's other statutory mandates, either to (A) provide transmission service to an applicant which the Commission would otherwise order, or (B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 824i of this title, section 824j of

this title, this section, or section 824*l* of this title requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in the Pacific Northwest, as that region is defined in section 839a(14) of this title, as is needed to assure adequate and reliable service to loads in that region.

(j) Equitability within territory restricted electric systems

With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 824j of this title may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: *Provided, however,* That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on October 24, 1992, and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k) ERCOT utilities

(1) Rates

Any order under section 824j of this title requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a) of this section, on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

(2) Definitions

For purposes of this subsection—

(A) the term "ERCOT" means the Electric Reliability Council of Texas; and

(B) the term "ERCOT utility" means a transmitting utility which is a member of ERCOT.

(June 10, 1920, ch. 285, pt. II, § 212, as added Pub. L. 95–617, title II, § 204(a), Nov. 9, 1978, 92 Stat. 3138; amended Oct. 24, 1992, Pub. L. 102–486, title VII, § 722, 106 Stat. 2916.)

REFERENCES IN TEXT

The TVA Act, referred to in subsec. (f)(1), means act May 18, 1933, ch. 32, 48 Stat. 58, as amended, known as the Tennessee Valley Authority Act of 1933, which is classified generally to chapter 12A (§ 831 et seq.) of this title. For complete classification of this Act to the Code, see section 831 of this title and Tables.

The Rural Electrification Act of 1936, referred to in subsec. (h)(2)(A), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Energy Policy Act of 1992, referred to in subsec. (i)(2)(A)(iii), (B)(i), is Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2776. For complete classification of this Act to the Code, see Short Title note set out under section 13201 of Title 42, The Public Health and Welfare and Tables.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-486, § 722(1), added subsec. (a) and struck out former subsec. (a) which related to determinations by Commission.

Subsec. (b). Pub. L. 102-486, § 722(1), struck out subsec. (b) which required applicants for orders to be ready, willing, and able to reimburse parties subject to such orders.

Subsec. (e). Pub. L. 102-486, § 722(2), amended subsec. (e) generally. Prior to amendment, subsec. (e) related to utilization of interconnection or wheeling authority in lieu of other authority and limitation of Commission authority.

Subsecs. (g) to (k). Pub. L. 102-486, § 722(3), added subsecs. (g) to (k).

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 79 of Title 15, Commerce and Trade.

TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 824, 824a-3, 824l, 824j, 825n, 825o, 825o-1 of this title.

§ 824*l*. Information requirements

(a) Requests for wholesale transmission services

Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints

Not later than 1 year after October 24, 1992, the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission

71	Oregon Trail Electric Consumers Cooperative	(Oregon EC)
72	Otter Tail Power Company	(Otter Tail)
73	Pacific Gas and Electric Company	(PG&E)
74	PacifiCorp	(PacifiCorp)
75	Pennsylvania-New Jersey-Maryland Power Pool	(PJM)
76	Pennsylvania Public Utility Commission	(PA Com)
77	Public Generating Pool	(Public Generating Pool)
78	Public Service Company of New Mexico	(PSNM)
79	Sacramento Municipal Utility District	(SMUD)
80	Salt River Project	(Salt River)
81	San Diego Gas & Electric Company	(San Diego G&E)
82	Seattle City Light	(Seattle)
83	Services-Oriented Open Network Technologies, Inc.	(SONETECH)
84	Sierra Pacific Power Company	(Sierra)
85	South Carolina Electric & Gas Company	(SCE&G)
86	South Carolina Public Service Authority	(SC Public Service Authority)
87	Southern California Edison Company	(SoCal Edison)
88	Southern Company Services, Inc.	(Southern)
89	Southwest Transmission Dependent Utility Group	(Southwest TDU Group)
90	Southwestern Public Service Company	(Southwestern)
91	Sunflower Electric Power Cooperative	(Sunflower)
92	City of Tallahassee, FL	(Tallahassee)
93	Tampa Electric Company	(Tampa)
94	Tennessee Valley Authority	(TVA)
95	Texas Utilities Electric Company	(Texas Utilities)
96	Transmission Access Policy Study Group	(TAPS)
97	Tucson Power Electric Power Company	(Tucson Power)
98	Union Electric Company	(Union Electric)
99	United Illuminating Company	(United Illuminating)
100	U.S. Department of Energy, Office of Energy Research	(DOE)
101	UTC, The Telecommunications Association	(UTC)
102	Virginia Electric and Power Company	(VEPCO)
103	Western Group	(Western Group)
104	Wisconsin Power & Light	(WP&L)

Attachment 2 [omitted in printing]

[¶ 31,036]

61 F.R. 21540 (May 10, 1996)

18 CFR Parts 35 and 385

[Docket Nos. RM95-8-000 and RM94-7-001; Order No. 888]

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

Issued April 24, 1996

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing a Final Rule requiring all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. The Final Rule also permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and Federal Power Act section 211 transmission services. The Commission's goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring

more efficient, lower cost power to the Nation's electricity consumers.

EFFECTIVE DATE: This Final Rule will become effective on July 9, 1996.

FOR FURTHER INFORMATION CONTACT: David D. Withnell (Legal Information—Docket No. RM95-8-000), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208-2063

Deborah B. Leahy (Legal Information—Docket No. RM94-7-001), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208-2039

Michael A. Coleman (Technical Information), Office of Electric Power Regulation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208-1236.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing 202-208-1397 if dialing locally, or 1-800-856-3920 if dialing long distance. CIPS is also available through the Fed World system (by modem or Internet). To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this order will be available on CIPS indefinitely in ASCII and WordPerfect 5.1 format. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in the Public Reference Room at 888 First Street NE., Washington, DC 20426.

Table of Contents

I. Introduction/Summary

Today the Commission issues three final, interrelated rules designed to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.[1] The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce. A second critical aspect of the

[1] These rules are the rules on open access and stranded costs in the above dockets (*FERC Statutes and Regulations* ¶ 31,036), and an accompanying rule on Open Access Same-Time Information System and Standards of Conduct (OASIS Final Rule) (*FERC Statutes and Regulations* ¶ 31,037) being issued contemporaneously. The Commission also is issuing contemporaneously a notice of proposed rulemaking on capacity reservation open access transmission tariffs in Docket No. RM96-11-000, *FERC Statutes and Regulations* ¶ 32,517. These final rules and proposed rule are being published concurrently in the *Federal Register*.

rules is to address recovery of the transition costs of moving from a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced.

In the year since the proposed rules were issued,[2] the pace of competitive changes in the electric utility industry has accelerated. By March of last year, 38 public utilities had filed wholesale open access transmission tariffs with the Commission. Today, prodded by such competitive changes and encouraged by our proposed rules, 106 of the approximately 166 public utilities that own, control, or operate[3] transmission facilities used in interstate commerce have filed some form of wholesale open access tariff. In addition, since the time the proposed rules were issued, numerous state regulatory commissions have adopted or are actively evaluating retail customer choice programs or other utility restructuring alternatives. These events have been spurred by continuing pressures in the marketplace for changes in the way electricity is bought, sold, and transported. Increasingly, customers are demanding the benefits of competition in the growing electricity commodity market.

The Commission estimates the potential quantitative benefits from the Final Rule will be approximately $3.8 to $5.4 billion per year of cost savings, in addition to the non-quantifiable benefits that include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion. The continuing competitive changes in the industry and the prospect of these benefits to customers make it imperative that this Commission take the necessary steps within its jurisdiction to ensure that all wholesale buyers and sellers of electric energy can obtain non-discriminatory transmission access, that the transition to competition is orderly and fair, and that the integrity and reliability of our electricity infrastructure is maintained.

In this Rule, the Commission seeks to remedy both existing and future undue discrimination in the industry and realize the significant customer benefits that will come with open access. Indeed, it is our statutory obligation under sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination.

To do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others. If we do not take this step now, the result will be benefits to some customers at the expense of others. We have learned from our experience in the natural gas area the importance of addressing competitive transition issues early and with as much certainty to market participants as possible.

Accordingly, in this proceeding and in the accompanying proceeding on OASIS, the Commission, pursuant to its authorities under sections 205 and 206 of the FPA:

- Requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce
- To file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service;

[2] On March 29, 1995, the Commission issued two notices of proposed rulemaking concerning open access transmission and stranded cost recovery. Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 FR 17662 (April 7, 1995), *FERC Statutes and Regulations* ¶ 32,514 (1995). On December 13, 1995, the Commission issued a notice of proposed rulemaking on information systems. Real-Time Information Networks and Standards of Conduct, Notice of Proposed Rulemaking, 60 FR 66182 (December 21, 1995), *FERC Statutes and Regulations* ¶ 32,516 (1995).

[3] The Commission's notice of proposed rulemaking in the above dockets proposed to apply the proposed requirements to public utilities that own and/or control facilities used for the transmission of electric energy in interstate commerce. "Own and/or control" is intended to include public utilities that "operate" facilities used for the transmission of electric energy in interstate commerce. However, we have modified the Final Rule regulatory text to remove any ambiguity.

● To take transmission service (including ancillary services) for their own new wholesale sales and purchases of electric energy under the open access tariffs;

● To develop and maintain a same-time information system that will give existing and potential transmission users the same access to transmission information that the public utility enjoys, and further requires public utilities to separate transmission from generation marketing functions and communications;

● Clarifies Federal/state jurisdiction over transmission in interstate commerce and local distribution and provides for deference to certain state recommendations; and

● Permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and FPA section 211 transmission services.

Open Access

The Final Rule requires public utilities to file a single open access tariff that offers both network, load-based service and point-to-point, contract-based service. The Rule contains a pro forma tariff that reflects modifications to the NOPR's proposed terms and conditions and also permits variations for regional practices. All public utilities subject to the Rule, including those that already have tariffs on file, will be required to make section 206 compliance filings to meet the new pro forma tariff non-price minimum terms and conditions of non-discriminatory transmission. Utilities may propose their own rates in a section 205 compliance filing.

The Rule provides that public utilities may seek a waiver of some or all of the requirements of the Final Rule. In addition, non-public utilities may seek a waiver of the tariff reciprocity provisions.

The Final Rule does not generically abrogate existing requirements contracts, but will permit customers and public utilities to seek modification, or termination, of certain existing requirements contracts on a case-by-case basis. As to coordination arrangements and contracts, the Rule finds that these arrangements and contracts may need to be modified to remove unduly discriminatory transmission access and/or pricing provisions. Such arrangements and agreements include power pool agreements, public utility holding company agreements, and certain bilateral coordination agreements. The Rule provides guidance and timelines for modifying unduly discriminatory coordination arrangements and contracts, and specifies when the members of such arrangements must begin to conduct trade with each other using the same open access tariff offered to others. The Rule also provides guidance regarding the formation of independent system operators (ISOs).

The Rule does not require any form of corporate restructuring, but will accommodate voluntary restructuring that is consistent with the Rule's open access and comparability policies.

As discussed in the NOPR, not all owners or controllers of interstate transmission facilities are subject to the Commission's jurisdiction under sections 205 and 206 of the FPA and therefore are not subject to this Rule's open access requirements. Therefore, the Final Rule retains the proposed reciprocity provision in the pro forma tariff. Without such a provision, non-open access utilities could take advantage of the competitive opportunities of open access, while at the same time offering inferior access, or no access at all, over their own facilities. Thus, open access utilities would be unfairly burdened. We note that some non-jurisdictional utilities have expressed an interest in a mechanism for obtaining a Commission determination that their transmission tariffs satisfy the reciprocity provisions in the pro forma tariffs, and we provide such a mechanism in the Rule.

The Final Rule does not generically provide for market-based generation rates. Although the Rule codifies the Commission's prior decision that there is no generation dominance in new generating capacity, intervenors in cases may raise generation dominance issues related to new capacity. In addition, to obtain market-based rates for existing generation, we will continue to require public utilities to show, on a case-by-case basis, that there is no generation dominance in existing capacity. Further, in all market-based rate cases, we will continue to look at whether an applicant and its affiliates could erect other barriers to entry and

whether there may be problems due to affiliate abuse or reciprocal dealing.

Finally, contemporaneously with this Rule the Commission issues an NOPR on capacity reservation tariffs as an alternative, and perhaps superior, means of remedying undue discrimination.

Transmission/Local Distribution

The Rule clarifies the Commission's interpretation of the Federal/ state jurisdictional boundaries over transmission and local distribution. While we reaffirm our conclusion that this Commission has exclusive jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities, we nevertheless recognize the very legitimate concerns of state regulatory authorities as they contemplate direct retail access or other state restructuring programs. Accordingly, we specify circumstances under which we will give deference to state recommendations. Although jurisdictional boundaries may shift as a result of restructuring programs in wholesale and retail markets, we do not believe this will change fundamental state regulatory authorities, including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories. We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies.

Stranded Costs

With regard to stranded costs, the Final Rule adopts the Commission's supplemental proposal. It will permit utilities to seek extra-contractual recovery of stranded costs associated with a limited set of existing (executed on or before July 11, 1994) wholesale requirements contracts and provides that the Commission will be the primary forum for utilities to seek recovery of stranded costs associated with retail-turned-wholesale transmission customers. It also will allow utilities to seek recovery of stranded costs caused by retail wheeling only in circumstances in which the state regulatory authority does not have authority to address retail stranded costs at the time the retail wheeling is required. The Rule retains the revenues lost approach for calculating stranded costs and provides a formula for calculating such costs.

Environmental Issues

The Commission has prepared a Final Environmental Impact Statement (FEIS) evaluating the possible environmental consequences of changes in the bulk power marketplace expected to occur as a result of the open access requirements of this Final Rule. The FEIS focuses, as do most commenters, on possible increases in emissions of nitrogen oxides (NO_X) from certain fossil-fuel fired generators, which could affect air quality in the producing region and in areas to which these emissions may be carried.

In response to comments on the Draft EIS, the Commission performed numerous additional studies. The FEIS finds that the relative future competitiveness of coal and natural gas generation is the key variable affecting the impact of the Final Rule. If competitive conditions favor natural gas, the Rule is likely to lead to environmental benefits. Both EPA and the Commission staff believe this projected scenario is the more likely one. If competitive conditions favor coal, the Rule may lead to small negative environmental impacts. However, even using the most extreme, unlikely assumptions about the future of the industry, the negative consequences are not likely to occur until after the turn of the century. Because the impacts will remain modest at least until 2010, there is no need for an interim mitigation program. In addition, even if the data showed more significant negative consequences requiring mitigation, the Commission does not have the statutory authority under the Federal Power Act or the expertise to address this possible far-term problem. The Commission believes, however, that there is time for federal and state air quality authorities to address any potential adverse impact as part of a comprehensive NO_X regulatory program under the Clean Air Act.[4]

Despite our conclusions regarding the lack of environmental impacts expected to result from the Rule, the Commission has examined a wide variety of proposals for mitigating possible adverse effects. We share the view of most commenters

[4] 42 U.S.C. § 7401, et seq.

that the preferred approach for mitigating increased NO/X/ emissions generally is a NO/X/ cap and trading regulatory program comparable to that developed by Congress to address sulfur dioxide emissions in the Clean Air Act Amendments of 1990,[5] The Commission has examined various means of establishing such a program, including use of existing federal authorities under the Clean Air Act, cooperative efforts by state and federal air quality regulators, and development of a new emissions regulatory program administered by the Commission under the Federal Power Act. The Commission has concluded that a NO/X/ regulatory program could best be developed and administered under the Clean Air Act, in cooperation with interested states, and offers to lend Commission support to that effort should it become necessary.

Conclusion

The Commission believes that the Final Rule will remedy undue discrimination in transmission services in interstate commerce and provide an orderly and fair transition to competitive bulk power markets.

II. Public Reporting Burden

The Open Access Final Rule and the Stranded Cost Final Rule specify filing requirements to be followed by public utilities that own, control or operate transmission facilities in interstate commerce in making non-discriminatory open access tariff filings and filings to recover legitimate, prudent and verifiable stranded costs. The information collection requirements of the final rules are attributable to FERC-516, "Electric Rate Filings." The current total annual reporting burden for FERC-516 is 828,300 hours.

A. *Docket No. RM95-8-000 (Open Access Final Rule)*

The Open Access Final Rule requires public utilities filing non-discriminatory open access tariffs to provide certain information to the Commission. The Commission estimated that the public reporting burden for the information collection would average 300 hours per response. This estimate included time for reviewing the requirements of the Commission's regulations, searching existing data sources, gathering and maintaining the necessary data, completing and reviewing the collection of information, and filing the revised information. No comments on the burden estimate were received. Because the Final Rule adopts essentially the same information requirements that are contained in the proposed rule, we believe that the average filing burden is same for the Final Rule.

In the proposed rule, the Commission noted that there are approximately 328 public utilities, including marketers and wholesale generation entities. We initially estimated that 137 public utilities own, control or operate facilities used for the transmission of electric energy in interstate commerce, and would be subject to the filing requirements of the proposed rule. Upon further review, the Commission believes that approximately 166 public utilities will respond to the information collection. Accordingly, the public reporting burden is estimated to be 49,800 hours.

B. *Docket No. RM94-7-001 (Stranded Cost Final Rule)*

In the supplemental notice of proposed rulemaking, the Commission estimated that the information requirements of the proposed rule would not differ substantially from those contained in the initial proposed rule. In that notice, the Commission estimated that the public reporting burden for the information requirements contained in the proposed rule would be 50 hours per response with 10 responses annually. No comments on this filing burden were received. The information requirements adopted in the Stranded Cost Final Rule are not substantially different from those in the proposed rule. Therefore, the Commission concludes that there will be no additional public filing burden associated with the Stranded Cost Final Rule.

III. Background

In the NOPR, we set out a detailed statement of the events leading up to this rulemaking. We repeat that background here, updated to reflect what has happened since March 1995, and discuss why it is necessary to undertake regulatory reform in the electric industry at this time. We do so to provide the necessary

[5] 42 U.S.C.A. § 7651b-e.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes

to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Nov. 9, 1978, Pub. L. 95-617, title II, §§ 207(a), 208, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95-617, § 207(a), substituted "sixty" for "thirty" in two places.

Subsec. (f). Pub. L. 95-617, § 208, added subsec. (f).

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 808, 824e, 824m of this title; title 15 section 79z-5a; title 42 section 13234.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for change; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to re-

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 808, 824e, 824m of this title; title 15 section 79z-5a; title 42 section 13234.

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Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies, and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to re-

cover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Oct. 6, 1988, Pub. L. 100-473, § 2, 102 Stat. 2299.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 838, as amended, which is classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade. The terms "electric utility company" and "registered holding company" are defined in section 79b(a)(3), (12) of Title 15. For complete classification of this Act to the Code, see section 79 of Title 15 and Tables.

AMENDMENTS

1988—Subsec. (a). Pub. L. 100-473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100-473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100-473 provided that: "The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice."

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, *eff.* May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100-473 provided that: "Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.]."

STUDY

Section 5 of Pub. L. 100-473 directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and its functions with regard to establishment, review, and enforcement of rates and charges for transmission or sale of electric energy, including determinations on construction work in progress under this subchapter transferred to Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, *eff.* May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property

Section 33, act June 30, 1906, ch. 3920, 34 Stat. 798, provided that, under the immunity provisions of former section 32 of this title, immunity was to extend only to a natural person who, in obedience to a subpoena, testified or produced evidence.

EFFECTIVE DATE OF REPEAL

Repeal of sections by Pub. L. 91-452 effective on the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

SAVINGS PROVISION

Repeal of sections by Pub. L. 91-452 not to affect any immunity to which any individual was entitled under sections by reason of any testimony given before the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 34. Definitions applicable to sections 34 to 36

For purposes of sections 34 to 36 of this title—

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act [15 U.S.C. 12(a)], but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

(Pub. L. 98-544, § 2, Oct. 24, 1984, 98 Stat. 2750.)

EFFECTIVE DATE

Section 6 of Pub. L. 98-544 provided that: "This Act [enacting sections 34 to 36 of this title, and provisions set out as a note under section 1 of this title] shall take effect thirty days before the date of the enactment of this Act [Oct. 24, 1984]."

§ 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Preconditions for attachment of prohibition; prima facie evidence for nonapplication of prohibition

Subsection (a) of this section shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) of this section shall not apply.

(Pub. L. 98-544, § 3, Oct. 24, 1984, 98 Stat. 2750.)

REFERENCES IN TEXT

For the effective date of this Act, referred to in subsec. (b), see Effective Date note below.

The Clayton Act, referred to in subsecs. (a) and (b), is act Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended, which is classified generally to sections 12, 13, 14 to 19, 20, 21, and 22 to 27 of this title and to sections 52 and 53 of Title 29, Labor. For further details and complete classification of this Act to the Code, see References in Text note set out under section 12 of this title and Tables.

EFFECTIVE DATE

Section effective thirty days before Oct. 24, 1984, see section 6 of Pub. L. 98-544, set out as a note under section 34 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 34 of this title.

§ 36. Recovery of damages, etc., for antitrust violations on claim against person based on official action directed by local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Nonapplication of prohibition for cases commenced before effective date of provisions

Subsection (a) of this section shall not apply with respect to cases commenced before the effective date of this Act.

(Pub. L. 98-544, § 4, Oct. 24, 1984, 98 Stat. 2750.)

REFERENCES IN TEXT

For effective date of this Act, referred to in subsec. (b), see Effective Date note below.

EFFECTIVE DATE

Section effective thirty days before Oct. 24, 1984, see section 6 of Pub. L. 98-544, set out as a note under section 34 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 34 of this title.

CHAPTER 2—FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION

SUBCHAPTER I—FEDERAL TRADE COMMISSION

Title 31 shall be in lieu of any audit of the financial transactions of any Government corporation required to be made by the General Accounting Office for the purpose of a report to the Congress or to the President under any existing law.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 831m, 831n-4 of this title; title 26 section 6402; title 31 sections 3720, 3720A; title 41 section 612.

§ 831h-1. Operation of dams primarily for promotion of navigation and controlling floods; generation and sale of electricity

The Board is directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this chapter provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority.

(May 18, 1933, ch. 32, § 9a, as added Aug. 31, 1935, ch. 836, § 5, 49 Stat. 1076.)

§ 831h-2. Repealed. Pub. L. 86-137, § 1, Aug. 6, 1959, 73 Stat. 280

Section, act July 30, 1947, ch. 358, title II, § 201, 61 Stat. 574, placed a limitation on use of power revenues of the Tennessee Valley Authority. See section 831n-4 of this title.

§ 831i. Sale of surplus power; preferences; experimental work; acquisition of existing electric facilities

The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided*, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further*, That the Board is authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further*, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further*, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further*, That the terms "States", "counties", and "municipalities" as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction.

(May 18, 1933, ch. 32, § 10, 48 Stat. 64; Aug. 31, 1935, ch. 836, § 6, 49 Stat. 1076.)

AMENDMENTS

1935—Act Aug. 31, 1935, inserted last three provisos.

§ 831j. Equitable distribution of surplus power among States and municipalities; improvement in production of fertilizer

It is declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and

cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this chapter.

(May 18, 1933, ch. 32, § 11, 48 Stat. 64.)

§ 831k. Transmission lines; construction or lease; sale of power over other than Government lines; rates when sold for resale at profit

In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds, secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided*, That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further*, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further*, That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further*, That the board is authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief.

(May 18, 1933, ch. 32, § 12, 48 Stat. 65.)

§ 831k-1. Extension of credit to States, municipalities and nonprofit organizations to assist in operation of existing facilities

In order (1) to facilitate the disposition of the surplus power of the Corporation according to the policies set forth in this chapter; (2) to give effect to the priority herein accorded to States, counties, municipalities, and nonprofit organizations in the purchase of such power by enabling them to acquire facilities for the distribution of such power; and (3) at the same time to preserve existing distribution facilities as going concerns and avoid duplication of such facilities, the Board is authorized to advise and cooperate with and assist, by extending credit for a period of not exceeding five years to, States, counties, municipalities and nonprofit organizations situated within transmission distance from any dam where such power is generated by the Corporation in acquiring, improving, and operating (a) existing distribution facilities and incidental works, including generating plants; and (b) interconnecting transmission lines; or in acquiring any interest in such facilities, incidental works, and lines.

(May 18, 1933, ch. 32, § 12a, as added Aug. 31, 1935, ch. 836, § 7, 49 Stat. 1076.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 831n-1, 831n-3 of this title.

§ 831l. Financial assistance to States and local governments in lieu of taxation; apportionment; limitation on contracts for sale of power to municipalities; report to Congress

In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power

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SECTION REFERRED TO IN OTHER SECTIONS

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(May 18, 1933, ch. 32, § 10, 48 Stat. 64; Aug. 31, 1935, ch. 836, § 6, 49 Stat. 1076.)

AMENDMENTS

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§ 831j. Equitable distribution of surplus power among States and municipalities; improvement in production of fertilizer

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Policy Statement, and the guidance herein concerning ancillary services.[552]

A final jurisdictional issue raised in the Open Access NOPR concerns buy-sell transactions. We remain concerned, just as we were with buy-sell arrangements in the gas industry, that buy-sell arrangements can be used by parties to obfuscate the true transactions taking place and thereby allow parties to circumvent Commission regulation of transmission in interstate commerce. Thus, we reaffirm our conclusion that we have jurisdiction over the interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third party. However, we recognize that there is a wide range of programs and transactions that might or might not fall within this category. We will address these on a case-by-case basis.

In summary, the Commission reaffirms and clarifies its prior jurisdictional conclusions and tests for determining the demarcation between federal and state jurisdiction over transmission in interstate commerce and local distribution. We have attempted to address these issues in a way that provides for flexibility and recognition of legitimate state concerns. With regard to retail services, we recognize the states' concerns that the unbundling of retail transactions would result in changes from what historically has been regulated by the states (principally, the rates of transmission assets previously included in retail rate base). However, the decision to provide unbundled retail wheeling is not the Commission's to make because we have no authority to order transmission directly to an ultimate consumer. In addition, even if a retail access program occurs, we do not believe the unbundling of retail transactions will radically change fundamental state authorities, including authority to regulate the vast majority of generation asset costs, the siting and maintenance of generation facilities and transmission lines, and decisions regarding retail service territories. Further, the Commission intends to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies. As the electric industry and state regulatory authorities continue to develop new competitive market structures and consider retail wheeling programs, we believe that the tests and mechanisms we have provided in this Rule will accommodate both Federal and state interests and will help provide jurisdictional certainty to market participants.

J. Stranded Costs

1. Justification for Allowing Recovery of Stranded Costs

In the Supplemental Stranded Cost NOPR, the Commission noted that the Open Access Rule would give a utility's historical wholesale customers greatly enhanced opportunities to reach new suppliers.[553] This would affect the way in which utilities have recovered costs under the traditional regulatory system that, on the one hand, imposed an obligation to serve,[554] and, on the other hand, permitted recovery of all prudently incurred costs. We noted that if customers leave their utilities' generation systems without paying a share of these costs, the costs will become stranded unless they can be recovered from other customers. The Commission stated in the NOPR that we must address the costs of the transition to a competitive industry by allowing utilities to recover their legitimate, prudent and verifiable stranded costs simultaneously with any final rule we adopt requiring open access transmission.[555]

Virtually all of the investor-owned utility commenters as well as commenters representing state commissions and other constituencies support the NOPR's premise that stranded costs can be created when a customer switches suppliers. They endorse the proposal to allow the recovery of legitimate and verifiable stranded

[552] In applying the principles of the Final Rule to retail transmission tariffs, the Commission clearly cannot order retail wheeling directly to an ultimate consumer. See FPA section 212(h).

[553] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,095.

[554] The Supplemental Stranded Cost NOPR described such an obligation as explicit at retail and arguably implicit at wholesale. *FERC Statutes and Regulations* ¶ 32,514 at p. 33,101.

[555] Id. at p. 33,095-96, 33,101.

costs.[556] Numerous commenters also support the Commission's proposal to link stranded cost recovery with open access tariffs. These commenters agree that the recovery of stranded costs is critical to the successful transition of the industry to an open transmission access, competitive industry.[557] Commenters such as EEI and NU submit that open access and stranded cost recovery should be implemented simultaneously; that unbundled transmission service should not be required until a stranded cost recovery mechanism is in place. Some commenters propose that if the full recovery of stranded costs is disallowed as a result of rehearing or judicial review, utilities that have filed open access transmission tariffs should be permitted to withdraw them, or the Commission should otherwise reconsider its rule on open access transmission in light of such a reversal.[558]

Commenters representing the financial community reiterate their strong support for the full recovery of stranded costs, noting that the prospect of not recovering stranded costs could erode a utility's ability to attract capital which, in turn, could impede the long-term goal of achieving competitive wholesale markets.[559] Several commenters also argue that stranded cost recovery is economically efficient and is necessary to ensure parity among competitors and to avoid uneconomic bypass.[560]

The commenters that oppose allowing utilities to recover legitimate and verifiable stranded costs repeat many of the arguments that were raised in response to the initial Stranded Cost NOPR. For example, a number of commenters argue that the risk that a utility could lose customers (and thereby incur stranded costs) is not a new phenomenon created by regulatory and statutory initiatives that utilities could not have anticipated.[561] Some commenters argue that there was never an implied obligation to serve at wholesale.[562] According to TDU Systems, monopoly power, not regulatory obligation, has kept wholesale customers captive over the years.

Other commenters argue that allowing the recovery of stranded costs would make it uneconomic for customers to seek alternative sources of power and that the prospect of liability for and protracted litigation over stranded cost claims would create paralyzing uncertainty for customers, uncertainty that may dissuade them from taking advantage of new opportunities in the wholesale power market.[563] Some commenters also argue that

[556] *See, e.g.*, EEI, Atlantic City, Arizona, Carolina P&L, Centerior, Central Hudson, Detroit Edison, Duke, Duquesne, Entergy, Florida Power Corp, El Paso, Houston, NIPSCO, NU, Oklahoma G&E, Otter Tail, PG&E, Puget, Southern, San Diego G&E, SCE&G, SoCal Edison, Montana, Montana-Dakota Utilities, NSP, Utilities For Improved Transition, NC Com, PA Com, Electric Consumers Alliance, American National Power, NE Public Power District, MEAG, OH Coops, Seattle, NY Energy Buyers, SBA, TVA, Utility Workers Union, Big Rivers EC, Central EC, Citizens Lehman, NGSA, AGA, Montaup, NIEP.

[557] *See, e.g.*, EEI, Coalition for Economic Competition, EGA, CINergy, Electric Consumers Alliance, Atlantic City, Com Ed, Consumers Power, Dayton P&L, Dominion, Duke, El Paso, NEPCO, NIMO, NIPSCO, Ohio Edison, Florida Power Corp, PECO, Pennsylvania P&L, PSNM, Public Service Co of CO, Southern, SCE&G, VEPCO, Texas Utilities, DOE, CA Energy Com, CO Com, PA Com, NE Public Power District, SMUD, Brazos, Sunflower, PJM, Utility Workers Union, Utility Investors Analysts, Nuclear Energy Institute, SoCal Gas, AGA, Utility Shareholders, LPPC. Although DOD agrees that addressing stranded costs is a critical part of the transition to a more competitive industry, it submits that there is nothing in the Open Access NOPR that should affect the treatment of stranded costs because the Open Access NOPR would not change the contracts that govern existing wholesale transactions. It argues that the Commission will have ample opportunity to decide these matters before the present wholesale long-term contracts expire.

[558] *E.g.*, Utilities For Improved Transition, PECO, Utility Workers Union, Dayton P&L.

[559] Utility Investors Analysts, Utility Shareholders.

[560] *See, e.g.*, EEI, SCE&G, Montana, Com Ed.

[561] *E.g.*, TAPS, IN Industrials, Air Liquide, Texas Industrials, Detroit Edison Customers, AMP-Ohio.

[562] *E.g.*, TDU Systems, Competitive Enterprise.

[563] *See, e.g.*, Missouri Joint Commission, Omaha PPD, American Forest & Paper, TAPS, AMP-Ohio, Kansas Commission, VA Com, Nucor, Torco, IPALCO, DE Muni, Municipal Energy Agency Nebraska, Air Liquide, Arkansas Cities, Detroit Edison Customers, Cleveland, Texas-New Mexico, Blue Ridge, Suffolk County, NM Industrials, PA Munis, Caparo, ABATE, NRRI, Building Owners, Alma, WEPCO, Total

stranded cost recovery would be a disincentive to efficient operation by affording the greatest protection to utilities that made the worst investment decisions.[564]

Commenters also argue that the scope of the proposed rule is overbroad; that stranded cost recovery should be allowed, if at all, on a case-by-case basis; that there should be no presumption that every utility will experience stranded costs; and that utilities should not be allowed to recover 100 percent of prudently incurred stranded costs.[565]

Several commenters suggest that there is no factual basis for the stranded cost rule, citing a lack of evidence of a wholesale stranded cost problem.[566] TDU Systems refers to a Resource Data International study that shows that, of $114 billion in potential investor-owned utility stranded investment, only $10.4 billion is associated with wholesale transactions.[567] Others submit that the Commission should obtain more current data concerning the magnitude of potential stranded cost recovery before issuing the final rule.[568] In reference to the statement in the Supplemental NOPR that the Commission will continue to gather information on the magnitude of potential stranded costs,[569] DE Muni states that the Commission must commit to making public all the data it obtains so that all can evaluate the impact of the recovery of stranded costs on an ongoing basis.

NRRI submits that the Commission has drawn the wrong conclusion from its natural gas industry experience. According to NRRI, pipelines were "caught in an unusual transition" by changes caused by Congress and the Commission. In the case of the electric industry, NRRI submits that although there are uneconomic wholesale power contracts, the Commission is not responsible for this situation.[570]

Several commenters suggest that the Commission condition a utility's ability to recover stranded costs upon the utility agreeing to take certain actions (such as reducing environmental effects[571] or ensuring the payment of costs that are stranded if the utility commences direct service to an end-use customer that was previously a wholesale customer of a transmission dependent utility[572]), or agreeing to refrain from certain actions (such as seeking unilaterally to terminate

(Footnote Continued)

Petroleum. SC Public Service Authority asserts that the Commission has not adequately addressed the anticompetitive potential of exit fees and the potential shifting of losses from high-cost to low-cost producers. It says that the Commission should renotice any further proposal that it develops to permit a reasoned analysis of anticompetitive concerns.

[564] *E.g.*, TAPS, AMP-Ohio, IPALCO, Suffolk County, Competitive Enterprise, NY Energy Buyers, Supervised Housing, Central Illinois Light, WP&L, SC Public Service Authority, KS Com.

[565] *E.g.*, Alma, IPALCO, Suffolk County, CO Consumers Counsel, Arkansas Cities, Central Illinois Light, NY AG, NASUCA, VA Com, NY Energy Buyers, UT Industrials, NM Industrials, NJ Ratepayer Advocate, WEPCO, IN Industrials, ABATE, AZ Com.

[566] *E.g.*, ELCON, TDU Systems, Texas-New Mexico, Central Illinois Light.

[567] However, Utilities for Improved Transition refers to a report by Moody's Investor Service estimating that the stranded costs of the Nation's 114 largest electric utilities under open access transmission will be $135 billion in the next ten years (13 to 14 times greater than the costs stranded by the introduction of open access transportation of natural gas). It notes that this estimate covers costs stranded by transmission in interstate commerce of both wholesale and retail power, and submits that both types of costs are relevant to this proceeding because of the Commission's jurisdiction over the transmission rates for wheeling to both wholesale and retail customers.

[568] *E.g.*, Central Illinois Light, Utility Workers Union, Alcoa.

[569] See *FERC Statutes and Regulations* ¶ 32,514 at p. 33,105.

[570] According to NRRI, the Commission did not "berate" electric utility management to sign uneconomic contracts in the manner that NRRI contends the Commission and Congress "berated" pipeline management. NRRI Initial Comments at p. 6. NRRI also objects that the proposed rule is a departure from what occurred in other deregulated industries (where no stranded cost recovery was allowed) and that the Commission should provide a fuller explanation as to why it believes allowing utilities full recovery of legitimate and verifiable stranded costs is the correct course of action.

[571] *E.g.*, Legal Environmental Assistance, Conservation Law Foundation.

[572] *E.g.*, TDU Systems.

or modify IPP contracts).[573] CCEM proposes that open access, conversion rights, and divestiture should each be a precondition to a utility's eligibility for any stranded cost recovery. VT DPS submits that, if the Commission adopts a stranded cost rule, it should limit utility stranded cost claims to those cases where the utility can demonstrate that its costs have been rendered unrecoverable as a direct result of the final rule.[574]

A number of commenters object that the proposed rule contains no provisions for non-transmission-owning utilities to collect stranded costs.[575] Illinois Municipal Electric Agency asks the Commission to consider providing a forum for municipals to recover stranded costs from their customers under the same guidelines as investor-owned utilities. Recognizing that the FPA gives the Commission no general jurisdiction over municipalities for purposes of rate regulation,[576] Illinois Municipal Electric Agency argues that the FPA nevertheless does not prevent the Commission from providing a forum for municipalities that may experience stranded costs as a result of new federal regulations. NE Public Power District, RUS, and rural electric cooperative commenters object that the NOPR gives public utilities a greater chance than other transmitting utilities to recover stranded costs from departing customers by offering public utilities two avenues of recovery (an exit fee under a power sales contract or a transmission surcharge) but offering other transmitting utilities only one avenue (a transmission surcharge).[577]

PA Munis objects that the Commission's proposal to impose stranded costs only on wholesale requirements customers (and not on other wholesale customers) is unduly discriminatory and counter to the goals of the Open Access NOPR. It submits that the Commission's proposal, by subjecting a wholesale requirements customer to increased transmission rates for stranded costs not levied on other wholesale customers, is indistinguishable in substance from the pre-Order 436 plan held to be discriminatory in Maryland People's Counsel v. FERC.[578]

ELCON and others[579] urge the Commission to clarify that stranded costs do not arise when a customer leaves a system because its plant becomes uneconomic or the customer wishes to co-generate or self-generate. They note that "[t]hese alternatives have always existed and do not arise from new opportunities for wholesale and retail wheeling."[580]

Commission Conclusion

We reaffirm our preliminary determination that the recovery of legitimate, prudent and verifiable stranded costs should be allowed. Having considered the arguments raised by the commenters that oppose stranded cost recovery, we continue to believe that utilities that entered into contracts to make wholesale requirements sales under an entirely different regulatory regime should have an opportunity to recover stranded costs that occur as a result of customers leaving the utilities' generation systems through Commission-jurisdictional open access tariffs or FPA section 211 orders,[581] in

[573] *E.g.*, EGA, LG&E. EGA and LG&E further argue that if a utility is able to abrogate a QF contract, a QF should be entitled to recover its costs based upon the same equities of reliance upon governmental approvals, changed regulatory regimes, and reasonable expectation.

[574] VT DPS argues that under Order No. 636, the Commission allowed recovery of costs that would be rendered "unrecoverable" because the costs would not be incurred to provide transportation service and because there would be no wholesale load from which to recover the costs. It suggests that when a utility loses wholesale load or a municipality establishes a new distribution system, the utility's costs are not necessarily rendered unrecoverable.

[575] *E.g.*, PA Munis, Missouri Joint Commission, TAPS, Municipal Energy Agency Nebraska.

[576] But see FPA section 212(a), 16 U.S.C. 824k(a).

[577] RUS objects that, at the same time, an RUS-financed cooperative that is a transmitting utility would be required to provide reciprocal open access to its public utility supplier, which is also its customer and its competitor.

[578] 761 F.2d 768 (D.C. Cir. 1985).

[579] *E.g.*, VA Com, DE Muni, LG&E, Mountain States Petroleum Assoc.

[580] ELCON July 25, 1995 Comments at p. 6.

[581] Hereafter referred to collectively as the "new open access" or "open access transmission."

order to reach other power suppliers. As we indicated in the Supplemental Stranded Cost NOPR, we do not believe that utilities that made large capital expenditures or long-term contractual commitments to buy power years ago should now be held responsible for failing to foresee the actions this Commission would take to alter the use of their transmission systems in response to the fundamental changes that are taking place in the industry.[582] We will not ignore the effects of recent significant statutory and regulatory changes on the past investment decisions of utilities.[583] While, as some commenters point out, there has always been some risk that a utility would lose a particular customer, in the past that risk was smaller. It was not unreasonable for the utility to plan to continue serving the needs of its wholesale requirements customers and retail customers, and for those customers to expect the utility to plan to meet future customer needs. With the new open access, the risk of losing a customer is radically increased. If a former wholesale requirements customer or a former retail customer uses the new open access to reach a new supplier, we believe that the utility is entitled to recover legitimate, prudent and verifiable costs that it incurred under the prior regulatory regime to serve that customer.[584]

We learned from our experience with natural gas that, as both a legal and a policy matter, we cannot ignore these costs. During the 1980s and early 1990s, the Commission undertook a series of actions that contributed to the impetus for restructuring of the gas pipeline industry. The introduction of competitive forces in the natural gas supply market as a result of the Natural Gas Policy Act of 1978[585] and the subsequent restructuring of the natural gas industry left many pipelines holding uneconomic take-or-pay contracts with gas producers. When the Commission initially declined to take direct action to alleviate that burden, the U.S. Court of Appeals for the District of Columbia Circuit faulted the Commission for failing to do so.[586] The court noted that pipelines were "caught in an unusual transition" as a result of regulatory changes beyond their control.[587]

As we stated in the Supplemental NOPR, the court's reasoning in the gas context applies to the current move to a competitive bulk power industry. Indeed, because the Commission failed to deal with the take-or-pay situation in the gas context, the court invalidated the Commission's first open access rule for gas pipelines. Once again, we are faced with an industry transition in which there is the possibility that certain utilities will be left with large unrecoverable costs or that those costs will be unfairly shifted to other (remaining) customers. That is why we must directly and timely address the costs of the transition by allowing utilities to seek recovery of legitimate, prudent and verifiable stranded costs. At the same time, however, this Rule will not insulate a utility from the normal risks of competition, such as self-generation, cogeneration, or industrial plant closure, that do not arise from the new availability of nondiscriminatory open access transmission. Any such costs would not constitute stranded costs for purposes of this Rule.

We are issuing the Stranded Cost Final Rule simultaneously with the Open Access Final Rule because we believe that the recovery of legitimate, prudent and verifiable stranded costs is critical to the successful transition of the electric industry to a competitive, open access environment. We believe that our decision today will be upheld by the courts. While the D.C. Circuit is still considering the vari-

[582] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,101-02.

[583] Contrary to NRRI's claim, and as explained in the NOPR (*See, e.g., FERC Statutes and Regulations* ¶ 32,514 at p. 33,063-68), the electric industry's transition to a more competitive market is driven in large part by statutory and regulatory changes beyond the utilities' control.

[584] As a result, the opportunity for wholesale stranded cost recovery under this Rule is limited to utilities that provided sales of generation and transmission under wholesale requirements contracts, and to utilities that provided service to retail customers that convert to wholesale customer status, and that face the potential inability to recover costs when their customers are able to reach new suppliers through open access transmission.

[585] 15 U.S.C. 3301 et seq.

[586] AGD, 824 F.2d at p. 1021.

[587] Id. at p. 1027.

ous appeals of Order No. 636,[588] it has already upheld, in at least two instances, our ultimate decision to allow the recovery of costs stranded in the transition to a competitive natural gas industry.[589] As a result, we reject the suggestions of some commenters that a utility's obligation to comply with the provisions of the Open Access Final Rule should be conditioned upon final court approval of the Stranded Cost Final Rule. We also decline otherwise to condition a utility's ability to recover its stranded costs. As described in greater detail in Section IV.J.8, if a utility can make the necessary evidentiary showings, it will be eligible for stranded cost recovery.

With regard to the magnitude of potential wholesale stranded costs, as the Supplemental Stranded Cost NOPR recognizes, the level may be small relative to that of retail stranded costs. Nevertheless, wholesale costs may be stranded as a result of open access transmission. Because the significance of such costs to the utilities that would face them may be great (and the prospect of not recovering such costs could erode utilities' ability to attract capital and be very detrimental to a diverse array of utility shareholders), we believe that we have a responsibility to allow for the recovery of such costs.

We disagree with the commenters who contend that this Rule would discriminate against certain segments of the industry, such as non-transmission-owning utilities (who would not be allowed to collect stranded costs) or wholesale requirements customers (who would be subject to stranded cost charges while other wholesale customers would not). These commenters misconstrue the purpose of this Rule and the nature of the stranded costs for which this Rule would allow recovery. This rule is designed to address a new and specific problem: The fact that a utility that historically has supplied bundled generation and transmission services to a wholesale requirements customer and incurred costs to meet reasonably expected customer demand may experience stranded costs when its customer is able to reach a new generation supplier due to the availability of open access transmission. This rule proposes a solution to that problem by allowing the recovery of legitimate, prudent and verifiable costs incurred by a utility to provide service to a wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of the utility. The opportunity for extra-contractual wholesale stranded cost recovery is allowed for only a discrete set of requirements contracts for which the utility can demonstrate that it had a reasonable expectation of continuing service, as well as for retail-turned-wholesale situations in which the utility satisfies the necessary evidentiary criteria. Thus, the fundamental premise of this rule—namely, that a utility should have an opportunity to recover reasonably-incurred costs that arise because open access use of the utility's transmission system enables a generation customer to shop for power—would not apply to a non-transmission-owning utility that, by definition, has no transmission by which its generation customer can escape to another supplier.

The same historical relationship discussed above, including the expectation of continued service, justifies imposing the stranded costs covered by this rule on wholesale requirements customers only (not on non-requirements customers that contract separately for transmission services to deliver their purchased power). Requirements customers historically were

[588] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 FR 13267 (April 16, 1992), *FERC Statutes and Regulations* ¶ 30,939 (1992), order on reh'g, Order No. 636-A, 57 FR 36128 (August 12, 1992), *FERC Statutes and Regulations* ¶ 30,950 (1992); order on reh'g, Order No. 636-B, 57 FR 57911 (December 8, 1992), 61 FERC ¶ 61,272 (1993), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *appeal pending United Distribution Companies, et al. v. FERC*, No. 92-1485, et al., (D.C. Cir. Oral Argument Held Feb. 21, 1996).

[589] *See, e.g.*, Public Utilities Commission of the State of California v. FERC, 988 F.2d 154, 166 (D.C. Cir. 1993) ("FERC, with the backing of this court, has been at pains to permit pipelines to recover these (take-or-pay) costs, which have accumulated less through mismanagement or miscalculation by the pipelines than through an otherwise beneficial transition to competitive gas markets."); *Western Resources, Inc. v. FERC*, 72 F.3d 147 (D.C. Cir. 1995).

long-term customers who typically did not expect to take service from other suppliers. Utilities thus assumed they would continue serving these customers and may have made significant investments based on that long-term expectation. In contrast, utilities did not (and do not today) generally make investments for short-term economy-type transactions. Rather, such transactions were entered into only when the utility temporarily had available capacity or energy that could be provided to the buyer at a price lower than the buyer's decremental cost. The utility was not obligated in any way—either explicitly or implicitly—to provide for the needs of non-requirements customers. Because coordination transactions were not the cause of stranded investment decisions, it would be inappropriate to allocate such costs to non-requirements customers.

Further, although some commenters object that the Rule would give public utilities a greater opportunity than other transmitting utilities to recover stranded costs, our jurisdiction over transmitting utilities that are not also public utilities is limited. If the selling utility under an existing contract is a transmitting utility that is not also a public utility, its wholesale requirements contracts are not subject to this Commission's jurisdiction. Thus, we can allow such a transmitting utility to recover stranded costs only through Commission-jurisdictional transmission rates under sections 211 and 212 of the FPA. Nevertheless, in the context of a specific section 211 case, we would expect to apply similar principles to the extent possible to assure full stranded cost recovery. We also encourage such transmitting utilities to negotiate mutually agreeable stranded cost provisions with their customers.

[590] In the Supplemental Stranded Cost NOPR, the Commission made a preliminary finding that the Cajun court decision does not bar the recovery of stranded costs as proposed in the NOPR and set forth our reasoning in support of that finding.[591]

Various commenters contend that the proposal to permit recovery of stranded costs at all, or particularly through transmission rates of departing customers, fails to address the Cajun court's concerns.[592] These commenters repeat many of the same arguments previously raised in this proceeding, which we have already addressed. Some commenters argue that including generation-based stranded costs in transmission rates is an anticompetitive tying arrangement and that Cajun compels the Commission to abandon this aspect of its stranded cost proposal or, at a minimum, to explain how the chosen method of recovery differs from that commanded in Cajun.[593]

Several commenters[594] question whether the NOPR's stranded cost provisions would undermine the "meaningful" access to alternative suppliers referenced by the Cajun court.[595] For example, Arkansas Cities asserts that the Commission has failed to address whether a transmitting utility retains market power over transmission even after imposition of an open access tariff. It contends that this question is vital to determining whether imposition of stranded costs would interfere with a wholesale transmission customer's meaningful access to other power suppliers.

Some commenters also submit that the proposed procedures for a customer to obtain an estimate of its stranded cost liability are inadequate because they do not ameliorate the uncertainty confronting the customer, which was a concern of the court in Cajun. They suggest that a customer would still face the prospect of litigation concerning whether a proposed stranded cost charge is appropriate.[596]

Other commenters argue that Cajun requires a trial-type evidentiary hearing before stranded costs may be recovered.

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[590] 28 F.3d 173 (D.C. Cir. 1994) (Cajun).

[591] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,105-06.

[592] *E.g.*, APPA, ABATE, ELCON, Central Illinois Light, IL Com, VT DPS.

[593] *See, e.g.*, ELCON, American Forest & Paper, MMWEC, Cajun, IL Com, PA Com, VT DPS, Education, DE Muni, IN Industrials, Texas-New Mexico, Las Cruces, Blue Ridge, Suffolk County, Total Petroleum, NM Industrials, PA Munis.

[594] *E.g.*, Arkansas Cities, PA Munis, NM Industrials.

[595] See Cajun, 28 F.3d at p. 179.

[596] *See, e.g.*, Suffolk County, Arkansas Cities, Education.

They question whether the Commission's generic proposals on open access and the Commission's statements about the need to recover stranded costs are adequate.[597] ELCON references the Cajun court's statement that "if the Commission is wrong at the outset concerning the possibility of legitimate stranded investment cost, it is not fair or reasonable to create such a mechanism for recovery."[598] ELCON submits that the factual record does not demonstrate any significant wholesale stranded cost problem and, as a result, a final rule allowing recovery of such costs would not be "fair or reasonable."

Many other commenters, in contrast, believe that the NOPR is distinguishable from the case that was before the court in Cajun and that the Commission has fully addressed the Cajun court's concerns. According to the Coalition for Economic Competition, this proceeding is very different from the Cajun proceeding because the proposed rule would not automatically permit utilities to charge market-based rates. The Coalition for Economic Competition states that in the absence of generic market-based rate authorization, there is no basis in Cajun for barring the recovery of stranded investment in transmission tariffs.[599]

A number of commenters agree with the Commission that the Cajun court was concerned with the need for a more complete explanation of the basis for stranded cost recovery and the mechanism selected for such recovery. These commenters believe that the NOPR provides both the evidentiary record for addressing these concerns on a generic basis and the opportunity for all participants to present evidence and arguments.[600]

Noting the Cajun court's concern as to whether the wholesale customer in that case had "meaningful" access to alternative suppliers, a number of commenters agree that the Commission, through the open access provisions of the NOPR, is in fact providing wholesale customers meaningful, reasonable access to alternative suppliers.[601]

As evidence that the Cajun court was concerned with inadequate explanation and procedures and did not find that stranded costs could never be justified, several commenters point out that the Cajun court did not mention the D.C. Circuit's landmark decision in AGD, which strongly supports stranded cost recovery.[602] For example, Coalition for Economic Competition suggests that construing Cajun to hold that stranded cost recovery is always anticompetitive would be at odds with AGD and other decisions that have upheld the Commission's policy of allowing recovery of the costs of the transition to competitive markets.[603]

Numerous commenters also support the Commission's conclusion that stranded cost recovery through transmission rates is not a tying arrangement.[604] Among other things, these commenters argue that a tying claim requires that the defendant force the sale of a separate product with the sale of a product over which

[597] *E.g.*, PA Com, NY Com, RUS.

[598] Cajun, 28 F.3d at p. 179 (emphasis in original).

[599] SC Public Service Authority notes this distinction as well (Initial Comments at p. 78): "In Cajun, the court was not criticizing the recovery of stranded assets as an abstract matter, but specifically as an integral part of a set of tariffs designed to justify market-based rates on the basis that the open access tariff adequately mitigated market power despite the provision permitting recovery of stranded assets." It suggests that if the Commission decides to allow utilities to recover stranded costs from departing customers, any utility recovering such costs should not be allowed to charge market-based rates.

[600] *See, e.g.*, EEI, NEPCO, Centerior, Electric Consumers Alliance, Southern.

[601] *E.g.*, Omaha PPD, Com Ed. Florida Power Corp. Com Ed also submits that the argument by the petitioners in Cajun that "there really is no such thing as stranded investment, only a failure to compete" ignored the circumstances under which the investments were made. It states that electric utilities did not incur the costs of generation facilities (and long-term fuel and power supply contracts) because they were less efficient competitors, but to satisfy their obligation in a fully-regulated market to provide service to all who request it.

[602] *See, e.g.*, Com Ed, Coalition for Economic Competition, NYSEG, Entergy.

[603] *See, e.g.*, KN Energy, Inc., 968 F.2d 1295 at p. 1301 (D.C. Cir. 1992), Elizabethtown Gas Co. v. *FERC*, 10 F.3d 866, 874 (D.C. Cir. 1993).

[604] *E.g.*, EEI, Com Ed, Consumers Power, So-Cal Edison, Salt River, Entergy.

it has market power, and that here there is no second product being tied to transmission. Several commenters also suggest that, in any event, stranded cost recovery as proposed in the NOPR would be considered a legitimate business justification under the antitrust laws.[605] Com Ed explains that the Commission, as part of its effort to enhance competition in generation by opening up the transmission network, is avoiding placing on utilities the entire burden of the stranded costs resulting from their past regulatory obligations; it is not permitting utilities to maintain a monopoly of power sales.

Commission Conclusion

We reaffirm that we do not interpret the Cajun court decision as barring the recovery of stranded costs. The court in that case did not bar stranded cost recovery, as some commenters suggest; it instead found that the Commission had not provided adequate proceedings and had not fully explained its decision. The Commission had failed to hold an evidentiary hearing concerning whether the inclusion of a stranded cost recovery provision in a particular utility's transmission tariff, along with other provisions in the tariff, resulted in the adequate mitigation of Entergy's market power so as to justify market-based rates. The court also found that the Commission had failed to explain adequately its approval of the stranded cost provision, among other provisions. In contrast, as discussed below, we have addressed in this consolidated proceeding (the Stranded Cost NOPR, the Supplemental Stranded Cost NOPR, the Open Access NOPR, and the Open Access/Stranded Cost Final Rule) all of the Cajun court's concerns.

Our interpretation of Cajun is bolstered by a recent opinion of the Court of Appeals for the D.C. Circuit (the same circuit that decided Cajun) that confirms the validity of Commission imposed stranded cost recovery mechanisms in the transition to competitive markets. In Western Resources, Inc. v. FERC,[606] the court affirmed the Commission's decision to allow the recovery of costs stranded in the transition of the natural gas industry to a competitive market.[607] We believe that, by this decision, the court has again affirmed the Commission's ability to allow stranded cost recovery, as long as we follow adequate procedures and explain our decision.[608]

We are providing in this proceeding the evidentiary record to support our decision to allow the recovery of legitimate, prudent and verifiable stranded costs on a generic basis. We also are ensuring the "meaningful" access to alternative suppliers that was identified as a concern of the Cajun court. The Open Access Final Rule is designed to attack one essential element of market power—namely, control over transmission access. The standard we are adopting for transmission service is far stricter than the standard we used at the time Cajun was decided; we now require non-discriminatory open access transmission, as well as a code of conduct and non-discriminatory sharing of transmission information (OASIS). The collective effect of these actions is that public utilities that own, control or operate interstate transmission facilities will not be able to favor their own generation and will have to compete on an equal basis with other suppliers.[609] All public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce will have tariffs on file that offer to any eligible customer any transmission services that the public

[605] See *State of Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1483 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992) (pipeline's refusal to transport gas that an LDC customer purchased from another supplier was "genuinely and reasonably motivated by the need to limit its potential take-or-pay liability, not by a desire to maintain its monopoly position by excluding competition in the sale of natural gas"); *City of Chanute v. Williams Natural Gas Company*, 743 F. Supp. 1437 (D. Kan.), aff'd. 955 F.2d 641 (7th Cir. 1990) (pipeline's refusal to transport third-party gas was motivated by legitimate business concerns, including desire to prevent take-or-pay liability, not by an anticompetitive motive).

[606] 72 F.3d 147 (D.C. Cir. 1995).

[607] Id. at p. 152.

[608] As we noted in the Supplemental NOPR, the same court had earlier instructed the Commission in the AGD case that the Commission must consider the transition costs borne by regulated utilities when the Commission changes the regulatory rules of the game. *FERC Statutes and Regulations* ¶ 32,514 at p. 33,106.

[609] Id. at p. 33,065-67.

utility could provide to itself, and under comparable terms and conditions.

We note that the Cajun court identified several provisions in Entergy's proposed tariff as potentially restraining competition: Entergy's retention of sole discretion to determine the amount of transmission capability available for its competitors' use;[610] the point-to-point service limitation;[611] the failure to impose reasonable time limits on Entergy's response to requests for transmission service;[612] and Entergy's reservation of the right to cancel service in certain instances,[613] even where a customer had paid for transmission system modifications.[614] These types of provisions, which have the potential to restrain competition, will not be allowed under the Open Access Rule. On the contrary, the Final Rule pro forma tariff contains terms and conditions to ensure the provision of non-discriminatory transmission service. In addition, the requirements that a public utility take service under its own tariff, adopt a non-discriminatory transmission information network, and separate power marketing and transmission functions further ensure non-discrimination and remove constraints to fair competition. Thus, the nondiscriminatory open access transmission that is the hallmark of this Rule is designed to ensure meaningful access to alternative suppliers and goes far beyond that which was offered in the transmission tariff that was under review in Cajun.

We also have addressed the Cajun court's concern over the method of recovery. In that case, Entergy proposed to include a charge in the departing customer's transmission rate to recover its stranded investment costs. The court said that this might constitute an anticompetitive tying arrangement.[615] As we explained in the Supplemental NOPR, the stranded cost recovery procedure we prescribe in this Rule is a transitional mechanism only that is intended to enable utilities to recover costs prudently incurred under a different regulatory regime. The purpose and effect of the stranded cost recovery mechanism that we approve in this Rule is to facilitate the transition to competitive wholesale power markets. Although we recognized in the Supplemental NOPR that stranded cost recovery may delay some of the benefits of competitive bulk power markets for some customers, such transition costs must nevertheless be addressed at an early stage if we are to fulfill our regulatory responsibilities in moving to competitive markets. The stranded cost recovery mechanism that we direct here is a necessary step to achieve pro-competitive results. In the long term, the Commission's rule will result in more competitive prices and lower rates for consumers.

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[610] In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff provides that available transmission capability (ATC) must be calculated and posted on the transmission provider's Open Access Same-time Information System (OASIS) pursuant to new Part 37—OPEN ACCESS SAME-TIME INFORMATION SYSTEM AND STANDARDS OF CONDUCT FOR PUBLIC UTILITIES of the Commission's regulations. Section 37.6 provides in pertinent part that along with posting its ATC on its OASIS node, a public utility must make all data used in the calculation publicly available, on request. Section 37.4 provides that employees of the public utility and any affiliate that are engaged in merchant functions are prohibited from having preferential access to any transmission-related information. Additionally, the regulations provide auditing and monitoring procedures to safeguard against discriminatory practices.

[611] In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff requires the provision of point-to-point and network service.

[612] In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff requires reasonable time limits for responses to transmission requests. Specifically, Section 17.5 provides that a transmission provider must respond to a request for firm service as soon as practicable, but not later than thirty days after the date of receipt of a completed application.

[613] In contrast to the tariff under review in Cajun, the Final Rule pro forma tariff does not allow firm transmission service to be cancelled after the service has been commenced. However, Section 7.3 of the Final Rule pro forma tariff does provide that in the event of a customer default, the transmission provider may, in accordance with Commission policy, file and initiate a proceeding with the Commission to terminate service.

[614] Cajun, 28 F.3d at p. 179-80.

[615] Notably, the court stated: "This is, in essence, a tying arrangement, (citation omitted), and it might be fine if the purpose of the arrangement were not to cabin Entergy's market power." Id. at p. 177-78 (emphasis added).

The Commission's approach also is consistent with the traditional regulatory concept of cost causation. We do not believe it is an illegal tying arrangement to hold a customer accountable for the consequences of leaving an incumbent supplier if, under our rules, the incumbent supplier must show a reasonable expectation of continuing service before it can recover stranded costs from the customer.

Further, in response to the Cajun court's concern that the Commission had failed in that case to explain adequately its approval of the stranded cost provision and other provisions, we have provided in this proceeding a detailed explanation of the fundamental industry and regulatory changes that have given rise to the potential for stranded costs; the transitional nature of stranded costs; the critical need to deal with these costs in order to reach more competitive wholesale markets; and the consumer benefits that will result from competitive generation markets. We also have provided a detailed explanation of the terms and conditions in the Final Rule pro forma tariff that will meet the non-discriminatory open access service requirement.

Several commenters (and the Cajun court) express concern for the need to provide as much certainty as possible for departing customers concerning their potential stranded cost obligation. Without some certainty, customers may be unable to shop for alternative suppliers. In response to these concerns, we have modified the stranded cost recovery mechanism to include a formula for calculating a departing customer's potential stranded cost obligation. As discussed in greater detail in Section IV.J.9, the revenues lost formula is designed to provide certainty for departing customers and to create incentives for the parties to address stranded cost claims between themselves without resort to litigation.

We conclude that we have fully explained our decision to allow the recovery of legitimate, prudent and verifiable costs that are stranded in the transition to competitive wholesale bulk power markets. We also have provided ample opportunity for all concerned to present arguments and evidence on the issue. Further, we have significantly strengthened our open access requirements to ensure mitigation of transmission market power. Thus, we have fully addressed the concerns of the Cajun court.

3. Responsibility for Wholesale Stranded Costs (Whether To Adopt Direct Assignment to Departing Customers)

In the Supplemental Stranded Cost NOPR, the Commission made a preliminary finding that direct assignment of stranded costs to the departing wholesale generation customer is the appropriate method for recovery of such costs.[616]

Numerous parties representing all constituencies support direct assignment of stranded costs to the departing generation customer.[617] These commenters argue, among other things, that direct assignment is consistent with the cost causation principle and preferable to increasing the delivered price of electricity to a whole region through the imposition of a wires charge, and that recovery of stranded costs from remaining customers would not be in the public interest. Several state commenters seek assurance from the Commission that native load customers will be held harmless from stranded costs resulting from other customers leaving the system.[618] KY Com submits that the possible results of a broader assessment of stranded costs, with the related uncertainty of its impact on the utilities' cost of capital, is more problematic in the long run than the possibility that the direct assignment of stranded costs would deter customers from shopping for power.

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[616] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,108.

[617] See, e.g., EEI, Atlantic Energy, Arizona, Carolina P&L, Centerior, Com Ed, Duke, Hawaii, Duquesne, Florida Power Corp, Omaha PPD, Alcoa, AEC & SMEPA, BG&E, Central Electric, Detroit Edison, El Paso, Montana-Dakota Utilities, Ohio Edison, PECO, PSNM, Southern, Sierra, SoCal Edison, Tucson Power, Utilities For Improved Transition, Cajun, NRECA, EGA, Electric Consumers Alliance, FL Com, PA Com, Knoxville, Salt River, KY Com, ND Com, California DWR, LA DWP, TVA, Utility Investors Analysts, Texas Utilities, LG&E, Utility Shareholders.

[618] *E.g.*, NC Com, UT Com, NJ Ratepayer Advocate.

Although TAPS opposes stranded cost recovery in general, it submits that, if the Commission decides to allow recovery, the Commission should directly assign stranded costs and not spread them across the board to all transmission users.

Several commenters also oppose any allocation of stranded cost liability to shareholders.[619]

Some commenters state that direct assignment of stranded costs sends the correct pricing signals during the transition to a competitive regime. For example, Electric Consumers Alliance states that a wholesale customer should be able to obtain power elsewhere, but that the motive to do so should not be to escape responsibility for sunk investments made on its behalf. El Paso submits that failure to make the departing generation customer liable for stranded cost recovery would create a "first-off" incentive; the customers that leave the system first would not suffer from higher future rates designed to recover prudently incurred costs from the reduced base of remaining customers.

Some commenters support direct assignment but oppose recovery of stranded costs through transmission rates. These commenters prefer an exit fee or lump-sum approach that would reflect cost causation in an unbundled fashion.[620] DOJ maintains that a transmission adder is analogous to an excise tax and that the excise tax approach would distort pricing signals and customers' decisions on the use of electric power. It submits that the lump-sum approach, on the other hand, would establish a fixed, sunk liability that would not depend upon how much transmission service the departing customer takes in the future.[621]

Other commenters oppose direct assignment as being inconsistent with wholesale competition.[622] They argue that placing all of the responsibility for stranded costs on departing generation customers would discourage customers from switching to other generation providers and would thereby inhibit competition.[623] Some commenters also assert that departing generation customers are not the sole "cause" of stranded costs.[624] VT DPS contends that direct assignment cannot be reconciled with the Commission's refusal to allow the imposition of exit fees by gas pipelines when their wholesale customers depart.[625]

Some commenters support spreading the burden of stranded costs broadly among departing customers, shareholders,

[619] *E.g.*, SCE&G, Corn Ed, Ky Corn, NC Corn. SCE&G states that the Commission misinterpreted its previous comments by suggesting in the Supplemental NOPR that SCE&G believed shareholders should bear part of the costs.

[620] *E.g.*, Texas Utilities, DOJ.

[621] In its reply comments, Utility Working Group disputes DOJ's arguments that a transmission adder is analogous to an excise tax and would distort competition. It argues that DOJ's claim of price distortion ignores the fact that the costs that would be associated with a transmission adder consist of a portion of the previous wholesale power price—the markup above the utility's marginal cost that had regulatory approval. Utility Working Group says that because the utility's price and its competitor's price will contain this same charge for the utility's sunk and regulatory costs (the difference between the utility's regulated rate and its incremental cost), they will compete on the basis of their respective incremental costs. It also suggests that transmission adders can be designed on a lump-sum basis so that they are not tied to the amount of electricity purchased.

[622] *E.g.*, ELCON, NYMEX, IL Industrials, Missouri-Kansas Industrials, Philip Morris, Fertilizer Institute, Coalition on Federal-State Issues.

[623] Some commenters also oppose the Commission's proposal to allow the recovery of generation-related costs through transmission rates as being in contravention of cost-causation principles (e.g., VT DPS) or in violation of section 212(a) of the FPA, which they contend limits cost recovery to transmission-related costs (e.g., IL Industrials, Las Cruces).

[624] *E.g.*, ELCON, IL Industrials, NY Energy Buyers, TX Industrials, Missouri-Kansas Industrials, Caparo, IBM, PA Munis, Education. For example, Caparo submits that business decisions by incumbent utilities are the cause of stranded costs.

[625] In support of this proposition, the VT DPS cites Transwestern Pipeline Co., 44 FERC ¶61,164 at p. 61,536 (1988); El Paso Natural Gas Co., 47 FERC ¶61,108 at p. 61,314 (1989); El Paso Natural Gas Co., 72 FERC ¶61,083 (1995). It also contends that the Commission recently treated a notice provision in an El Paso contract as a conclusive, rather than a rebuttable, presumption. VT DPS cites other differences between the Commission's treatment of the natural gas and the electric utility industries. It notes that the Commission has not proposed to allow existing wholesale electric customers to get out of their contracts early, as it did in the gas area.

and remaining wholesale customers on the basis that it would be equitable for all industry stakeholders to share both the benefits and the costs of the transition to competition.[626]

Others support spreading the costs to all customers through, for example, a meter charge to all utilities (to be passed on to customers), a one-time charge across the total market base, an access fee on the transmission system, or a component of transmission rates.[627] Nordhaus proposes a uniform national tax on all customers, at a rate that declines over time in a predetermined manner. He submits that this approach would remove "gaming" between utilities and potential exiters, would ensure that the stranded costs are not disproportionately loaded on price-sensitive demanders (that is, exiting customers), and would gradually disappear over time in a predictable fashion, thereby increasing the predictability of the new market.

PA Munis disputes the Commission's assertion in the Supplemental Stranded Cost NOPR that there is no compelling reason to assess costs broadly. It argues that a broad-based recovery mechanism that distributes uneconomic stranded costs to all power users would minimize the competition-inhibiting aspects of the Commission's proposed surcharge on departing generation customers. In a similar fashion, NSP states that across-the-board recovery from all users of the grid would recognize the societal benefits to be achieved from the transition to a competitive bulk power market and would reflect precedent set during the move to competition in the natural gas and telephone industries. It submits that the cost per service unit would be lower than exit fees assigned to particular customers and would eliminate the need for detailing stranded cost exposure for each customer contemplating leaving the system.

FTC submits that some investments that now appear as stranded costs may have been intended to benefit customers over a wider area than a single utility. It suggests that national regional assessment methods could recover stranded costs undertaken to benefit these wider groups of customers.

We also received comments suggesting that less than full recovery of stranded costs should be allowed. A number of commenters urge the Commission to require some shareholder liability for stranded cost recovery to give utilities an incentive to mitigate.[628] Several of these commenters assert that utility shareholders should be required to pay a portion of any stranded costs (such as 25-50 percent) because at least some of the responsibility for stranded costs lies with poor business decisions by utility management.[629] Occidental Chemical proposes that the Commission grant utilities a "presumption of prudence" in return for requiring them to absorb a minimum of 25 percent (up to 50 percent) of stranded costs, citing as support the Commission's precedent in the natural gas industry.

Commission Conclusion

We reaffirm our decision that direct assignment of stranded costs to the departing wholesale generation customer through either an exit fee[630] or a surcharge on transmission is the appropri-

[626] *E.g.*, ELCON, IN Industrials, Reynolds, Philip Morris, ABATE, Missouri-Kansas Industrials, Aluminum.

[627] *See, e.g.*, American National Power, NIEP, NSP, SBA, Coalition on Federal-State Issues, Pennsylvania P&L, Consolidated Natural Gas, Nordhaus, PA Munis. Consumers Power states that it does not oppose direct assignment, but asks that the final rule not preclude utilities from proposing alternative recovery mechanisms, including those that assess stranded costs on all transmission customers as part of the transmission rate. It suggests that utilities should not be precluded from showing that there may be countervailing reasons to assess stranded costs broadly among all transmission customers (e.g., where the costs assignable to a particular customer or group of customers may be so high as to create a dispute as to the propriety of direct assignment).

[628] *See, e.g.*, American Forest & Paper, Torco, Philip Morris, DE Muni, MT Com, IL Com, KS Com, Fertilizer Institute, Caparo, Las Cruces, IN Com, PA Munis, San Francisco, NRRI, Competitive Enterprise, ELCON, IN Industrials, UT Industrials, NY Energy Buyers, ABATE, CA Energy Co, Caparo, Education, Reynolds.

[629] *See, e.g.*, Fertilizer Institute, Caparo, DE Muni, PA Munis, MT Com, San Francisco, ELCON, IN Industrials, NY Energy Buyers.

[630] As used in this Rule, "exit fee" refers to the charge that will be payable by a departing generation customer upon the termination of its requirements contract with a utility (if the utility is able to demonstrate that it reasonably

ate method for recovery of such costs. We believe it is appropriate that the departing generation customer, and not the remaining generation or transmission customers (or shareholders), bear its fair share of the legitimate and prudent obligations that the utility undertook on that customer's behalf.

In reaching this decision, we have carefully weighed the arguments supporting direct assignment of stranded costs against those supporting a more broad-based approach, such as spreading stranded costs to all transmission users of a utility's system. Recognizing that each approach has advantages and disadvantages, we conclude that, on balance, direct assignment is the preferable approach for both legal and policy reasons.

One of the main reasons to adopt direct assignment of stranded costs is that direct assignment is consistent with the well-established principle of cost causation, namely, that the party who has caused a cost to be incurred should pay it. Direct assignment of stranded costs to departing generation customers is particularly appropriate given the nature of the stranded cost recovery mechanism contained in this Rule, which links the incurrence of stranded costs to the decision of a particular generation customer to use open access transmission to leave the utility's generation system and shop for power, and which bases the prospect of stranded cost recovery on the utility's ability to demonstrate that it incurred costs with the reasonable expectation that the customer would remain on its generation system.

A broad-based approach, in contrast, would violate the cost causation principle by shifting costs to customers (such as transmission users of the utility's system) that had no responsibility for stranding the costs in the first place. In addition, if the Commission were to adopt a broad-based approach, it would have to determine whether to base the transmission surcharge on all users of a utility's transmission system on a one-time, up-front estimate of stranded costs (that is, each utility claiming stranded costs would make a one-time, comprehensive determination of stranded costs for the utility as a whole) or on an as-realized basis (the surcharge would be based on actual customer departures and would be adjusted each time a customer departs). Each option would have disadvantages that are not present in the direct cost causation approach we are adopting.

For example, a major disadvantage of an up-front, broad-based transmission surcharge is that it in effect would charge customers for costs before the costs are incurred (i.e., before customers have even decided to leave the utility's generation system) and could charge for costs that may never be incurred (e.g., some customers may decide to stay on the utility's system as requirements customers). The other option, a broad-based transmission surcharge that would be adjusted as customers leave the utility's system, also has disadvantages. While this option might recover stranded costs that are closer to the actual amount incurred by the utility, it could produce variability in transmission rates every time stranded costs from a newly-departed customer are included in the transmission surcharge and, in turn, could possibly hamper efficient power supply choices and efficient generator location decisions. These disadvantages are not present in the direct assignment approach.

Direct assignment will result in a more accurate determination of a utility's stranded costs than would an up-front, broad-based transmission surcharge. This is because the stranded cost for any customer is finally determined only if that customer actually leaves a utility. Moreover, there is no stranded cost unless the then-current market price of power for the period that the utility reasonably expected to continue serving the customer is below the utility's cost. Thus, because the circumstances of each departing customer will be known, the amount of any stranded cost liability can be determined with reasonable accuracy. Further, if a customer does not leave the utility or leaves at some future time when the util-

(Footnote Continued)

expected to continue serving the customer beyond the term of the contract), whether payable in a lump-sum payment or an amortization of a lump-sum payment. (The same charge also can be paid as a surcharge on the customer's transmission rate.)

ity's costs are competitive, the issue need not be addressed.

On this basis, the direct assignment approach is more suited to the recovery of stranded costs as defined in this Rule (including the reasonable expectation standard and open access transmission causation requirement) than is a broad-based approach. We expect that a utility would have difficulty estimating in advance all of its stranded costs for purposes of an up-front, broad-based transmission surcharge. In the face of this uncertainty, the utility's best strategy likely would be to try to recover through the broad-based surcharge as much of its uneconomic assets as possible by claiming that all of its wholesale customers are likely to depart and to leave large stranded costs. In this regard, the broad-based approach would provide an incentive for a utility to try to recover the costs of all of its uneconomic assets whether or not they were prudently incurred. This is in contrast to what this Rule provides, which is for recovery of only those legitimate, prudent and verifiable costs that were incurred on behalf of a specific customer based on a reasonable expectation that the utility would continue to serve the customer and that are stranded when the customer departs the utility's generation system by using the utility's open access transmission.

The direct assignment approach also can be readily applied to both wholesale and retail-turned-wholesale departing customers. It also can be adapted for retail customers. Further, it works for costs stranded by a section 211 order requiring either a public utility, or a transmitting utility that is not also a public utility, to provide transmission service. However, this is not the case for a broad-based approach, particularly an up-front, broad-based approach. Assuming that a principal motivation for an up-front, broad-based approach would be to recover all of a utility's stranded costs as quickly as possible, retail-turned-wholesale stranded costs nevertheless are not susceptible of being collected on an up-front basis. It is not possible to make a realistic up-front estimate of costs stranded by municipalizations that may occur in the future. Thus, even if we were to adopt an up-front, broad-based approach for recovering costs that are stranded when wholesale requirements customers use their former supplier's transmission system to reach a new supplier, retail-turned-wholesale stranded costs would have to be identified as they occur and the stranded cost surcharge on transmission users adjusted accordingly. Similarly, the broad-based approach is not easily adaptable to transmitting utilities that are not also public utilities. It is doubtful that, in establishing the rate for a section 211 applicant, the Commission could also set transmission surcharges for customers that were not section 211 applicants; this is what a broad-based approach, in effect, would require us to do.

Direct assignment by means of an exit fee or a transmission surcharge that is not dependent on any subsequent power or transmission purchases by the customer is also an economically efficient way to collected stranded costs. The customer may make a lump-sum stranded cost payment, amortize the lump-sum payment, or spread the payment as a surcharge in addition to its transmission rate. The total amount of stranded costs that the directly-assigned customer ultimately pays would not depend on how much transmission service it takes and thus would not influence the customer's subsequent transmission purchase decisions.

With a broad-based surcharge (which could be demand- or usage-based), on the other hand, the surcharge for transmission users would depend on how much transmission service the users take. A broad-based approach also would be inefficient as it would raise the price of transmission service for all customers, thereby potentially cutting off some beneficial power trading that would otherwise occur for all unbundled transmission customers. The surcharge also could convert some profitable existing power purchase contracts into unprofitable contracts. In addition, it could reduce economy trading because the surcharge would be added to the price of [illegible] transmission. In this [illegible], a broad-based surcharge would constitute a cross-subsidy that could distort the market.

We recognize that direct assignment is not without its potential drawbacks. For example, when compared to an up-front, broad-based transmission surcharge approach, direct assignment may entail a longer stranded cost recovery period. The transition period for stranded cost recovery under a direct assignment approach

would depend on the length of the remaining terms of the wholesale requirements contracts for which this Rule provides an opportunity for recovery (contracts executed on or before July 11, 1994 that do not contain an exit fee or explicit stranded cost provision).

On the other hand, a broad-based approach could identify and recover stranded costs earlier than the direct assignment approach; recovery of stranded costs for all of a utility's wholesale requirements customers could begin as soon as the utility's up-front stranded cost amount for departing wholesale customers is determined (through litigation or settlement). However, this potential advantage of a broad-based approach (the shorter transition period) is outweighed by what we believe to be a serious infirmity, namely, the possibility that the broad-based transmission surcharge could end up including costs that have not yet been incurred and may never be incurred.

In addition, another potential drawback to the direct assignment approach is that the departing generation customer may see little or no savings in the short-term by switching power suppliers once its stranded cost exit fee is added to its lower power price from a new supplier. Direct assignment may leave the customer uncertain about the benefits of shopping for power because of the customer's potential stranded cost liability and, in turn, may bias the customer toward staying with its existing power supplier.[631]

In the case of a broad-based approach, in contrast, much of the customer's direct assignment stranded costs are spread to others through a transmission surcharge. As a result, the departing generation customer's power cost savings may more than offset the customer's stranded cost transmission surcharge. The customer may therefore see earlier power cost savings if a broad-based approach were adopted.[632] Once again, however, we believe that this potential benefit to a broad-based approach is outweighed by a significant countervailing disadvantage. In particular, the potential power cost savings to the departing generation customer would be realized only by shifting costs (that are directly attributable to the departing generation customer) to the other users of the utility's transmission system. We believe that this negative aspect of a broad-based approach—its violation of the cost causation principle—is too great a price to pay for allowing a departing generation customer to realize power cost savings as early as possible.

Thus, we recognize that under direct assignment, it is possible that some customers may not be able to afford to leave as soon as they would like. This in turn could mean that lower cost suppliers would not be able to make sales to those customers as soon as they would like. However, this would occur only during a transition period, and it would ensure that, consistent with strict cost causation principles, the burden of these transition costs is not unfairly spread to other customers. Once the existing uneconomic assets and contracts are behind us, all wholesale customers will be better able to shop for power and reap the long-term benefits of competitive supply markets.

Although this direct assignment approach is different from the approach taken in the natural gas industry, we believe that the difference is justified. The transition of the electric industry to an open transmission access, competitive industry (including our proposal to allow an opportunity for extra-contractual recovery of stranded costs associated with a discrete set of wholesale requirements contracts) is different in a number of re-

[631] To counteract this potential disadvantage, we have provided procedures in this Rule, including a formula that the utility is to use to calculate a departing generation customer's stranded cost obligation, that allow a customer considering switching power suppliers to request a stranded cost determination from the utility at any time before the expiration of the customer's wholesale requirements contract. See Section IV.J.9.

[632] In addition, because the customer would already know its stranded cost transmission surcharge, it presumably would have some certainty as to the costs of shopping for power. However, the stranded cost surcharge in its transmission rates subsequently may be adjusted upward if the utility providing transmission becomes eligible to recover retail-turned-wholesale stranded costs. Also, if the broad-based stranded cost surcharge is adjusted on an as-realized basis, the potential departing generation customer's surcharge may increase as a result of other customers leaving the utility's system.

spects from the natural gas industry's transition to open access transportation service by interstate natural gas pipelines. The gas industry underwent a long period of open access transition, starting with Order No. 436 in 1985 and culminating with Order No. 636 in 1992. In the gas context, prior to addressing potential stranded costs, the Commission in Order No. 436 allowed customers receiving bundled gas sales and transportation service from a pipeline the option to convert to transportation-only service, or to reduce their contract demand for gas service, before the termination of their contracts with the pipeline.[633] As a result, most of the former bundled customers of the pipeline had already departed the pipeline's sales service before the Commission addressed the recovery of take-or-pay costs in Order Nos. 500 and 528. In addition, by the time that the Commission addressed the remaining transition costs in Order No. 636, the commodity or wellhead natural gas market was already competitive and the majority of gas was already being sold on an unbundled basis.

Thus, changes in the natural gas industry had progressed to such a point (i.e., the departure of customers from bundled sales) that it was not possible for the Commission to use a strict cost causation approach. We noted in the Supplemental Stranded Cost NOPR that

Many natural gas customers had already left their historical pipeline suppliers' systems. Others had converted from sales and transportation customers to transportation-only customers. Others were in a transition stage having had opportunities to lower their contract demands or otherwise become partial service customers. Significant take-or-pay and other costs had accumulated.[634]

Under those circumstances, the Commission determined that it was appropriate to spread the majority of the remaining transition costs associated with take-or-pay and other supply contracts to all customers (both existing and new) using the interstate natural gas transportation system. Moreover, because of the changes in contractual relationships that had already occurred among pipelines and their customers, it was no longer possible for the Commission to follow a strict cost causation approach to recovering take-or-pay costs. The Commission-prescribed remedy for the recovery of transition costs in the natural gas industry thus was tailored to fit the needs of that industry given the stage of development at the time.

However, such a broad-based approach to recovery of natural gas transition costs was an exception to the time-honored principle that rates should reflect cost causation, and because of this it was necessary for the Commission to justify its departure from that principle. As the court said in K N Energy v. FERC,[635] "[I]t has been this Commission's long standing policy that rates must be cost supported. Properly designed rates should produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class or individual customer." In that case, the court found the Commission's departure from cost-causation justified "given the unusual circumstances surrounding the take-or-pay problem, and the limited nature—both in time and scope—of the Commission's departure from the cost-causation principle."[636] It continues to be Commission policy to follow the cost-causation principle to the extent possible.

The factors described above are not present in the electric industry. At this time, the vast majority of customers remain on their bundled suppliers' systems and generation is not yet fully competitive. Because the situation facing the electric industry today is different from that which the natural gas industry faced, the Commission must tailor its approach differently. In the case of the electric industry today, we have the opportunity to address the stranded cost recovery issue up front, before customers leave their

[633] As discussed in Section IV.A.5, we are not providing for a similar conversion right in this Rule.

[634] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,108.

[635] 968 F.2d 1295, 1300-01 (D.C. Cir. 1992) (quoting *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (emphasis in original).

[636] Id. at p. 1301. *See also Public Utilities Commission of State of California v. FERC*, 988 F.2d 154, 169 (D.C. Cir. 1993).

suppliers' systems. We thus are able to use the cost causation approach that has been fundamental to our regulation since 1935.[637]

The Commission disagrees with commenters' arguments that we cannot impose an exit fee to recover stranded costs because we did not do so in the gas context. As discussed in Section IV.J.9, this Rule establishes procedures for providing a potential departing generation customer advance notice (before it leaves its existing supplier) of the stranded cost charge (whether it is to be paid as an exit fee or a transmission surcharge) that will be applied if the customer decides to buy power elsewhere. In the natural gas context, in contrast, the Commission has prohibited pipelines from developing and charging an "exit fee" after a customer had implemented its gas purchase decision, noting that otherwise, the customer would not know in advance the full cost consequences of its nomination decision.[638] The "exit fee" that the Commission rejected in El Paso Natural Gas Company[639] is also factually distinguishable from the "exit fee" discussed in this rule. In that case, the Commission rejected a pipeline's attempt post-restructuring to impose an "exit fee" on firm transportation-only customers (that were converted sales customers) who in the future elect either to terminate their firm transportation service upon expiration of the service agreement, or to reduce their firm transportation services level by more than 10 percent pursuant to an existing contractual reduction right. Such a scenario is quite different from the limited opportunity for stranded cost recovery provided in this Rule, which is based on a utility's reasonable expectation of continuing generation service to a bundled (sales and transmission) requirements customer.

We also will decline to require a utility seeking stranded cost recovery to shoulder a portion of its stranded costs. Such a requirement would be a major deviation from the traditional principle that a utility should have a reasonable opportunity to recover its prudently incurred costs.[640] Although the Commission allowed such an approach with regard to a natural gas pipeline's take-or-pay costs,[641] we did so only as an extraordinary measure given the nature of the take-or-pay problem and the prevailing environment at that time. We returned to traditional principles when, in issuing Order No. 636, we authorized pipelines to recover all of their prudently incurred gas supply realignment costs (the costs pipelines incur in

[637] Moreover, as we explained in the Supplemental Stranded Cost NOPR, the shifting of generation costs to transmission rates does not violate Commission policy where, as here, the customer that caused the costs to be incurred and stranded will continue to pay those costs. As we indicated, the only difference is that in some instances the customer will pay the costs through an adder to its transmission rate instead of through a generation rate. See *FERC Statutes and Regulations* ¶ 32,514 at p. 33,108 n.269.

[638] See, *e.g.*, Transwestern Pipeline Company, 43 FERC ¶ 61,240 at p. 61,654, order on rehearing, 44 FERC ¶ 61,164 at p. 61,536 (1988), relevant petitions for review dismissed as moot, *Transwestern Pipeline Company v. FERC*, 897 F.2d 570, 575-76 (D.C. Cir. 1990); *El Paso Natural Gas Company*, 47 FERC ¶ 61,108 at p. 61,314 (1989).

[639] 72 FERC ¶ 61,083 (1995). Further, VT DPS misinterprets the Commission's reference to the NOPR in that case. The Commission did not treat a notice of termination provision in El Paso's contract as a conclusive presumption that El Paso had no reasonable expectation of continuing to serve certain customers, as VT DPS contends. The Commission merely stated that "[e]ven if the rules proposed in [the Supplemental Stranded Cost] NOPR were applied here, El Paso would have difficulty justifying the exit fee proposed in light of the existence of the notice of termination provision in the contract." 72 FERC at p. 61,441.

[640] See, *e.g.*, Maryland v. Louisiana, 451 U.S. 725, 748 (1981); *Office of Consumers' Counsel v. FERC*, 914 F.2d 292 (D.C. 1990); *National Fuel Gas Supply Corporation v. FERC*, 900 F.2d 340, 342, 347-51 (D.C. Cir. 1990).

[641] In Order No. 500, the Commission provided that if pipelines absorbed from 25 to 50 percent of their take-or-pay settlement costs, they could recover an equal amount from their firm sales customers in the form of fixed charges. Any balance could be recovered in the form of a commodity rate surcharge or a volumetric surcharge on total pipeline throughput. Order No. 500, *FERC Statutes and Regulations* ¶ 30,761 at p. 30,787 (1987). See also Order No. 528, 53 FERC ¶ 61,163 at p. 61,597 (1990). Moreover, we offered pipelines an important quid pro quo for absorbing take-or-pay costs under Order Nos. 500 and 528—a special presumption that they had been prudent in incurring their take-or-pay liabilities.

realigning, renegotiating, or terminating their portfolio of gas supply contracts to adjust to their sales customers' decisions to exercise their unilateral right under the rule to reduce or end their commodity purchase obligations to the pipelines).[642] In the case of the open access transmission required by this Rule, we believe that a utility is entitled to an opportunity to recover all legitimate, prudent and verifiable costs incurred by the utility when the availability of open access transmission enables a requirements customer to reach a new generation supplier.

Although the alternatives of either spreading the stranded costs to all transmission users or requiring the utility shareholders to share the costs with departing customers might enable a wholesale customer to leave sooner than would the direct assignment approach, the departing customer would be able to do so only at the expense of others who had no responsibility for causing the legitimate, prudent and verifiable costs to be incurred. Although we departed from strict cost causation principles in the gas context and required a broad spreading of the costs given the particular circumstances presented by the gas industry's transition to open access, we ultimately returned to the more traditional approach of allowing utilities to recover all of their prudently incurred transition costs in Order No. 636. At this juncture in the evolution of competition in the electric industry we need not make such a departure from cost causation principles; utilities can identify and seek to charge the customers who caused the costs to be incurred in the first place, before those customers leave the utility's generation system. Accordingly, we believe that a broader spreading of the costs to entities who are not responsible for the incurrence of the stranded costs would not be equitable.

4. Recovery of Stranded Costs Associated With New Wholesale Requirements Contracts

In the Supplemental Stranded Cost NOPR, the Commission preliminarily concluded that future wholesale contracts must explicitly address the obligations of the seller and buyer, including the seller's obligation to continue to serve the buyer, if any, and the buyer's obligation, if any, if it changes suppliers. We stated that utilities will be allowed stranded cost recovery associated with "new" wholesale requirements contracts (executed after July 11, 1994) only if explicit stranded cost provisions are contained in the contract. We indicated that recovery of wholesale stranded costs associated with any such new contract will not be allowed unless such recovery is provided for in the contract.[643] We also stated that a contract that is extended or renegotiated for an effective date after July 11, 1994 becomes a "new" contract for which stranded cost recovery will be allowed only if explicitly provided for in the contract.[644]

We also stated that it is not appropriate to impose on a wholesale requirements supplier a regulatory obligation to continue to serve its existing requirements customer beyond the end of the contract term. We proposed to retain the § 35.15 prior notice of termination filing requirement only for: (i) All contracts required to be filed under sections 205 and 206 of the FPA that were executed before the effective date of the Final Rule pro forma tariffs; and (ii) any unexecuted contracts that were filed before the effective date of the Final Rule pro forma tariffs. With regard to any power sales contract executed on or after that date, we proposed to no longer require prior notice of termination under § 35.15, but to require (for administrative reasons) written notification of the termination of such contract within 30 days after termination takes place. We requested comments on whether this proposal should also be applied to transmission contracts.[645]

Numerous commenters support our preliminary conclusion that new wholesale requirements contracts should explicitly address the obligations of the seller and buyer and that it is not appropriate to impose on wholesale requirements suppliers a regulatory obligation to continue to serve their existing requirements custom-

[642] Order No. 636, *FERC Statutes and Regulations* ¶ 30,939 at p. 30,461.

[643] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,110.

[644] Id. at p. 33,118.

[645] Id. and nn.273, 274.

ers beyond the end of the contract term.[646] However, Arkansas Cities expresses concern that this could undermine obligations to serve that have been included in certain contracts with utilities. It asks the Commission to state that, unless a utility has undertaken an obligation to serve via contract, there is no obligation to serve beyond the contract term. Arkansas Cities asks the Commission to clarify that contracts establishing an obligation to serve will be enforced.

Several other commenters argue that if a wholesale customer elects to switch suppliers, the previous supplier should be under no obligation to take the customer back onto its system at embedded cost rates.[647] Sierra asks the Commission to endorse a host utility's ability to insist on protective contract provisions before reestablishing service, including a predetermined period (such as five years—a commonly-used planning period) before the customer could seek to leave the system again.

A number of commenters support the Commission's proposal to eliminate the prior notice of termination requirement for power sales contracts executed after the date on which the final rule pro forma tariffs become effective.[648] Southern states that, because of the opportunities for power purchasers that will exist after the proposed rules take effect, the Commission also should eliminate § 35.15 as it applies to old contracts.

Several commenters support eliminating the § 35.15 filing requirement for transmission contracts as well.[649] This change is needed, some assert, to provide certainty in commercial arrangements in the more competitive environment and as a matter of fairness. CSW suggests that all § 35.15 filing requirements for existing contracts (wholesale and transmission contracts) be phased out over three years and that only contracts that expire within three years after the final rule should be subject to the requirement to file a notice of termination.

Nevertheless, several other commenters oppose the Commission's proposal to no longer require prior notice of termination for power sales contracts executed on or after the effective date of the generic tariffs.[650] TDU Systems opposes elimination of § 35.15 as tantamount to a finding that termination of all contracts is just and reasonable. TDU Systems and NRECA submit that the market power exercised by supplying utilities will not disappear the instant the rule becomes final and that it may be possible for a utility to exercise monopoly power even with regard to "new" contracts. They propose that if the Commission nevertheless decides to allow contract termination under § 35.15, the Commission should require a public utility to pay "stranded benefit" costs to former wholesale power customers if the customers show that they had a reasonable expectation that the power sales would continue past the end of the agreement at the prior rate.

Several commenters also oppose eliminating the § 35.15 filing requirement for transmission contracts.[651] FL Com asserts that because the Commission has imposed an obligation to serve for transmission service, § 35.15 should be retained for new and existing transmission contracts.

Commission Conclusion

We reaffirm our preliminary determination that future wholesale requirements contracts should explicitly address the mutual obligations of the seller and buyer, including the seller's obligation to continue to serve the buyer, if any, and the buyer's obligation, if any, if it changes suppliers. As we indicated in the Supplemental Stranded Cost NOPR, now that

[646] *E.g.*, PA Com, FL Com, PSNM, Southern, NC Com, Duke, Public Service Co of CO, SoCal Edison, PacifiCorp, Carolina P&L, NYSEG.

[647] *E.g.*, Sunflower, Sierra, Public Service Co of CO, Duke.

[648] *E.g.*, EEI, NYSEG, Southern, PA Com, SoCal Edison, Pacificorp, El Paso.

[649] *E.g.*, EEI, Public Service Co of CO, PA Com, Entergy, Florida Power Corp.

[650] *E.g.*, TDU Systems, NRECA, TAPS, Redding, Southwest TDU Group. VT DPS sees no urgent need for elimination of the § 35.15 requirement or for automatic termination of sales service under a wholesale contract of more than three years duration. However, it supports pregranted authorization of service termination upon expiration of sales contracts with terms of less than three years. Among other things, it submits that the pregranted authority to terminate short-term service would relieve the utility of a planning uncertainty and allow it to maximize use of uncommitted transmission capacity.

[651] TAPS, TDU Systems, FL Com, MMWEC.

utilities have been placed on explicit notice that the risk of losing customers through increased wholesale competition must be addressed through contractual means only, they must address stranded cost issues when negotiating new contracts or be held strictly accountable for the failure to do so.

We accordingly will allow recovery of wholesale stranded costs associated with any new requirements contract (executed after July 11, 1994) only if explicit stranded cost provisions are contained in the contract. By "explicit stranded cost provision" (for contracts executed after July 11, 1994) we mean a provision that identifies the specific amount of stranded cost liability of the customer(s) and a specific method for calculating the stranded cost charge or rate. For purposes of requirements contracts executed after July 11, 1994 but before the date on which this Final Rule is published in the Federal Register, however, we clarify that a provision that specifically reserved the right to seek stranded cost recovery consistent with what the Commission permits in this Rule (without identifying the specific amount of stranded cost liability of the customer(s) and calculation method) nevertheless will be deemed an "explicit stranded cost provision." However, a provision in a requirements contract executed after July 11, 1994 but before the date on which this Final Rule is published in the Federal Register that merely postpones the issue of stranded cost recovery without specifically providing for such recovery will not be considered an "explicit stranded cost provision." After the date on which this Final Rule is published in the Federal Register, a provision must identify the specific amount of stranded cost liability of the customer(s) and a specific method for calculating the stranded cost charge or rate in order to constitute an "explicit stranded cost provision."

We reaffirm that a requirements contract that is extended or renegotiated for an effective date after July 11, 1994 becomes a "new" requirements contract for which stranded cost recovery will be allowed only if explicitly provided for in the contract.

We also reaffirm our preliminary determination not to impose a regulatory obligation on wholesale requirements suppliers to continue to serve their existing requirements customers beyond the end of the contract term. The only exception to this would be if the customer decides to remain a requirements customer for the period for which the Commission finds that the supplying utility reasonably expected to continue serving the customer. In such a case, the supplying utility will be obligated to offer continuing service to the requirements customer for the period the utility reasonably expected to continue serving the customer.

A requirements customer will be responsible for planning to meet its power needs beyond the end of the contract term by either building its own generation, signing a new power sales contract with its existing supplier, or contracting with new suppliers in conjunction with obtaining transmission service under its existing supplier's open access transmission tariff or another utility's transmission system. In so holding, it is not our intent to undermine any obligations specifically contained in a contract. Thus, if a contract explicitly establishes an obligation to serve beyond the end of the contract term, such a contractually-imposed obligation to serve (as distinguished from a regulatory obligation to serve) would be enforceable as a term of the contract. If a wholesale customer that switches suppliers later seeks to reestablish service with its former supplier, it will be up to the parties to negotiate their respective obligations.

We also reaffirm our preliminary determination to no longer require prior notice of termination under §35.15 for any power sales contract executed on or after the effective date of the Final Rule pro forma tariff (but to require written notification of the termination of such contract within 30 days after termination takes places). This determination goes hand-in-hand with our determination (discussed above) not to impose a regulatory obligation on wholesale requirements suppliers to continue to serve their existing requirements customers beyond the end of the contract term.[652] We clarify, however,

[652] Although several commenters have asked the Commission to retain the prior notice of termination filing requirement due to concern that a utility nevertheless may be able to exer-

that this decision applies only to a power sales contract that is to terminate by its own terms (such as on the contract's expiration date). We have revised § 35.15 accordingly. We will, however, continue to require prior notice of cancellation or termination for any power sales contract that is proposed to be cancelled or terminated for a reason other than by the contract's own terms (such as a self-help provision related to, for example, a billing dispute), regardless of when the contract was executed. We also will continue to require prior notice of the proposed termination of any power sales contract executed before the effective date of the Final Rule pro forma tariff (even if the contract is to terminate by its own terms) as well as any unexecuted power sales contract that was filed before that date.

Further, we will retain the § 35.15 filing requirement for all transmission contracts. The reason for retaining the § 35.15 requirement for transmission contracts is that transmission will continue to be provided under conditions of potential market power, and the Commission must be assured that transmission owners are not exerting market power in termination of transmission contracts. In addition, this filing requirement will provide the customer an opportunity to notify the Commission if the termination terms are disputed or if the customer was not given adequate opportunity to exercise its limited right of first refusal under the Final Rule (see Section IV.A.5).

5. Recovery of Stranded Costs Associated With Existing Wholesale Requirements Contracts

In the Supplemental Stranded Cost NOPR, the Commission reaffirmed its proposal to permit the recovery of legitimate, prudent and verifiable stranded costs for a discrete set of "existing" wholesale requirements contracts (executed on or before July 11, 1994)—those that do not already contain exit fees or other explicit stranded cost provisions. We encouraged the parties to such contracts to renegotiate them to address stranded costs. In the case of existing contracts that already contain an exit fee or explicit stranded cost provision, however, we proposed to reject a unilateral stranded cost amendment; that is, we stated we would reject an amendment unless the contract permits renegotiation of the existing stranded cost provision or the parties to the contract mutually agree to renegotiate the contract.[653] In so doing, we proposed to drop the three year mandatory negotiation period suggested in the initial Stranded Cost NOPR.[654]

If an existing requirements contract does not contain an exit fee or other explicit stranded cost provision (and is not renegotiated to add such a provision), we proposed that before the expiration of the contract: (1) A public utility or its customer may file a proposed stranded cost amendment to the contract under section 205 or 206; or (2) a public utility or transmitting utility may file a proposal to recover stranded costs associated with any such existing contract through its transmission rates for a customer that uses the utility's transmission system to reach another generation supplier.

In the Supplemental Stranded Cost NOPR, we reaffirmed our proposal in the initial Stranded Cost NOPR that, even if the contract contains an explicit Mobile-Sierra[655] provision, it is in the public interest to permit public utilities to seek unilateral amendments to add stranded cost provisions if the contracts do not in essence forbid such recovery by containing exit fees or other explicit stranded cost provisions.[656] Under these circumstances, if neither of the parties seeks and obtains acceptance or approval of a

(Footnote Continued)

cise generation market power with regard to a "new" wholesale requirements contract, we do not believe that retention of that provision is necessary to address these commenters' concerns. Instead, any party claiming to be aggrieved by a utility's alleged abuse of generation market power under a wholesale requirements contract can file a complaint with the Commission under section 206 of the FPA.

[653] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,113.

[654] We invited comments on this proposal. Id. at p. 33,115.

[655] *See United Gas Pipeline Company v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Company*, 350 U.S. 348 (1956).

[656] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,113-14. We noted that under the Mobile-Sierra doctrine, a customer may waive its right to challenge the contract and/or the utility

stranded cost amendment, we propose to permit the public utility to seek recovery of stranded costs through its wholesale transmission rates.

We also proposed procedures for providing an existing wholesale requirements customer advance notice of how the utility would propose to calculate costs that the utility claims would be stranded by the customer's departure.[657]

a. July 11, 1994 Cut-Off Date

A number of commenters ask the Commission to reconsider the July 11, 1994 cut-off date for distinguishing between "existing" and "new" requirements contracts. Some commenters[658] support October 24, 1992 (the date of passage of the Energy Policy Act) as the cut-off date on the basis that anyone entering into a wholesale requirements contract after that date should have recognized the greatly increased possibility of the customer terminating or not renewing the contract.

Other commenters[659] support a later date for defining "new" requirements contracts, such as the date on which the final rule open access tariffs become effective. Utilities For Improved Transition argues that the Commission cannot retroactively adopt the July 11, 1994 cut-off date, but must wait until the final rule is issued before setting the date after which requirements contracts must contain stranded cost provisions in order for stranded cost recovery to be allowed.

Commenters representing electric cooperatives also oppose the July 11, 1994 cut-off date.[660] They contend that RUS borrowers were not free to negotiate stranded cost amendments to wholesale power contracts as soon as the Commission warned them to do so because their wholesale power contracts are mandated both as to form and substance by the RUS.[661]

PA Munis asks the Commission to treat certain contracts that were executed before July 11, 1994 (but not approved by the Commission until after that date) as "new" contracts. PA Munis argues that the utility, after issuance of the initial NOPR, could have withdrawn its filing of the contract and sought to negotiate an exit fee at that time. It submits that the utility's failure to do so would justify a finding by the Commission that contracts approved after July 11, 1994 be treated similarly to contracts executed after that date.

b. Stranded Cost Recovery for Existing Requirements Contracts

A number of commenters express support for the Commission's proposal to permit modification of existing requirements contracts that do not already contain exit fees or other explicit stranded cost provisions.[662] NEPCO states its interpretation that the NOPR does not consider notice provisions to be "explicit stranded cost provisions;" it argues that the presence of a notice provision in a contract, while bearing on the supplier's ability to demonstrate the duration of its reasonable expectation of continued service, should not foreclose the amendment of a wholesale contract to add an exit fee or similar payment provision. Several other commenters ask the Commission to clarify that contracts that contain notice provisions and that preclude recovery for termination or reduction of service (but that do not necessarily use the terms

(Footnote Continued)

may waive its right to make unilateral rate changes. However, the parties may not waive the indefeasible right of the Commission to alter rates that are contrary to the public interest. Id. at p. 33,111.

[657] Id. at p. 33,114-15.

[658] *E.g.*, ELCON, TAPS, Alcoa, Utilicorp.

[659] *E.g.*, Utilities For Improved Transition, Atlantic City.

[660] *E.g.*, Basin, Tri-County EC, NW Iowa Cooperative, Baker EC, Big Horn EC, Black Hills EC, Bon Homme Yankton EC, Carbon Power, Central EC, Douglas EC, East River EC, Ida County REC, James Valley EC, Lincoln-Union EC, McKenzie EC, North Dakota RECs, Oahe EC, Oliver-Mercer EC, Panhandle Coop, Rushmore EC, San Luis Valley EC, Slope EC, Spink EC, Turner-Hutchinson EC, Traverse EC, Union County EC, West River EC, Whetstone Valley EC, Woodbury County REC, Yellowstone Valley EC.

[661] Basin indicates that all such contracts for the sale of more than 1,000 kW and any amendments thereto must be specifically approved by the RUS.

[662] *E.g.*, EEI, PSNM, AEP, Consumers Power. Consumers Power suggests that the language of proposed § 35.26(c)(1)(iv) be modified to recite the Commission's public interest finding.

"exit fee" or "stranded cost"), or that expressly provide that stranded costs shall not be charged, cannot be reopened for a stranded cost claim.[663]

A number of other commenters oppose the Commission's proposal to permit amendment of wholesale requirements contracts that do not address stranded cost recovery, for reasons previously raised in this proceeding.[664] They argue, among other things, that contracts should stand on their own. RUS asserts that the integrity of its Federal loan program is to a large extent predicated on honoring the long-term requirements wholesale power contracts between G&Ts and their distribution members.

Several commenters also challenge the Commission's proposed determination that it is in the public interest to permit utilities to seek unilateral amendments to add stranded cost provisions to requirements contracts. These commenters argue that the NOPR's assumptions concerning the financial stability of public utilities are unsupported and thus do not meet the burden of proof required for the public interest finding under the Mobile-Sierra doctrine. They urge the Commission to require a utility-specific finding of imminent financial jeopardy before overriding a Mobile-Sierra contract.[665]

ELCON argues that the recent Northeast Utilities Service Company v. FERC[666] case reaffirms the traditional high threshold for overriding Mobile-Sierra clauses in the "classic Mobile-Sierra situation" in which one of the parties seeks modification of a contract that has already been reviewed and approved by the Commission. It submits that a utility seeking to add a stranded cost provision to an existing contract would fall within the "classic situation." ELCON also argues that the First Circuit strongly implied that to satisfy Mobile-Sierra, the Commission must identify specifically those aspects of a contract that are contrary to the public interest and why. On this basis, ELCON argues that the case supports its position that a utility-specific finding of imminent financial jeopardy is necessary to override an existing Mobile-Sierra contract.[667]

Some commenters argue that if utilities are to be granted industry-wide Mobile-Sierra relief, then the Commission should give wholesale customers the reciprocal right to convert their wholesale power contracts to transmission-only service.[668] However, EEI contends that the Commission is barred by section 211(c)(2) of the FPA from ordering wheeling where a customer is taking service under a contract or under a rate tariff on file with the Commission.

Several commenters ask the Commission to require renegotiation of the notice and/or term of all existing contracts with long lead-time cancellation provisions in order to allow all wholesale customers access to the market at the same time.[669] They submit that customers with short notice provisions will be the first to enjoy the benefits of open access and will have an effective "first right of refusal" of the most economical transmission paths and low cost suppliers, putting customers with long lead-time cancellations at a competitive disadvantage.

c. Transition Period

A number of commenters support the Commission's proposal not to mandate a three-year time limit for renegotiation of existing wholesale requirements contracts. They note that existing contracts

[663] *E.g.*, Concord, Chugach, ME Consumer-Owned Utilities.

[664] *E.g.*, Utilicorp, AMP-Ohio, Environmental Action, DE Muni, Arkansas Cities, Direct Service Industries, PA Munis, ABATE, APPA.

[665] *See, e.g.*, American Forest & Paper, VT DPS, PA Munis, ABATE, ELCON, APPA, Environmental Action.

[666] 55 F.3d 686 (1st Cir. 1995) (Northeast Utilities).

[667] PA Munis argues that Northeast Utilities provides no support for the Commission's proposed Mobile-Sierra finding because Northeast Utilities involved the effect of disputed contractual terms on third parties, not the alleged financial effect on the utility. It argues that the court found that the Commission had adequately explained how the disputed contractual terms may harm third parties to the contract (which PA Munis says the Commission has failed to do here). PA Munis also submits that the court went out of its way to emphasize the narrow scope of its order affirming the Commission.

[668] *E.g.*, ELCON, CCEM, VT DPS, OK Com, TDU Systems, LG&E, ABATE, Portland, Utilicorp, TAPS.

[669] *E.g.*, Knoxville, Memphis.

have unique characteristics and complexities that affect the time required to renegotiate the contract bilaterally, to file a unilateral amendment with the Commission, or to file for stranded cost recovery through transmission rates.[670]

On the other hand, some commenters object that the proposal to replace the previously proposed three-year window with an opportunity to raise stranded cost claims throughout the existing contract term creates a virtually unlimited transition period.[671] For example, ELCON asserts that because the NOPR would allow utilities to seek amendment of an existing contract any time prior to its expiration, stranded cost issues could extend through the life of existing facilities (30 years or more). Portland suggests that the Commission set a schedule now for proceedings to determine transmission costs and stranded costs for each utility with wholesale requirements customers.

Commenters propose various limits to the period within which stranded cost recovery could be raised, such as: (i) Three to five years;[672] (ii) the lesser of three years from the effective date of the final rule or the remaining term of the contract;[673] (iii) one year from the effective date of the final rule;[674] and (iv) December 31, 1998 (20 years after PURPA).[675]

Commission Conclusion

a. July 11, 1994 Contract Cut-Off Date

We reaffirm our proposal to permit the recovery of legitimate, prudent and verifiable stranded costs for "existing" wholesale requirements contracts (executed on or before July 11, 1994) that do not already contain exit fees or other explicit stranded cost provisions. We believe that July 11, 1994—the date on which the initial Stranded Cost NOPR was published and, thus, on which the industry was put on notice of the proposal to disallow prospectively extra-contractual recovery of stranded costs—is the appropriate date for distinguishing "existing" requirements contracts from "new" requirements contracts. Because all parties were put on notice in the initial Stranded Cost NOPR that July 11, 1994 would be the operable date for the "existing"/"new" contract distinction, utilities that executed requirements contracts after that date could have had no reasonable expectation that they would be permitted to recover any costs extra-contractually.

Moreover, because the costs at issue are extra-contractual costs, the Commission's notice to all parties that contracts executed after July 11, 1994 will be enforced by their terms as far as stranded cost recovery is concerned does not constitute "retroactive rulemaking." Contrary to UFIT's contention, the Commission is not "requir[ing]" utilities to include stranded cost recovery provisions in all contracts executed after July 11, 1994.[676] The Commission has merely put all parties on notice that the opportunity for extra-contractual stranded cost recovery (which will be allowed on a prospective basis upon the effective date of the Rule) will not be available for any requirements contracts executed after July 11, 1994. The parties to requirements contracts executed after July 11, 1994 have been free to provide for stranded cost recovery in the contract, or not.[677] The point is that, for requirements contracts executed after

[670] *E.g.*, EEI, Florida Power Corp, PA Com, WP&L, Consumers Power, FL Com, TVA, SoCal Edison, Texas Utilities.

[671] *E.g.*, TAPS, TDU Systems, DOD, ELCON, APPA.

[672] *E.g.*, Sierra, Central Illinois Light, NY Energy Buyers, American Forest & Paper, WEPCO, EGA. Education proposes either a transition period that ends five years after the effective date of the final rule or a phase-out of the utility's authority to recover stranded costs from departing customers by gradually reducing (for instance, over a ten year period from the date of the final rule) the percentage of stranded costs that the utility could recover.

[673] *E.g.*, TAPS, Missouri Joint Commission.

[674] *E.g.*, TDU Systems.

[675] *E.g.*, DOD, ABATE.

[676] See UFIT Initial Comments at p. 34. Moreover, the cases that UFIT cites, in which the Commission rejected parties' efforts to devise rates based on methods or formulas contained in proposed rules, are inapposite. By establishing the July 11, 1994 cutoff date, the Commission is not "fix[ing] rates under section 206" or otherwise making "a Section 206 'determination,' " as UFIT suggests. Id. at p. 35, 36. The Commission has not proposed a change in the way that utilities compute their rates: it has simply put all parties on notice of the limited nature and opportunity for extra-contractual stranded cost recovery.

[677] In response to the commenters representing electric cooperatives that object to the July

the cut-off date, stranded cost recovery will be governed solely by the terms of the contract.

b. Stranded Cost Recovery for Existing Requirements Contracts

We reaffirm that we will permit utilities to seek recovery of stranded costs for a limited set of existing wholesale requirements contracts, namely, those that do not already contain exit fees or other explicit stranded cost provisions.[678] If an existing requirements contract includes an explicit provision for payment of stranded costs or an exit fee, we will assume that the parties intended the contract to cover the contingency of the buyer leaving the system. We will reject a stranded cost amendment to such a contract, unless the contract permits renegotiation of the existing stranded cost provision or the parties to the contract mutually agree to a new stranded cost provision. Similarly, we will reject a stranded cost amendment to an existing requirements contract if the contract prohibits stranded cost recovery (or precludes recovery for termination or reduction of service) or prohibits renegotiation of an existing stranded cost or exit fee provision, unless the parties to the contract mutually agree to a new stranded cost provision.[679]

We reaffirm our desire that utilities attempt to renegotiate with their customers existing requirements contracts that do not contain exit fees or other explicit stranded cost provisions. If the parties negotiate a stranded cost provision and the seller is A public utility, the utility must file the provision with the Commission as an amendment to the existing requirements contract.

If an existing requirements contract does not contain an exit fee or other explicit stranded cost provision (and is not renegotiated to add such a provision), before the expiration of the contract: (1) a public utility or its customer may file a proposed stranded cost amendment to the contract under section 205 or 206; or (2) a public utility in a section 205 proceeding, or a transmitting utility in a section 211 proceeding, may file a proposal to recover stranded costs associated with any such existing contract through its transmission rates for a customer that uses the utility's transmission system to reach another generation supplier.

We thus reaffirm that if an existing requirements contract is not renegotiated, and the contract permits the seller and/or buyer to seek an amendment to the contract, the authorized party may seek an amendment to add a stranded cost provision. We also adopt our preliminary finding that, even if an existing requirements contract contains an explicit Mobile-Sierra provision, it is in the public interest to permit the public utility to seek a unilateral amendment to add stranded cost provisions if the contract does not already contain exit fees or other explicit stranded cost provisions. In the initial Stranded Cost NOPR, we identified two ways in which a failure to permit public utilities to address stranded costs could harm third parties, and thereby harm the public interest:

(Footnote Continued)

11, 1994 cut-off date, we do not believe that the requirement that RUS borrowers obtain RUS approval of their contracts necessarily prevents such borrowers from addressing stranded cost recovery in contracts executed after July 11, 1994.

[678] We confirm that a notice of termination provision by itself (that is, one that does not also provide for or preclude recovery of stranded costs by the seller upon termination of the contract) is not an "explicit" stranded cost provision; however, as discussed in Section IV.J.8, the presence of a notice provision creates a rebuttable presumption that the utility had no reasonable expectation of continuing to serve the customer.

[679] In the case of an existing wholesale requirements contract that does not contain an exit fee or other explicit stranded cost provision but does contain a notice provision, once a customer gives notice according to the terms of the contract that it will no longer purchase all or a part of its requirements from the selling utility, we would not allow the utility to amend the contract to add a stranded cost provision. However, in such a case, the utility could seek to recover stranded costs through its rates for transmission services to the customer. As discussed in Section IV.J.8, the utility would have to rebut the presumption that, based on the presence of the notice provision, it had no reasonable expectation of continuing to serve the customer.

First, the inability to seek recovery of stranded costs could impair the financial ability of a utility to continue to provide reliable service. This will depend on the magnitude of stranded costs and the prospect or lack thereof for recovering such costs from ratepayers. The prospect of not recovering from ratepayers significant amounts of stranded costs could seriously erode a utility's access to capital markets, or could drive the utility's cost of capital to unprecedented levels. This high cost of capital could precipitate other customers leaving the system which, in turn, could cause others to leave. Such a spiral could be difficult to stop once begun. Second, if some customers are permitted to leave their suppliers without paying for stranded costs, this may cause an excessive burden on the remaining customers who, for whatever reason, cannot leave and therefore may have to bear those costs.[680]

The financial community commenters confirm our views in this regard. As they note, a utility's access to financial markets is essential to the continued provision of safe and reliable electric service to customers. However, the prospect of a utility not recovering stranded costs could erode a utility's ability to attract capital and thus imperil its continued financial stability.[681] As these and other commenters agree, the recovery of stranded costs is critical to the successful transition to more competitive markets.

Moreover, our determination that it is in the public interest to give public utilities a limited opportunity to propose contract changes unilaterally to address stranded costs if their contracts do not already explicitly do so satisfies the public interest standard of the Mobile-Sierra doctrine as recently interpreted by the Northeast Utilities court. In that case, the court affirmed an order of the Commission on remand modifying a contract under the Mobile-Sierra public interest standard.[682] As the court explained, the Mobile-Sierra doctrine "represents the Supreme Court's attempt to strike a balance between private contractual rights and the regulatory power to modify contracts when necessary to protect the public interest."[683] The court noted that when the Commission is considering whether a contract rate is too low, protective action by the Commission in the public interest is justified "where the rate might impair the financial ability of the utility to continue to supply electricity, force electricity consumers to bear an excessive burden, or be unduly discriminatory."[684]

The court also explained that "the most attractive case for affording additional protection [under the public interest standard], despite the presence of a contract, is where the protection is intended to safeguard the interests of third parties • • •." [685] It stated that the Mobile-Sierra doctrine allows the Commission to modify the terms of a private contract "when third parties are threatened by possible 'undu[e] discrimination' or the imposition of an 'excessive burden.' "[686] The court found that the Commission had met the public interest standard by show-

[680] *FERC Statutes and Regulations* ¶ 32,507 at p. 32,870.

[681] See Utility Investors Analysts, Initial Comments at p. 2-3; Utility Shareholders, Initial Comments at p. 2-4.

[682] The court concluded that the Commission "gave thoughtful consideration to the public interest." 55 F.3d at p. 693.

[683] Id. at p. 689.

[684] Id. at p. 690.

[685] Id. at p. 691, *citing Northeast Utilities Service Company v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993).

[686] Northeast Utilities, 55 F.3d at p. 691. The court distinguished the facts of that case from other Mobile-Sierra cases. It noted that "[t]he issue here is not whether one party to a rate contract filed with FERC can effect a rate change unilaterally, but the standard to be used by FERC in examining electric power contracts filed with it." Id. at p. 690-91. It also noted that the contract provisions under review were not low-rate issues in the context of Mobile and Sierra. We recognize that whether a contract should be modified to add a stranded cost provision could be viewed as one party to a contract seeking to effect a unilateral rate change, or as a low-rate issue (i.e., whether the utility's rates would be insufficient without stranded cost recovery). However, parties are being permitted to make such unilateral filings only after a generic finding by the Commission that the public interest likely would be jeopardized if utilities are not permitted to make a case-specific showing that recovery should be allowed. We believe that Northeast Utilities provides valuable guidance concerning application of the public interest standard where, as here, a failure to allow limited contract modification may harm the public interest by harming third parties.

ing how the contract could harm third parties.[687]

Consistent with the holding in Northeast Utilities, and contrary to the positions of some commenters, we have demonstrated how "third parties may ultimately bear the burden"[688] if public utilities with Mobile-Sierra contracts are not given any opportunity to propose contract changes to address stranded costs. If the Commission fails to give a public utility this opportunity, and the utility's financial ability to continue the provision of safe and reliable service is impaired, third parties (customers relying on the public utility for their electric service) will be placed at risk. Similarly, if the Commission fails to give a public utility the opportunity to directly assign costs to the customers on whose behalf they were incurred, and some of the utility's customers leave the utility's generation system for that of another supplier without paying such costs, third parties (the utility's remaining customers) will be harmed by having to bear the costs that were not incurred to serve them and that are stranded by the other customers' departures via open access transmission. Moreover, we believe that protective action in the public interest is particularly necessary where, as here, a utility's rates could become insufficient because of fundamental changes in the industry that largely result from legislative or regulatory changes that could not be anticipated.

Further, notwithstanding the arguments of some commenters supporting a case-by-case (as opposed to a generic) public interest finding, we believe it appropriate that our public interest finding be made on a generic basis given the fact that, by this Rule, we are requiring full open access that could significantly affect historical relationships among traditional utilities and their customers and the ability of utilities to recover prudently incurred costs. We also emphasize that we are not eliminating the need for case-by-case demonstrations that stranded cost recovery should be allowed. Our public interest finding is that utilities be permitted to seek extra-contractual recovery of stranded costs in certain defined circumstances. Utilities seeking recovery of stranded costs will have the burden, on a case-by-case basis, of showing they had a reasonable expectation of continuing to serve the departing generation customer.

In summary, we emphasize the limited nature of our Mobile-Sierra public interest finding. First, our holding applies only to wholesale requirements contracts executed on or before July 11, 1994 that do not contain an exit fee or other explicit stranded cost provision. Thus, we will not permit modification of any contract that addresses the stranded cost issue explicitly, unless the contract specifically permits such modifications. Instead, we are simply examining requirements contracts that do not clearly address the issue in the context of the traditional regulatory regime under which they were signed—a regulatory environment in which it was assumed as a matter of course that the great majority of requirements customers would stay with their original suppliers and that these suppliers had a concomitant obligation to plan to supply these customers' continuing needs.

Second, although we have decided on a generic basis that it is in the public interest to permit public utilities with Mobile-Sierra contracts to make unilateral filings, we are not automatically approving any amendment that a particular utility might file. As we stated in the initial Stranded Cost NOPR, if a public utility unilaterally files a proposed stranded cost amendment under either section 205 or 206 of the FPA, this does not necessarily

[687] The court found that the Commission had met the public interest standard "by explaining how the disputed contractual terms may harm third parties to the contract. * * * For example, the Commission found the automatic rate-of-return-on-equity adjustment provision unacceptable because third parties may ultimately bear the burden of a rate component that does not reflect actual capital market conditions. Likewise, the 'blank check' given owners of the power plant to determine the decommissioning costs for themselves under New Hampshire law is impermissible because it may be cashed at the expense of non-parties to the contract." Id. at p. 692 (emphasis in original). The court rejected the argument that the public interest standard is "practically insurmountable" in all circumstances. It noted, among other things, "that neither Mobile nor Sierra stated or intimated that the 'public interest' doctrine was 'practically insurmountable.' " Id. at p. 691.

[688] Id. at p. 692 (emphasis in original).

mean that the Commission ultimately will find it appropriate to allow such amendment.[689] In addition, customers with Mobile-Sierra contracts that do not explicitly address stranded costs may also file complaints under section 206 of the FPA to propose to address stranded costs in existing requirements contracts. The Commission will analyze any proposed stranded cost amendment to a Mobile-Sierra contract, whether proposed by the utility or by its customer, based on the particular circumstances surrounding that contract. Thus, the case-by-case findings that some commenters seek will, in effect, be made when the Commission determines whether to approve a proposed stranded cost amendment to a particular contract.

As discussed in Section IV.A (Scope), the Commission has concluded that although current conditions in the wholesale power market do not warrant the generic modification of requirements contracts, nonetheless the modification of certain requirements contracts on a case-by-case basis may be appropriate. We have concluded further that, even if customers under such contracts are bound by so-called Mobile-Sierra clauses, they nonetheless ought to have the opportunity to demonstrate that their contracts no longer are just and reasonable.

We have found that it would be against the public interest to permit a Mobile-Sierra clause in an existing wholesale requirements contract to preclude the parties to such a contract from the opportunity to realize the benefits of the competitive wholesale power markets. For purposes of this finding, the Commission defines existing requirements contracts as contracts executed on or before July 11, 1994.[690] By operation of this finding, a party to a requirements contract containing a Mobile-Sierra clause no longer will have the burden of establishing independently that it is in the public interest to permit the modification of such contract. The party, however, still will have the burden of establishing that such contract no longer is just and reasonable and therefore ought to be modified.

This finding complements the Commission's finding that, notwithstanding a Mobile-Sierra clause in an existing requirements contract, it is in the public interest to permit amendments to add stranded cost provisions to such contracts if the public utility proposing the amendment can meet the evidentiary requirements of this Rule. The Commission's complementary Mobile-Sierra findings are not mutually exclusive. Any contract modification approved under this section shall provide for the utility's recovery of any costs stranded consistent with the contract modification. The stranded costs must be prudently incurred, legitimate and verifiable. Further, the Commission has concluded that if a customer is permitted to argue for modification of existing contracts that are less favorable to it than other generation alternatives, then the utility should be able to seek modification of contracts that may be beneficial to the customer.

The Commission believes that the most productive way to analyze contract modification issues is to consider simultaneously both the selling public utility's claims, if any, that it had a reasonable expectation of continuing to serve the customer beyond the term of the contract and the customer's claim, if any, that the contract no longer is just and reasonable and therefore ought to be modified. Thus, if the selling public utility intends to claim stranded costs, it must present that claim in any section 206 proceeding brought by the customer to shorten or terminate the contract. Similarly, if the customer intends to claim that the notice or termination provision of its existing requirements contract is unjust and unreasonable, it must present that claim in any proceeding brought by the selling public utility to seek recovery of stranded costs. This will promote administrative efficiency and will permit the Commission to consider how the contracting parties' claims bear on one another.

The Commission does not take contract modification lightly. Whether a utility is seeking a contract amendment to permit stranded cost recovery based on expectations beyond the stated term of the con-

[689] *FERC Statutes and Regulations* ¶ 32,507 at p. 32,871.

[690] This is consistent with the definition of existing requirements contracts we have used for purposes of stranded cost recovery.

tract, or a customer is seeking to shorten or eliminate the term of an existing contract, we believe that each have a heavy burden in demonstrating that the contract ought to be modified. Still, we believe that given the industry circumstances now facing us, both selling utilities and their customers ought to have an opportunity to make the case that their existing requirements contracts ought to be modified. By providing both buyers and sellers this opportunity, the Commission attempts to strike a reasonable balance of the interests of all market participants. The Commission expects that many of the arguments presented by buyers and sellers in such proceedings will be fact specific.

c. Transition Period

We reaffirm our proposal to allow a public utility or its customer to file a proposed stranded cost amendment, or to allow a public utility or transmitting utility to file a proposal to recover stranded costs through a departing generation customer's transmission rates, at any time prior to the expiration of the contract. There is no uniform time remaining on requirements contracts executed on or before July 11, 1994. Any limitation on the period in which parties could propose amendments covering stranded costs (e.g., 3 years) would thus unequally affect market participants. Those with long terms remaining on their contracts could object that immediately addressing the issue would not be cost effective. For example, a utility with a long remaining term (e.g., 20 years) might not even seek stranded cost recovery depending on the competitive value of its assets near the end of the contract term.[691] However, such a utility would invariably seek to preserve its option to seek stranded cost recovery if its failure to do so within a short period resulted in a waiver of its right to do so. 6. Recovery of Stranded Costs Caused by Retail-Turned-Wholesale Customers

In the Supplemental Stranded Cost NOPR, we stated that both this Commission and state commissions have the legal authority to address stranded costs that result from retail customers becoming wholesale customers who then obtain transmission under the open access tariffs.[692] We proposed that this Commission should be the primary forum for addressing the recovery of stranded costs caused by retail-turned-wholesale customers. We explained that if a retail customer becomes a legitimate wholesale customer (such as through municipalization), it becomes eligible to use the non-discriminatory open access tariffs:

> If costs are stranded as a result of this wholesale transmission access, we believe that these costs should be viewed as 'wholesale stranded costs.' But for the ability of the new wholesale entity to reach another generation supplier through the FERC-filed open access transmission tariff, such costs would not be stranded.[693]

We accordingly proposed to define "wholesale stranded costs" to include stranded costs resulting from unbundled transmission for newly-created wholesale customers and sought comments on this definition.

We proposed to require the same evidentiary demonstration for recovery as that required if recovery were sought from a wholesale requirements customer. We reaffirmed our proposal in the initial Stranded Cost NOPR that a utility will have to show that the stranded costs are not more than the net revenues that the retail-turned-wholesale customer would have contributed to the utility had it remained a retail customer of the utility, and that the utility has taken and will take reasonable steps to mitigate stranded costs. We further proposed to deduct any recovery that a state has permitted from departing retail-turned-wholesale customers from the legitimate stranded costs of which we will allow recovery. In addition, we proposed to apply the same procedures for obtaining an estimate of maximum stranded cost exposure without mitigation to retail customers contemplating becoming wholesale trans-

[691] The value of its assets could vary over time as new technologies emerge, fuel costs fluctuate, or environmental requirements change.

[692] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,127.

[693] Id. at p. 33,128.

mission customers as those proposed for wholesale customers.[694]

Some commenters contend that stranded costs that result when a retail customer becomes a wholesale customer should be left to the states as a matter of law and comity.[695] These commenters argue, among other things, that because the facilities used to provide retail service to these retail customers were subject to state jurisdiction and were included in retail rate base when the service was rendered, the state is the appropriate entity to determine the extent to which those customers should compensate the utility for the stranding of these costs. According to ELCON, "(a) retail customer's new found access to the wholesale market does not provide FERC with authority over costs that originated with the local distribution function."[696]

Commenters assert that stranded costs resulting from the creation of new wholesale entities will occur as a result of state or local decisionmaking.[697] A number of commenters contend that in states where the state commission has control over municipalization, the Commission has no authority to provide for the recovery of stranded costs due to municipalization.[698] IL Com asserts that the Commission lacks authority over retail-turned-wholesale stranded costs, even in the absence of any explicit statutory authority for state commissions to address such costs. FL Com argues that the Commission should address the recovery of these stranded costs only upon petition from a state public utility commission.

According to some commenters, the availability of open access transmission tariffs does not convert the character of the costs of stranded generation that was built to serve retail customers from retail to wholesale.[699] CA Com argues that this reasoning could require the Commission to act as the primary forum for stranded costs resulting from retail wheeling if the Commission's jurisdiction over retail transmission is upheld. It argues that in such a case, there also would be a relationship between the Commission-jurisdictional transmission and stranded costs.

Some commenters also submit that the potential for retail customers to become wholesale customers has existed since the beginning of the industry and that utilities have had ample opportunity to adjust to this risk.[700] A number of commenters submit that state commissions are in a better position than the Commission to address the recovery of costs that were incurred to serve retail customers and to take into consideration local concerns.[701]

NARUC recognizes that a "practical regulatory gap may exist that prevents [state commission] consideration of recovery of * * * potentially stranded costs" in certain instances "such as municipalization and cooperatives, where retail customers become wholesale customers under a FERC-approved open access tariff, [and] costs of the utility which served the customer at retail may become stranded."[702] NARUC proposes that the affected states and the Commission collaboratively develop mechanisms (which may involve amendments to the FPA,

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[694] Id.

[695] *E.g.*, NARUC, ELCON, TAPS, NASUCA, N.Y. Mayors, NY Industrials, American Iron & Steel, Missouri Joint Commission, Omaha PPD, MI Com, NY Com, NJ BPU, VT DPS, OK Com, IN Com, UT Com, WA Com, Environmental Action, IN Industrials, LA DWP, Seattle, CAMU, Las Cruces, UT Industrials, Suffolk County, NM Industrials, CO Consumers Counsel.

[696] ELCON Comments, dated July 25, 1995, at p. 41.

[697] *E.g.*, MD Com, MI Com, LA DWP, Las Cruces. For example, MD Com states that while open access transmission may make municipalization more attractive, it ultimately is MD Com's approval that makes municipalization possible in Maryland.

[698] *E.g.*, MD Com, Las Cruces, Caparo, Coalition on Federal-State Issues, IN Com, MI Com, Iowa Board.

[699] *E.g.*, IL Com, CA Com, Midwest Commissions, CO Consumers Counsel.

[700] *E.g.*, LA DWP, Ohio Manufacturers, MMWEC, American Iron & Steel, UT Industrials, MI Com, NY Industrials, WA Com, Caparo.

[701] *E.g.*, American Iron & Steel, MD Com, LA DWP, Suffolk County, MI Com, NJ BPU, N.Y. Mayors. NASUCA cites practical problems posed by the Commission's proposal to assume jurisdiction over stranded costs resulting from municipalization, such as how the Commission would transfer the revenues extracted from the retail-turned-wholesale customer to a non-wholesale, locally-franchised entity.

[702] NARUC Initial Comments at p. 18-19.

state statutes, or both) to eliminate these regulatory gaps.

Some commenters object that the Commission's proposal to be the primary forum for recovery of stranded costs caused by retail-turned-wholesale customers would make municipalization more expensive and therefore would discourage municipalities from seeking alternative sources of electricity.[703] Some argue that different treatment of stranded costs between federal and state authorities may lead to forum-shopping as a primary determinant in the decision to municipalize.[704]

A number of commenters also suggest that the NOPR is inconsistent with prior Commission treatment of municipalization because the Commission has historically promoted franchise competition between municipalities and utilities and has never before suggested that utilities could "penalize" municipalization decisions through generation cost add-ons to transmission rates.[705] VT DPS states: "By the Commission's logic, there would never have been an Otter Tail case. If Otter Tail could have made a stranded cost claim against the municipal utility Elbow Lake planned to create, Otter Tail would never have needed to refuse to wheel."[706]

Suffolk County states that the Commission already considered stranded costs in the context of retail-turned-wholesale customers in United Illuminating Company,[707] where the Commission required United Illuminating to remove a provision in its proposed transmission tariff that would have allowed it to recover stranded costs associated with former retail loads served by new municipal systems. Suffolk County states that the Commission made clear that stranded cost matters, including those caused by municipalization, properly would be raised before state regulatory authorities. It objects that the Open Access NOPR ignores this case. Suffolk County also submits that the Commission's adoption of the settlement approved by the Massachusetts DPU in the Massachusetts Bay Transportation Authority case should serve as an example of proper jurisdictional deference with respect to local issues.[708]

However, many other commenters support the Commission's proposal to be the primary forum for retail-turned-wholesale stranded costs.[709] These commenters submit, among other things, that the Commission's jurisdiction over such costs is clear.[710] Coalition for Economic Competition states that when a utility's costs are stranded through the availability of Commission-jurisdictional transmission service, the Commission must address those costs. It argues that commenters opposing the Commission's jurisdiction fail to analyze the Commission's duty to establish just and reasonable rates for Commission-jurisdictional transmission service.

A number of commenters support the Commission's proposal to address retail-turned-wholesale stranded costs on the basis that many state commissions either lack authority to address costs that are

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[703] *E.g.*, N.Y. Mayors, NIEP, Wing Group, VT DPS, NY Industrials, American Iron & Steel, Environmental Action, IN Industrials, Las Cruces, Caparo, UT Industrials.

[704] *E.g.*, IN Com.

[705] *E.g.*, VT DPS, American Iron & Steel. American Forest & Paper states that allowing stranded cost recovery in the event of municipalization would be inconsistent with the Commission's actions in the natural gas industry, where the Commission has encouraged competition at the retail level (through competitive bypass rather than franchise competition) and has not imposed transition charges or exit fees on converting customers.

[706] VT DPS Initial Comments at p. 49; see also American Iron & Steel, NY Industrials, Caparo.

[707] 63 FERC ¶ 61,212 (1993), reh'g denied, 64 FERC ¶ 61,087 (1993).

[708] See Massachusetts Electric Company, 68 FERC ¶ 61,101 (1994); Letter Order dated March 3, 1995, Docket No. ER94-129-000 (approving settlement).

[709] *E.g.*, EEI, PSE&G, Centerior, Com Ed, Consumers Power, Detroit Edison, Duke, El Paso, Entergy, LILCO, Minnesota Power, Montana-Dakota Utilities, NYSEG, PECO, PG&E, PSNM, Southern, Utilities For Improved Transition, Allegheny, OH Com, Utilicorp, PA Com, WI Com, Coalition for Economic Competition, Central Louisiana, United Illuminating, Utility Investors Analysts, Nuclear Energy Institute, Utility Shareholders.

[710] *E.g.*, Consumers Power, Coalition for Economic Competition, Utilities For Improved Transition.

stranded because of expanding or newly-created municipal systems, or have failed to address such costs.[711] El Paso adds that any protection offered by state judicial condemnation proceedings does not obviate the need for the Commission's involvement in this issue, noting that condemnation awards may not provide full stranded investment recovery under the Commission's standards. In addition, El Paso suggests that municipalization may occur through means other than condemnation of the distribution systems of electric utilities, such as when a municipality constructs its own, duplicative distribution facilities.

Several commenters also indicate that by forthrightly addressing this issue, the Commission has removed a cloud of uncertainty that would have taken years to resolve through litigation.[712] El Paso states that the proposed rule is needed because utilities may be subject to stranded costs resulting from municipalization in two separate state jurisdictions.

In response to the argument that stranded costs are exclusively subject to state jurisdiction, SoCal Edison asserts that whether the costs are retail or wholesale is irrelevant because the issue is how and where these costs should be recovered. According to SoCal Edison, if the Commission finds that these costs are just and reasonable costs associated with providing open access transmission service, the Commission may allow utilities to recover them in Commission-regulated rates.

Coalition for Economic Competition notes that while utilities are aware of state laws allowing municipalities to condemn electric facilities and to form utilities, in recent decades, it has not happened on most systems. Moreover, it argues that merely being on notice that municipalization is a possibility does not relieve utilities of their state-imposed obligation to serve all customers in their franchise areas. It asserts that utilities had to continue to invest in plant to satisfy their duty to serve. In addition, it submits that utilities had a reasonable expectation that they would continue to serve retail load because, among other things, state regulators set long amortization periods of 30-40 years for depreciation rates.

Some commenters state that the Commission also should ensure that stranded costs are recovered when a municipal utility annexes territory served by another utility or otherwise expands its service territory.[713] A number of commenters also urge the Commission to ensure recovery of costs that are stranded if a municipal utility or a newly-formed wholesale or municipal utility physically interconnects to another utility or builds new transmission or distribution facilities to the municipal system.[714]

Several commenters believe that close coordination between the Commission and state regulators as to the calculation of stranded costs is important in the case of municipalization.[715] A number of state commissions suggest that the Commission

[711] *E.g.*, Detroit Edison, Minnesota Power, El Paso, LILCO, Centerior, PG&E. PG&E urges a clarification in the rule so that the Commission would address retail-turned-wholesale stranded costs only if the state commission either lacks jurisdiction over municipal utilities, or, if it has jurisdiction, declines to address stranded costs. Where a state commission possesses jurisdiction over municipal entities and provides a utility with stranded cost recovery from former retail customers that have municipalized, PG&E proposes that such action should be final and not subject to Commission review. Other commenters, such as El Paso, ask the Commission to establish itself as the forum of last resort when states do not provide for full recovery of stranded costs.

[712] *E.g.*, Coalition for Economic Competition, El Paso.

[713] *E.g.*, EEI, Minnesota Power, Centerior, Public Service Co of CO, SoCal Edison, Coalition for Economic Competition. PG&E asks that we allow utilities to seek recovery at the Commission for stranded costs attributable to former retail customers that have become customers of existing public agencies or municipal utilities where such costs cannot be collected at the state level.

[714] *E.g.*, Centerior, Coalition for Economic Competition, PG&E. Coalition for Economic Competition proposes that the Commission accept just and reasonable regional stranded cost recovery mechanisms in such situations to enable regional transmission associations (whether through pool and interpool arrangements or regional transmission groups) to collect through Commission-filed rate schedules from interconnected utilities charges equal to the costs otherwise stranded as a result of Commission-jurisdictional service realignments.

[715] *E.g.*, SoCal Edison, OH Com, NY Com, MI Com, Coalition on Federal-State Issues.

allow the states to set the level of retail-turned-wholesale stranded costs to be recovered in wholesale transmission rates set by the Commission.[716] They submit that this approach would respect state interests in controlling the rate impact of stranded costs, while allowing the Commission to design cost recovery, and would address the needs of industrial customers and other stakeholders by providing a forum before state regulators who will be more aware of their particular needs. Further, they contend that this approach would prevent relitigation of issues, minimize forum-shopping, and prevent legitimate and verifiable costs from falling through the cracks or being double-recovered.[717] NY Industrials asks the Commission to clarify that utilities will not be allowed to seek cost recovery at both the Commission and state commissions.

Commission Conclusion

We reaffirm our preliminary determination that this Commission should be the primary forum for addressing the recovery of stranded costs caused by retail-turned-wholesale customers. If such a customer is able to reach a new generation supplier because of the new open access (through the use of a FERC-filed open access transmission tariff or through transmission services ordered pursuant to section 211 of the FPA), we believe that any costs stranded as a result of this wholesale transmission access should be viewed as "wholesale stranded costs." Such costs would not be stranded but for the action of this Commission (either through a mandatory FPA section 205-206 open access tariff or an order under FPA section 211) in permitting the new wholesale entity to become an unbundled transmission services customer of the utility and thereby to obtain power from a new supplier.[718] There is a clear nexus between the FERC-jurisdictional transmission access requirement and the exposure to non-recovery of prudently incurred costs. In these circumstances, we believe that this Commission should be the primary forum for addressing recovery of such costs. To avoid forum-shopping and duplicative litigation of the issue, we expect parties to raise claims before this Commission in the first instance.[719]

Some commenters have asked us also to be the primary forum for stranded cost recovery in situations in which an existing municipal utility annexes territory served by another utility or otherwise expands its service territory. We decline to do so because in these situations there is no direct nexus between the FERC-jurisdictional transmission access requirement and the exposure to non-recovery of prudently incurred costs. The risk of an existing municipal utility expanding its territory was a risk prior to the Energy Policy Act and prior to any open access requirement.

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[716] *E.g.*, MI Com, NY Com, Ohio Com.

[717] PG&E proposes a similar approach, noting that if there are differences in the stranded cost method used by the Commission and the states, an incentive may remain for retail customers to municipalize merely to take advantage of more favorable stranded cost treatment at the Commission.

[718] Costs that are exposed to nonrecovery when a retail customer or a newly-created wholesale power sales customer ceases to purchase power from the utility and does not use the utility's transmission system to reach a new generation supplier (e.g., through self-generation or use of another utility's transmission system) do not meet the definition of "wholesale stranded costs" for which this rule provides an opportunity for recovery. Such costs are outside the scope of this rule because such costs would not be stranded as a result of the new open access. See Section IV.J.12.

[719] We recognize that we took a different approach to retail-turned-wholesale stranded cost recovery in United Illuminating, where we suggested that state and local regulatory authorities or the courts should be able to provide an adequate forum to address retail franchise matters, including recovery of stranded costs caused by municipalization, but said we would consider revisiting the question if United Illuminating could demonstrate the lack of a forum. 63 FERC at p. 62,583-84. Since the issuance of that decision, however, we have had an opportunity to reanalyze the nature of the stranded cost problem in cases where a retail customer becomes a wholesale customer, including the potential that there might not be a state regulatory forum for recovery of such costs. In these circumstances, we have determined that where such costs are stranded as a result of wholesale open access transmission, these costs should be viewed as wholesale stranded costs and this Commission should be the primary forum for addressing their recovery.

Nevertheless, we are concerned that there may be circumstances in which customers and/or utilities could attempt, through indirect use of open access transmission, to circumvent the ability of any regulatory commission—either this Commission or state commissions—to address recovery of stranded costs.[720] We reserve the right to address such situations on a case-by-case basis.

As we indicated in the Supplemental Stranded Cost NOPR, if the state has permitted any recovery from departing retail-turned-wholesale customers (for example, if it imposed an exit fee prior to, or as a condition of, creating the wholesale entity), that amount will not, in fact, be stranded, and we will deduct that amount from the legitimate stranded costs for which we will allow recovery.

As discussed in Sections IV.J.8-IV.J.9, we will require the same evidentiary demonstration for recovery of stranded costs from a retail-turned-wholesale customer, and will apply the same procedures for determining stranded cost obligation, as that required in the case of a wholesale requirements customer.

7. Recovery of Stranded Costs Caused by Retail Wheeling

In the Supplemental Stranded Cost NOPR, we stated that both this Commission and state commissions have the legal authority to address stranded costs that result from retail customers who obtain retail wheeling from public utilities in order to reach a different generation supplier.[721] Because the vast majority of commenters urged the Commission not to assume responsibility for retail stranded costs, except in certain circumstances, we preliminarily concluded that it is appropriate to leave it to state regulatory authorities to deal with any stranded costs occasioned by retail wheeling. We proposed to entertain requests to recover stranded costs caused by retail wheeling only when the state regulatory authority does not have authority under state law to address stranded costs at the time when the retail wheeling is required.[722] In so doing, we preliminarily accepted the view that stranded costs caused by retail wheeling are primarily a matter of local or state concern and thus, with the limited exception discussed above, generally must be recovered through retail charges.

We noted that the states have a number of mechanisms for addressing stranded costs caused by retail wheeling, one of which is a surcharge to state-jurisdictional rates for local distribution.[723] We encouraged the states to use the mechanisms available to them to address

[720] The CA Com has asked that, "(t)o the extent of FERC's authority, it should assume jurisdiction to fulfill a backstop role in case retail customers evade a state-determined transition charge by becoming retail customers of an entity not subject to the state regulatory commission's jurisdiction. In assuming jurisdiction, the Commission should defer to the state commission's determination and allocation of stranded costs for the departing retail customer." CA Com March 18, 1996 Response to Supplemental Comments of PG&E.

[721] As discussed in Section IV.I, the Commission's authority to address retail stranded costs derives from its jurisdiction over the rates, terms and conditions of unbundled transmission in interstate commerce used by retail customers that obtain retail wheeling. The states' authority derives from state jurisdiction over local distribution facilities and over the service of delivering electric energy to end users, and from the authority to impose, among other things, retail exit fees and surcharges on local distribution rates.

[722] We proposed to require the same evidentiary demonstration for recovery of stranded costs from a retail customer that obtains retail wheeling as that required in the case of a wholesale requirements customer. We also reaffirmed our proposal in the initial Stranded Cost NOPR that a utility will have to show that the stranded costs are not more than the net revenues that the retail customer would have contributed to the utility had it remained a retail customer of the utility, and that the utility has taken and will take reasonable steps to mitigate stranded costs. *FERC Statutes and Regulations* ¶ 32,514 at p. 33,128.

[723] As we noted in the Supplemental NOPR, a state may require payment of an exit fee before a franchise customer is permitted to obtain unbundled retail wheeling. If local distribution facilities are used by a retail wheeling customer, the state may allow recovery of stranded costs through rates for use of such local distribution facilities. In addition, as discussed in Section IV.I, because we believe that states have authority over the service of delivering electric energy to end users, not merely the local distribution facilities themselves, state authorities can assign stranded costs and benefits through a local distribution service charge, and may do so based on usage (kWh), demand (kW), or any combination or method they find appropriate. If

stranded costs.[724] We also noted that the states may use their jurisdiction over local distribution facilities to address "stranded benefits," such as environmental benefits associated with conservation, load management, and other demand side management programs.[725]

A number of commenters support the Commission's proposal for addressing stranded costs caused by retail wheeling.[726]

Other commenters urge the Commission to take a greater role in retail stranded cost recovery and to entertain requests to recover stranded costs as a backstop where: (1) State regulatory authorities have the authority to address stranded costs but either choose not to exercise that authority or fail to permit full stranded cost recovery;[727] or (2) the state commission's authority is unclear.[728]

Commenters that support a greater Commission backstop role argue, among other things, that because the Commission has exclusive ratemaking jurisdiction over any stranded cost charges imposed "for or in connection with" interstate transmission service by public utilities, the Commission has an obligation to regulate the recovery of stranded costs from interstate retail transmission customers.[729] A number of these commenters argue that the determining factor is who has the jurisdiction to review the rates for the service, not who has the jurisdiction to order the service.[730] They explain that the Commission has jurisdiction over generating facilities and associated costs to the extent appropriate to establish just and reasonable rates for jurisdictional services. They disagree with other commenters who argue that only the jurisdiction under whose authority the costs were incurred and initially recovered should have authority to order recovery of stranded costs.[731]

These commenters contend that the Commission cannot abdicate its regulatory responsibilities by either deferring to the state commissions or otherwise failing to independently address the issue.[732] EEI and the Coalition for Economic Competition refer to "a long line of cases (where) the courts have held that where a federal regulatory agency * * * is charged with implementing a statutory framework, that agency is without authority to deviate from or abdicate its statutory responsibilities."[733] According to Coalition for Economic Competition, for example, the Commission could satisfy its obligation to address stranded costs that arise from retail wheeling by allowing states to determine retail stranded cost charges in the first instance; to the extent that the state allows full recovery, Coalition for Economic Competition submits that the Commission's obligation would be satisfied.

(Footnote Continued)

a state decides not to take any of these routes, it may consider whether to allow recovery of stranded costs from remaining retail customers or whether shareholders should bear all or part of those costs. Id. at p. 33,129.

[724] Id. at p. 33,129-30.

[725] Id. at p. 33,098 n.230.

[726] *E.g.*, Utilicorp, Houston L&P, PG&E, Freedom Energy Co, WI Com.

[727] *E.g.*, EEI, EGA, Coalition for Economic Competition, Utilities for Improved Transition, Atlantic City, Arizona, Centerior, Com Ed, Detroit Edison, El Paso, LILCO, NU, NSP, NYSEG, United Illuminating, BG&E, Sierra, Southern, UT Industrials, NRECA. NRECA argues that unless the Commission addresses stranded costs caused by retail wheeling where a state commission lacks authority, or has authority but decides not to exercise it, there could be a jurisdictional gap into which many rural electric cooperatives could fall.

[728] *E.g.*, CSW.

[729] *E.g.*, EEI, Illinois Power, PSNM, Entergy, Nuclear Energy Institute, Coalition for Economic Competition.

[730] *E.g.*, Coalition for Economic Competition, Illinois Power, Utilities for Improved Transition, EEI.

[731] EEI notes, for example, that as use of electrical facilities shifts between retail and wholesale, jurisdiction over the rates to recover the allocated cost of service shifts between state commissions and this Commission, and that the regulatory authority is determined by the nature of the transactions and the classification of the customer, not the jurisdiction under which the costs originally arose.

[732] *E.g.*, Illinois Power, Utilities For Improved Transition, EEI, Coalition for Economic Competition.

[733] EEI Initial Comments at IV-13; see also Coalition for Economic Competition Initial Comments at p. 23-31.

EEI asserts that it would be unduly discriminatory and preferential for the Commission to refuse to address all stranded costs arising from retail wheeling. According to EEI, the same arguments that support the Commission's decision to address costs that are stranded where retail load municipalizes and where the state regulatory authority, at the time retail wheeling is required, lacks authority to act, apply with equal force to all other retail stranded costs. EEI submits that the nexus in these cases is that Commission-jurisdictional transmission service is the means by which the costs are stranded.[734]

Utility Working Group argues that the NOPR inappropriately characterizes the Commission's jurisdiction over retail stranded costs and that this could later be used against the Commission's exercise of its full authority. According to Utility Working Group, the NOPR depicts the Commission's jurisdiction as being derived from state law (in other words, the Commission will act where state regulatory authorities have no authority over retail stranded costs and will not act where state regulatory authorities have such authority). If the Commission desires to afford substantial deference to the states regarding retail stranded costs, Utility Working Group contends that the final rule should reflect that policy determination; however, the rule should not confuse policy with jurisdiction by purporting to place limits on, or attempting to waive, the Commission's jurisdiction over such costs.

Entergy asserts that the Commission's jurisdiction over multi-state utilities provides further support for our jurisdiction over retail stranded costs in certain contexts. Entergy states that most of the eleven multi-state registered holding company systems have some form of Commission-jurisdictional agreement that allocates production and transmission costs among the systems' affiliated operating companies. It asserts that these agreements by their very nature allocate costs among jurisdictions (that is, between states). Many of these agreements equalize the cost of generating reserves among affiliated operating companies, and such reserve equalization formulas can shift retail stranded costs among states unless the Commission provides a regulatory forum to address cost-shifting. Citing Middle South Energy,[735] and City of New Orleans v. FERC,[736] Entergy submits that the Commission cannot sit on the sidelines when it comes to stranded retail costs on the Entergy system. According to Entergy, Commission and judicial precedent place on the Commission the responsibility to ensure that federally-approved costs and cost allocations are not undermined by state action.

Commenters also express concern that it will not be possible to be sure that a state regulatory authority has authority over retail stranded costs until after years of litigation. If the Commission waits for the resolution of challenges to state authority and a court holds that the state regulatory authority is without authority, these commenters assert that the bar on retroactive ratemaking could leave the states and the Commission without a remedy to compensate utilities for stranded costs.[737] A number of commenters suggest that while the states should be allowed to set retail wheeling stranded cost charges in the first instance, the Commission should accept filings to preserve a utility's ability to recover retail stranded costs from the time the customer departs if the state-authorized charges are not upheld in court. They submit that this would put customers on notice of the potential for Commission action and thereby avoid the retroactivity problem.[738]

Some commenters express concern that if the Commission does not take more decisive action on retail wheeling stranded costs, the result will be wasteful litigation that will discourage competition by causing financial uncertainty and higher financing costs for investor-owned utilities and higher rates for consumers.[739]

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[734] See also SoCal Edison.

[735] Opinion 234, 31 FERC ¶ 61,305, on reh'g, 32 FERC ¶ 61,425 (1985).

[736] 875 F.2d 903 (D.C. Cir. 1989), cert. denied sub nom. *Mississippi v. FERC*, 494 U.S. 1078 (1990).

[737] *E.g.*, NU, Coalition for Economic Competition, Illinois Power, EEI.

[738] *E.g.*, NEPCO, EEI, Coalition for Economic Competition, Entergy.

[739] *E.g.*, LILCO, Coalition for Economic Competition.

Coalition for Economic Competition also asserts that stranded cost charges would be greatest at the start of a retail wheeling program, thereby making the years during which the state-authorized charges are subject to appeal more important for recovery purposes.

A number of commenters support Commission-established uniform standards for, and uniform recovery of, costs stranded as a result of open access to the interstate transmission system.[740] They argue that disparate state treatment of stranded costs would be economically inefficient and discriminatory and would burden interstate commerce.[741] Several commenters support state involvement in the establishment of uniform standards.[742]

In contrast to the commenters that support a greater Commission role in retail stranded cost recovery, NARUC and a number of other commenters oppose any Commission involvement in retail stranded costs.[743] These commenters contend, among other things, that the Commission lacks authority over these costs. Even if the Commission could assert such jurisdiction, they argue that as a policy matter it would be inappropriate for the Commission to delve into complicated legal and policy issues governed by varying state regulatory regimes.

According to some of these commenters,[744] section 201(a) of the FPA precludes an exercise of federal jurisdiction over retail stranded cost recovery because the Commission's jurisdiction extends "only to those matters which are not subject to regulation by the States."[745] NM Industrials argues that a lack of state commission authority is an affirmative state determination, either by act or omission, that stranded costs must be dealt with in a particular manner. It submits that the Commission also lacks authority over retail stranded costs when states either decide not to address such costs or, in the Commission's opinion, grant insufficient recovery of stranded costs. NM Industrials asserts that the language of the FPA and its legislative history indicate that Congress wanted to preclude Commission jurisdiction in those areas where states could exercise effective control, and that this limitation covers all matters which are or can be regulated by the states, including the recovery of stranded investment. NM Industrials also suggests that assertion of Commission jurisdiction would violate the provision of section 212 of the FPA that prohibits the Commission from interfering with the states' authority over the transmission of energy directly to an ultimate consumer.[746]

Other commenters argue that the Commission's proposed treatment of retail stranded costs infringes on the states' jurisdiction over the allocation of costs that were under their jurisdiction when the costs were incurred. According to these commenters, the question of whether these costs should be recovered from other retail ratepayers, eliminated as excess capacity, or billed in some fashion to the customer now receiving wheeling service are purely questions of state ratemaking law.[747] Some commenters assert that, as a matter of policy, the Commission should stay out of retail stranded costs because only the states have sufficient knowledge and expertise regarding utility planning, investment, and forecasting to address these costs adequately.[748]

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[740] *E.g.*, NU, NSP, Illinois Power, Coalition for Economic competition, PSE&G, Utilities For Improved Transition, Philip Morris, EEI.

[741] Freedom Energy Co. rejects this argument on the basis that state regulation has never been wholly consistent and yet utilities have not asked for federal unification of state ratemaking policies or resolution of differences.

[742] *E.g.*, PSNM, GA Com, Omaha PPD, Illinois Power.

[743] *E.g.*, CA Com, MD Com, VA Com, IN Com, NH Com, NV Com, NY-Com, OH Com, FL Com, AZ Com, TX Com, ELCON, NY Industrials, NY AG, NY Consumer Protection, MA DPU, Iowa Board, IN Industrials, Texas Industrials, NM Industrials, Reynolds, NYMEX, Legal Environmental Assistance, CO Consumers Counsel, NJ Ratepayer Advocate, IBM, ME Industrials, Jay, WEPCO, NH General Court.

[744] *E.g.*, NARUC, ELCON, NY Industrials, NM Industrials, NV Com.

[745] 16 U.S.C. 824(a).

[746] See also Freedom Energy Co. Reply Comments.

[747] E.g., ELCON, PA Com, NY Industrials, ND Com, VA Com, NM Com.

[748] *E.g.*, OH Com, NY Industrials, NM Com, IN Com, WA Com, NV Com, NY Com, Suffolk

Commenters also express concern that the possibility of Commission involvement in retail stranded cost recovery will encourage forum-shopping whenever state commission action is unfavorable, even when states have procedures to deal with stranded costs. They argue that the result would be endless litigation over where federal jurisdiction ends and where state jurisdiction begins. They suggest that if a state fails to address retail stranded cost recovery, the issue should be addressed in court or in state legislatures.[749] OH Com contends that a Commission policy that does not recognize states' authority over retail stranded costs would be a disincentive for states to permit retail wheeling.

A number of commenters argue that recovery of retail stranded costs is not directly implicated by any Commission or Congressional action—that most such costs would be created by retail wheeling, which is not the subject of the Commission's open access initiatives—and thus need not be dealt with as part of the final rule.[750]

Commenters seek a number of clarifications concerning the Commission's position on, and the procedures for, retail stranded cost recovery. A number of commenters ask the Commission to clarify the states' role with respect to retail stranded cost recovery.[751] Others address the type of evidence required to establish that the state regulatory authority lacks authority to address stranded costs when retail wheeling is required.[752]

Several commenters express concern that customers receiving retail wheeling not be able to evade state stranded cost charges.[753] IL Com says that the Commission's proposal for determining whether facilities are state-jurisdictional "local distribution" facilities or Commission-jurisdictional "transmission" facilities in interstate commerce may not always provide a state with the opportunity to recover retail stranded costs through distribution rate surcharges. It says that the Commission does not offer any assurances that the case-by-case application of the proposed "functional-technical test" will result in a finding that "local distribution" facilities are used in all retail wheeling scenarios. PG&E asks the Commission to provide that all retail customers that opt for direct transmission access by definition take service over local distribution facilities and therefore may be subjected to a state-determined distribution rate that includes stranded cost surcharges.

A number of commenters ask the Commission to clarify that, in issuing the final rule, the Commission is not endorsing (either implicitly or explicitly) retail wheeling.[754]

Several commenters express concern that stranded costs may arise in one state jurisdiction and be shifted to another.[755] For example, MT Com says that an analysis confined to a state's boundaries may reveal no stranded costs, but that such costs may indirectly arise because of common pool revenue recovery mechanisms, which may be the largest source of stranded costs for some utilities. Entergy raises a similar concern in the context of holding company or other multi-state situations. It argues that denial of retail stranded cost recovery by a state regulatory authority could harm customers in other states. Entergy proposes that, while state regulators should be given the opportunity in the first instance to assure that stranded costs are recovered and are not shifted to other states, the Commission should allow utilities to file retail wheeling tariffs with the Commission to preserve the right to seek recovery from the Commission.

Several commenters oppose Entergy's proposal.[756] Among other things, they argue that the FPA does not authorize the Commission to act as an appellate court

(Footnote Continued)

County, NY AG, Tonko, PA Industrials, NH General Court.

[749] *E.g.*, OH Com, PA Com, NM Com, CA Com, Blue Ridge.

[750] *E.g.*, Nucor, AEC & SMEPA.

[751] *E.g.*, NY Industrials, EGA, NJ BPU, Coalition on Federal-State Issues.

[752] *E.g.*, Iowa Board, Nevada Commission, CCEM; see also NE Public Power District.

[753] *E.g.*, IL Com, PG&E, Public Service Co of CO.

[754] *E.g.*, NRECA, Wisconsin EC, EEI, PECO, Missouri Basin Group.

[755] *E.g.*, MT Com, Entergy.

[756] *E.g.*, NARUC, Entergy Retail Regulators, MS Com, Al Com.

over retail regulators. They assert that, in the case of a multi-state holding company system, it is the Commission-jurisdictional intra-system agreement (not a state's decision as to recovery of retail stranded costs) that determines the allocation of costs at wholesale among the affiliates. Several of these commenters suggest that if the holding company believes that, as a result of a state's disallowance of costs in retail rate base, the cost allocations under an intra-system agreement are unduly discriminatory, the holding company could propose to amend the agreement.[757]

A number of commenters also express concern that services that investor-owned utilities provide to promote energy efficiency and conservation and to assist low-income residents and the elderly be continued.[758] NW Conservation Act Coalition suggests that the Commission should condition stranded cost recovery upon a showing by the utility that allowing recovery will not strand such social benefits.[759]

Various commenters endorse the use by state regulators of a distribution charge or other fee imposed on electricity consumption to address stranded social benefits.[760] NARUC and OH Com express concern that the Commission, by claiming authority over unbundled retail transmission services, may make it difficult for states to use non-bypassable "wires charges" or "access fees" to require all customer classes to support such programs.[761] NARUC asks the Commission to ensure that any jurisdiction we exercise over unbundled transmission services does not legally or practically foreclose the ability of individual states to fund such programs.[762] LILCO, as part of its argument that the Commission should provide a complete backstop for stranded cost recovery resulting from retail wheeling, urges the Commission to establish retail wheeling rates that provide for full recovery of any stranded costs, including stranded social benefits, that are unrecovered after state stranded cost determinations.

Commission Conclusion

We believe that both this Commission and the states have the legal authority to address stranded costs that result when retail customers obtain retail wheeling in order to reach a different generation supplier, and that utilities are entitled, from both a legal and a policy perspective, to an opportunity to recover all of their prudently incurred costs. This Commission's authority to address retail stranded costs is based on our jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce. The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users. However, because it is a state decision to permit or require the

[757] *E.g.*, NARUC, MS Com.

[758] *E.g.*, Homelessness Alliance, Black Mayors, National Women's Caucus, Vann, La Raza.

[759] NARUC and OH Com assert that, in determining whether a wholesale transmission transaction is a "sham," the Commission should consider a retail customer's intent to bypass responsibility for supporting social programs.

[760] *E.g.*, Natural Resources Defense, NW Conservation Act Coalition, Seattle, FTC, Northeast States for Coordinated Air Use Management, NARUC, OH Com. CO Com agrees that states should have the option to fund such programs through the imposition of surcharges on any form of electric service used to benefit retail customers, including surcharges on retail transmission rates. Seattle proposes either a simple fee on kWhs or a differential fee based on the type of resource and its environmental affects. DOE urges the Commission to work with state regulators to ensure that states have the ability to recover stranded retail costs and benefits in a way that prevents cost-shifting, forum-shopping, and uneconomic bypass (including bypass of stranded benefits).

[761] CO Com notes that the NOPR proposes to limit states to funding mechanisms that can be implemented solely at the local distribution level, presumably through the use of a surcharge on distribution facilities or so-called "fee at the meter" or the use of a local distribution system revenue decoupling mechanism. It suggests that neither of these options may be legally or practically feasible in many states for a wide variety of reasons (but does not expand on these reasons).

[762] Natural Resources Defense proposes that the Commission adopt the following language: "The FPA does not affect state regulators' jurisdiction to apply distribution charges—either volume-based or fixed—to electricity that is used by any utility customer to provide end-use services (as distinguished from electricity that is purchased for resale to end-use customers)." Natural Resources Defense Initial Comments at p. 3.

retail wheeling that causes retail stranded costs to occur, we will leave it to state regulatory authorities to deal with any stranded costs occasioned by retail wheeling. The only circumstance in which we will entertain requests to recover stranded costs caused by retail wheeling is when the state regulatory authority[763] does not have authority under state law to address stranded costs when the retail wheeling is required.

Commenters that describe our action as an unlawful abdication or delegation of authority misconstrue the nature of our decision to leave retail stranded costs (with a limited exception) to state regulatory authorities.[764] We have not "abdicated" or "delegated" to state regulatory authorities our jurisdiction over the rates, terms, and conditions of retail transmission in interstate commerce; if retail transmission in interstate commerce by a public utility occurs, public utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205. Instead, we have made a policy determination that the recovery of retail stranded costs—an issue over which either this Commission or state commissions could exercise authority by virtue of their jurisdiction over retail transmission in interstate commerce and over local distribution facilities and services, respectively—is primarily a matter of local or state concern that should be left with the state commissions. However, if the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required, then we will entertain requests to recover such costs.[765]

Because we have accepted the view that stranded costs caused by retail wheeling are primarily a matter of local or state concern, we will not allow the states to use the interstate transmission grid as a vehicle for passing through any retail stranded costs, with the following limited exception. If the state regulatory authority does not have authority under state law when the retail wheeling is required to resolve the retail stranded cost issue, we will permit a utility to seek a customer-specific surcharge to be added to an unbundled transmission rate.

We believe that most states have a number of mechanisms for addressing stranded costs caused by retail wheeling.[766] In addition, as further discussed in Section IV.I, we are defining in this rule "facilities used in local distribution" under section 201(b)(1) of the FPA. Rates

[763] "State regulatory authority" has the same meaning as provided in section 3(21) of the FPA.

[764] We reject the arguments of EEI and Coalition for Economic Competition that the Commission made findings in the initial stranded cost NOPR that "inexorably" lead to the conclusion that Commission action providing full recovery of retail stranded costs is required. Their reliance on *Williams Natural Gas Company v. FERC*, 872 F.2d 438 (D.C. Cir. 1989), appeal after remand, 943 F.2d 1320 (D.C. Cir. 1991) (Williams), is simply misplaced. Williams involved a rulemaking that was terminated by the Commission. The court stated that the Commission, "having expressed these tentative views (that the incentive price for tight formation gas would disserve the public interest) and having solicited comments on the issue, was not free to terminate the rulemaking" without providing a satisfactory explanation.872 F.2d at p. 446, 450. Here, in contrast, we are issuing a Final Rule that reaffirms in many respects preliminary findings proposed in both the initial and Supplemental Stranded Cost NOPRs. Although the conclusion we reach based on those findings may be different than that which some commenters advocate, we have fully explained the basis for our decision.

[765] In these circumstances, the cases cited by commenters to support the proposition that an agency is not authorized to abdicate its statutory responsibilities or to delegate to parties and intervenors regulatory responsibilities (such as preparation of an environmental impact statement) are factually distinguishable and inapposite. See, e.g., FPC v. Texaco, 417 U.S. 380, 394 (1974) (Commission cannot exempt small-producer rates from compliance with just and reasonable standard); *United States v. City of Detroit*, 720 F.2d 443, 451 (6th Cir. 1983) (district court inappropriately implied waiver of EPA statutory duty under Title II of the Federal Water Pollution Prevention and Control Act); *State of Idaho v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (an agency cannot abdicate its NEPA responsibilities in favor of the regulated party).

[766] As discussed in the Supplemental NOPR (*FERC Statutes and Regulations* ¶ 32,514 at p. 33,129-30), these mechanisms include requiring an exit fee before a franchise customer is permitted to obtain unbundled retail wheeling and imposing a surcharge on local distribution rates. Commenters identified several other possible mechanisms in response to the initial Stranded Cost NOPR.

for services using such facilities to make a retail sale are state-jurisdictional, and states will be free to impose stranded costs caused by retail wheeling on facilities or services used in local distribution. States may also use their jurisdiction over local distribution facilities or services to recover so-called stranded benefits. This rule is not intended to preempt any existing state authority to assess a stranded cost or stranded benefits charge on a retail customer that obtains retail wheeling. Moreover, since the charge is state jurisdictional, it is of no moment to our responsibilities under the FPA as to whether such charges are volume-based (kWh), demand-based (kW), or customer-based (fixed).

We believe that our approach to retail wheeling stranded costs represents an appropriate balance between federal and state interests. This approach ensures that the rates for transmission in interstate commerce by public utilities (except in a narrow circumstance) will not be burdened by retail costs. It also helps to ensure that one state will not be able to impose costs stranded by its ordering of retail wheeling[767] on customers in another state.[768] In a holding company or other multi-state situation, we recognize that denial of retail stranded cost recovery by a state regulatory authority could, through operation of the reserve equalization formula in a Commission-jurisdictional intra-system agreement, inappropriately shift the disallowed costs to affiliated operating companies in other states. The Commission is concerned about this potential for cost-shifting. We would not wish to see an intra-system agreement used as a means for one jurisdiction to shift to other jurisdictions retail stranded costs for which it would otherwise be responsible under that agreement. However, we will deal with such situations if they arise pursuant to public utility filings under section 205 or complaints under section 206. Thus, the need to amend a jurisdictional agreement to prevent retail stranded costs from being shifted to customers in other states will be addressed on a case-by-case basis. We encourage the affected state commissions in such situations to seek a mutually agreeable approach to this potential problem. If such a consensus solution resulted in a filing to modify a jurisdictional agreement, we would accord such a proposal deference, particularly if other interested parties support the filing. In the event that the state commissions and other interested parties cannot reach consensus that would prevent cost shifting, the Commission would ultimately have to resolve the appropriate treatment of such stranded costs.

Should a situation arise in which a state regulatory authority concludes that it has no ability to address retail stranded costs, or the appropriate state courts ultimately determine that a state regulatory authority does not have authority to impose retail stranded costs, a utility may seek recovery here through its Commission-jurisdictional retail transmission rates of costs stranded as of the date of the customer's departure. Because all parties are put on notice by this Rule of the potential for recovery through Commission-jurisdictional retail transmission rates should state commission-authorized retail wheeling charges be invalidated, such recovery (if allowed) would not be retroactive ratemaking.[769]

8. Evidentiary Demonstration Necessary—Reasonable Expectation Standard

In the Supplemental Stranded Cost NOPR, the Commission made a preliminary determination that a public utility or transmitting utility seeking to recover stranded costs must demonstrate that it had a reasonable expectation of continuing to serve a customer. We indicated that the existence of a notice of termination provision in a wholesale requirements contract creates a rebuttable presumption that the utility had no reasonable expectation of serving the customer beyond the period provided for in the notice provision.[770] We proposed not to adopt a mini-

[767] As we stated in the Supplemental NOPR, we do not address whether states have the lawful authority to order retail wheeling in interstate commerce. Id. at p. 33,098 at n.228. In addition, we are neither endorsing nor discouraging retail wheeling.

[768] See id. at p. 33,098, 33,127-28.

[769] *See Public Utilities Commission of the State of California v. FERC*, 988 F.2d 154, 163-66 (D.C. Cir. 1993).

[770] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,117.

mum notice period for purposes of applying the rebuttable presumption. This was because whether a utility has a reasonable expectation of continuing to serve a customer, and for how long, including whether there is sufficient evidence to rebut the presumption that no such expectation existed beyond the notice provision in the contract, will depend on the facts of each case.

We sought further comment concerning whether the reasonable expectation standard should apply if a utility has been making wholesale requirements sales to a customer in a non-contiguous service territory and where, in order to make such a sale possible, transmission service has been rendered by an intervening utility. We asked whether the Commission should take this as conclusive evidence that the customer had a choice of wholesale suppliers and, therefore, that the seller had no reasonable expectation that the contract would be extended. We further asked should we choose to provide the seller with an opportunity to prove that it had a reasonable expectation, what weight should be given to the fact that transmission service was rendered by the intervening utility. If the seller establishes that it had a reasonable expectation, and the former wholesale customer does not take unbundled transmission service from the former seller, we asked what if any means ought to be available for the collection of stranded costs.[771]

We also proposed to require the same evidentiary demonstration for recovery of stranded costs from a retail-turned-wholesale customer or a retail customer that obtains retail wheeling as that required when a wholesale requirements customer leaves a utility's system. We proposed that the utility must demonstrate that it incurred stranded costs based on a reasonable expectation that the customer would continue to receive bundled retail services. We anticipated that the reasonable expectation test would be easily met in those instances in which state law awards exclusive service territories and imposes a mandatory obligation to serve. We requested comments on these proposals.[772]

a. Rebuttable Presumption

Some commenters oppose treating a notice provision as a rebuttable presumption that the utility had no reasonable expectation of continuing to serve a customer. Commenters representing the financial community (Utility Shareholders and Utility Investors Analysts), for example, state that investment in generation and other costs incurred in providing utility service have not been tied to notice provisions. Based on the use of notice provisions in the past, and their infrequent use for termination, they state that the financial community has not viewed notice provisions as a determinant of the financial basis of investment in the industry.

Other commenters also argue that the Commission interprets the intent behind termination notice provisions too narrowly. These commenters submit that the Commission should examine on a case-by-case basis whether a notice provision demonstrates a sufficient meeting of the minds between the parties that there was no reasonable expectation that the contract would be extended.[773] TVA notes that the existence of a notice provision in its contracts in no way implies that continued service would not be expected.

A number of commenters[774] note that some utilities have "evergreen" contracts that remain in effect indefinitely unless either party gives notice that it intends to terminate the contract. They argue that, with no date certain for termination, the provider of bundled service must proceed on the assumption that it will have to meet its contract obligations on a contin-

[771] Id. at p. 33,118.

[772] Id. at p. 33,128.

[773] *E.g.*, Carolina P&L, CSW, Duke, Utilities for Improved Transition, Montaup, TVA, MidAmerican. MidAmerican states that, for years, utilities have entered into wholesale contracts containing termination notice provisions and, for years, customers have renewed and renegotiated those contracts. Duke agrees that more important indications of the utility's reasonable expectation of continuing to serve the customer can be found where the service has been included in the IRP process or the contract has been repeatedly renewed. Orange & Rockland proposes that there be a rebuttable presumption of recovery for long-standing (at least 10 years) contracts between utility affiliates on the basis that the existence of a long-standing relationship is of greater significance than a notice provision.

[774] *E.g.*, CSW, IN Com.

ued basis. CSW recommends that the Commission limit the rebuttable presumption standard to contracts that contain a fixed contract termination date. IN Com suggests that where a contract contains an evergreen provision, the Commission should consider how often the contract has been automatically renewed and the length of the notice period.

A number of commenters suggest that the following factors should be conclusive proof of a reasonable expectation (or sufficient to conclusively rebut the presumption of no reasonable expectation): (1) An obligation under statute, certificate of public convenience and necessity, order or otherwise, granted to the utility to provide service to the area that includes the customer; (2) participation by the customer in regulatory proceedings that defer the utility's complete recovery of the costs associated with existing investment to a later period; or (3) service under a wholesale rate that averaged the cost of all of a utility's generation resources, both long-term and short-term.[775] Utilities For Improved Transition maintains that a customer whose rates were based on the totality of a utility's resources, including those with long life expectancies, cannot claim that the governing expectation was that the utility would serve the customer only for a period of one to three years.

Other commenters, in contrast, assert that the rebuttable presumption does not go far enough. These commenters submit that a notice of termination provision should create a conclusive presumption that a utility had no reasonable expectation of continuing to serve a customer beyond the notice period.[776] Some commenters[777] also support a conclusive presumption of no reasonable expectation where one or more of the following grounds are present: (1) An explicit termination provision, regardless of the length of the pre-termination notice period; (2) an explicit provision for decreasing service or switching to partial requirements service; (3) a pre-existing transmission tariff or transmission service schedule; (4) NRC license conditions providing for transmission service or pooling rights;[778] (5) a municipal joint action agency or G&T cooperative with authority to supply the wholesale load in question; (6) a fixed-term contract; (7) membership in a power pool that provides access to regional markets; (8) a contract entered into after passage of the Energy Policy Act; or (9) other evidence of an ability to seek alternative suppliers. Several of these commenters, such as TAPS and Detroit Edison Customers, submit that a conclusive, irrebuttable presumption would decrease the number of disputes over stranded cost issues.

Several comments were submitted concerning the examples listed in the NOPR that the Commission suggested, depending on all of the facts and circumstances, could establish a reasonable expectation that a contract would be extended. These examples include lack of access to alternative suppliers, repeated contract renewals, failure of a customer to object to the imposition of construction-work-in-progress, or communications between supplier and customer concerning including the customer's load in system planning.[779] Some commenters argue that evidence of this type should not be enough to rebut the presumption (or to overcome a summary judgment motion based on the presumption) of no reasonable expectation for contracts with notice provisions.[780]

[775] *E.g.*, El Paso, Utilities For Improved Transition.

[776] *See, e.g.*, ELCON, NRECA, APPA, American Forest & Paper, Central Montana EC, Municipal Energy Agency Nebraska, Arkansas Cities, Direct Service Industries, Atlantic City, TDU Systems, Fertilizer Institute, LG&E, ABATE, Oglethorpe.

[777] *E.g.*, TAPS, Missouri Joint Commission, Detroit Edison Customers, LEPA, APPA, Cleveland.

[778] According to LEPA, the normal set of NRC license conditions included an explicit wheeling commitment and many of the license conditions clearly referenced the possibility that the wheeling commitment would lead to the loss of customers to whom the utility had been selling bulk power supply as well as retail power. LEPA submits that acceptance of such license conditions should have ended any reasonable expectation that a utility might have had of continuing to serve a full requirements customer, wholesale or retail, after the termination of its contract.

[779] See *FERC Statutes and Regulations* ¶ 32,514 at p. 33,117.

[780] *E.g.*, TAPS, Phelps Dodge. Phelps Dodge suggests that evidence of past contract renewals, by itself, should not serve to rebut the pre-

ELCON objects to using a customer's lack of alternative supply as evidence of a continued service obligation; it submits that the historic lack of supply alternatives has been caused by undue exercise of market power and should not be rewarded.[781] Las Cruces suggests that if lack of opposition to construction-work-in-progress evidences a reasonable expectation of continued service, continuous opposition should evidence a reasonable expectation that the customer will depart a system at the earliest possible date. With regard to the Commission's suggestion that communications with the customer on the customer's future plans could establish reasonable expectation, Direct Service Industries submits that no claimed reliance should be deemed reasonable unless the seller obtained express assurances from the customer that the customer intended to continue to purchase power from the seller beyond its current contract.

We also received comments on the time at which the reasonable expectation had to exist. TAPS urges that the Commission should focus on whether a utility had a reasonable expectation of continued service when it entered into the most recent execution, renewal or amendment of the power supply contract.[782] PSE&G, on the other hand, argues that the focus of the Commission's review should be whether, at the time of incurring or obligating itself to incur the cost of serving a customer, the utility had a reasonable expectation of serving that customer for its planning horizon.

b. Application of Reasonable Expectation Standard to Non-Contiguous Service Territory

Some commenters discuss the situation in which a utility has been making wholesale requirements sales to a customer in a non-contiguous service territory and, in order to make such a sale possible, transmission service has been rendered by an intervening utility. They argue that this situation presents conclusive evidence that the customer had a choice of wholesale suppliers and, therefore, that the seller had no reasonable expectation that the contract would be extended.[783] Direct Service Industries submits that if a customer has power supply options that do not rely on access to the selling utility's transmission system, the selling utility could have had no reasonable expectations other than those expressly created by contract. NM Industrials submits that allowing recovery of stranded costs in this situation would also constitute retroactive ratemaking in violation of Arkansas Louisiana Gas Company v. Hall.[784] It argues that by assessing stranded costs at the close of a contract's term against customers that do not even need a generating utility's transmission services to leave its system, the Commission would retroactively alter the terms and conditions of the rates for generation negotiated between the parties and approved by the Commission.

Other commenters submit that in these circumstances the Commission should give the supplier the opportunity to prove that it had a reasonable expectation that it would continue to serve the customer.[785] ELCON and WP&L state that the reasonable expectation standard should be satisfied (or not) by reference to the parties' existing contract, regardless of whether the customer is in a contiguous service territory.

Utility Investors Analysts asserts that a seller will always have a reasonable expectation that a business relationship can be continued with a current customer and that the better presumption would be that the contract will be extended unless evidence to the contrary exists.

(Footnote Continued)

sumption that the utility has no reasonable expectation of contract renewal in the future.

[781] In contrast, EEI believes that lack of access to alternative suppliers can be evidence that a utility reasonably expected to continue to serve a customer.

[782] If the investment now alleged to be stranded was incurred after the most recent amendment or extension to the contract, TAPS would focus the reasonable expectation review on such later date.

[783] *E.g.*, IL Com, Utilicorp, PSG&E, NM Industrials.

[784] 453 U.S. 571 (1981).

[785] *E.g.*, Florida Power Corp, Consumers Power, FL Com, TDU Systems.

c. Application of Reasonable Expectation Standard to Retail-Turned-Wholesale Customers or To Retail Wheeling

A number of commenters support the Commission's proposal to apply the reasonable expectation standard in these cases.[786] PA Com submits that the case-by-case analysis contemplated by the Commission for establishing a utility's reasonable expectation of continuing to serve a wholesale requirements customer should also apply in the case of a retail-turned-wholesale customer or a retail customer that obtains retail wheeling.

Some commenters believe that the reasonable expectation test would be easily met in those instances in which state law awards exclusive service territories and imposes an obligation to serve.[787] Some contend that the reasonable expectation standard should be presumed met in these circumstances because state law obligates a utility to serve all retail customers. A number of commenters assert that such a presumption would obviate the need for case-by-case showings concerning the expectations of each utility and the nature of each franchise.[788] At a minimum, several commenters propose that the Commission adopt a rebuttable presumption that utilities had an obligation to serve retail customers and therefore that the reasonable expectation test is met in a retail-turned-wholesale customer scenario or in the case of costs stranded as a result of retail wheeling.[789]

On the other hand, a number of commenters argue that there is no basis for a utility to reasonably expect that it will continue to serve a particular customer in states where franchises are non-exclusive.[790] Several of these commenters argue that a utility operating under a non-exclusive franchise is faced with the ever-present prospect that the communities it serves may build their own systems.[791]

Other commenters oppose the suggestion that the reasonable expectation test cannot be met where a franchise is non-exclusive or has terminated.[792] They argue that a utility's obligation to serve retail customers arises under state laws independent of the franchise. SoCal Edison explains that in states such as California, a franchise is nothing more than the source of a utility's right to use

[786] *E.g.*, PA Com, Com Ed, CSW, United Illuminating, UFIT, PSNM, TDU Systems.

[787] *E.g.*, Com Ed, Central and Southwest, United Illuminating, Utilities For Improved Transition, Utility Investors Analysts, Utility Shareholders.

[788] *E.g.*, EEI, Minnesota Power, PECO, Puget, Centerior, Florida Power Corp, FL Com, Southern, SoCal Edison, NEPCO, Consumers Power, Coalition for Economic Competition. NEPCO asserts that the Supplemental Stranded Cost NOPR does not cite any comments or evidence casting doubt on the Commission's initial proposal (in the initial Stranded Cost NOPR) not to apply the reasonable expectation test to retail-turned-wholesale or retail customers that obtain retail wheeling on the basis that utilities operating under an obligation to serve at retail necessarily have an entitlement to recover the costs prudently incurred in fulfillment of that obligation.

[789] *E.g.*, EEI, Detroit Edison, Centerior, Consumers Power, Ohio Edison.

[790] *E.g.*, Wing Group, Alma, Total Petroleum, Cleveland, ABATE, N.Y. Mayors, CAMU, Suffolk County.

[791] *E.g.*, Wing Group, Total Petroleum, ABATE, CAMU, NY Mayors. Proposals advanced by commenters to address non-exclusive franchises include suggestions that the Commission: summarily reject claims to recover retail stranded costs where the utility has a non-exclusive franchise and historically has been subject to retail competition (e.g., Cleveland); apply a rebuttable presumption that a utility had no reasonable expectation of continued service where a municipal franchise is expiring and the municipality has put the retail supplier on notice that the municipality may seek an alternative source of power supply (e.g., Las Cruces); or provide that no stranded cost claim will be entertained absent a showing, by reference to applicable state law, that the utility had an exclusive service franchise obligation or was otherwise subject to an obligation to serve the customer that is departing its system (e.g., Phelps Dodge).

[792] *E.g.*, Utility Working Group, SoCal Edison, Florida Power Corp, PG&E. Referring to the Commission's statement that it expects the reasonable expectation test to be easily met in those instances in which state law awards exclusive territories and imposes a mandatory obligation to serve, Utility Working Group asks the Commission to make clear in the final rule that it did not intend by that example that utilities with non-exclusive service territories would be presumed to fail the reasonable expectation test. According to Utility Working Group, the focus of the test must be on the utility's obligation to serve, which may be separate from any franchise arrangements.

the city's streets, poles, rights of way, etc., and that a utility's duty to serve extends to all customers within its certificated service territories and not simply to those areas in which it has a franchise.

Commission Conclusion

We reaffirm that a utility seeking to recover stranded costs must demonstrate that it had a reasonable expectation of continuing to serve a customer. Whether a utility had a reasonable expectation of continuing to serve a customer, and for how long, will be determined on a case-by-case basis, and will depend on all of the facts and circumstances.[793]

Further, we will apply the reasonable expectation standard in those cases where a utility has been making wholesale requirements sales to a customer in a non-contiguous service territory and, in order to make such a sale possible, transmission service has been rendered by an intervening utility. We believe it is appropriate to give the utility an opportunity to prove that it had a reasonable expectation of contract renewal in circumstances in which the remote customer becomes an unbundled transmission services customer of the former supplier.[794]

We also reaffirm our determination that the existence of a notice provision in a contract creates a rebuttable presumption that the utility had no reasonable expectation of serving the customer beyond the specified period. Whether or not a contract contains an "evergreen" or other automatic renewal provision will be a factor to be considered in determining whether the presumption of no reasonable expectation is rebutted in a particular case.

We will not adopt a minimum notice period for purposes of applying the reasonable expectation rebuttable presumption. Whether a utility had a reasonable expectation of continuing to serve a customer, including whether there is sufficient evidence to rebut the presumption that no such expectation existed beyond the notice provisions in a contract, will depend on the facts of each case.

In addition, we reaffirm our preliminary determination to apply the reasonable expectation standard to retail-turned-wholesale customers. In this scenario, before the Commission will permit a utility to recover stranded costs, the utility must demonstrate that it incurred such costs based on a reasonable expectation that the retail-turned-wholesale customer would continue to receive bundled retail service. Whether the state law awards exclusive service territories and imposes a mandatory obligation to serve would be among the factors to be considered in determining whether the reasonable expectation test is met in a particular case.[795]

We further note that we are not addressing in this Rule who will bear the stranded costs caused by a departing generation customer if the Commission finds that the utility had no reasonable expectation of continuing to serve that customer. As we suggested in the initial Stranded Cost NOPR,[796] we anticipate that, in such a case, a public utility will seek in subsequent requirements rate cases to have the costs reallocated among the remaining customers on its system. However, we will not prejudge that issue here.

9. Calculation of Recoverable Stranded Costs

In the Supplemental Stranded Cost NOPR, the Commission proposed that the determination of recoverable stranded costs be based on a "revenues lost" approach. Under this approach, stranded costs are calculated by subtracting the competitive market value of the power the customer would have purchased from

[793] The examples that the Commission provided in the Supplemental NOPR of possible ways to establish reasonable expectation were not intended to be dispositive of the issue. As we make clear in this Rule, whether a particular utility had a reasonable expectation that a contract would be extended will depend on all of the facts and circumstances.

[794] However, if the remote customer does not use the former supplying utility's open access tariff to reach the new supplier, there would be no "wholesale stranded costs" as that term is defined in this Rule. In this situation, we would not allow extra-contractual recovery of stranded costs. Thus, there would be no need to address reasonable expectation. See Section IV.J.12.

[795] The same procedures would apply to retail customers that obtain retail wheeling.

[796] *FERC Statutes and Regulations* ¶ 32,507 at p. 32,872.

the revenues that the customer would have paid had it stayed on the utility's generation system. We cited several benefits that we believe a "revenues lost" approach offers over a hypothetical cost-of-service approach, including avoidance of an asset-by-asset review, minimization of cost allocation procedures, and ease of application.[797]

We sought comments on how to calculate what the utility's revenue stream would have been had the customer continued service. We also sought comments on how to calculate the revenues that the utility would receive in a competitive market for the stranded assets. This included whether we should require the utility to track the actual selling price of the power over time or require the utility to use an up-front approach (such as an estimate of the forecasted market value of the power for the period during which the customer would have taken service). We asked whether we should allow prices in futures markets or forward markets to be used in an up-front approach, assuming such financial instruments become available.[798]

We suggested that the revenues lost approach automatically takes account of mitigation measures because it reduces the amount of stranded costs recoverable by a utility by the market price of the power that the customer no longer takes. We noted that this is particularly so if mitigation is reflected through a one-time, up-front estimate of the future market value of the power and is not trued up over time. We sought comments regarding implementation of a mitigation requirement. If mitigation is trued up over time, we asked how the Commission should ensure that the utility takes all reasonable steps to mitigate its own costs so as to minimize what the customer would have paid. We also asked how the Commission should ensure that the utility does its best to sell the power at its highest possible value. In addition, we asked whether there are other mitigation measures that should be taken into account (such as efficiency improvements that a utility would have undertaken regardless of whether the particular customer continued to take power under its contract, or cost savings resulting from the buy-out of a fuel contract made possible by the customer's departure).[799]

With regard to determining how long a utility could have reasonably expected to keep a generation customer (which we will call the "reasonable expectation period"), we preliminarily found that a one-size-fits-all approach is not appropriate. We sought further comment with respect to whether the Commission ought to establish presumptions or, in the alternative, absolute limits on a customer's maximum liability when a utility establishes that it had a reasonable expectation that the contract would be extended. We inquired whether it would be appropriate to pick an outer limit equal to the revenues that the utility would lose during the length of one additional contract extension period, or during the length of the utility's planning horizon. We also asked what other events or criteria might be used to establish either presumptions or absolute limits on the reasonable expectation period.[800]

In addition, we proposed procedures for providing a customer advance notice of how the utility would propose to calculate costs that the utility claims would be stranded by the customer's departure.[801] We invited comments on these procedures.[802]

a. Revenues Lost Approach

Numerous commenters, including almost all investor-owned utility com-

[797] Id. at p. 33,121.

[798] Id.

[799] Id. at p. 33,123. We also asked how revenues received as a result of mitigation measures should be reflected in the determination of the amount of recoverable stranded costs; what special accounts, if any, should be created to track revenue liability for specific customers, revenues from mitigation measures, and other revenues received by the utility that offset the stranded cost liability; whether any adjustment should be permitted to the revenues that the utility claims will be realized in a competitive market for its stranded assets, and if so, how often and under what circumstances. Further, we sought comments on whether there are special costs that warrant some special consideration in the determination of stranded cost liability under a revenues lost approach, and if so, how they should be treated. Id. at p. 33,121-22.

[800] Id. at p. 33,122.

[801] Id. at p. 33,114-15.

[802] Id. at p. 33,115.

menters, support the revenues lost approach for calculating stranded costs.[803] Among other things, commenters maintain that the revenues lost approach is fair, reliable, and less complicated than the asset-by-asset approach. As discussed below, while some of these commenters support an "up-front" determination of stranded costs with no subsequent adjustments, others prefer use of a true-up mechanism whereby a customer's responsibility for stranded costs is adjusted to the extent that the actual competitive market value is different from the estimated market value used to determine the customer's up-front stranded cost charge.

Other commenters, on the other hand, oppose the revenues lost approach.[804] Some commenters state that the revenues lost approach provides no incentive to mitigate stranded costs because, by permitting a utility to recoup from a departing generation customer the difference between the contract price and a power resale price, the utility receives the same total revenues regardless of whether the customer stays or leaves and regardless of whether the utility effectively mitigates stranded costs.[805] Others maintain that the revenues lost approach is imprecise.[806] Referencing the problems associated with avoided cost projections used in setting QF rates under PURPA, some of these commenters submit that the revenues lost approach also requires significant assumptions (regarding projected revenue streams, service levels, and generic market value forecasts).[807] Among the other criticisms of the revenues lost approach that are raised by commenters are that it leads to over-recovery of stranded costs,[808] is anticompetitive,[809] and that it leads to cost shifting.[810] NARUC and TDU Systems also maintain that it is likely that assets stranded by a customer's departure from the utility's generation system will be used to serve new customers but that the revenues lost approach offers no method of accounting for such "unstranding" of assets.

A number of commenters request clarification of the stranded cost formula contained in the NOPR, including specific instructions regarding how to calculate the revenues the customer would have paid the utility had it remained a customer and the competitive market value of the power the customer would have purchased.[811] Some of these commenters suggest that the stranded cost issue will be more contentious if the final rule does not provide greater detail.[812] Several commenters request that the Commission issue a detailed list of recoverable costs.[813] A number of commenters propose detailed alternatives to, or variations of, the revenues lost approach.[814]

Numerous commenters urge the Commission to be flexible and not overly prescriptive regarding the calculation of the formula components.[815] These com-

[803] *E.g.*, Centerior, NYSEG, Florida Power Corp, Houston L&P, NIMO, Orange & Rockland, Com Ed, PSE&G, EEI, PECO, Texas Utilities, PG&E, SoCal Edison, Dayton P&L, El Paso, IL Com, United Illuminating, Nuclear Energy Institute.

[804] *E.g.*, LG&E, TAPS, TDU Systems, ABATE, Blue Ridge, NY Energy Buyers, WP&L, PA Com, KY Com, American National Power, ELCON, Texaco, UT Com, NARUC, NIEP, DE Muni, Reynolds, Knoxville, Alma, APPA, NY Industrials, IL Industrials, SC Public Service Authority, Caparo, American Forest & Paper.

[805] *E.g.*, NIEP, DE Muni and TDU Systems.

[806] *E.g.*, SC Public Service Authority, ABATE, NY Energy Buyers, NARUC, ELCON, American Forest and Paper, APPA.

[807] *E.g.*, NARUC, NYSEG.

[808] *E.g.*, NRECA, NIEP, TDU Systems.

[809] *E.g.*, TDU Systems, Blue Ridge, NY Energy Buyers.

[810] *E.g.*, UT Com.

[811] *E.g.*, Utility Investors Analysts, Public Power Council, Atlantic City, EEI, PA Com, NYSEG, Central Montana EC, Nebraska Public Power District, LG&E ABATE.

[812] Several commenters (Illinois Power, Oklahoma G&E, and Utility Investors Analysts) suggest that the Commission hold a technical conference to discuss how best to define the calculation of the formula components.

[813] Central Montana EC and NY Energy Buyers.

[814] See EEI, Electronic Data Systems, Knoxville, NIMO, NYSEG, NY Energy Buyers, Reynolds.

[815] *E.g.*, Nuclear Energy Institute, EEI, Consumers Power, PA Com, Oklahoma G&E, Portland, Knoxville, MidAmerican, Seattle, Salt River, Washington and Oregon Energy Offices, SMUD, Caparo.

menters generally recommend that the Commission judge each stranded cost proposal on a case-by-case basis.[816]

Definition and Calculation of Revenue Stream

Some commenters maintain that the revenue stream component should be calculated based on the present rates paid by the customer.[817] These commenters state that because present rates have been approved by various commissions, the costs have been shown to be legitimate, prudent, and verifiable.

Other commenters oppose the use of current rates to calculate the utility's revenue stream. WP&L believes that the use of current rates would be overly generous and recommends capping the revenue measure at a regional average rate rather than a utility-specific rate. A number of other commenters argue that the effects of competition should be factored into the revenue stream by using the rates for capacity and energy actually offered or available in the utility's marketplace, such as incentive and special rates, not just the tariff rates to a particular customer.[818] Several commenters support removal of rate of return-related revenues associated with stranded assets, including risk premiums that are designed to compensate for potential nonrecovery of stranded costs.[819] EEI, in contrast, opposes any disallowance of rate of return-related revenues on the grounds that such a disallowance would violate the constitutional bar against the taking of private property without just compensation. Electronic Data Systems recommends calculation of the revenue stream using projected rates that include the effects of future rate increases.

The Commission requested comments on what categories of costs, in addition to investment costs, should be eligible for stranded cost recovery. In response, many commenters support the inclusion in the revenue stream calculation of additional costs, termed "special" costs, that may not be currently reflected in the rates paid by the departing customers, but that were incurred to provide service to these customers.[820] "Special" costs include: (1) Nuclear decommissioning costs; (2) environmental obligations existing at the time of the customer's departure; (3) purchased power contracts; (4) buyouts and buydowns of purchased power contracts; and (5) all regulatory assets, including deferred costs of generating assets for which regulators have promised recovery, deferred taxes, transition costs for post-employment benefits other than pensions, and contingent liability.

Other commenters oppose the inclusion of "special" costs in the calculation of the revenue stream.[821] TAPS questions how a customer can be held responsible for a cost that, by definition, it was never under a contractual obligation to pay. WP&L states that suppliers' rates should already reflect reasonable estimates of decommissioning costs and, therefore, no additional recovery is warranted.

Some commenters argue that the calculation of stranded costs should include social costs, such as demand side management, environmental costs, low income assistance costs, and costs associated with the management of fish and wildlife.[822]

NARUC states that the Commission should not preempt the ability of states to establish competitively neutral programs, such as DSM and energy efficiency, environmental mitigation, and R&D.

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[816] Some commenters (e.g., Alma, Freedom Energy) oppose such flexibility. Alma maintains that clarity of rules is needed to provide participants in the competitive market as much certainty as possible about stranded cost charges likely to be recovered before they engage in alternative transactions. Freedom Energy similarly supports across-the-board or generic standards, as opposed to a case-by-case approach.

[817] *E.g.*, Centerior, Com Ed, Duke, Entergy, Florida Power Corp, Utility Investors Analysts, CA Energy Co, CSW.

[818] *E.g.*, Alma, ABATE, DOD, TDU Systems, ELCON.

[819] *E.g.*, NRECA, CA Energy Co, ABATE, DOD.

[820] *E.g.*, EEI and various investor-owned utilities, Nuclear Energy Institute, NC Com, Legal Environmental Assistance, EPA, Utilities for Improved Transition, PA Com.

[821] *E.g.*, TAPS, WP&L, UT Industrials, UtiliCorp, American Forest & Paper.

[822] *E.g.*, DC Com, Sustainable Energy Policy, Washington and Oregon Energy Offices.

Various commenters state that any determination of stranded costs should take into account all offsetting benefits realized by the transmission provider upon a customer's departure.[823] Some commenters describe these costs as "stranded benefits."[824]

Most commenters favor the removal of avoided variable costs from the calculation of stranded costs on the basis that only fixed costs are truly stranded.

Some commenters support prioritizing stranded cost recovery.[825] These commenters argue that stranded costs should be categorized and ranked by the degree of responsibility that utilities had for their incurrence. Utilities would be allowed the greatest percentage of recovery for those stranded costs over which they had the least control.

Definition and Calculation of the Competitive Market Value

There generally was no consensus among the commenters concerning how to determine the revenues a utility would receive in a competitive market for the stranded assets, that is, the competitive market value.[826] Proposals for calculating competitive market value include using: (1) The marginal cost of the released capacity; (2) the long-run marginal cost of the most competitive incremental generation replacement technology; (3) the marginal cost of requirements service; (4) a combination of the marginal costs of the utility, alternative suppliers, and others; (5) the cost of a combined cycle combustion turbine; (6) the price paid by the departing generation customer; (7) the highest price available in the market; and (8) auctions. In addition, to the extent that a futures market is sufficiently well-developed when the Commission issues a final rule, several commenters believe that futures market prices could be used as an estimate of market value.[827]

MT Com contrasts the effect of using short-term nonfirm prices instead of long-term firm prices as the competitive market value. It states that if short-term nonfirm prices are used, the stranded cost estimate would be higher, because the market price of short-term nonfirm power is lower than both the market price of long-term firm power and the embedded cost price.

Some commenters express concern regarding the difficulty of determining the market value of the displaced capacity under the revenues lost approach.[828] Among other things, commenters note that because a competitive market does not yet exist, the market price cannot be calculated in advance. For this reason, several commenters support an after-the-fact determination of market value.[829]

Snapshot Approach vs. True-Ups

Commenters are split on whether the revenues lost approach should use a one-time snapshot approach[830] or whether true-ups should be required or allowed.[831] The primary rationale offered in support of a snapshot approach is certainty;[832] the

[823] *E.g.*, AEC & SMEPA, Electronic Data Systems, Freedom Energy Co, LG&E, American National Power, EGA, Entergy, AMP Ohio, TDU Systems, TAPS, Las Cruces.

[824] TDU Systems proposes that the Commission allow for the recovery of stranded benefits in one of two ways: (1) Require direct payment of stranded benefits to a wholesale purchaser whose contract is terminated; or (2) allow a party to continue to receive power at cost-based rates for a period sufficient for the purchaser to be "transitioned" into a competitive market.

[825] *E.g.*, ELCON, NY Energy Buyers, SMUD, Caparo.

[826] *E.g.*, Centerior, Duke, Entergy, Com Ed, Houston L&P, Florida Power Corp, Carolina P&L, NRRI, WP&L, DOE, CSW, UtiliCorp, LG&E, FL Com.

[827] *E.g.*, WP&L, DOD, Duke, PSNM, ABATE, Houston L&P. The Commission notes that the New York Mercantile Exchange only recently began trading in electricity futures and that such trading was limited to two delivery points located within the Western Interconnection.

[828] *E.g.*, MI Com, NSP, NY Energy Buyers, KS Com.

[829] *E.g.*, KS Com, NY Energy Buyers.

[830] Commenters that support a one-time, up-front approach include FL Com, Dayton P&L, Portland, DE Muni.

[831] Commenters that support true-ups include ELCON, NYSEG, MN DPS, Reynolds, TAPS, NIMO, DOE, Electric Consumers Alliance, Com Ed, United Illuminating, SoCal Edison.

[832] DE Muni urges rejection of true-ups on the basis that true-ups represent guaranteed recovery of 100 percent of stranded costs.

primary rationale offered in support of true-ups is accuracy.

Commenters that support true-ups note the inaccuracy associated with long-term avoided cost estimates contained in PURPA-mandated QF contracts and maintain that the projections required by the revenues lost approach will produce similarly disastrous results if true-ups are not permitted. As a component of the true-up calculation, some commenters favor inclusion of revenues associated with future load growth of remaining customers.[833] According to Electronic Data Systems, if these revenues are not included in a true-up calculation, the utility could over- or under-collect stranded costs, depending on whether and what type of load growth is anticipated. CA Energy Co and American National Power recommend consideration of load growth of remaining customers as a mitigating factor because the load increases of these customers allow the sale of the stranded capacity. CSW, on the other hand, opposes using the future load growth of remaining customers as a mitigation device. CSW states that the benefits of growth on the former supplier's system should flow to the customers who remain customers of that system. Ohio Ed agrees, except where the customer proves that the utility has deferred or cancelled capacity resource additions in response to departing customers.

Other commenters suggest that the Commission should not prescribe one method over the other.[834] EGA, for example, states that customers should have the choice of paying either a projected fixed amount or a charge that is periodically trued up.

Mitigation

A number of commenters agree that the revenues lost approach effectively encompasses mitigation.[835] Others argue that mitigation should (or could) be accomplished through divestiture of assets or capacity auctions.[836] LG&E states that a utility requesting recovery of stranded costs should be required to auction that portion of its system to the highest bidder. The difference between the auction price and the depreciated value of the auctioned assets could be used to determine stranded costs. However, LG&E does not advocate complete recovery of this difference; rather, it argues that this amount could be used as a starting point.

Several commenters argue that the revenues lost approach can produce anticompetitive results if capacity auctions or divestiture are not required.[837] A number of these commenters contend that utilities that recover significant stranded costs (while still maintaining control over the stranded capacity) can use the freed capacity to make sales in the market at subsidized prices. They maintain that these utilities do not have to worry about recovery of fixed costs because those costs are recovered by the stranded cost charge. According to these commenters, utilities can then remarket (or "dump") stranded capacity at artificially low prices (made possible by the subsidy from the stranded cost recovery) and thereby gain a competitive advantage in other transactions.[838] If the utilities are permitted to remarket the displaced capacity, CA Energy Co states that market-sensitive floor prices should be set to prevent utilities from reselling power from stranded assets at artificially low prices.

Suggestions as to how to prevent such anticompetitive consequences include allowing the customer to own or control the residual asset or amount of stranded capacity equivalent to the lost revenues. According to EGA, the customer could market the capacity it would have had to pay for through stranded cost charges and

[833] *E.g.*, Electronic Data Systems, Alma, American National Power, CA Energy Co, NARUC, NRECA.

[834] *E.g.*, Atlantic City Electric, EGA, Conservation Law Foundation.

[835] *E.g.*, Utility Investors Analysts, Duke, PSE&G, Com Ed, United Illuminating, Entergy.

[836] *E.g.*, NIEP, LG&E, TDU Systems, EGA, NY Energy Buyers, ELCON, American National Power.

[837] *E.g.*, LG&E, Allegheny, TDU Systems, EGA, AMP Ohio, CA Energy Co, WP&L, Torco.

[838] CA Energy Co maintains that an anticompetitive intent could be hidden by the argument that power must be dumped to mitigate stranded costs. It thus submits that, even without intending to do so, a utility could cripple competition by depressing market rates to artificially low levels.

thus prevent the utility from remarketing the capacity after it has been paid stranded costs.

Several commenters take a harder line and would require suppliers seeking stranded cost recovery to offer for sale to the departing customer a "slice" of their system.[839] TDU Systems states that the purchase of an undivided slice of the system is superior to divestiture of a specific asset because the utility cannot keep the wheat and leave the purchaser with the chaff. TDU Systems would also make purchase rights to the system assignable. According to TDU Systems, this mitigation scheme is the only possible way to justify the revenues lost approach. TDU Systems argues that this proposal would inflict no harm on the utility, which would be fully compensated for the stranded assets. It also suggests that the ability to purchase a slice of the supplier's system would serve as an important bargaining tool in stranded cost negotiations, which would help level the playing field among the parties.

Other mitigation proposals include: (i) Requiring each utility to prepare a mitigation plan under the supervision of an independent expert that must be approved by the parties or by the Commission before stranded cost recovery is permitted;[840] (ii) requiring a utility to report annually for a five-year period its mitigation activities and to identify its stranded costs yet to be recovered;[841] and (iii) setting the market value of the displaced capacity at a high level (thereby reducing the stranded cost charge) to provide a mitigation incentive.[842] A number of commenters support customer-controlled mitigation, arguing, among other things, that the entity responsible for paying stranded costs has the best incentive to mitigate them.[843] Others support some form of utility sharing of stranded costs to give utilities an incentive to mitigate stranded costs.[844]

b. Reasonable Expectation Period (Period of Expected Continued Service)

Numerous commenters oppose setting absolute limits on the period over which a customer's liability for stranded costs would be determined.[845] They suggest instead that the Commission should apply the facts of each case, including the facts used to prove a reasonable expectation of continued service, to its determination of a reasonable expectation period. Among the factors commenters propose for consideration are: the utility's planning horizon; the average remaining life of the utility's generating facilities or a specific number of years that coincides with the duration of a utility-specific stranded cost recovery plan; utility projected load growth; dedicated facility construction lead times; estimated time to market stranded assets; the lesser of the utility's need date for new generation or the crossover date when the market generation price is expected to equal a customer's embedded cost less other charges and compensation; and the period for which estimated revenues exceed market values. Commenters representing the financial community[846] oppose limiting cost recovery from the departing generation customer based on the term of the contract. They argue that it was reasonable for a utility to expect to continue to serve a customer, or customers who would take its place, through the life of the assets; otherwise, the asset could not have been financed in the first place.

A number of other commenters urge the Commission to prescribe limits on a customer's maximum liability.[847] Some commenters believe that the utility's planning horizon is the reasonable expec-

[839] *E.g.*, TDU Systems, Arkansas EC.

[840] *See, e.g.*, CA Energy Co.

[841] *See, e.g.*, PSNM.

[842] See WP&L.

[843] *E.g.*, EEI, PA Com, AMP Ohio, TAPS.

[844] *E.g.*, ABATE, Fertilizer Institute, IL Com, KS Com, San Francisco, UT Industrials, ELCON, CA Energy Co, MT Com, Caparo, WA Com, Education, NRRI, NY Energy Buyers, Reynolds, DOD, DC Com.

[845] See, *e.g.*, Florida Power Corp, Central and South West, Com Ed, EEI, Montana, PECO, Minnesota DPS, NIMO, NSP, SoCal Edison, PA Com, Central Louisiana, Utility Investors Analysts, Salt River, Orange & Rockland.

[846] *E.g.*, Utility Investors Analysts and Utility Shareholders.

[847] *E.g.*, NIEP, TAPS, Allegheny, Central Montana, Municipal Energy Agency Nebraska, PSNM, ABATE, ELCON, PSE&G, UtiliCorp.

tation period.[848] PSE&G states that since utilities invested and incurred costs to serve customers based on the planning horizon, the planning horizon is the only logical period. Other commenters propose that the reasonable expectation period be limited to one contract extension period, or to the shortest of: (i) One additional contract renewal period; (ii) the utility's planning horizon; (iii) the period it would/ does take for load growth on the seller's system to absorb the lost load; or (iv) the contractual notice period.[849] Other suggested limits include the weighted average remaining life of all generating assets;[850] the in-service date of the utility's next avoidable generating unit or purchased power contract that is projected to have a capacity factor comparable to the departing generation customer's load factor minus a one-time mitigation effort;[851] and a rebuttable presumption that two years is the maximum time for a utility reasonably to expect to receive revenue from tariff sales or "open-ended" contracts.[852]

Other commenters propose recovery periods that range from three to five years (e.g., Central Montana EC),[853] five years (e.g., Public Power Council), and eight years (e.g., Allegheny).[854]

GA Com and AZ Com state that stranded cost recovery should not go on indefinitely. GA Com states that stranded costs should be collected for a sufficient period of time to ensure full recovery and indifference on the part of the utilities' remaining native load customers. AZ Com states that a specific termination period will also create an incentive for utilities to mitigate stranded costs.

c. Proposed Stranded Cost Recovery Procedures

Several commenters[855] urge the Commission to be flexible in evaluating proposed mechanisms for recovery of stranded costs, including the payment method, noting that an approach suitable to one utility and its customers may not be suitable to another. They say that utilities within a region might find a mechanism that meets their region's unique characteristics.

Some commenters oppose certain aspects of the procedures proposed in the NOPR. For example, TAPS objects that the NOPR procedure aimed at providing advance notice to the customer of its potential stranded cost obligation resembles the procedure rejected in Cajun. It says that "the customer will likely be forced to spend significant time and resources 'litigat[ing] to determine the price of a product(,)' thereby 'introduc[ing] deal-killing transactional costs and uncertainties.' " (citing Cajun, 28 F.3d at 179). TAPS proposes that the seller be required to produce a stranded cost estimate that reflects a good faith, reasonable estimate of the likely impact of mitigation and that sellers making excessive and unsupported stranded cost claims be penalized. At a minimum, it argues that the seller should be held responsible for the costs reasonably expended by the buyer to litigate the stranded cost claim.

DE Muni asserts that if filing a complaint to redress grievances related to the recovery of stranded costs is to be a mean-

[848] *E.g.*, PSE&G, PSNM, ELCON, Oklahoma G&E, Duke. Oklahoma G&E supports use of the utility's planning cycle for retail stranded costs and use of the contract term for wholesale stranded costs. Duke states that the Commission should permit the customer and the transmission provider to establish the compensation period at something less than the maximum period.

[849] *E.g.*, UtiliCorp, WP&L, Missouri Joint Commission, TAPS, Municipal Energy Agency Nebraska, TDU Systems.

[850] *E.g.*, Carolina P&L.

[851] *E.g.*, FL Com.

[852] *E.g.*, UT Industrials.

[853] Central Montana describes as "excessive" the recovery period offered to it by Montana. Central Montana states that it gave notice under a five-year notice provision and that Montana responded with a stranded cost demand extending 14 years after notice of termination (nine years from the date service would terminate).

[854] Allegheny would exempt three types of stranded costs from such a limit: (1) Those due to PURPA power purchases (it submits that these were federally-mandated rather than profit-motivated business decisions); (2) those due to regulatory assets (such as deferred taxes); and (3) those due to municipalization. In addition, it favors establishing a rebuttable presumption that these special costs are eligible for stranded cost recovery.

[855] *E.g.*, EEI, Centerior, PECO, Houston L&P, Salt River.

ingful remedy, the final rule should set a time limit within which the complaint must be resolved.

A number of commenters offer modifications to the recovery procedures set forth in the NOPR, including: (1) Extending a utility's response time for providing stranded cost liability estimates from 30 days to at least 60 days;[856] (2) requiring a utility to provide to each wholesale customer within six months of the effective date of the final rule: (a) The formula that the utility proposes to use to calculate the customer's maximum possible stranded cost exposure without mitigation; and (b) an actual calculation of the customer's stranded cost exposure assuming the customer left the utility's system six months after the effective date of the final rule;[857] (3) allowing customers that desire to litigate their stranded cost liability to do so in a forum in which all litigating customers participate;[858] (4) requiring utilities to disclose their estimated transition cost liabilities (and the nature of those liabilities) before the effective date of the final rule to permit a realistic evaluation of the scope of the transition cost problem and possibly facilitate resolution of some disputes by settlement;[859] (5) requiring any utility seeking stranded cost recovery to provide a list of the stranded facilities to the departing generation customer and offer that customer an equity position in those facilities in return for payment of stranded costs, thereby enabling the departing customer to recover some of its stranded costs payment when any of the facilities becomes useful again;[860] (6) requiring a "good faith request" for an estimate of stranded costs based on an expected date of departure from the providing utility's system and mitigation efforts expected to be undertaken by the utility;[861] and (7) requiring documented evidence that a utility made a good faith attempt to settle with a departing generation customer before the utility is given the opportunity to recover stranded costs.[862]

Commission Conclusion

We reaffirm our proposal that the determination of recoverable stranded costs should be based on the "revenues lost" approach. We find that the revenues lost approach is the fairest and most efficient way to balance the competing interests of those involved.

After careful consideration of the comments submitted, we have decided to adopt the following formula for calculating a departing generation customer's stranded cost obligation (SCO), on a present value basis, under a revenues lost approach:

SCO=(RSE-CMVE x L

where:

RSE=Revenue Stream Estimate—average annual revenues from the departing generation customer over the three years prior to the customer's departure (with the variable cost component of the revenues clearly identified), less the average transmission-related revenues that the host utility would have recovered from the departing generation customer over the same three years under its new wholesale transmission tariff.[863]

CMVE=Competitive Market Value Estimate—determined in one of two ways, at the customer's option: Option (1)—the utility's estimate of the average annual revenues (over the reasonable expectation period "L" discussed below) that it can receive by selling the released capacity and associated energy, based on a market analysis performed by the utility; or Option (2)—the average annual cost to the customer of replacement capacity and associated energy, based on the customer's contractual commitment with its new supplier(s).

L=Length of Obligation (reasonable expectation period)—refers to the period of time the utility could have reasonably expected to continue to serve the departing generation customer. We reaffirm that we do not believe that a one-size-fits-all approach is appropriate for determining the length of a customer's

[856] *E.g.*, Entergy.

[857] *E.g.*, Associated Power.

[858] *E.g.*, Associated Power.

[859] *E.g.*, Texaco.

[860] *E.g.*, Heartland.

[861] *E.g.*, PSNM, ELCON.

[862] *E.g.*, ELCON.

[863] In the case of a retail-turned-wholesale customer, subtraction of distribution system-related costs may also be appropriate.

obligation. If the parties cannot reach agreement as to the length of the customer's obligation, this period is to be determined through litigation as a part of the threshold issue of whether the utility had a reasonable expectation of continuing to serve the customer.

Application of the foregoing formula and collection of the resulting stranded costs are subject to the following conditions:

1. Cap on SCO. The quantity (RSE-CMVE) can be no greater than the average annual contribution to fixed power supply costs (defined as RSE less variable costs) that would have been made by the departing generation customer had it remained a customer.

2. Changes in Customer Revenues. If the customer's rates (or contract demand amounts, if relevant) changed during the three-year period prior to the termination of its existing requirements contract, then the RSE should be calculated using the customer's most recent 12 months of revenue.

3. CMVE Option 2 Conditions. Option 2 (a CMVE equal to the average cost to the customer of replacement capacity and associated energy) would be available to a customer whose alternative purchase(s) runs concurrent with L, or, if longer than L, contains rates that do not fluctuate over the duration of the contract. The customer would be required to demonstrate (at the time it chooses this option) that the replacement capacity contract(s) is for service equivalent to the released capacity (that is, firm power for a period at least equal to L), and must also clearly identify the rates to be paid for the replacement service.

4. Payment Options. The method and term of payment should be negotiated, but is ultimately left to the customer's discretion. Possible payment options include a lump-sum payment, an amortization of a lump-sum payment over a reasonable period of time, or a surcharge on the customer's transmission rate.

5. Applicability. The formula is designed for determining stranded costs associated with departing wholesale generation customers and for retail-turned-wholesale customers.[864]

6. Marketing/Brokering Option. The Commission will allow the customer, at its sole discretion, a choice to market the released capacity and associated energy (or to contract with a marketer for such service). Alternatively, the customer may choose to broker the released capacity and associated energy (or to contract with a broker).[865]

7. Released Capacity and Associated Energy. A utility requesting stranded cost recovery must indicate the amount of system capacity and the amount of associated energy released by the departing generation customer and used in the revenues lost calculation. This will allow the departing generation customer to fairly consider exercising a choice to market or broker the released capacity and associated energy.

The formula balances a number of goals, including: (1) Ensuring full recovery of legitimate, prudent and verifiable stranded costs; (2) requiring the utility to mitigate stranded costs; (3) providing certainty for departing generation customers; and (4) creating incentives for the parties to renegotiate their existing requirements contracts or otherwise settle stranded cost claims without resort to litigation.

Contrary to the objections of some commenters that the revenues lost approach creates no incentive to mitigate stranded costs, the formula automatically encompasses mitigation by reducing the departing generation customer's stranded cost obligation by the competitive market value of the released capacity and associated energy. Further, the option provided in the formula for a customer to market

[864] The formula is not to be used for recovering stranded costs associated with retail wheeling. We believe the formula is unworkable in this scenario because one of its key elements—the option for a customer to market or broker the utility's power—may not be practicable for retail customers. Therefore, stranded costs associated with retail wheeling will be determined on a case-by-case basis.

[865] The customer may also decide to remain a requirements customer for L. If the customer elects to remain a requirements customer, the utility will be obligated to continue service to the customer for the duration of L.

or broker the released capacity and associated energy protects the customer from a utility trying to overrecover stranded costs by estimating a low value for the released capacity and associated energy and thereby provides the customer some assurance that stranded costs will be minimized. Specifically, if a customer believes the utility's competitive market value estimate (CMVE) is too low, it can market or broker the released capacity and associated energy and reduce its stranded cost obligation.[866] We accordingly will not impose a separate mitigation obligation on the utility above that which is already subsumed in the revenues lost approach. In addition, a utility will continue to be subject to an ongoing prudence obligation to sell excess capacity off-system and/or to dispose of uneconomic assets.

We recognize that some commenters oppose the revenues lost approach as imprecise. However, any ratemaking method that relies on estimates will be subject to forecasting error. Moreover, in direct response to commenter concerns, we have gone to great lengths in this rule to provide specificity with respect to the calculation of the components of the formula. We believe that use of the formula will narrow the scope of disputes over the calculation of stranded costs, lend precision to the stranded cost amount it produces, and provide certainty to departing generation customers with respect to their stranded cost obligations.

Calculation of the Revenue Stream Estimate (RSE)

The RSE component of the formula is based on revenues paid by the departing generation customer during the last three years of its contract or retail service. We believe that the use of "present" revenues in the calculation of the revenue stream has numerous advantages over other approaches advocated. The use of present revenues eliminates disputes over estimates of future revenues, thereby adding certainty to the calculation. It also eliminates the need for a detailed listing of includable costs, relying instead on the assumption that present rates include all of the utility's costs of providing service. Further, the rates that produce present revenues have been approved by regulators, which strongly suggests that the costs included in them are prudent, legitimate and verifiable.[867]

We reject the suggestion by commenters that a utility be required to calculate the revenue stream using any lower rate being offered by the utility for service comparable to that being taken by the customer when the customer departs the utility's generation system. A revenue stream calculated in this manner could deny a utility the opportunity to fully recover its stranded costs or could shift costs to other customers, a result we find unacceptable. Similarly, the elimination of return-related revenues from the revenue stream effectively would require shareholders to absorb stranded costs, which is contrary to our determination that a utility is entitled to an opportunity to fully recover legitimate, prudent and verifiable stranded costs. Calculation of the Competitive Market Value Estimate (CMVE)

We recognize the difficulty associated with estimating the competitive market value of the capacity and associated energy not purchased by the departing generation customer. However, we believe that an up-front estimate, which provides flexibility to the utility and a measure of certainty to customers, is superior to other proposals, provided the right mix of incentives and options is included in the formula.

A utility requesting stranded cost recovery must estimate CMVE based on a market analysis, with all assumptions and work papers made available to the departing generation customer. This provides a utility with the flexibility to choose the methodology that it feels produces the best estimate of the competitive market value of the released capacity and associated energy. We note that numer-

[866] This option also addresses the concerns of commenters that, by failing to require auctions or divestiture of stranded capacity, the Rule would allow a utility recovering stranded costs to sell the freed capacity at subsidized prices, thereby gaining a competitive advantage in other transactions. If the customer avails itself of this option, the utility would no longer control the released capacity.

[867] The present rates, whether established by settlement or otherwise, have been found to be just and reasonable. In other words, they are neither confiscatory nor exorbitant.

ous proposals for calculating competitive market value were made in the comments. The Commission believes that the flexibility provided by the formula we adopt in this Rule permits the filing utility to avail itself of many of these recommendations.

At the same time, a utility may have an incentive to underestimate CMVE and thereby increase the stranded costs charge. To address this issue, the formula contains several features designed to create an incentive to produce a good faith estimate of stranded costs and to safeguard customers if a utility fails to do so. For example, the formula provides a departing generation customer with the option to market or broker the released capacity and associated energy if it believes the utility's estimate is too low. If the marketing option is chosen, the customer would buy the released capacity from the utility at the utility's market value estimate. The associated energy would be purchased at the utility's average system variable cost. The customer would then resell the released capacity and energy and keep the resulting revenues. If the revenues it receives are greater than the utility's market value estimate, the customer will have reduced its stranded cost obligation. If the customer chooses the brokering option and the released capacity and associated energy are purchased by a third-party for more than the utility's market value estimate, the difference between the average annual revenues produced by the sale and the utility's CMVE estimate will be used to lower the customer's stranded cost obligation. The utility may be required to show in a compliance filing that it has reduced the customer's stranded cost obligation under such circumstances.

If the customer chooses CMVE Option 2 and meets its conditions, CMVE will be set at the average price that the customer pays its new supplier. The customer will test the market and choose the best deal available. Hence, the price the customer pays its alternative supplier is arguably a more accurate measure of the competitive market value of the capacity and associated energy not taken from the host utility. Whether to exercise Option 2 resides solely with the customer.

We further note that the sale of all or part of a utility's generating assets could be used as a method to determine competitive market value of such assets. Under the theory that an asset sale price reflects the highest value for the utility's assets, the Commission would presume that the competitive market value established under an open asset sale (i.e., an offer to sell assets to any taker) would fully satisfy the utility's responsibility to minimize stranded costs. If a stranded cost claim involves divestiture of assets, the amount of stranded costs associated with those assets would be the book value less the sale price. The Commission would determine the appropriate stranded cost charge based on the facts presented.

Snapshot Approach Versus True-Ups

The revenues lost formula is based on a one-time snapshot approach. We favor this approach over the true-up approach because it creates certainty and will produce reasonably accurate results. True-ups, on the other hand, while theoretically more accurate, require periodic recalculation of stranded costs, which creates ongoing uncertainty and disputes. In addition, true-ups will result in additional transaction costs. We believe that an approach that provides certainty and establishes cost responsibility up front is best for what is fundamentally a transition issue.[868] In the Supplemental Stranded Cost NOPR, we proposed procedures to provide a potential departing generation customer with advance notice of how the utility would propose to calculate costs that the utility claims would be stranded by the customer's departure.[869] These procedures are modified as follows to incorporate the findings made in this

[868] These procedures apply to a potential departing generation customer who is an existing wholesale requirements customer of a public utility, or a retail customer of a public utility who is contemplating becoming a wholesale transmission customer (such as through municipalization). They may be used at the option of the potential departing generation customer. An existing wholesale requirements customer may use the procedures in conjunction with, or in lieu of, a complaint under section 206 to amend its existing requirements contract to add an explicit stranded cost provision, as discussed in Section IV.J.5.

[869] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,114-15; 33,128-29.

rule:(1) A customer may, at any time before the termination date specified in its existing wholesale requirements contract,[870] request the public utility to provide an estimate of the customer's stranded cost obligation based on the revenues lost formula contained in this Rule,[871] as of the date set forth in the customer's request. The customer should specify in its request, to the extent possible, pursuant to its rights under its power sales requirements contract with the seller,[872] the date on which the customer is considering substituting alternative generation for the requirements purchase and the amount of the substitute generation. Any remaining generation requirements to be purchased from the existing supplier after this date should be clearly indicated. The customer may seek further information on how the stranded cost charge would vary as a result of choosing different dates or different amounts of substitute purchases. The customer also should indicate its preferred payment method, such as a lump-sum payment, an amortization of a lump-sum payment, or a surcharge (such as monthly or annual) on the customer's transmission rate.

(2) The utility shall, within thirty days of receipt of the request, or other mutually agreed-upon period, provide the customer with an estimate of the customer's stranded cost obligation. The response shall include: (i) Estimates of RSE, CMVE, and L according to the revenues lost formula and based on the information supplied by the customer; (ii) supporting detail (including the underlying market analysis that forms the basis for the CMVE estimate) indicating how each element in the formula is derived to enable the customer to understand the basis for each element; (iii) a detailed rationale justifying the basis for the utility's reasonable expectation of continuing to serve the customer beyond the termination date in the contract;[873] (iv) an estimate of the amount of released capacity and the amount of associated energy that would result from the customer's departure, based on the information supplied by the customer, including detailed support for the amount of the released capacity and the amount of associated energy, and the market value of each, for each year of the reasonable expectation period, and how those amounts are consistent with the RSE and CMVE estimates; and (v) the utility's proposal for any contract amendment needed to implement the customer's payment of stranded costs (the proposed modification should also reflect the customer's chosen payment method).

(3) If the customer believes that: (i) The utility has failed to establish that it had a reasonable expectation of continuing to serve the customer beyond the contract term;[874] (ii) the proposed stranded cost charge (or any of the elements used to compute it) is unreasonable; (iii) the amount of released capacity and the amount of associated energy assumed to be sold is unreasonable; or (iv) the utility's proposal for any contract amendment needed to implement the customer's

[870] If the customer is a retail customer contemplating becoming a wholesale transmission customer, it may at any time request the public utility to provide an estimate of its stranded cost obligation.

[871] Because the formula reduces a customer's stranded cost obligation by the competitive market value of the capacity and associated energy that would be released by the customer's departure, we will not adopt the proposal in the Supplemental Stranded Cost NOPR to allow a potential departing customer to receive an estimate of the customer's "maximum possible stranded cost exposure without mitigation." Requiring the utility to provide an estimate that reflects the competitive market value of the capacity and associated energy to be released will better enable the customer to assess its supply options.

[872] If the customer is a retail customer contemplating becoming a wholesale transmission customer, it should specify in its request, to the extent possible, the date on which the customer is considering becoming a wholesale transmission customer of the utility and the amount of generation, if any, it will continue to purchase from its existing supplier.

[873] If the customer is a retail customer contemplating becoming a wholesale transmission customer, the utility should provide a detailed rationale justifying the basis for its reasonable expectation of continuing to provide the customer bundled retail service.

[874] Subsection (i) above also would apply to a retail customer contemplating becoming a wholesale transmission customer if the customer believes that the utility has failed to establish that it had a reasonable expectation of continuing to provide the customer bundled retail service.

payment of stranded costs is unreasonable, the customer will have thirty days in which to respond to the utility explaining why it disagrees. The Commission expects parties to attempt to resolve any disputed issues.

(4) If the parties are unable to resolve the matter using the procedures in (1)-(3) above, the customer may either: (a) File a petition for declaratory order, or a section 206 filing seeking to amend an existing requirements contract, to seek a Commission determination as to whether: (i) The utility has met the reasonable expectation standard; (ii) the proposed stranded cost charge satisfies the other evidentiary standards set forth in this Rule; (iii) the amount of released capacity and the amount of associated energy proposed by the utility is reasonable; or (iv) the utility's proposal for any contract amendment needed to implement the customer's payment of stranded costs is reasonable; or (b) wait until the proposed stranded cost charge is filed by the utility under section 205 of the FPA, and contest it at that time.[875] In either case, because estimates of RSE and CMVE may change over time, any estimate of stranded costs provided by a utility to a customer will not be considered binding prior to any filing by either party with the Commission. However, any stranded cost estimate filed by the utility in a section 205 or 206 proceeding, or in response to a petition for a declaratory order, shall be considered to be a binding estimate of the customer's maximum stranded cost obligation for purposes of litigation. Similarly, any estimate of stranded cost obligation filed by a customer in a petition for declaratory order or a section 205 or 206 proceeding shall be considered to be a binding estimate of the customer's minimum stranded cost obligation for purposes of litigation.[876] Estimates of stranded cost obligation that are filed by either party with the Commission shall include the information, including the supporting detail, identified in (2) above.

(5) If a utility intends to file for stranded cost recovery from a customer through either a stranded cost amendment to its existing contract or a surcharge on transmission rates, it must file its stranded cost estimate no later than 120 days prior to the end of the customer's contract term. The filing shall include the information, including the supporting detail, set forth in (2) above. The customer, of course, may contest the contents of such a filing.[877]

Conditions of the Marketing/Brokering Option

A customer may choose to market or broker a portion or all of the released capacity and associated energy identified by the utility in its stranded cost estimate (or to contract with a marketing/brokering agent). Importantly, by exercising the marketing or brokering option, the customer does not relinquish its right to contest any aspect of the utility's stranded cost estimate, including whether the utility is entitled to recover stranded costs for the period that the customer has agreed to market or broker any released capacity and associated energy. To implement this option, a customer must inform the utility in writing of its decision no later than 30 days after the utility files its estimate of stranded costs for the customer with the Commission. Before marketing or brokering of the released capacity and associated energy can begin, the utility and customer must execute an agreement

[875] As discussed above, retail customers contemplating becoming wholesale transmission customers may use the same procedures. As also discussed above, customers under existing requirements contracts with public utilities have the option of making a filing under section 206 seeking to amend the contract to add an explicit stranded cost provision, without having to go through these procedures.

[876] Although estimates by the utility or the customer may be binding for purposes of litigation, this does not mean that the parties may not settle at any time on another amount.

[877] A customer requesting a section 211 order for transmission services from a transmitting utility also may incur a stranded cost obligation. Any estimate of stranded cost obligation resulting from the requested transmission services should be included as part of the utility's good faith response to the customer's request for transmission services. See 18 CFR 2.20. Because the Commission will apply the revenues lost formula to any request for stranded cost recovery as a part of its determination of the appropriate charge for transmission services ordered in a section 211 proceeding, we encourage nonpublic utilities to use the revenues lost formula to estimate a customer's stranded cost obligation.

identifying, at a minimum, the amount of capacity and associated energy the customer is entitled to schedule, the price of capacity and associated energy, and the duration of the customer's marketing/ brokering of the released capacity and associated energy. Parties are encouraged to settle disputes over these and any other marketing/ brokering implementation issues. The negotiations should be guided by the principle that the utility must allow the customer to market or broker the released capacity and associated energy under terms and conditions comparable to those for a utility resale of the capacity and associated energy to a third party. If agreement over marketing or brokering cannot be reached, the parties may seek to include the issue as a part of a proceeding initiated at the Commission with respect to the utility's stranded cost estimate for the customer.[878] Upon issuance of an order resolving the disputed issues, the customer may reevaluate its decision to exercise the marketing/brokering option. The customer also may choose to market or broker any released capacity and associated energy not being marketed or brokered under an earlier agreement with the utility. A customer must notify the utility in writing within 30 days of issuance of the Commission's order resolving the disputed issues whether the customer will market or broker a portion or all of the capacity and energy associated with stranded costs allowed by the Commission.

Payment for Released Capacity and Associated Energy Under the Marketing Option

If the customer chooses to market released capacity and associated energy, it shall pay the utility's estimate of the competitive market value of the capacity, or, if the marketing option is exercised after a Commission order, it shall pay the competitive market value amount as determined by Commission order. In addition, for all energy scheduled to be delivered, the customer shall pay the utility's average system variable costs. The customer may also choose to market only a portion of the released capacity and/or for a shorter period. In this situation, the customer will also pay the competitive market value for the released capacity plus the utility's average system energy costs. The customer's liability for payment of stranded costs is unaffected by its decision to market released capacity and associated energy.[879] In addition, to the extent that the customer chooses to market a portion or all of the capacity alleged by the utility to be stranded, a final determination with respect to the customer's stranded cost obligation will not affect any prior marketing agreement.

Payment for Stranded Costs Under the Brokering Option

If the customer chooses to broker a portion or all of the released capacity and associated energy, any revenue received from such brokering activity shall be used to offset the utility's estimate of the competitive market value of the brokered capacity and associated energy.[880] Once a brokering agreement is executed between the customer and the utility, if the customer's brokering efforts fail to produce a buyer within 60 days of the date of that agreement, the customer shall relinquish all rights to broker the released capacity and associated energy and will pay stranded costs as determined by the formula.

10. Stranded Costs in the Context of Voluntary Restructuring

In the Supplemental Stranded Cost NOPR, we noted that the functional unbundling of wholesale services does not require corporate unbundling (such as disposition of assets to a non-affiliate, or establishing a separate corporate affiliate

[878] Because litigation of stranded costs may extend beyond the date of the customer's departure, the customer may also file a petition for a declaratory order requesting expedited resolution of marketing or brokering implementation issues.

[879] If the customer can market the released capacity and associated energy for a higher price than the customer paid for it, the customer effectively reduces its stranded cost obligation, i.e., the incremental revenue received offsets a portion of the customer's stranded cost payment to the utility.

[880] For example, if the customer brokers any released capacity and associated energy for a higher price than the utility's estimated competitive market value of that capacity and energy, the difference between the utility's estimate and the brokered price will be used to increase the utility's CMVE component of the stranded cost calculation, thereby reducing the customer's stranded cost obligation.

to manage a utility's transmission assets). At the same time, we indicated that some utilities may ultimately choose some form of corporate unbundling.[881] We reaffirm in this Final Rule that we are willing to consider case-specific proposals for dealing with stranded costs in the context of any restructuring proceedings that may be instituted by individual utilities.

11. Accounting Treatment for Stranded Costs Comments

A number of commenters ask the Commission to provide accounting treatment guidance as part of its procedures for implementing its policies on stranded costs and their recovery.[882]

NSP states that the Commission will need to provide appropriate accounting guidance for the final stranded cost recovery methodology, including accounting for any portion of stranded cost recovery representing capital costs, the effect of any interperiod differences between the stranded cost calculations and the authorized recovery period, and the effects of differences between book and income implications of the stranded cost recovery mechanism. NSP also asserts that, in addressing the accounting implications of the final rule, the Commission must consider the requirements of the Financial Accounting Standards Board (FASB) Statement of Financial Accounting Standards No. 121, "Impairment of Long-Lived Assets" (SFAS No 121).

NASUCA states that one of the Commission's stated goals in providing stranded cost recovery is to protect against cost shifting. NASUCA argues that the Commission should adopt an accounting rule that assures that any federal resolution of wholesale stranded costs does not impose any cost shifting to captive customers.

EEI and Centerior argue that the Uniform System of Accounts as presently configured does not support the Commission's proposed policies on stranded cost recovery. Further, EEI states that even with the revenues lost approach, which EEI supports, utilities will still have to account for their assets on a class-of-asset by class-of-asset basis. EEI argues that this is necessary to ensure that the costs of the assets are expensed in the proper accounting period. EEI states that one of the basic principles of financial accounting is that expenses should be matched with the related revenues.

Commission Conclusion

As discussed in Section IV.J.3, this rule adopts a direct assignment approach for the recovery of stranded costs from departing generation customers. Under the revenues lost approach, stranded cost recovery is limited to the departing generation customer's contribution to fixed costs that the utility otherwise would not recover because of the customer's departure.

We recognize that there are certain similarities between the financial reporting objectives of SFAS No. 121 and the determination of stranded costs. However, there are also important differences between SFAS No. 121 and our approach to stranded costs. The revenues lost approach does not attempt to identify specific uneconomic assets and is not limited to only long-lived assets. Instead, it uses a formulary methodology that encompasses all fixed costs of providing service.

From a financial accounting standpoint, our approach to stranded costs creates the potential for a mismatch between the periods in which the stranded costs are charged to expense and any revenues provided for their recovery are included in net income determinations. This is because the earning process entitling a utility to the benefits of stranded cost recovery and thereby requiring the recognition of revenue may be completed prior to the time that the stranded costs must be charged to expense under generally accepted cost recognition criteria. This circumstance in a cost-based regulated environment creates the undesirable potential for double recovery of the same cost, cost shifting, and inappropriate financial reporting.

In order to avoid this potential, utilities shall not recognize revenues intended to provide for recovery of stranded costs from wholesale requirements customers prior to the time that the stranded costs are charged to expense, unless prior Commission approval to do so has been ob-

[881] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,132.

[882] See, e.g., EEI, NSP, LILCO, Central Hudson, Deloitte & Touche, Centerior.

tained. Absent Commission approval, utilities shall defer such amounts in Account 253, Other Deferred Credits, and amortize them to Account 456, Other Electric Revenues, consistent with the period the related costs are charged to expense. Also, we will require a utility to submit its proposed accounting for stranded costs and related revenues as part of its rate filing requesting recovery of stranded costs under section 205 of the FPA.

12. Definitions, Application, and Summary

In the Supplemental Stranded Cost NOPR, the Commission described proposed amendments to our regulations to establish filing requirements for public utilities and transmitting utilities that seek stranded cost recovery. We proposed to define "wholesale stranded cost" as "any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service to: (i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility, or (ii) a retail customer, or a newly created wholesale power sales customer, that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility." We sought comments on whether this definition should encompass the situation where a wholesale requirements customer ceases to purchase power from the utility that had been making wholesale requirements sales to such customer without becoming an unbundled transmission services customer of that utility.[883]

We received numerous comments both supporting and opposing revisions to the proposed definition of wholesale stranded costs.[884] Several commenters oppose broadening the definition to include costs stranded by customers that do not become unbundled transmission service customers of the former supplier.[885] For example, EGA argues that the loss of an industrial customer that chooses to self-generate or the loss of a requirements customer as a result of a newly-created municipal system that interconnects with a transmitting utility that is not the customer's former supplier could have happened at any time. EGA states that revenues lost as a result of either scenario have nothing to do with regulatory reforms and should not be considered "stranded" costs.

Other commenters disagree.[886] Puget asserts that permitting departing generation customers to avoid paying stranded costs if they do not take unbundled transmission from their former suppliers would create an incentive for departing customers (or their new electric suppliers) to build unneeded and uneconomic new transmission lines. Puget says that it also could be a disincentive to engage in regional transmission planning and coordination because the existence of new transmission facilities needed to achieve regional reliability and efficiency may increase the likelihood that departing generation customers could import their power supplies over those new facilities and avoid paying the utility's stranded costs.[887]

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[883] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,115.

[884] EEI asks the Commission to expand the definition of stranded costs to account for the case where the Commission has proposed to address purely retail stranded costs (that is, where a state regulatory authority does not have authority to address stranded costs at the time that retail wheeling is required). However, the regulations will contain a definition of "retail stranded costs" to account for this case. See § 35.26(b)(5) of the Final Rule.

[885] *E.g.*, EGA, Direct Service Industries, Memphis.

[886] *E.g.*, Atlantic City, Carolina P&L, Consumers Power, Minnesota Power, Knoxville, Alma, Florida Power Corp, El Paso, Central Louisiana, Southern, WP&L, FL Com. Utility Investors Analysts, Florida Power Corp, El Paso, Central Louisiana, TDU Systems, NW Conservation Act Coalition, Puget, NU, EEI.

[887] Several commenters also ask the Commission to expand the definition of wholesale stranded cost to include the situation where a wholesale supplier loses wholesale load as a result of a requirements customer's loss of retail load because of retail wheeling, municipalization or retail taps from another utility's system. E.g., Utilities For Improved Transition, Montaup, SC Public Service Authority. In addition, a number of commenters ask the Commission to treat the members of a single G&T cooperative system as a single economic unit and to revise the definition of wholesale

Some of these commenters propose using an exit fee to collect stranded costs from a customer that does not take unbundled transmission from its former supplier, since a transmission surcharge is not available in this circumstance.[888] Other methods proposed include: (1) Conditioning Commission approval of the transmission rates or wholesale power rates charged by the transmission-providing utility upon the inclusion of a surcharge to recover the former supplier's stranded costs or upon the transmission-providing utility otherwise agreeing to guarantee the payment of the stranded costs or act as billing agent for the former supplier;[889] (2) authorizing the former supplier to levy a stranded cost charge on the transmission-providing utility (if that utility is interconnected with and has transmission contracts with the former supplier); (3) if a retail customer becomes annexed to a municipal utility and does not take unbundled transmission services from its former supplier, permitting recovery of stranded costs from the municipal utility through its jurisdictional transmission rates; or (4) requiring a public utility providing transmission service for a customer that has left its former supplier to agree, as a condition to recovery of its own stranded costs, to ensure the payment of any stranded costs incurred by the former supplier.[890]

Commenters also address the use of the terms "legitimate, prudent, and verifiable" in the definitions of wholesale and retail stranded costs. Several commenters suggest that the Commission's use of the word "prudent" could imply that utilities have to relitigate the prudence of costs that the Commission and state commissions have already approved; these commenters believe that utilities should not have to relitigate prudence.[891] Some argue that once a regulatory agency (state or federal) has allowed recovery of the costs in rates, or promised future recovery, utilities should not have to undergo a second regulatory review to recover those costs if they become stranded.[892]

Commenters recommend that the Commission address this situation by: Striking the word "prudent" from the definition or specifying that the prudence requirement is satisfied by previous regulatory authorization;[893] dropping the terms "legitimate, prudent and verifiable" from the definition and using instead "allowed," "accepted," or "allowable";[894] or adding "or approved by state commission" after the words "legitimate, prudent and verifiable" in the definitions of both wholesale and retail stranded costs.[895]

(Footnote Continued)

stranded costs to allow a transmitting G&T cooperative (the arm of the cooperative system that provides the transmission) to recover the costs stranded when a retail customer of one of its member distribution cooperatives takes advantage of the open access environment by becoming a wholesale entity. E.g., Big Rivers EC, NRECA, Tri-County EC, TDU Systems.

[888] *E.g.*, Carolina P&L, NU, Florida Power Corp, PSNM, Southern, Mountain States Petroleum Assoc, FL Com.

[889] In its reply comments, Memphis Light objects to the proposal that the Commission condition approval of all new power contracts for those customers that leave a utility's system without using the transmission services of the original utility upon the inclusion of a provision to recover the stranded cost for the previous power supplier. It argues that this proposal could result in nonrecovery from some customers because wholesale customers faced with such a provision would pursue non-jurisdictional contracts and/ or generate within the confines of their own systems.

[890] *E.g.*, EEI, El Paso, NU, Atlantic City, PG&E, Coalition for Economic Competition, NW Conservation Act Coalition, Puget, NRECA, Cajun, East Kentucky, FL Com, Associated EC, Utilities For Improved Transition, TDU Systems, TVA.

[891] *E.g.*, EEI, NSP, Arizona, United Illuminating, Entergy, SCG&E, PECO, NRECA.

[892] *E.g.*, EEI, Centerior, NSP, SCG&E, PECO, Tucson Power, Arizona.

[893] *E.g.*, PECO, Entergy.

[894] *E.g.*, EEI, SCG&E, Carolina P&L.

[895] *E.g.*, Atlantic City. EEI also proposes that at the time of filing of a stranded cost recovery charge (whether as an amendment to a contract or a surcharge to a transmission rate), the Commission limit its inquiry to the issue of the stranded cost charge rather than allowing all aspects of a rate or contract to be opened up. EEI states that this is what the Commission did in the natural gas context, where it permitted limited rate filing cases under section 4 of the NGA.

Other commenters oppose these proposals, suggesting that the prudence analysis for stranded cost purposes may involve questions of prudence different from those that arise in a ratemaking context.[896] DE Muni objects that replacing "legitimate, prudent and verifiable" with "allowed, accepted, or allowable" could enable a utility to recover costs that the utility may not be able to prove were prudent, legitimate, and verifiable.

A number of commenters submit that "legitimate, prudent and verifiable" costs should not include the costs of uneconomic plants or costs resulting from utilities' independent business decisions (as distinguished from costs the utility was forced by regulation to incur).[897]

Several other commenters address the rule's application to wholesale requirements customers.[898] AMP-Ohio asks the Commission to clarify that the reference to "wholesale requirements customer" is to a full requirements customer, not a partial requirements customer. It says that no transmission provider should have any reasonable expectation of continuing to serve loads of partial requirements customers. TAPS suggests that references to "new wholesale requirements contract" in proposed §35.26(c)(1) should be conformed to the defined term "new contract" in proposed §35.26(b)(7). In addition, it suggests that the Commission clarify the regulations by clearly foreclosing stranded cost claims for "new contracts" without express exit fees, instead of simply failing to provide for such recovery.

Commission Conclusion

We will retain the definition of "wholesale stranded cost" proposed in the Supplemental Stranded Cost NOPR.[899] We believe it would be inappropriate to expand the definition to include the situation where a wholesale requirements customer[900] (or a retail-turned-wholesale customer) ceases to purchase power from the utility without using the transmission services of that utility.[901] Any costs that the utility might incur as a result of the loss of the requirements customer in this scenario would be outside the scope of this Rule. The premise of this Rule is that, where a customer uses the new open access to obtain power from a new generation supplier, the customer must pay the costs that were incurred on its behalf under the prior regulatory regime. However, if a customer leaves its utility supplier by exercising power supply options (such as access to another utility's transmission system or self-generation) that do not rely on access to the former seller's transmission, there is no nexus to the new open access rules.[902] If a customer is able to obtain power from a new supplier by using the transmission system of another utility, it is likely that the customer could have made these arrangements in the absence of the new open access rules. The new transmission provider would have had little incentive to deny transmission services to the customer in order to pro-

[896] *E.g.*, Alcoa, Cleveland.

[897] *E.g.*, Mountain States Petroleum Assoc, Caparo, Torco.

[898] *E.g.*, AMP-Ohio, PA Munis, TAPS.

[899] For the reasons articulated below, we accordingly will reject the various revisions to the definition that were proposed by commenters.

[900] "Wholesale requirements contract" is defined as "a contract under which a public utility or transmitting utility provides any portion of a customer's bundled wholesale power requirements" (emphasis added). Thus, a "wholesale requirements customer" for purposes of the Rule can be either a full or a partial requirements customer. We reject AMP-Ohio's suggestion that the Commission make a blanket finding that a utility could not have had a reasonable expectation of continuing to serve a partial requirements customer. For example, a partial requirements customer may have met part of its needs with its own generation but because it could not build more of its own generation locally it had to depend on the utility for the remainder of its needs in the absence of the new open access. Also, a partial requirements customer may have been able to reach alternative suppliers for only a portion of its requirements due to transmission constraints. If this were the case, the partial requirements supplier may well have had a reasonable expectation of continuing to serve the balance of the customer's load.

[901] The definition of "retail stranded cost" contains a similar requirement (i.e., the retail customer must become, in whole or in part, an unbundled retail transmission services customer of the public utility or transmitting utility from which the customer previously received bundled retail services). We will retain it for the same reasons discussed above.

[902] As we have said, this Rule is not intended to insulate a utility from the normal risks of competition.

tect an existing power supply arrangement, since it was not the customer's power supplier in the first place. Indeed, it is likely that the neighboring utility would have a positive incentive to provide the transmission service in order to increase its revenues. This incentive is unchanged by open access transmission.

Some commenters have asked us to eliminate the term "prudent" from the definition of stranded costs. We will not do so; we will retain the requirement that stranded costs be "legitimate, prudent and verifiable." A determination that a utility had a reasonable expectation of continuing to serve a customer would not, in all circumstances, mean that costs incurred by the utility were prudent. Prudence of costs, depending upon the facts in a specific case, may include different things: e.g., prudence in operation and maintenance of a plant; prudence in continuing to own a plant when cheaper alternatives become available; prudence in entering into purchased power contracts, or continuing such contracts when buy-outs or buy-downs of the contracts would result in savings. The Commission therefore cannot make a blanket assumption that all claimed stranded costs will have been prudently incurred. However, we clarify that we do not intend to relitigate the prudence of costs previously recovered.[903]

Thus, this Rule will permit a public utility or transmitting utility to seek recovery of wholesale stranded costs as follows. First, for stranded costs associated with new wholesale requirements contracts (that is, any wholesale requirements contract executed after July 11, 1994), the regulations will allow recovery of stranded costs only if the contract contains an explicit stranded cost provision that permits recovery. By "explicit stranded cost provision" we mean a provision that identifies the specific amount of stranded cost liability of the customer(s) and a specific method for calculating the stranded cost charge or rate.. We clarify that provisions in requirements contracts executed after July 11, 1994 but before the date on which this Final Rule is published in the Federal Register that explicitly reserved the right to stranded cost recovery pending the outcome of this Rule will be deemed "explicit stranded cost provisions." However, provisions in requirements contracts executed after July 11, 1994 but before the date on which this Final Rule is published in the Federal Register that postpone the issue of stranded cost recovery without specifically providing for recovery of stranded costs will not be considered "explicit stranded cost provisions."

Second, for existing wholesale requirements contracts (that is, any wholesale requirements contract executed on or before July 11, 1994), a utility may not recover stranded costs if recovery is explicitly prohibited by the contract (including associated settlements) or by any power sales or transmission tariff on file with the Commission.

Third, for existing wholesale requirements contracts that do not address stranded costs through exit fee or other explicit stranded cost provisions, a public utility may seek recovery of stranded costs only as follows: (1) If the parties to the existing contract renegotiate the contract and file a mutually agreeable amendment dealing with stranded costs, and the Commission accepts or approves the amendment; (2) if either or both parties seeks an amendment to the existing contract under sections 205 or 206 of the FPA, before the contract expires, and the Commission accepts or approves an amendment permitting stranded cost recovery; or (3) if the public utility files a request, before the contract expires, to recover stranded costs through a departing generation customer's transmission rates under FPA sections 205-206 or 211-212.

Fourth, if the selling utility under an existing wholesale requirements contract is a transmitting utility but not also a public utility, and the contract does not address stranded costs through an explicit exit fee or other stranded cost provision, the transmitting utility may seek to recover stranded costs through a surcharge to a departing generation customer's transmission rates under FPA sections

[903] As the Commission has previously indicated, however, in the case of formula rates, approval of a formula rate constitutes approval of the formula, and not the underlying costs. *See, e.g., New England Power Company, et al.*, 72 FERC ¶ 61,148 at p. 61,761 (1995); *Boston Edison Company*, Opinion No. 376, 61 FERC ¶ 61,026 at p. 61,145 (1992).

211-212. Such utility may not seek recovery of stranded costs through a section 211-212 transmission rate if the existing requirements contract does contain an explicit exit fee or other stranded cost provision.

Fifth, for a retail-turned-wholesale customer, a public utility or transmitting utility may file a request to recover stranded costs from the newly-created wholesale customer through that customer's transmission rates under FPA sections 205-206 or 211-212.

Sixth, for customers who obtain retail wheeling, a public utility or transmitting utility may seek recovery through Commission-jurisdictional transmission rates only if the state regulatory authority had no authority under state law to address stranded costs when retail wheeling is required.

K. *Other*

1. Information Reporting Requirements for Public Utilities

In the NOPR, the Commission did not propose any changes to its information filing requirements for public utilities.

Comments

Many IOUs argue that the current information filing requirements competitively disadvantage traditional public utilities and unfairly benefit sellers, such as power marketers, that are not required to provide comparable information.[904] They urge the Commission to eliminate the requirement for public disclosure of competitively sensitive, proprietary, or otherwise confidential Form No. 1 data. They contend that requiring such disclosure only from traditional public utilities harms such public utilities and compromises the development of efficient competition. Illinois Power asks the Commission to review all information that utilities must file, including EIA 860, EIA 767, and FERC Form No. 715.

A number of commenters believe that some type of information requirement must also be placed on non-public utility entities.[905] PacifiCorp suggests that the Commission should require transmitting utilities that do not file a Form No. 1 to file similar information annually with the Commission. Ohio Edison asserts that the Commission should extend its use of the reciprocity concept to require the filing of operating data with the Commission. Further, if non-public utility entities are not required to disclose certain information, Ohio Edison asserts that all public utilities that have received approval to sell power at market-based rates, including traditional utilities, should also be free from having to disclose such information.

Arizona argues that enforcing comparability vis-a-vis non-public utility transmitting utilities would seem to invite jurisdictional challenge. Thus, it would support legislation to broaden the Commission's jurisdiction.[906]

Commission Conclusion

We will not adopt the suggestion made by a number of commenters that we now eliminate the public disclosure of allegedly competitively sensitive, proprietary, or otherwise confidential data submitted to the Commission on Form No. 1, as well as on other Commission forms. The information that we collect from public utilities is necessary to carry out our jurisdictional responsibilities and is used, among other things, to evaluate the reasonableness of cost-based rates subject to our jurisdiction and the operation of power markets.[907] Moreover, as we explained in ConEd,

[R]eports required to be submitted by Commission rule and necessary for the Commission's jurisdictional activities are considered public information. 18 CFR 388.106. In addition, the Commission has long required jurisdictional utilities to submit Form 1 data on a form that states on its cover that the Commission does not consider the material to be confidential.[908]

We are sensitive to the lack of symmetry in the generation information we require from traditional public utilities,

[904] *E.g.*, NIPSCO, Illinois Power, Centerior, Ohio Edison, EEI.

[905] *E.g.*, NSP, Ohio Edison.

[906] See also Minnesota P&L.

[907] *See, e.g., Consolidated Edison Company of New York, Inc. and Central Hudson Gas & Electric Corp.*, 72 FERC ¶ 61,184 at p. 61,891 (1995) (ConEd).

[908] 72 FERC at p. 61,891.

balance the following public interest considerations:

(A) The harm to the intervenor if it is not granted preliminary relief from the requested CWIP;

(B) The harm to the public utility if, during the interim period of preliminary relief, the public utility is required to recover its financing charges later through AFUDC rather than immediately through CWIP; and

(C) Mitigating bias against investment in new plants, ensuring accurate price signals, and fostering rate stability.

(ii) Whether or not preliminary relief is granted at the suspension stage will not preclude consideration of further interim or final remedies later in the proceedings, if warranted.

(3) If the Commission makes a final determination that a price squeeze due solely to allowance of a lower percentage of non-pollution control/fuel conversion CWIP in the public utility's retail rate base than allowed by this Commission, the Commission will consider an adjustment to non-pollution control/fuel conversion CWIP in order to eliminate or mitigate the price squeeze.

(4) If an intervenor meets the requirements of paragraph (g)(2) of this section, the Commission, depending on the type of showing made including the likelihood, immediacy, and severity of any anticompetitive harm, may:

(i) Suspend the entire rate increase or all or a portion of the non-pollution control/fuel conversion CWIP component for up to five months;

(ii) Allow all or a portion of the non-pollution control/fuel conversion CWIP only prospectively from the issuance of the Commission's final order on rehearing on the matter; or

(iii) Take such other action as is proper under the circumstances.

[Order 474, 52 FR 23965, June 26, 1987, as amended by Order 474-A, 52 FR 35702, Sept. 23, 1987; Order 474-B, 54 FR 22804, Aug. 10, 1989. Redesignated by Order 545, 57 FR 53290, Nov. 16, 1992]

§35.26 Recovery of stranded costs by public utilities and transmitting utilities.

(a) *Purpose.* This section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs.

(b) *Definitions*—(1) *Wholesale stranded cost* means any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service to:

(i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility; or

(ii) A retail customer that subsequently becomes, either directly or through another wholesale transmission purchaser, an unbundled wholesale transmission services customer of such public utility or transmitting utility.

(2) *Wholesale requirements customer* means a customer for whom a public utility or transmitting utility provides by contract any portion of its bundled wholesale power requirements.

(3) *Wholesale transmission services* means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce or ordered pursuant to section 211 of the Federal Power Act (FPA).

(4) *Wholesale requirements contract* means a contract under which a public utility or transmitting utility provides any portion of a customer's bundled wholesale power requirements.

(5) *Retail stranded cost* means any legitimate, prudent and verifiable cost incurred by a public utility to provide service to a retail customer that subsequently becomes, in whole or in part, an unbundled retail transmission services customer of that public utility.

(6) *Retail transmission services* means the transmission of electric energy sold, or to be sold, in interstate commerce directly to a retail customer.

(7) *New wholesale requirements contract* means any *wholesale requirements* contract executed after July 11, 1994, or extended or renegotiated to be effective after July 11, 1994.

(8) *Existing wholesale requirements* contract means any *wholesale requirements* contract executed on or before July 11, 1994.

(c) *Recovery of wholesale stranded costs*—(1) *General requirement.* A public utility or transmitting utility will be

allowed to seek recovery of wholesale stranded costs only as follows:

(i) No public utility or transmitting utility may seek recovery of wholesale stranded costs if such recovery is explicitly prohibited by a contract or settlement agreement, or by any power sales or transmission rate schedule or tariff.

(ii) No public utility or transmitting utility may seek recovery of stranded costs associated with a new wholesale requirements contract if such contract does not contain an exit fee or other explicit stranded cost provision.

(iii) If wholesale stranded costs are associated with a new wholesale requirements contract containing an exit fee or other explicit stranded cost provision, and the seller under the contract is a public utility, the public utility may seek recovery of such costs, in accordance with the contract, through rates for electric energy under sections 205–206 of the FPA. The public utility may not seek recovery of such costs through any transmission rate for FPA section 206 or 211 transmission services.

(iv) If wholesale stranded costs are associated with a new wholesale requirements contract, and the seller under the contract is a transmitting utility but not also a public utility, the transmitting utility may not seek an order from the Commission allowing recovery of such costs.

(v) If wholesale stranded costs are associated with an existing wholesale requirements contract, if the seller under such contract is a public utility, and if the contract does not contain an exit fee or other explicit stranded cost provision, the public utility may seek recovery of stranded costs only as follows:

(A) If either party to the contract seeks a stranded cost amendment pursuant to a section 205 or section 206 filing under the FPA made prior to the expiration of the contract, and the Commission accepts or approves an amendment permitting recovery of stranded costs, the public utility may seek recovery of such costs through FPA section 205–206 rates for electric energy.

(B) If the contract is not amended to permit recovery of stranded costs as described in paragraph (o)(1)(v)(A) of this section, the public utility may file a proposal, prior to the expiration of the contract, to recover stranded costs through FPA section 205–206 or section 211–212 rates for wholesale transmission services to the customer.

(vi) If wholesale stranded costs are associated with an existing wholesale requirements contract, if the seller under such contract is a transmitting utility but not also a public utility, and if the contract does not contain an exit fee or other explicit stranded cost provision, the transmitting utility may seek recovery of stranded costs through FPA section 211–212 transmission rates.

(vii) If a retail customer becomes a legitimate wholesale transmission customer of a public utility or transmitting utility, *e.g.*, through municipalization, and costs are stranded as a result of the retail-turned-wholesale customer's access to wholesale transmission, the utility may seek recovery of such costs through FPA section 205–206 or section 211–212 rates for wholesale transmission services to that customer.

(2) *Evidentiary demonstration for wholesale stranded cost recovery.* A public utility or transmitting utility seeking to recover wholesale stranded costs in accordance with paragraphs (o)(1)(v) through (vii) of this section must demonstrate that:

(i) It incurred costs to provide service to a wholesale requirements customer or retail customer based on a reasonable expectation that the utility would continue to serve the customer;

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a wholesale requirements customer of the utility, or, in the case of a retail-turned-wholesale customer, had the customer remained a retail customer of the utility; and

(iii) The stranded costs are derived using the following formula: Stranded Cost Obligation = (Revenue Stream Estimate—Competitive Market Value Estimate) × Length of Obligation (reasonable expectation period).

(3) *Rebuttable presumption.* If a public utility or transmitting utility seeks recovery of wholesale stranded costs associated with an existing wholesale requirements contract, as permitted in paragraph (c)(1) of this section, and the existing wholesale requirements contract contains a notice provision, there will be a rebuttable presumption that the utility had no reasonable expectation of continuing to serve the customer beyond the term of the notice provision.

(4) *Procedure for customer to obtain stranded cost estimate.* A customer under an existing wholesale requirements contract with a public utility seller may obtain from the seller an estimate of the customer's stranded cost obligation if it were to leave the public utility's generation supply system by filing with the public utility a request for an estimate at any time prior to the termination date specified in its contract.

(i) The public utility must provide a response within 30 days of receiving the request. The response must include:

(A) An estimate of the customer's stranded cost obligation based on the formula in paragraph (c)(2)(iii) of this section;

(B) Supporting detail indicating how each element in the formula was derived;

(C) A detailed rationale justifying the basis for the utility's reasonable expectation of continuing to serve the customer beyond the termination date in the contract;

(D) An estimate of the amount of released capacity and associated energy that would result from the customer's departure; and

(E) The utility's proposal for any contract amendment needed to implement the customer's payment of stranded costs.

(ii) If the customer disagrees with the utility's response, it must respond to the utility within 30 days explaining why it disagrees. If the parties cannot work out a mutually agreeable resolution, they may exercise their rights to Commission resolution under the FPA.

(5) A customer must be given the option to market or broker a portion or all of the capacity and energy associated with any stranded costs claimed by the public utility.

(i) To exercise the option, the customer must so notify the utility in writing no later than 30 days after the public utility files its estimate of stranded costs for the customer with the Commission.

(A) Before marketing or brokering can begin, the utility and customer must execute an agreement identifying, at a minimum, the amount and the price of capacity and associated energy the customer is entitled to schedule, and the duration of the customer's marketing or brokering of such capacity and energy.

(ii) If agreement over marketing or brokering cannot be reached, and the parties seek Commission resolution of disputed issues, upon issuance of a Commission order resolving the disputed issues, the customer may reevaluate its decision in paragraph (c)(5)(i) of this section to exercise the marketing or brokering option. The customer must notify the utility in writing within 30 days of issuance of the Commission's order resolving the disputed issues whether the customer will market or broker a portion or all of the capacity and energy associated with stranded costs allowed by the Commission.

(iii) If a customer undertakes the brokering option, and the customer's brokering efforts fail to produce a buyer within 60 days of the date of the brokering agreement entered into between the customer and the utility, the customer shall relinquish all rights to broker the released capacity and associated energy and will pay stranded costs as determined by the formula in paragraph (c)(2)(iii) of this section.

(d) *Recovery of retail stranded costs*—(1) *General requirement.* A public utility may seek to recover retail stranded costs through rates for retail transmission services only if the state regulatory authority does not have authority under state law to address stranded costs at the time the retail wheeling is required.

(2) *Evidentiary demonstration necessary for retail stranded cost recovery.* A public utility seeking to recover retail stranded costs in accordance with paragraph

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(d)(1) of this section must demonstrate that:

(i) It incurred costs to provide service to a retail customer that obtains retail wheeling based on a reasonable expectation that the utility would continue to serve the customer; and

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a retail customer of the utility.

[Order 888–A, 62 FR 12460, Mar. 14, 1997]

§ 35.27 Power sales at market-based rates.

(a) Notwithstanding any other requirements, any public utility seeking authorization to engage in sales for resale of electric energy at market-based rates shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity for which construction has commenced on or after July 9, 1996.

(b) Nothing in this part—

(1) Shall be construed as preempting or affecting any jurisdiction a state commission or other state authority may have under applicable state and federal law, or

(2) Limits the authority of a state commission in accordance with state and federal law to establish

(i) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(ii) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with state law.

[Order 888, 61 FR 21663, May 10, 1996]

§ 35.28 Non-discriminatory open access transmission tariff.

(a) *Applicability.* This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) *Definitions*—(1) *Requirements service agreement* means a contract or rate schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) *Economy energy coordination agreement* means a contract, or service schedule thereunder, that provides for trading of electric energy on an "if, as and when available" basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) *Non-economy energy coordination agreement* means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (b)(2) of this section.

(c) *Non-discriminatory open access transmission tariffs*—(1) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission a tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the open access pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036 (Final Rule on Open Access and Stranded Costs) or such other open access tariff as may be approved by the Commission consistent with Order No. 888, FERC Stats. & Regs. ¶31,036.

(i) Subject to the exceptions in paragraphs (c)(1)(ii), (c)(1)(iii), and (c)(1)(iv) of this section, the pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036, and accompanying rates, must be filed no later than 60 days prior to the date on which a public utility would engage in a sale of electric energy at wholesale in interstate commerce or in the transmission of electric energy in interstate commerce.

(ii) If a public utility owns, controls or operates facilities used for the transmission of electric energy in interstate commerce as of July 9, 1996, it must file the pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036, pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA, no later than July 9, 1996. However, if a public utility has already filed, or has on file, an open access tariff and accompanying rates as of April 24, 1996, it may, but is not required to, file new rates with its section 206 pro forma tariff filing.

Testimony of

Frank K. Turner, President

American Short Line and Regional

Railroad Association

Railroad Infrastructure Policy

House Committee on Transportation and Infrastructure
Subcommittee on Railroads

April 25, 2001

Today, the contribution that small railroads make to our national transportation system is threatened by the condition of their infrastructure. In one sense this problem has always been with us. These are light density lines that don't generate enough revenue to make up for the years of deferred maintenance they inherited from their Class I owners. Because of their lower cost structure and their ability to deal with individual shippers in a more flexible way than the Class I's, they have been able to turn money losing lines into marginally profitable lines. They have made enough money to get by, but not enough to make the kind of one-time capital expenditures needed to remain an efficient feeder system for the national rail network.

How Large Is the problem and How Should Congress Confront It?

A recent study by ZETA-TECH Associates concluded that investment in track and structures

needed to handle 286,000-pound cars will approach $7 billion on small railroads. ASLRRA and the Federal Railroad Administration funded the ZETA-TECH study jointly under a cooperative agreement. It validated the scope of the "286" problem that had been established in an earlier survey of short lines by the Standing Committee on Rail Transportation of AASHTO (the American Association of State Highway and Transportation Officials).

How should Congress confront this pressing issue? There are two solutions that I would like to discuss today. One involves loans, and the other involves grants. Both are desperately needed. The first is the Railroad Rehabilitation and Improvement Financing Program, commonly referred to as "the RRIF Loan Program." The RRIF Loan Program already exists, but steps need to be taken as soon as possible to make this program work the way Congress intended. The second is H.R. 1020, which would authorize grants of $350 million per year for three years for small railroad infrastructure projects.

1. Implementation of the RRIF Loan Program

Congress enacted the RRIF Loan Program as Section 7203 of the Transportation Equity Act for the 21st Century (TEA-21). The program authorizes the Secretary of Transportation to provide up to $3.5 billion in direct loans and loan guarantees for railroads projects. Of this amount, at least $1 billion is reserved for small railroad projects.

The loan program has been on the books since June of 1998. It took the Administration more than two years to produce implementing regulations. Since the regulations took effect in September of 2000, over a dozen railroad applications have been presented to the Federal Railroad Administration. Not a single one has been approved. This innovative infrastructure financing tool has not yet begun to perform in the way Congress intended.

You have heard from the FRA on this subject and I do not question their good intentions with regard to this program. But the fact is that somehow and somewhere this program is stuck. Somebody in the Department of Transportation needs to get it unstuck.

2. Enactment of H.R. 1020

On March 14th of this year, Congressmen Jack Quinn (R-NY), Bob Clement (D-TN) and Spencer Bachus (R-AL) introduced H.R. 1020, the Railroad Track Modernization Act of 2001. In addition to this strong support from the leadership of this Subcommittee, for which we are grateful, the bill has been sponsored by full Committee Chairman Don Young, by four of the six Subcommittee Chairman and by three of the six Subcommittee ranking Democratic Members.

The bill authorizes General Fund appropriations of $350 million per year for three years for capital grants to rehabilitate, preserve or improve track (including roadbed and bridges) of Class II and Class III railroads. The grants are intended for projects to allow safe and efficient rail operations, particularly when handling 286,000-lb. freight cars. In addition, H.R. 1020 specifically allows grants to be used to supplement the RRIF loan program, to pay credit risk premiums, lower interest rates, or provide a "holiday" on principal payments.

Enactment of H.R. 1020 is a "Win-Win" for Railroads, Employees, Shippers and States.

Certainly the large railroads will benefit from passage of the bill and stabilization of light density rail infrastructure. One way to think of the more than 500 short line and regional railroads in this country is as a very big customer to the mega-carriers. We market business, gather traffic from remote locations and tender it to the AAR member Class I railroads. Our share of the revenues of the traffic we generate and terminate each year is about $3 billion. Theirs is much greater. If we fail, that traffic will be lost to the highways and waterways. At the very least it will move great distances over rural and secondary road systems at great cost to the taxpayers.

This bill is supported by the largest rail union, the UTU. As you have heard, it is opposed by the

Transportation Trades Department of the AFL-CIO, on behalf of its other rail union members. As I understand that opposition, it is based on the fact that many of today's short line railroads began operation as non-union companies and as such the over 25,000 people we employ today do not merit the attention of the federal government. I want to address that issue head on.

First, I served as President of one of the very first spin-off railroads, the MidSouth, during the 1990's. It was fully unionized. I inherited some of the most dilapidated railroad track in the State of Mississippi, track that was well on its way to abandonment. Fortunately we had some profitable segments and we invested every dollar we could from those segments into upgrading those poor segments. We saved the line and we saved the jobs.

Second, while one may argue about why or how short line railroads were originally formed, the fact of the matter is they are increasingly unionized. I have attached to my testimony a copy of the facts as they relate to that matter. Today, 66 percent of small railroad employees are represented by a union. Eight two percent of small railroads with 50 or more employees have a union on the property. One hundred percent of all Class II railroads have at least one union on the property. The trend is clear. As small railroads grow their employees tend to unionize. This legislation will help small railroads grow and prosper and it seems counterproductive to oppose that opportunity in the name of a perceived inequity that occurred twenty years ago.

Third, the railroad unions told you today that preserving the financial stability of Railroad Retirement is one of their most important priorities. Every small railroad worker, whether they are unionized or not, pays into the Railroad Retirement System. Together small railroad employees contribute approximately $206 million annually to the Tier II system. That is not an insignificant amount of money, and everyone that is interested in preserving Railroad Retirement should be interested in preserving and growing this financial contribution to the system.

Fourth, and finally, the Short Line Association has spent considerable time working with the unions, including the TTD in trying to accommodate rail labor's concerns. The sections in the legislation concerning labor protection, Davis-Bacon requirements and disallowing the use of the money for new spin-offs were all included in the bill at the request of rail labor. Not all my members are supportive of these provisions, particularly taking away this funding opportunities for yet to be created short line railroads. But we want to work with rail labor on this legislation and we have tried hard to do so.

Finally, Mr. Chairman, our shippers and the communities in which they are located are beneficiaries of this legislation. Without small railroads our shippers lose their connection to the national railroad system. Our communities lose an important economic development tool. Our states are faced with increasing highway congestion and repair costs.

Meeting the Challenge of Infrastructure

The purpose of the infrastructure program ASLRRA is advocating is to provide a one-time fix for light density railroads so they can meet the new requirements of the 21st Century. The need exceeds $7 billion over the next decade. Our railroads can raise part of the money needed, but they are not big enough or wealthy enough to raise it all for the major rehabilitation that is required to meet the heavy car challenge.

There will be many projects with low returns that will not be suitable for loan financing under the RRIF program. H.R. 1020 provides the missing piece of the puzzle. We believe the Quinn-Clement-Bachus grant program leveraging federal loan funds and state assistance, together with private capital, will help to fix the problem.

If this problem is not fixed, then these railroads will gradually lose their business as their shippers are forced to move to truck or relocate. Once that occurs, these lines will deteriorate and ultimately be abandoned and no amount of federal funding will be able to bring them back. Thousands of current rail shippers will close their doors or put their goods on the highway.

Enactment of H.R. 1020 will be a "win-win" for railroads, employees, shippers and communities across America. I urge your support and prompt passage of this important legislation.

Thank you.

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* ASLRRA is a non-profit trade association incorporated in the District of Columbia. ASLRRA represents the interests of its more than 400 short line and regional railroad members in legislative and regulatory matters. Short line and regional railroads are an important and growing component of the railroad industry. Today, they operate and maintain 29 percent of the American railroad industry's route mileage (approximately 50,000 miles of track), and account for ten percent of the rail industry's freight revenue and twelve percent of railroad employment (based on statistics for calendar year 1999).

STATEMENT SUBMITTED

BY THE

UNITED STATES NUCLEAR REGULATORY COMMISSION

TO THE

SUBCOMMITTEE ON ENERGY AND AIR QUALITY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE U.S. NATIONAL ENERGY POLICY: NUCLEAR ENERGY

SUBMITTED BY
DR. WILLIAM D. TRAVERS
EXECUTIVE DIRECTOR FOR
OPERATIONS

Submitted: March 27, 2001

U.S. NUCLEAR REGULATORY COMMISSION
TESTIMONY ON THE U.S. NATIONAL ENERGY POLICY:
NUCLEAR ENERGY

Introduction

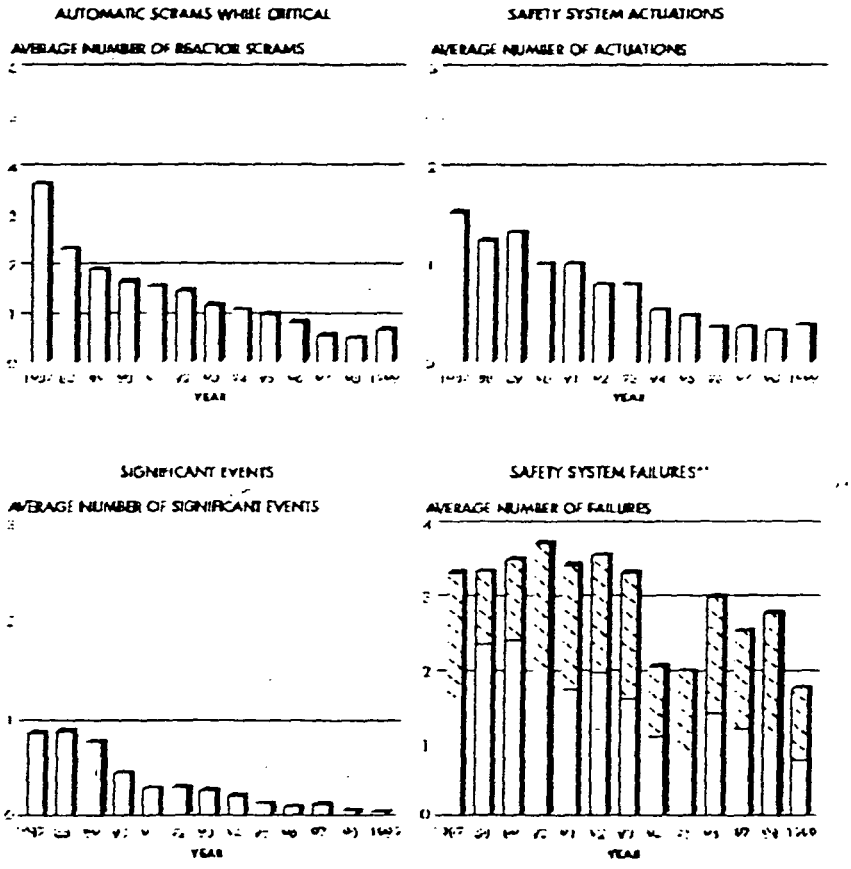
Mr. Chairman, members of the Subcommittee, I am pleased to submit this testimony on behalf of the U.S. Nuclear Regulatory Commission (NRC) regarding the NRC's perspective on how nuclear energy fits into the U.S. National Energy Policy. As the Subcommittee knows, the Commission's mission is to ensure the adequate protection of public health and safety, the common defense and security, and the environment in the application of nuclear technology for civilian use. The Commission does not have a promotional role - - the agency's role is to ensure the safe application of nuclear technology if society elects to pursue the nuclear energy option. The Commission recognizes, however, that its regulatory system should not establish inappropriate impediments to the application of nuclear technology. Many of the Commission's initiatives over the past several years have sought to maintain or enhance safety while simultaneously improving the efficiency and effectiveness of our regulatory system. The Commission also recognizes that its decisions and actions as a regulator influence the public's perception of the NRC and ultimately the public's perception of the safety of nuclear technology. For this reason, the Commission's primary performance goals also include increasing public confidence.

The Commission's primary focus is on safety. The Commission nonetheless recognizes that the quality, predictability, and timeliness of its regulatory actions bear on licensee decisions related to construction and operation of nuclear power plants.

Background

Currently there are 104 nuclear power plants licensed by the Commission to operate in the United States in 31 different states. As a group, they are operating at high levels of safety and reliability.

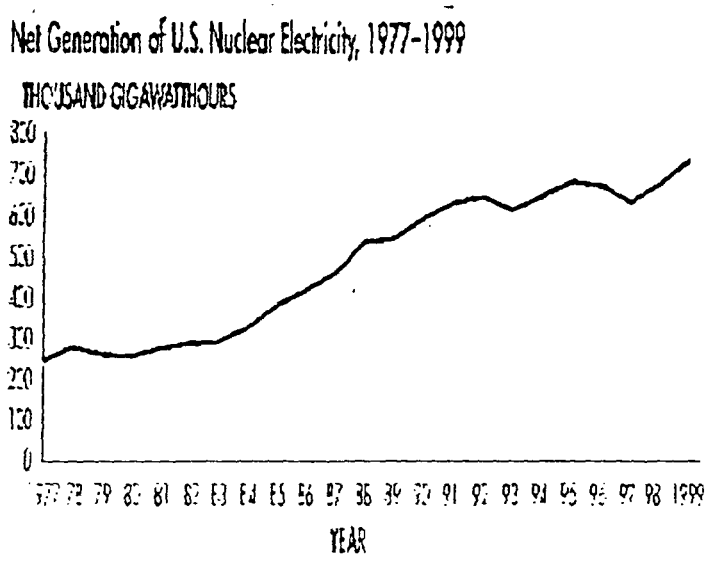
NRC Performance Indicators; Annual Industry Averages, 1987–1999*



*Calendar year values used for 1986 through 1995. Fiscal year values are used beginning in 1996.

**The hatched areas represent additional data that resulted from reclassification of safety system failures.

These plants have produced approximately 20% of our nation's electricity for the past severa. years and are operated by about 40 different companies. In 2000, these nuclear power plants produced a record 755-thousand gigawatt-hours of electricity.



Improved Licensee Efficiencies (Increased Capacity Factors)

The nation's nuclear electricity generators have worked over the past 10 years to improve nuclear power plant performance, reliability, and efficiency. According to the Nuclear Energy Institute, the improved performance of the U.S. nuclear power plants since 1990 is equivalent to placing 23 new 1000-MWe power plants on line. The average capacity factor[1] for U.S. light water reactors was 86 percent in 1999, up from 63 percent just 10 years ago. ~~The Commission has focused on~~ ensuring that safety has not been compromised as a result of ~~these industry~~ efforts. ~~The Commission will continue to carry out its regulatory~~ responsibilities in an effective and efficient manner so as not to impede industry initiatives inappropriately.

[1]Capacity factor is the ratio of electricity generated, for the period of time considered, to the amount of energy that could have been generated at continuous full-power operation during the same period.

U.S. Commercial Nuclear Power Reactor Average Capacity Factor and Net Generation

		Net Generation of Electricity		
Year	Number of Reactors Licensed to Operate	Average Annual Capacity Factor (Percent) -	Thousands of Gigawatthours	Percent of Total U.S.
1989	109	63	528	19.0
1990	111	68	576	20.5
1991	111	71	613	21.7
1992	110	71	620	22.2
1993	109	73	611	21.2
1994	109	75	640	22.1
1995	109	79	674	22.5
1996	110	77	670	21.9
1997	104	74	628	20.1
1998	104	78	673	22.6
1999	104	86	727	19.8

Electric Industry Restructuring

As the Subcommittee is aware, the nuclear industry has undergone a period of remarkable change. The industry is in a period of transition in several dimensions, probably experiencing more rapid change than in any other period in the history of civilian nuclear power. As deregulation of electricity generation proceeds, the Commission is seeing significant restructuring among the licensees and the start of the consolidation of nuclear generating capacity among a smaller group of operating companies. In part, this change is due to an industry that has achieved gains in both economic and safety performance over the past decade and thus has been able to take advantage of the opportunities presented by industry restructuring. The Commission has established a regulatory system that is technically sound, that is fair, predictable, and reaches decisions with reasonable dispatch.

Initiatives in the Area of Current Reactor Regulation

License Transfers

One of the more immediate results of the economic deregulation of the electric power industry has been the development of a market for nuclear power plants as capital assets themselves. As a result, the Commission has seen a significant increase in the number of requests for approval of license transfers. These requests increased from a historical average of about two or three per year, to 20 - 25 in the past two years.

The Commission has assured that our reviews of license transfer applications, which focus on adequate protection of public health and safety, are conducted efficiently. These reviews sometimes require a significant expenditure of talent and energy by our staff to ensure a high quality and timely result. Our legislative proposal to eliminate foreign ownership review could help to further streamline the process. To date, the Commission believes that it has been timely in these transfers. For example, in CY 2000, the staff has reviewed and approved transfers in periods ranging from four to eight months, depending on the complexity of the applications. The Commission will strive to continue to perform at this level of proficiency even in the face of continued demand.

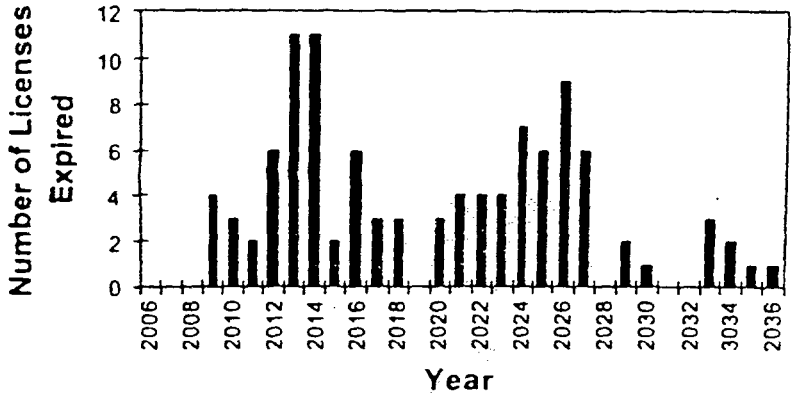
License Renewals

Another result of the new economic conditions is an increasing interest in license renewal that would allow plants to operate beyond the original 40-year term. That term, which was established in the Atomic Energy Act (AEA), did not reflect a limitation that was determined by engineering or scientific considerations, but rather was based on financial and antitrust concerns. The Commission now has the technical bases and experience on which to base judgments about the potential useful life and safe operation of facilities and is addressing the question of extensions beyond the original 40-year term.

The focus of the Commission's review of applications is on maintaining plant safety, with the primary concern directed at the effects of aging on important systems, structures, and components. Applicants must demonstrate that they have identified and can manage the effects of aging so as to maintain an acceptable level of safety during the period of extended operation.

The Commission has now renewed the licenses of plants at two sites for an additional 20 years: Calvert Cliffs in Maryland, and Oconee in South Carolina, comprising a total of five units. The thorough reviews of these applications were completed ahead of schedule, which is indicative of the care exercised by licensees in the preparation of the applications and the planning and dedication of the Commission staff. Applications for units from three additional sites – Hatch in Georgia, ANO-1 in Arkansas, and Turkey Point in Florida – are currently under review. As indicated by our licensees, many more applications for renewal are anticipated in the coming years.

Although the Commission has met the projected schedules for the first reviews, it would like the renewal process to become as effective and efficient as possible. The extent to which the Commission is able to sustain or improve on our performance depends on the rate at which applications are actually received, the quality of the applications, and the ability to staff the review effort. The Commission recognizes the importance of license renewal and is committed to providing high-priority attention to this effort. As you know, the Commission encourages early notification by licensees, in advance of their intentions to seek renewals, in order to allow adequate planning so as not to create unmanageable demands on staff resources.



Reactor Plant Power Uprates

In recent years, the Commission has approved numerous license amendments that permit its licensees to make relatively small power uprates (approximately 2-7 percent increases in the output of a facility). Collectively, these uprates supplied the electricity equivalent to that from two large power plants (approximately 2,000 MWe). The Commission has received applications for several substantial uprates, and anticipates more within the near term. In addition, some nuclear generators have requested Commission safety review of increasing fuel burnup, thereby extending the operating cycle between refueling outages and thus increasing nuclear plant capacity factors. Such approvals are granted only after a thorough evaluation by Commission staff to ensure that safe operation and shutdown can be achieved at the higher power and increased fuel burnup.

High Level Waste Storage/Disposal (Spent Fuel Storage)

In the past several years, the Commission has responded to numerous requests to approve spent fuel cask designs and independent spent fuel storage installations for onsite dry storage of spent fuel. These actions have provided an interim approach pending implementation of a program for the long-term disposition of spent fuel. The ability of the Commission to review and approve these requests has provided the needed additional onsite storage of spent nuclear fuel, thereby avoiding plant shutdowns as spent fuel pools reach their capacity. The Commission anticipates that the current lack of a final disposal site will result in a large increase in on-site dry storage capacity during this decade.

The Commission is currently reviewing an application for an Independent Spent Fuel Storage Installation on the reservation of the Skull Valley Band of Goshute Indians in Utah.

Certain matters also need to be resolved in order to make progress on a deep geologic repository for disposal of spent nuclear fuel. The Energy Policy Act of 1992 requires the Environmental

Protection Agency (EPA) to promulgate general standards to govern the site, while the Commission has the obligation to implement those standards through its licensing and regulatory process. The Commission has concerns about certain aspects of EPA's proposed approach and is working with EPA to resolve these issues.

Risk-Informing the Commission's Regulatory Framework

The Commission also is in a period of dynamic change as the Agency moves from a prescriptive, deterministic approach towards a more risk-informed and performance-based regulatory paradigm. Improved probabilistic risk assessment techniques combined with over four decades of accumulated experience with operating nuclear power reactors have led the Commission to recognize that some regulations may not serve their intended safety purpose and may not be necessary to provide adequate protection of public health and safety. Where that is the case, the Commission has determined it should revise or eliminate the requirements. On the other hand, the Commission is prepared to strengthen our regulatory system where risk considerations reveal the need.

Perhaps the most visible aspect of the Commission's efforts to risk-inform its regulatory framework is the new reactor oversight process. The process was initiated on a pilot basis in 1999 and fully implemented in April 2000. The new process was developed to focus inspection effort on those areas involving greater risk to the plant and thus to workers and the public, while simultaneously providing a more objective and transparent process. While the Commission continues to work with its stakeholders to assess the effectiveness of the revised oversight process, the feedback received from industry and the public is favorable.

Future Activities

Scheduling and Organizational Assumptions Associated with New Reactor Designs

While improved performance of operating nuclear power plants has resulted in significant increases in electrical output, significant increased demands for electricity will need to be addressed by construction of new generating capacity of some type. Serious industry interest in

new construction of nuclear power plants in the U.S. has only recently emerged. As you know, the Commission has already certified three new reactor designs pursuant to 10 CFR Part 52. These designs include General Electric's advanced boiling water reactor, Westinghouse's AP-600 and Combustion Engineering's System 80+. Because the Commission has certified these designs, a new plant order may include one of these approved designs. However, the staff is also conducting a preliminary review associated with other new designs.

In addition to the three already certified advanced reactor designs, there are new nuclear power plant technologies, such as the Pebble Bed Modular Reactor, which some believe can provide enhanced safety, improved efficiency, lower costs, as well as other benefits. To ensure that the Commission staff is prepared to evaluate any applications to introduce these advanced nuclear reactors, the Commission recently directed the staff to assess the technical, licensing, and inspection capabilities that would be necessary to review an application for an early site permit, a license application, or construction permit for a new reactor unit. This will include the capability to review the designs for generation III+ or generation IV light water reactors including the Westinghouse AP-1000, the Pebble Bed Modular Reactor, and the International Reactor Innovative and Secure (IRIS) designs. In addition to assessing its capability to review the new designs, the Commission will also examine its regulations relating to license applications, such as 10 CFR Parts 50 and 52, in order to identify whether any enhancements are necessary.

In order to confirm the safety of new reactor designs and technology, the Commission believes that a strong nuclear research program should be maintained. A comprehensive evaluation of the Commission's research program is underway with assistance from a group of outside experts and from the Advisory Committee on Reactor Safeguards. With the benefit of these insights, the Commission expects to undertake measures to strengthen our research program over the coming months.

Human Capital

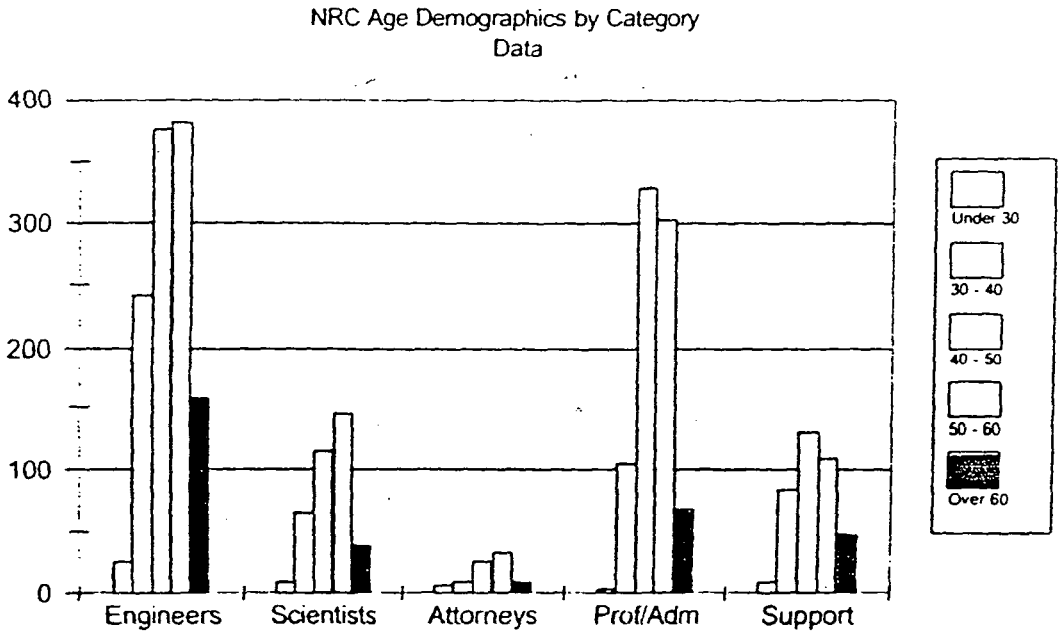
Linked to these technical and regulatory assessments, the Commission is reviewing its human capital to assure that the appropriate professional staff is available for the Commission to fulfill its

traditional safety mission, as well as any new regulatory responsibilities in the area of licensing new reactor designs.

In some important offices within the Commission, nearly 25 percent of the staff are eligible to retire today. In fact, the Commission has six times as many staff over the age of 60 as it has staff under 30.

And, as with many Federal agencies, it is becoming increasingly difficult for the Commission to hire personnel with the knowledge, skills, and abilities to conduct the safety reviews, licensing, research, and oversight actions that are essential to our safety mission. Moreover, the number of individuals with the technical skills critical to the achievement of the Commission's safety mission is rapidly declining in the Nation and the educational system is not replacing them. The Commission's staff has taken steps to address this situation, and as a result, is now seeking systematically to identify future staffing needs and to develop strategies to address the gaps. It is apparent, however, that the maintenance of a technically competent staff will require substantial effort for an extended time.

As the Commission is currently challenged to meet its existing workload with available resources, additional resources would be necessary to respond to increased workload which could result from some of the initiatives discussed in this testimony.


NRC Age Demographics by Category
Data
400
300
200
100
0
Engineers
Scientists
Attorneys
Prof/Adm
Support
Under 30
30 - 40
40 - 50
50 - 60
Over 60

Implications of a National Energy Policy

The Commission has a stake in a national energy policy and has identified areas where new legislation would be helpful to eliminate artificial restrictions and to reduce the uncertainty in the licensing process. These changes would maintain safety while increasing flexibility in decision-making. Although those changes would have little or no immediate impact on electrical supply, they would help establish the context for consideration of nuclear power by the private sector without any compromise of public health and safety or protection of the environment.

Legislation will be needed to extend the Price-Anderson Act. The Act, which expires on August 1, 2002, establishes a framework that provides assurance that adequate funds are available in the event of a nuclear accident and sets out the process for consideration of nuclear claims. Without the framework provided by the Act, private-sector participation in nuclear power would be discouraged by the risk of large liabilities.

Several other legislative changes would be helpful. For example, Reorganization Plan No. 3 of 1970 could be revised to provide the Commission with the sole responsibility to establish all generally applicable standards related to Atomic Energy Act (AEA) materials, thereby avoiding dual regulation of such matters by other agencies. Along these same lines, the Nuclear Waste Policy Act of 1982 could be amended to provide the Commission with the sole authority to establish standards for high-level radioactive waste disposal. These changes would serve to provide full protection of public health and safety, provide consistency, and avoid needless and duplicative regulatory burden.

Commission antitrust reviews could also be eliminated. As a result of the growth of Federal antitrust law since the passage of the AEA, the Commission's antitrust reviews are redundant of the reviews of other agencies. The requirement for Commission review of such matters, which are distant from the Commission's central expertise, should be eliminated.

Elimination of the ban on foreign ownership of U.S. nuclear plants would be an enhancement since many of the entities that are involved in electrical generation have

foreign participants, thereby making the ban on foreign ownership increasingly anachronistic. The Commission has authority to deny a license that would be inimical to the common defense and security, and thus an outright ban on all foreign ownership is unnecessary.

With the strong Congressional interest in examining energy policy, the Commission is optimistic that there will be a legislative vehicle for making these changes and thereby for updating the AEA.

Summary

The Commission has long been, and will continue to be, active in concentrating its staffs' efforts on ensuring the adequate protection of public health and safety, the common defense and security, and the environment in the application of nuclear technology for civilian use. Those statutory mandates notwithstanding, the Commission is mindful of the need to: 1) reduce unnecessary burdens, so as not to inappropriately inhibit any renewed interest in nuclear power; (2) maintain open communications with all its stakeholders, in order to seek to ensure the full, fair, and timely consideration of issues that are brought to our attention; and (3) continue to encourage its highly qualified staff to strive for increased efficiency and effectiveness, both in our dealings with all the Commission's stakeholders and internally within the agency.

I look forward to working with the Committee, and I welcome your comments and questions.

The Subcommittee on Railroads

Hearing on

Railroad Infrastructure Policy

TABLE OF CONTENTS(*Click on Section*)

PURPOSE

The Subcommittee will conduct a hearing on the infrastructure policies affecting the nation's railroads on Wednesday, April. 25, 2001, at 10:00 a.m. in Room 2167, Rayburn House Office Building. The Subcommittee will hear testimony both on the implementation of the direct and guaranteed rail and rail-intermodal infrastructure loan program enacted in the 1998 Transportation Equity Act for the 21st Century (TEA 21) and on H.R. 1020, legislation to address smaller railroads' infrastructure needs.

BACKGROUND

Smaller railroads are generally labeled Class II or Class III rail carriers, using Surface Transportation Board (formerly Interstate Commerce Commission) size thresholds based on total annual revenues. Class III carriers each have $20.8 million or less in annual revenues, while the limit for Class II carriers is $259.4 million. Although some smaller railroads have existed for decades, hundreds of new short-line and regional railroads were created following the enactment of the Staggers Rail Act of 1980.

Prior to the Staggers Act reforms that permitted large (Class I) railroads to abandon unproductive lines more easily, deterioration of the rail network, especially on light-density lines serving smaller towns and rural areas, was widespread. The generally higher operating costs of the Class I carriers, combined with low traffic levels, made most light-density lines money-losing enterprises for the large railroads. Prior to 1980, most such lines were shed by Class I carriers (when the ICC regulatory process permitted) through outright abandonment—removing the lines permanently from the rail network.

After 1980, ICC policies and regulations were revised to permit easier sale or lease of marginal lines by Class I railroads to start-up operations. This led to a boom in the formation of Class II and Class III railroads, which include both union and non-union carriers. Some have succeeded financially, while others have not. In the vast majority of cases, the track, roadbed, and other infrastructure acquired by the new smaller operators was already severely deteriorated by Class I standards, but still sufficiently sound to allow low-density (and often low-speed) freight operations. Besides attracting sufficient revenue, a secondary struggle by the smaller freight railroads involved acquiring sufficient capital to maintain and possibly upgrade the quality of the infrastructure inherited from the former owners of these lines. In the early 1990s, an FRA study of smaller railroads' infrastructure needs showed a severe shortfall in the capital resources of these carriers relative to the state of their infrastructure.

In the last several years, a new burden to the marginal infrastructure of smaller railroads has appeared. Class I railroads have begun to add large numbers of more efficient, but far heavier, 286,000-pound cars to their fleets. This increases the operating stresses and wear and tear on smaller railroads' track systems, and depending on the level of deterioration, could entirely prevent operation of "286" cars on certain light-density lines. If such physical embargos were to become widespread, it could result in a non-interoperable rail network, i.e., a rail system where the same fleet of cars cannot operate in all locations on the

system. Smaller railroads provide approximately 10 per cent of the freight traffic of the major Class I carriers. A recent study, conducted by Zeta-Tech Associates, Inc., under contract to the American Short Line and Regional Railroad Association, concluded that the entire Class II/Class III rail network will require about $6.8 billion in infrastructure upgrades to deal with the heavier rail cars.

H.R. 1020, Railroad Track Modernization Act of 2001

On March 14, 2001, I introduced this bill, with the original cosponsorship of Subcommittee Ranking Member Clement and Mr. Bachus, a Subcommittee Member. Chairman Young has since also cosponsored this legislation, which has been referred to the Transportation and Infrastructure Committee and this Subcommittee.

The bill establishes a program of direct grants to smaller (Class II and Class III) railroads for rehabilitation and improvement of tracks and related structures, to bring the infrastructure up to a level permitting safe and efficient operation, including traffic containing the new heavier 286,000-pound rail cars being adopted as an industry standard by the large railroads. The general fund authorization level is $350 million per year for FY 2002-2004.

Matching contributions are required under an 80/20 federal/non-federal formula. The nonfederal contribution can be from any non-federal source, and may be cash, equipment, supplies, or other in-kind contribution. Generally, a project must have a 1.0 or higher cost-benefit ratio, with DOT Secretary empowered to waive this standard based on public interest. Track to be rehabilitated or improved must have been operated as a Class II or Class III rail property on date of enactment.

Grant funds must be contractually obligated within 3 full fiscal years after the award of grant. Besides direct funding of track rehabilitation and improvement, grants may also be used to supplement TEA 21 rail loans, including paying credit risk premium for loans, lowering rate of interest, or providing principal payment holidays.

Davis-Bacon standards applicable to Amtrak and transit apply to construction work financed by grants. Any rail employee adversely affected by a grant-funded project will receive standard New York Dock labor protection benefits, under current Surface Transportation Board standards.

DOT is required to conduct a study of future needs of light-density rail lines for federal infrastructure funding, and report to Congress by March 31, 2003.

TEA 21 Rail Infrastructure Loan Program

This program was based on a proposal submitted by the American Short Line and Regional Railroad Association at a 1997 Subcommittee on Railroads hearing (and introduced by Congresswoman Molinari as H.R. 1939). It was enacted as Section 7203 of the TEA 21 (Pub. L. 105-178), and is now codified as Title V of the Railroad Revitalization and Regulatory Reform ("4R") Act, as amended [45 U.S.C. 821-823, 836].

The new program expanded a predecessor loan program established by Section 511 of the "4R" Act. The TEA 21 program created a permanent, revolving authorization for $3.5 billion (face amount) in direct and guaranteed loans for virtually any form of rail or rail-intermodal equipment or infrastructure. This includes freight rail-port connections, commuter and passenger rail facilities, and rail-truck transloading facilities. Of this $3.5 billion revolving authorization, $1 billion was dedicated to the primary benefit of Class II and Class III railroads. The amended TEA 21 loan program retained the labor protection requirements of the 1976 statute.

The TEA 21 program also created two alternative procedures for obtaining a loan. Prior to TEA 21 and after enactment of the Credit Reform Act of 1990, loans under the predecessor program could be obtained only if the credit risk premium (security deposit) for the loan was appropriated as federal funds. The new program permits either an appropriated credit risk premium or one furnished by public or private non-appropriated sources. Thus the second option created the possibility of loans being made on an off-budget basis without any need to become involved in the appropriations process.

Initial Proposals by the Previous Administration

Since TEA 21 was enacted in the summer of 1998, implementation of the loan program by the Federal Railroad Administration has proceeded very slowly. The Administration's first official statement regarding implementation came in the President's FY 2000 Budget (Appendix, p. 767) where the Administration stated its intention (1) to require market rates of interest on all loans made under the program and (2) to require a prior showing that the DOT loan represented a "loan of last resort" following private sector rejections.

The Transportation Committee leadership (Messrs. Shuster, Oberstar, Petri, and Rahall) wrote to Secretary Slater and OMB Director Lew on April 15, 1999, pointing out that neither of these requirements had any legal basis, and that they would cripple the loan program. The letter also complained of the extremely slow implementation of the program to that point. (Unlike entirely new programs like TIFIA, new railroad loan regulations required only a revision of the rules applicable to the predecessor program.)

FRA Proposed Regulations

Notwithstanding these concerns, no rules were proposed until the summer of 1999 [64 Fed. Reg. 27488 (May 20, 1999)].

The proposed regulations deleted the universal market interest rate requirement, which directly contravened statutory language governing interest rates. Nevertheless, the proposed regulations continued to require a showing of "lender of last resort" status through at least two prior rejections of financing from commercial lenders (proposed 49 C.F.R. 260.23(o), 64 Fed. Reg. 27495).

The Committee again responded, this time with a joint comment in the FRA rulemaking docket, dated June 14, 1999, pointing out this and several other deficiencies. When 1999 ended without any final regulations in place, the Committee leadership again wrote to Secretary Slater, pointing out the urgency of having final regulations, so that loan applications could be processed. The leadership's letter of January 3, 2000, pointed out the immediate need for infrastructure funds to address transportation "choke points" such as intermodal port facilities, as well as the urgent need of smaller railroads for upgraded infrastructure to address the "286" car weight problem. Nevertheless, another half-year elapsed without the issuance of regulations.

Final FRA Regulations

FRA issued its final regulations last summer [65 Fed. Reg. 41838 (July 6, 2000)]. Responding to the Committee leadership's repeated comments pointing out the lack of any legal basis for the proposed "lender of last resort" requirement, FRA stated:

While FRA need not be a lender of last resort, it does not intend to replace private funding sources already available to the rail industry. Therefore, in order to establish that private funding on terms necessary to the viability of the applicant's project is not available, FRA will require that railroad applicants provide a letter from a commercial lender denying funding for the project [emphasis added].

This relabeled version of "lender of last resort" is codified at 49 C.F.R. 260.23(o) [65 Fed. Reg. 41844]:

Railroad applicants must also submit a copy of application [sic] for financing for the project in the private sector, including the terms requested, from at least one commercial lender, and its response refusing to provide such financing.

Administration delay in promulgating final rules has prevented any loans from being made (including loans that require no appropriation whatever) for more than two and one-half years since enactment of TEA 21.

DOT-OMB Memorandum of Understanding

At a Ground Transportation Subcommittee hearing on July 25, 2000, a memorandum of understanding dated June 23, 2000, between DOT and OMB was made part of the record. In the memorandum, a number of additional requirements were imposed on the loan program. These included (1) not approving any loan over 10 per cent of the annual "cohort" of loans, i.e., holding an early-month application until the entire annual cohort is defined at the end of the year; (2) capping any loan at no more than 6 per cent of the unused authorization, i.e., a constantly declining amount; (3) requiring collateral with a recovery value of 100 per cent of principal and interest, i.e., the equivalent of requiring the collateral for a $100,000 home loan to cover not only the $100,000 loan principal, but the entire 30-year interest stream as well. All of these requirements lack statutory basis, were never subjected to public notice and comment as part of the FRA rulemaking proceeding, and make implementation of the program more difficult. Mr. Rahall has introduced corrective legislation, H.R. 517, to expunge the lender-of-last-resort requirement in the published regulations and the full-recovery collateral requirement in the DOT-OMB memorandum.

On April 6, 2001, Chairman Young, Ranking Member Oberstar, Ranking Subcommittee Member Clement and I wrote to Secretary Mineta, expressing our concern about the complete stagnation of the rail loan program. We urged the Secretary to begin immediately the process of conforming the DOT regulations to the statutory requirements of TEA 21. Not a single loan has been approved under this program since the enactment of TEA 21. The Bush Administration's FY2002 budget proposal (as with all prior Presidential budgets since enactment of TEA 21) includes no funds for appropriated federally provided credit risk premiums to support loans under this program.

WITNESSES
PANEL I

Mr. Mark Lindsey
Chief Counsel and Acting Deputy Administrator
Federal Railroad Administration
Accompanied by:
Mrs. Joanne McGowan
Chief of Freight Programs Division
Mr. Mark Yachmetz
Associate Administrator
Mr. Joseph Pomponio
Attorney-Advisor

Panel II
Mr. Ed Hamberger
President
Association of American Railroads
(statement, appendices)

Mr. Frank Turner
President
American Short Line & Regional Railroad Association

Mr. Patrick K. Gamble
President & CEO
Alaska Railroad Corporation
Accompanied by Mr. Johne Binkley
Chairman of the Board
Alaska Railroad Corporation

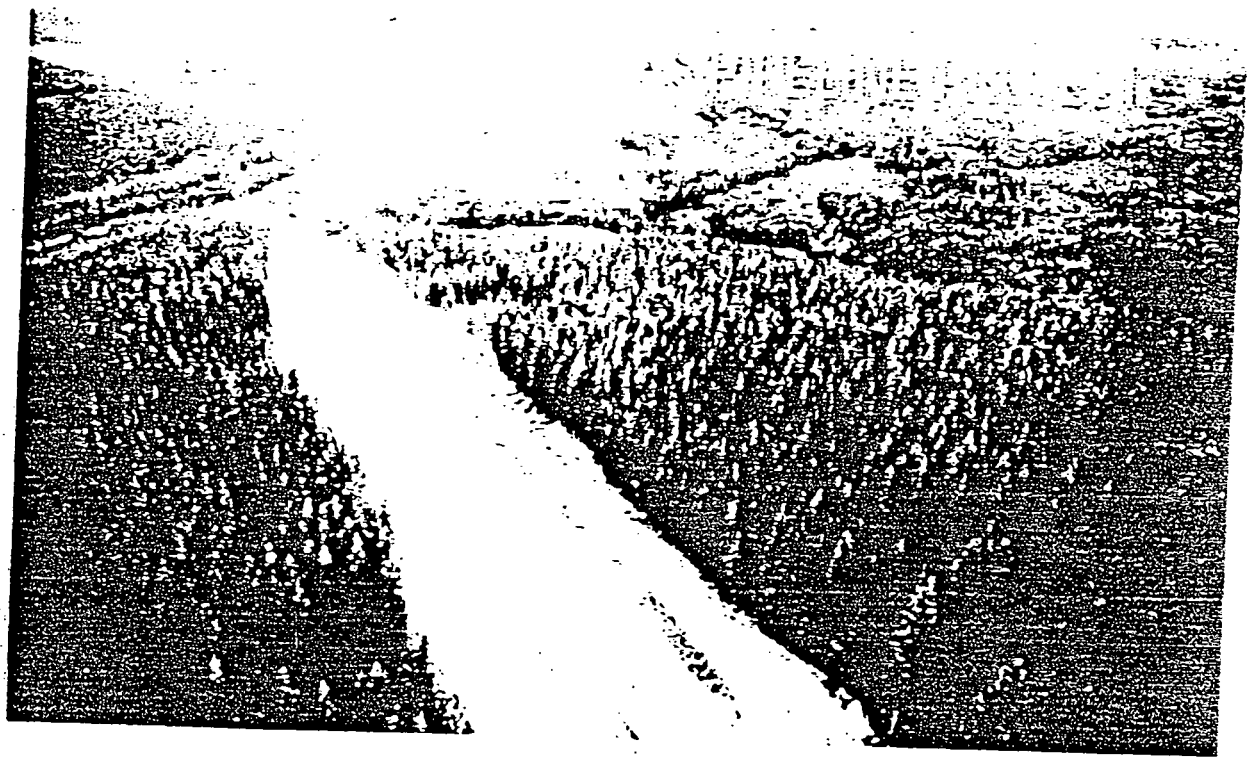
Mr. William W. Millar
President
American Public Transit Associatic

Panel III
Mr. Byron Boyd
President
United Transportation Union

Mr. Donald Griffin
Assistant General Counsel
Brotherhood of Maintenance of Way Employes

ALASKA SENATE LEGISLATURE

Senate Resources Committee



February 5, 2001

Presentation by

John Ellwood
Vice President, Engineering & Operations

Foothills Pipe Lines Ltd.

Foothills Pipe Lines Ltd. / Alaska Highway Gas Pipeline Project

My name is John Ellwood. I am Vice President, Engineering and Operations at Foothills Pipe Lines Ltd. ("Foothills"). We appreciate your invitation to discuss the transportation of Alaska North Slope natural gas to markets in the lower-48 states through the Alaska Natural Gas Transportation System ("Alaska Highway Project"). I understand that your committee wishes to explore with us the current status of our pipeline project with a particular focus on our permits.

Let me begin by telling you about Foothills. Our company is jointly owned by Westcoast Energy Ltd. ("Westcoast") and TransCanada PipeLines Limited. ("TransCanada"), the two major players in the Canadian gas pipeline business. Our corporate mission is very specific: to build and operate the Alaska Highway Pipeline Project. We were leaders in the project that was conceived twenty-five years ago, and we are just as committed today.

Between Westcoast and TransCanada, we have nearly 100 years of experience in developing, building and operating gas pipeline projects. We have been involved with every major Canadian gas pipeline project built in the last fifteen years.

Our existing pipeline systems provide access to five of North America's largest natural gas markets. Together, these systems have the capability to move fifteen billion cubic feet per day of gas from Western Canada to the consuming markets. Canadian gas accounts for almost 20% of all gas consumed in the United States and all of that gas currently moves through pipelines owned in whole or in part by TransCanada and Westcoast.

This map shows the existing and planned pipeline network of Westcoast and TransCanada.

TransCanada, Westcoast and Foothills have developed leading edge gas pipeline design, construction and operating technology, including expertise in dense phase designs. We are also well known for our development of environmentally sound design, construction and operation practices. We believe that our expertise in northern, remote and difficult terrain gas pipeline construction and operations is second to none.

Building and operating pipelines is our core business.

The Alaska Highway Project is the Alaskan gas pipeline project approved in accordance with the Alaska Natural Gas Transportation Act of 1976 ("ANGTA") in the U.S., the 1978 Northern Pipeline Act in Canada, and the 1977 Agreement Applicable to a Northern Natural Gas Pipeline between the two countries ("U.S./Canada Agreement"). The project is shown in black and green on this map. As approved, the Alaska Highway Project is a 4,800-mile international pipeline project commencing at Prudhoe Bay and terminating in the Midwest and California market areas. It is important to note that the southern part of this pipeline has been constructed and is in full operation. The route for this system parallels the Trans Alaska Pipeline System ("TAPS") to Fairbanks, where it angles southeast, following the Alcan Highway to the Alaska-Yukon border with Canada, down through the Yukon Territory and northern British Columbia, and into Alberta. In Alberta, the pipeline splits into two legs. The Eastern Leg proceeds southwest, crossing the U.S.-Canada border at Monchy, Saskatchewan and terminating near Chicago. The Western Leg proceeds southwest, crossing the U.S.-Canada border near Kingsgate, British Columbia and terminating at a point near San Francisco, California.

Foothills and TransCanada are the two remaining partners of the Alaska Northwest Natural Gas Transportation Company (Alaska Northwest), a partnership formed to construct and operate the Alaska portion of the Alaska Highway Project. In addition, Foothills is the Canadian sponsor of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Alaska Highway Project.

Foothills has continuously championed the Alaska Highway Pipeline Project from the very beginning.

The Project is back **"on the list"** of possible solutions to the current North American concerns about high energy prices and the adequacy of natural gas supplies.

At the outset, there are some basic points that we should delineate:

- It is important to remember that this pipeline crosses the territory of two countries with different regulatory and political regimes.

- The Project has a long history, which adds unique attributes. The permits which have been issued are a product of this history and to understand the former requires an appreciation of the latter. Significantly, ANGTA in the U.S. and the Northern Pipeline Act in Canada create expedited procedures for completing the chosen system, the Alaska Highway Project.

- The pipeline permitting process can be very time consuming. In addition to the substantial work already completed on both the Alaskan and Canadian portions of the Alaska Highway Project, the special legislative and regulatory procedures in place in the U.S. and Canada will assist in expediting the construction and initial operation of the Project and keeping unnecessary delays to a minimum.

Historical Background

As I indicated, there are important historical dimensions associated with this project. We might focus on the time frame 1976-1982. Originally there were three competing Alaskan natural gas pipelines proposed. As shown on this map two of the projects were overland pipelines through Alaska and Canada. The third project would have transported gas by pipeline to tidewater, following the route of the"TAPS" pipeline, where the gas would be liquefied and transported to California by liquefied natural gas ("LNG") tankers.

The U.S Congress enacted the Alaska Natural Gas Transportation Act of 1976 with a purpose to provide an expedited process with respect to the selection of a single transportation system for the delivery of Alaska natural gas to the lower forty-eight states and to expedite construction and initial operation of the chosen transportation system.

With respect to the transportation of Alaska North Slope gas to markets in the lower 48 states, ANGTA superseded the usual Natural Gas Act ("NGA")

process for granting Federal regulatory authorization to construct and operate a pipeline. ANGTA assigned the responsibility for the overall Alaska pipeline agenda to the President and Congress. Much the same approach was followed in Canada, where the Government took an active role in the decision regarding the Alaska natural gas pipeline. The reason for the creation of this extraordinary authority was that the governments wanted to expedite a cumbersome regulatory approval process in order to move more quickly to a solution.

Prior to 1978, a Canadian Board of Inquiry (The Berger Inquiry) examined a proposal to move Alaska gas across the North Slope and along the Mackenzie Valley. At the same time the National Energy Board ("NEB") held a hearing to determine which of the two overland pipeline routes was acceptable to Canada. Both processes rejected the North Slope route (primarily for environmental reasons) and the NEB recommended the Alaska Highway (Alaska Highway Project) option, being promoted by Foothills. The Berger Inquiry recommended that no pipeline should be built along the Mackenzie Valley for at least a decade and that a pipeline across the northern Yukon should never be built.

During this same period of time the Federal Power Commission (later to become the Federal Energy Regulatory Commission ("FERC") came to a split decision on the question of which route should be selected.

Following the enactment of the ANGTA, the President selected the Alaska Highway route and the Alaska Highway Project with his Decision and Report to Congress on the Alaska Natural Gas Transportation System ("President's Decision" or "Decision").

In 1977 just prior to the President issuing his Decision, the U.S. and Canada signed the U.S./Canada Agreement. This agreement or treaty, established the route, chose the companies who would build and operate the system, established tolling principles, and set the terms and principles to be followed in facilitating the construction and operation of the Alaska Highway Project pipeline. The President's Decision reflected the U.S./Canada Agreement. The Decision and the Agreement were subsequently approved by the U.S. Congress.

In 1978 Canadian Parliament enacted the Northern Pipeline Act. The Act:

1) incorporated all of the terms of the U.S./Canada Agreement

2) issued **statutory certificates** of public convenience and necessity to the respective subsidiaries of Foothills Pipe Lines Ltd.,
3) created the Northern Pipeline Agency to "*facilitate the efficient and expeditious planning and construction of the pipeline*

4) established the methodology and rules for setting the Canadian tolls and tariffs for the pipeline

5) selected the route for the pipeline across Canada and

6) established Terms and Conditions respecting the socio-economic, environmental, construction and operations matters.

The complete Alaska Highway Project is shown on the attached map.

The President's Decision designated Alcan Pipeline, a subsidiary of Northwest Pipeline Company (Northwest), as the party who would construct and operate the Alaska pipeline segment of the Alaska Highway Project. This authority was later assigned to Alaska Northwest, a partnership assembled by Northwest. At one time Alaska Northwest consisted of eleven (11) partners, all subsidiaries of U.S. or Canadian pipeline companies.

Given the magnitude of the pipeline undertaking Alaska Northwest sought to recruit the North Slope Producers to join the project and assist the financing of the pipeline. The Producers expressed a willingness to join but were restricted by the President's Decision that disallowed the producers taking an equity position in the pipeline. In 1981, President Reagan submitted and Congress approved a Waiver of Law package allowing producer participation and including in the project, the North Slope gas conditioning facility.

In 1980, before the Waiver of Law was passed, Alaska Northwest and the Alaska Producers entered into a Cooperation Agreement providing for joint funding of the design and engineering of the Alaska Highway pipeline and the gas conditioning facility. Following the approval of the Waiver of Law,

the scope of the Cooperation Agreement was expanded to encompass efforts to achieve the remaining regulatory approvals and to jointly pursue financing arrangements. The two sides anticipated that affiliates of the Producers would join the Alaska Northwest Partnership.

Design, engineering, environmental, financing and regulatory work proceeded along parallel tracks in Alaska and in Canada during this period of time.

As world wide energy supply and demand came back into balance and the "energy crisis" eased, the focus of the pipeline shifted to the pre-building of the southern portions of the Alaska Highway Project. There was a disagreement between Canada and the United States over this issue, primarily as it related to the export of Canadian natural gas to the U.S. market.

The Canadian Government was unwilling to authorize the Pre-build or the gas exports without further assurance from the United States that the entire Alaska Highway Project, including the Alaska segment, would eventually be completed. This assurance was forthcoming in a letter from President Carter to Prime Minister Trudeau, along with a Congressional resolution. As a result the southern Pre-build pipeline section was completed by 1982. This involved constructing 650 miles of 36 and 42 inch pipeline from Caroline, Alberta to Monchy and Kingsgate on the US border. The Pre-build and subsequent expansions were constructed pursuant to the Northern Pipeline Act and it's regulatory regime managed by the Northern Pipeline Agency.

When the Pre-build construction began it was widely anticipated that North American natural gas demand would quickly resume its upward trend. However the market did not recover as anticipated and demobilization of the Alaska Highway Project soon began.

In order to remobilize, we will be required to make modifications and enhancements to various elements of the Alaska Highway Project regime. Pipeline designs will have to be modified so that that the Project can respond to capacity and gas quality requirements of the shippers. We will have to incorporate the latest technology and techniques necessary to ensure that the maximum environmental protection measures are in place. We do not expect any difficulty in introducing these revisions which are so obviously of benefit to all parties.

Recently other parties have raised issues related to payments that might be due to withdrawn partners pursuant to the Alaska Northwest Partnership Agreement. We are confident that if any return of the withdrawn partners' original investment is required it can be resolved within the context of an economically viable project.

Clearly there is a lot of work still to be done. It is very important to understand is that the advantages that come with the unique ANGTA and NPA regulatory regimes far outweigh the alternative of starting from scratch. Using the existing statutes and treaty we can assist in having Alaska natural gas into the U.S. market sooner, with competitive transportation costs and at the same time reducing project risks for all stakeholders.

In our capacity as the managing partner of Alaska Northwest we have maintained the Alaska Highway Project in good standing. We have kept the project alive to ensure that the advantages and benefits of the Project could be used in remobilization plans to expedite construction of the pipeline. We particularly wished to preserve what we see as the "special and unique fast track" regulatory regime.

Foothills and its shareholders have expended time and effort to keep the permits current and to optimize the project design. We do not intend to quit the field now that success is within sight.

The Alaska Permits – Federal

A substantial amount of work has been completed by the Alaska Highway Project sponsors to date. Before discussing the specific permits held by Alaska Northwest it is important to better understand the unique regulatory and legislative framework under which these permits were issued, namely ANGTA.

ANGTA and the President's Decision remain in effect and can be terminated only by another act of Congress. ANGTA does not create a perpetual priority for the Alaska Highway Project. Rather, it establishes a priority designed to ensure that the Alaska Highway Project will be completed and begin initial operation in accordance with the decision of the President and

Congress. Once the Alaska Highway Project is in operation additional projects may be considered under the Natural Gas Act.

In implementing this priority, ANGTA requires that Federal agencies and officers expedite and issue "at the earliest practicable date" all permits and authorizations required by the Alaska Highway Project. In addition, ANGTA provides that applications and requests with respect to permits and authorizations required by the approved system "shall take precedence" over any similar applications and requests. Furthermore, ANGTA limits the discretion of Federal agencies and officers to include in certificates and permits for the Alaska Highway Project any conditions that would obstruct the system's expeditious construction and initial operation.

As required by ANGTA, the FERC in 1977 expeditiously issued a conditional certificate of public convenience and necessity for the Alaska Highway Project. That certificate contains no expiration date and is still in effect today.

In addition, Alaska Northwest holds a federal right-of-way grant issued in 1980 by the Department of Interior's Bureau of Land Management. That grant does not expire until December 2010, and may be renewed at the request of Alaska Northwest.

Furthermore, Alaska Northwest holds two recently extended Clean Water Act wetlands permits issued by the Army Corps of Engineers in coordination with many other agencies. Those permits were extended through September of 2007.

While these various federal permits were issued some time ago, they all are valid today. Indeed, nothing in ANGTA or in the certificates and authorizations issued for the Alaska Highway Project thereunder provides for the expiration of the chosen system's priority because completion of the Alaska segment was postponed until the U.S. domestic market could support it. Rather, the Alaska portion of the Alaska Highway Project has been held in reserve until the need for additional natural gas arises in the Lower 48 states is such that this section can be completed. As sponsors we have actively protected the preserved Alaska segment by maintaining all necessary certificates and permits and actively overseeing the rights-of-way.

We recognize that these certificates and permits need to be "updated" to capture changes in technology, markets and environmental requirements. We will do such updating, and it can be done within the ANGTA framework. To that end, a couple of additional points need to be emphasized before I move on to the State permits.

- First, ANGTA clearly envisions and provides for the ability to condition and to amend these permits. These powers are subject only to the limitation prohibiting changes in the "basic nature and general route" and actions that will "otherwise" prevent or impair in any significant respect the expeditious construction and initial operation of the Alaska Highway Project.

- Second, the Alaska Highway Project sponsors' requests for both new permits and amendments to existing permits must be given priority under ANGTA. This priority translates into a timing advantage for the Alaska Highway Project.

- Third, the authority of the Office of Federal Inspector, as transferred to the Secretary of Energy, also continues in effect today to expedite and coordinate federal permitting, enforcement of permit conditions, and facilitation and oversight of the construction and initial operation of the U.S. portion of the Alaska Highway Project.

- Fourth, ANGTA also provides for expedited and limited judicial review of actions taken by Federal agencies and officers.

- Finally, the Alaska Northwest Partnership is well along in permitting the Alaska Highway Project.

The Alaska Permits – State of Alaska

On the state side, Alaska Northwest has a pending State of Alaska right-of-way lease application. Recently, we have initiated discussions with the State officials regarding perfecting and processing the pending application. Also at the state level, Alaska Northwest holds certificates of reasonable assurances issued pursuant to Section 401 of the Clean Water Act and a determination of consistency with the Coastal Zone Management Act.

Additional Alaska Permits

While Foothills already holds the major permits necessary to construct the remainder of the Alaska Highway Project, there are additional permits and authorizations that will need to be obtained. For example, the Alaska Highway Project sponsors will need to acquire a permit under the Clean Air Act. However, these additional permits will be procured as the Project proceeds, and such procurement will not cause a delay in the expeditious construction of the Alaska Highway Project.

The Canadian Permits

On the Canadian side, Foothills holds two unique certificates or permits:

- Certificate of public convenience and necessity.
- Yukon right-of-way.

Certificate of Public Convenience and Necessity

The certificate of public convenience and necessity ("certificate") is the Order issued following a successful hearing before the National Energy Board (NEB) of a pipeline application. The information that is required to be filed for hearing purposes is delineated in regulation and includes details about supply and markets, environmental impact assessment, engineering, construction and operations plans and details about connecting pipeline facilities.

The preparation of the required hearing information generally takes one to two years to complete and the length of the hearing will be proportional to the level of controversy surrounding the issues.

Foothills has completed this phase of the process. We have the "certificates" that entitle us to build a pipeline, subject only to terms and conditions set out in the Alaska Highway Project regime.

The "certificates" are statutory. They were issued by the Parliament of Canada when it enacted the Northern Pipeline Act and are in keeping with the principles and intent of the U.S./Canada Agreement.

We acknowledge that the "certificates" were legislated 20 years ago and that some have raised questions about their scope and validity. Others suggest that the certificates are dated and accordingly must be reissued. The "certificates" are valid. We are on solid legal ground in this regard.

Changes to the pipeline design to accommodate new technical issues and improvements have previously have been granted by the Northern Pipeline Agency both at the time of the construction of the original Pre-build facilities and later during the facility expansion.

However, fundamental changes to the Canadian "certificates" would require changes to both the legislation and the treaty. For example another project could not be approved under the Alaska Highway Project regime. Further the Northern Pipeline Act (incorporating the U.S. /Canada Agreement) provides that the route for Alaska natural gas will be along the route set forth in Annex 1 to the U.S. /Canada Agreement i.e. the Alaska Highway route. In the face of the provision of the Northern Pipeline Act and the U.S. /Canada Agreement, a treaty with the force of law, it is difficult to see how the National Energy Board could entertain applications either for alternative pipeline routes for delivery of Alaska gas through Canada or applications by companies other than Foothills following the Foothills highway route for delivery of Alaska gas through Canada.

Given the above we may well ask what remains to be done before the project can proceed?

First of all, we do not have a commercial arrangement negotiated with the Alaska North Slope producers or other shippers. Achieving this commercial arrangement is our number one priority. We are confident that the mutual interests of all sides will ultimately lead to satisfactory arrangements.

Following the successful completion of such a commercial agreement, there are a number of terms and conditions that must be satisfied. These are set out in the Northern Pipeline Socio-economic and Environmental Terms and Conditions. It is our view that the terms and conditions are broad enough to accommodate modern environmental, engineering and construction

practices. In fact, we addressed this issue when we pre-built the southern portion of the Alaska Highway Project pipeline.

Detailed design and engineering work also must be completed and approvals must be obtained from the Northern Pipeline Agency. It is this mechanism that I referred to when I indicated that we had a "fast track" regulatory process.

The Yukon Right-of-Way

I will take a few minutes to describe the status of our right-of-way through the Yukon. Foothills has been granted an easement in the Yukon. The current term of the easement is September 2012 and provisions are in place to renew the easement for a further term of 24 years. It is important to note that the easement is protected under the Encumbering Rights provisions of the Umbrella Final agreement which has been signed by the Government of Canada, the Government of the Yukon and the Yukon First Nations. The Final Settlement Agreements that have been negotiated with the Yukon First Nations contain specific provisions relating to the easement. In addition, the compressor stations locations and permanent access to the proposed stations are protected.

What does this mean? From our perspective this translates into certainty of land tenure and a significant timing advantage. Foothills has developed an excellent working relationship with the Yukon First Nations over the years and we are building on that relationship. Like the Canadian "certificates" the easements also constitutes an important asset. An asset not easily replicated.

Conclusion

Let me summarize and focus on some of the key points.

Foothills is a company with real pipelines and real customers.

When combined with our shareholders TransCanada and Westcoast, we transport 20% of all the natural gas consumed in the United States. And we have the know-how and the where-with-all to build the Alaska Highway Pipeline.

We have been involved in this project for 25 years.

We and our former partners have invested heavily to achieve the permits, certificates, rights-of-way and much of the engineering on the Alaska Highway pipeline.

A basic message that I want to leave with you is this, we have a...very unique and solid regulatory framework, it is a very valuable framework in terms of saving money and avoiding costly delays when building a pipeline. It is more than a collection of permits. It is a package, designed specifically to expedite building the Alaska Highway pipeline.

This framework can neither be duplicated nor terminated easily. It is a one-of-a-kind regime. I urge all Alaskans to take full advantage of it.

Finally let me raise one other issue and that is the matter of the pipeline route decision. Before we can move from discussion to action this must be resolved. Anything this committee can do to bring clarity to the routing debate will be a positive development.

Ultimately all stakeholders must find some common ground and go forward.

So where do we go from here?

A commercial agreement between pipelines and producers is the next major mile post for the Project.

Once a satisfactory commercial arrangement is achieved ... the flag drops; from that point on we believe that our regulatory framework will allow "shovels to be in the ground" within 24 months.

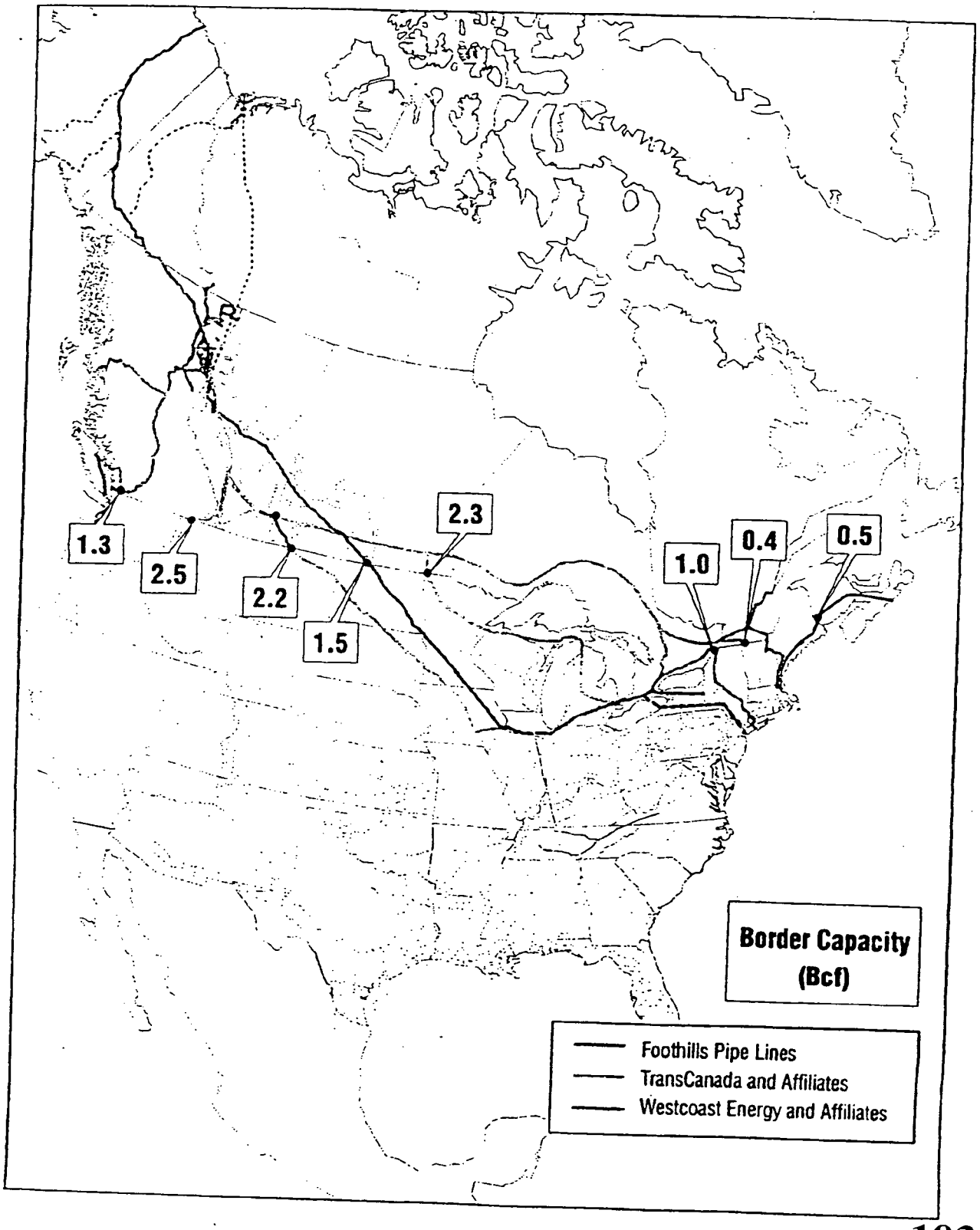
This is a very large project. It will involve many companies. It will cost a lot of money and there will be lots of issues to address and benefits to share.

Foothills and its shareholders intend to be major players in the development and operation of this important pipeline and we believe that we bring value to the Project and value to Alaska.

Thank you, and I am now prepared for questions.

FOOTHILLS PIPE LINES LTD.

NORTH AMERICAN PIPELINE INFRASTRUCTURE



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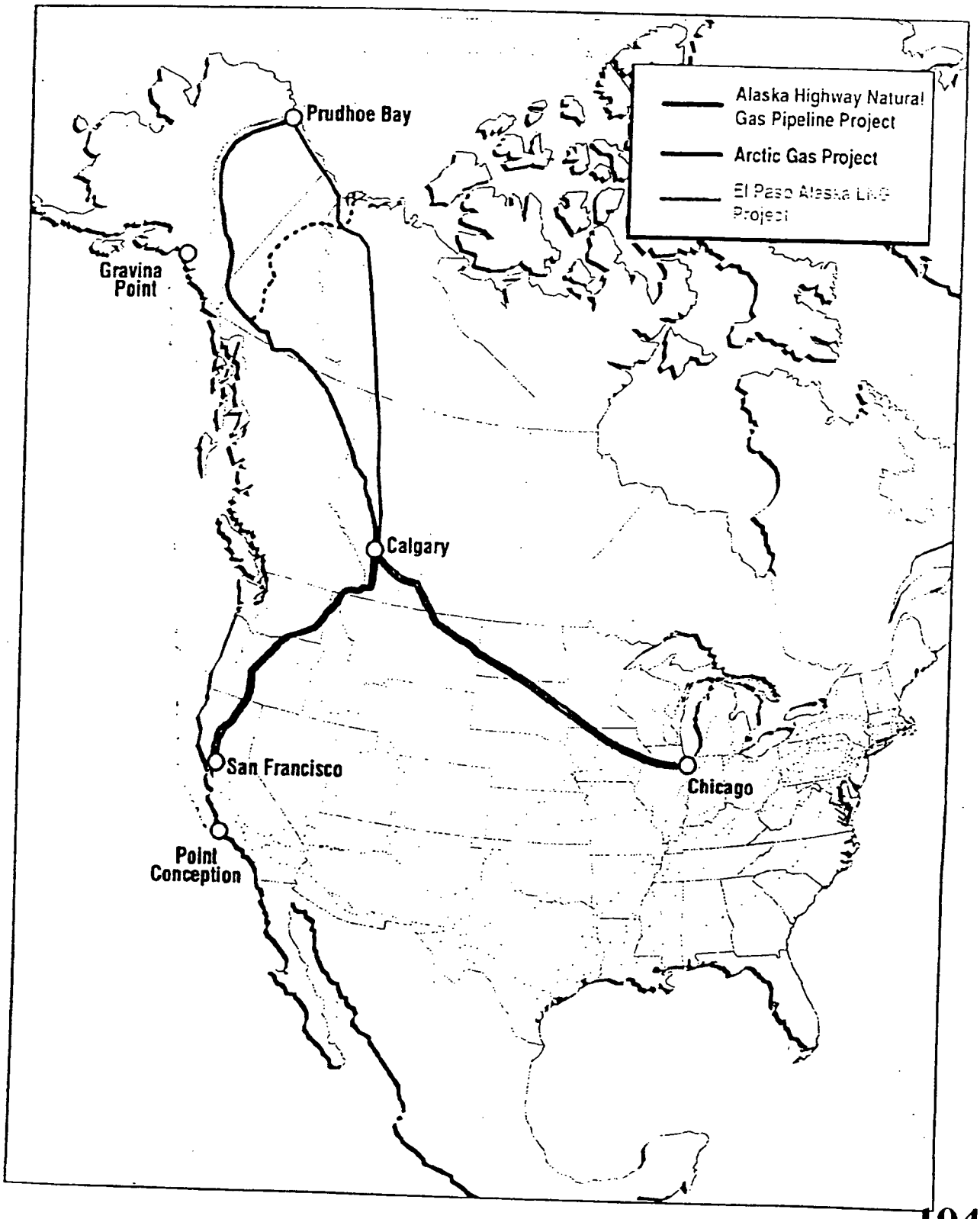
FOOTHILLS PIPE LINES LTD.

ORIGINAL COMPETING PROJECTS



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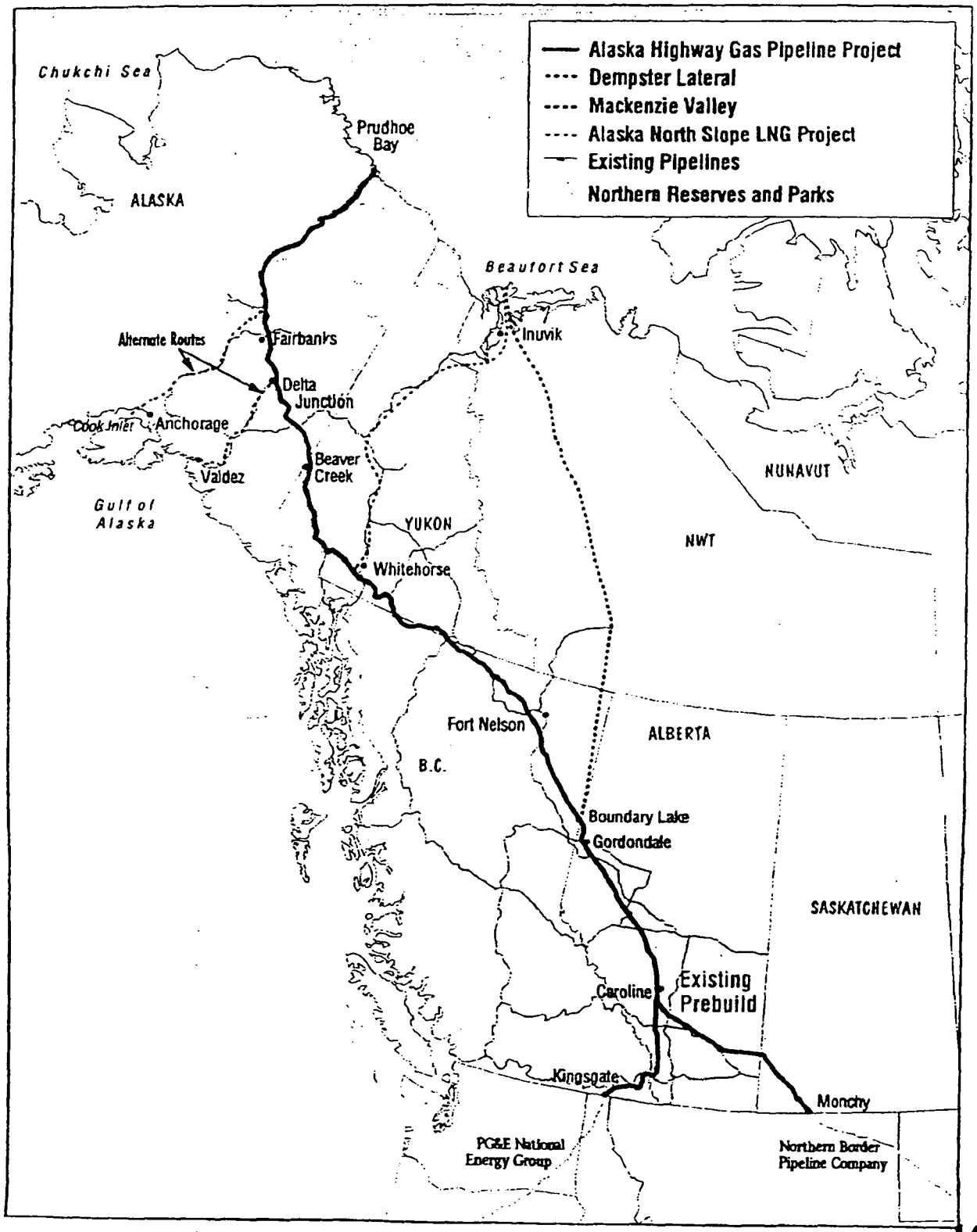
FOOTHILLS PIPE LINES LTD.

TRANSPORTATION SYSTEMS



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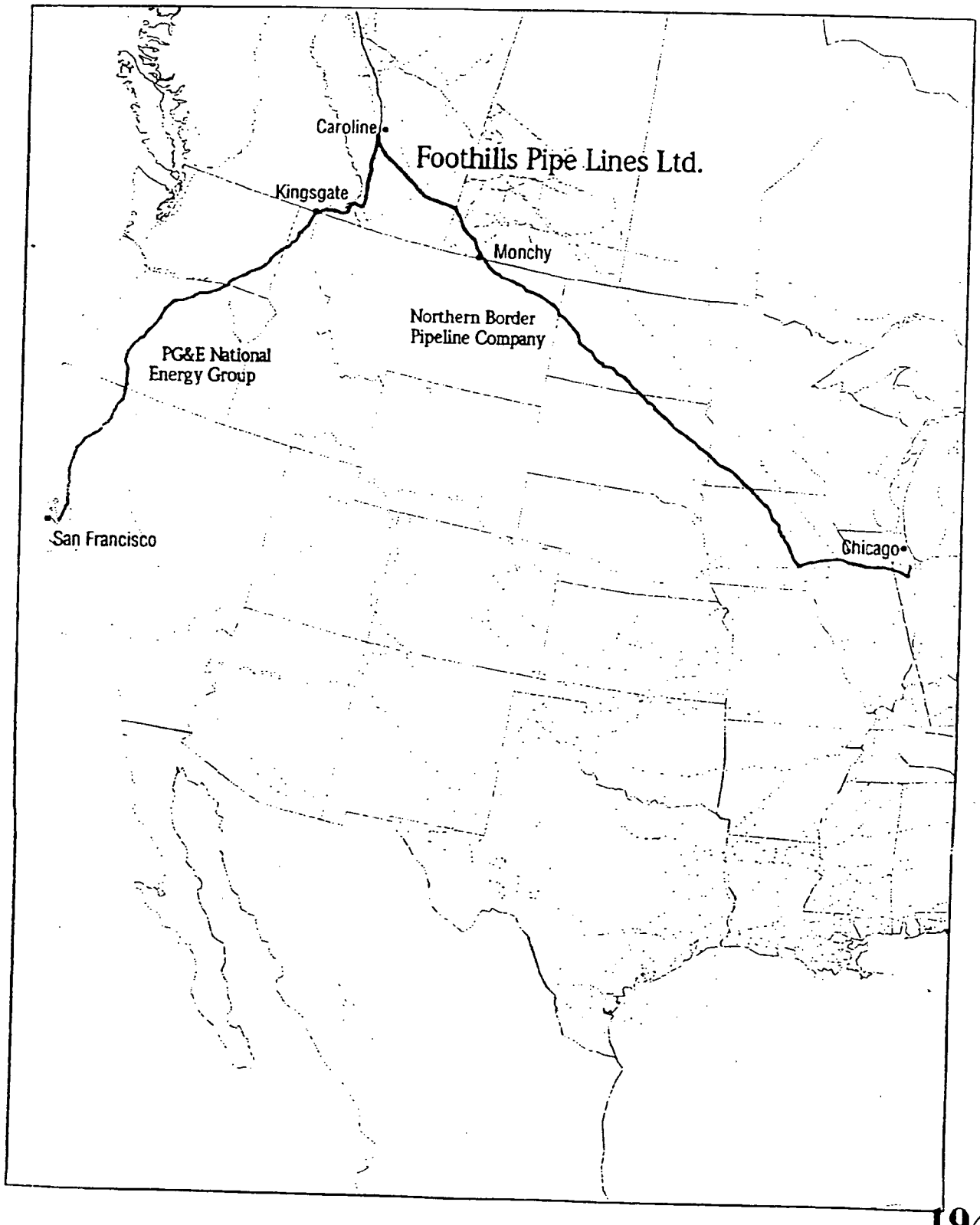
FOOTHILLS PIPE LINES LTD.

PREBUILD SYSTEM



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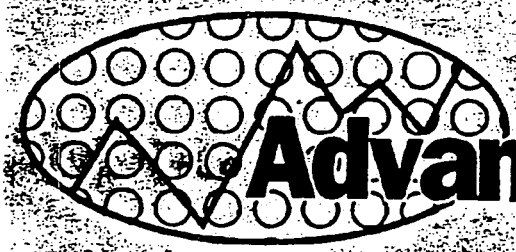

Advance Release | 2000 Edition

1999 Data for the Statistical Yearbook of the Electric Utility Industry

May 2000

EDISON ELECTRIC INSTITUTE

1943

Advance Release/2000 Edition

Data for the upcoming
Statistical Yearbook of the Electric Utility Industry/1999 Data

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1999 IN REVIEW

Capacity

Installed generating capacity of the total electric utility industry totaled 677,020 megawatts as of December 31, 1999. This was a decrease of 7.1% from 1998 capacity. This decline in capacity is attributed to 55,070 megawatts of capacity from electric utility plants that were sold and reclassified as non-utility plants. In addition, 180 megawatts of capacity were retired during 1999. The investor-owned electric utility industry generating capacity declined 9.7% which is also largely attributed to the sell-off of capacity to non-utility plants. The New England and Middle Atlantic regions showed the largest declines in investor-owned electric utility capacity at 42.3% and 33.2%, respectively.

Generation

Total electric utility industry generation was 3,173,671 gigawatthours in 1999, decreasing 1.2% from the previous year. The investor-owned utility industry generation portion decreased 1.9%, falling to 2,444,435 gigawatthours.

Total electric utility industry generation from coal decreased 2.0% in 1999 while electricity generated from fuel oil showed the largest decline at 24.7%. Electric power generated from hydro sources declined 3.4%. Conversely, nuclear power generation increased 7.6% over 1998 generation.

The share of total electricity generated from coal decreased slightly, from 56.3% in 1998 to 55.8% in 1999. The share of electricity generated from gas also decreased slightly, while nuclear fuel increased to 22.8% as compared to a 21.0% share in 1998.

Customers and Revenues

Total sales to ultimate customers for the total electric utility industry were 3,264,997 gigawatthours in 1999. This was an increase of 0.7% over 1998. Sales by the investor-owned segment rose by 1.8%, to 2,471,793 GWh.

The average number of ultimate customers for the total utility industry increased by 1.5% over 1998, totaling 127,002,519 for 1999. The investor-owned segment increased by 0.8%, to 93,696,883.

Total industry revenues from sales to ultimate customers for 1999 decreased 0.8% to 216.7 billion dollars. The investor-owned segment showed a slight increase of 0.2%, to $168.8 billion.

The average revenue per kWh sold to total ultimate customers in 1999 was 6.64 cents for the total industry and 6.83 cents for the investor-owned electric utilities.

Financial

Total assets of the investor-owned electric utilities rose from $671.8 billion in 1998 to $736.0 billion in 1999, an increase of 9.5%. Investor-owned electric utility operating revenues rose by 11.4%, to $328.9 billion in 1999. Total investor-owned electric utility operating expenses increased by 12.5%, to $293.6 billion.

The 1999 consumer price index for electricity was 126.5. The producer price index for electric power was 129.0.

1999 AT- A- GLANCE

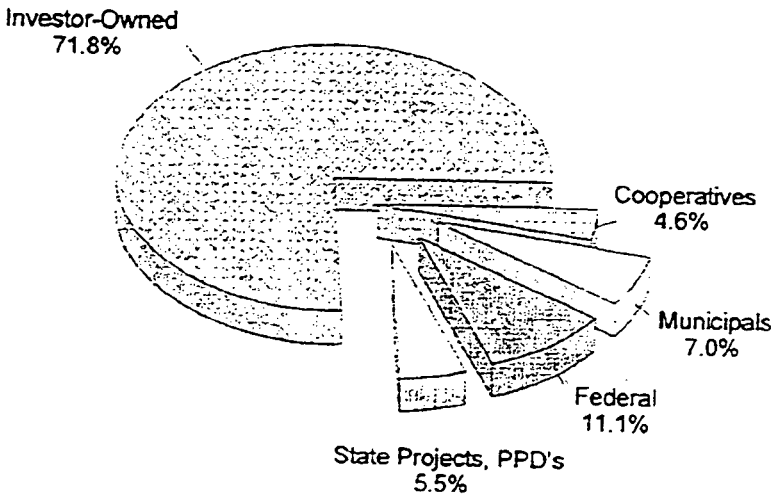
Total United States - 1999p	Total Electric Utility Industry	Investor-Owned Electric Utilities
Installed Generating Capacity	677,020 MW	486,272 MW
Generation*	3,173,671 GWh	2,444,435 GWh
Energy Sales to Ultimate Customers	3,264,997 GWh	2,471,793 GWh
Ultimate Customers	127,002,519	93,696,883
Revenues from Sales to Ultimate Customers	$216,711,904,000	$168,785,265,000
Average Revenue per kWh Sold	6.64¢	6.83¢
Average Annual kWh Use per Customer	25,708 kWh	26,381 kWh
Average Annual Revenue per Customer	$1,706.36	$1,801.40

p Preliminary.
* Generation data is final.
kWh = kilowatthour.
MW = megawatt = one thousand kilowatts.
GWh = gigawatthour = one million kilowatthours.

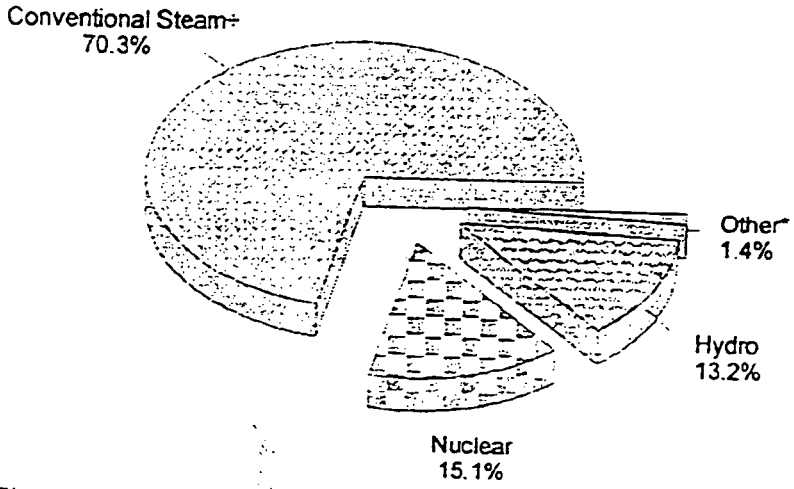
INSTALLED GENERATING CAPACITY

Total Electric Utility Industry -1999p

By Ownership



By Type of Prime Mover



p Preliminary.
÷ Includes Combustion Turbine and Combined Cycle Plants.
* Includes Internal Combustion, Wind and Solar.
Note: Sum of components may not add to 100% due to independent rounding.

INSTALLED GENERATING CAPACITY IN THE UNITED STATES
Megawatts (Nameplate)

At December 31st	Investor-Owned Utilities	Government and Cooperatives	Total Electric Utility Industry	Non Utility Sources	Total United States
1999p	486,272	190,747	677,020	175,493	852,513
1998	538,785	189,997	728,783	99,650	828,432

Note: Total may not equal sum of components due to independent rounding.
1999 data based on 1999 capacity additions, retirements and plants sold to non-utilities reported to the U.S. Department of Energy as of March 2000.
p Preliminary.
Sources: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759), "Annual Electric Generator Report" (EIA-860), "Annual Electric Utility Report" (EIA-861), Edison Electric Institute and RDI PowerDat.

TABLE 2

INSTALLED GENERATING CAPACITY
TOTAL ELECTRIC UTILITY INDUSTRY
By Ownership and Type of Prime Mover Driving the Generator
Megawatts (Nameplate)

At December 31st	Total Electric Utility Industry	Investor-Owned Utilities	Cooperatives	Municipal Utilities	Federal	State Projects, Public Power Districts
TOTAL (Capacity of Generators Driven by All Types of Prime Mover)						
1999p	677,020	486,272	31,057	47,262	74,969	37,459
1998	728,783	538,785	29,868	47,812	74,969	37,348
HYDRO (Capacity of Generators Driven by Water Wheels and Turbines)						
1999p	89,623	27,897	1,156	5,527	40,765	14,278
1998	91,156	29,580	1,048	5,527	40,765	14,236
CONVENTIONAL STEAM+ (Capacity of Generators Driven by Steam Engines and Turbines)						
1999p	475,658	364,866	29,600	37,982	25,748	17,462
1998	522,634	412,307	28,522	38,612	25,748	17,445
NUCLEAR STEAM (Capacity of Generators Driven by Nuclear Reactors)						
1999p	102,244	88,850	-	-	8,443	4,951
1998	104,757	91,362	-	-	8,443	4,951
INTERNAL COMBUSTION (Capacity of Generators Driven by Internal Combustion Engines)						
1999p	9,469	4,651	299	3,751	13	755
1998	10,214	5,528	296	3,671	13	706
WIND (Capacity of Generators Driven by Wind Turbines)						
1999p	18	6	*	2	-	10
1998	15	6	*	2	-	7
SOLAR (Capacity of Generators Driven by Photovoltaic or Solar Thermal Energy)						
1999p	5	2	-	*	-	3
1998	5	2	-	*	-	3

Note: Total may not equal sum of components due to independent rounding.
1999 data based on 1999 capacity additions, retirements and plants sold to non-utilities reported to the U.S. Department of Energy as of March 2000.
p Preliminary. * Less than five hundred kilowatts.
+ Includes Combustion Turbines and Combined Cycle Plants.
Sources: U.S. Department of Energy. Energy Information Administration. "Annual Electric Generator Report" (EIA-860), and "Annual Electric Utility Report" (EIA-861).

INSTALLED GENERATING CAPACITY BY STATE

At December 31st, 1998 and 1999p - Megawatts (Nameplate)

State/Division	Total Electric Utility Industry		Investor-Owned Electric Utilities	
	1999p	1998	1999p	1998
Total United States	677,020	728,783	486,272	538,785
Maine	358	1,457	333	1,432
New Hampshire	2,426	2,426	2,282	2,282
Vermont	886	886	797	797
Massachusetts	2,174	3,269	1,264	2,359
Rhode Island	8	8	6	6
Connecticut	2,780	5,940	2,632	5,792
New England	8,632	13,985	7,314	12,668
New York	18,786	32,163	7,027	20,405
New Jersey	12,712	14,216	12,614	14,118
Pennsylvania	28,036	36,817	28,010	36,791
Middle Atlantic	59,534	83,196	47,652	71,314
Ohio	29,041	28,963	26,477	26,477
Indiana	22,488	22,488	20,434	20,434
Illinois	18,039	33,620	17,477	33,160
Michigan	24,506	23,879	22,333	21,891
Wisconsin	11,974	11,958	10,779	10,778
East North Central	106,048	120,908	97,500	112,740
Minnesota	9,361	9,356	7,834	7,834
Iowa	8,885	8,863	7,452	7,452
Missouri	17,711	17,459	12,427	12,427
North Dakota	4,641	4,641	826	826
South Dakota	2,973	2,973	1,040	1,040
Nebraska	6,004	6,003	-	-
Kansas	10,595	10,568	7,955	7,955
West North Central	60,170	59,863	37,533	37,533
Delaware	2,293	2,293	2,087	2,087
Maryland	11,745	11,762	11,581	11,600
District of Columbia	868	868	868	868
Virginia	16,245	16,245	15,517	15,517
West Virginia	15,167	15,167	15,167	15,167
North Carolina	22,178	22,013	21,221	21,056
South Carolina	18,781	18,724	14,690	14,635
Georgia	24,624	24,624	18,816	18,816
Florida	40,202	40,421	31,844	31,374
South Atlantic	152,102	152,116	131,791	131,120
Kentucky	16,329	15,671	9,068	8,740
Tennessee	19,544	19,544	-	-
Alabama	22,986	22,563	12,966	12,760
Mississippi	7,387	7,387	6,517	6,517
East South Central	66,246	65,164	28,552	28,018
Arkansas	9,981	9,873	6,640	6,640
Louisiana	18,962	18,962	15,108	15,108
Oklahoma	13,451	13,451	10,061	10,061
Texas	67,623	67,623	55,482	55,482
West South Central	110,038	109,930	87,292	87,292
Montana	2,096	5,084	657	3,645
Idaho	2,393	2,393	1,628	1,628
Wyoming	6,287	6,284	4,327	4,327
Colorado	7,530	7,337	4,265	4,137
New Mexico	5,723	5,723	4,495	4,495
Arizona	16,543	16,543	8,223	8,223
Utah	5,322	5,311	2,733	2,733
Nevada	5,901	5,901	4,190	4,190
Mountain	51,795	54,576	30,518	33,378
Washington	24,686	24,679	2,799	2,800
Oregon	9,807	9,807	3,016	3,016
California	24,352	30,952	10,385	16,985
Pacific	58,846	65,439	16,200	22,801
Alaska	1,929	1,925	243	244
Hawaii	1,680	1,680	1,680	1,680
Alaska & Hawaii	3,610	3,606	1,924	1,925

Note: Total may not equal sum of components due to independent rounding.
1999 data based on 1999 capacity additions and retirements reported to the U.S. Department of Energy as of March 2000.
See Table 2 for additional footnotes.

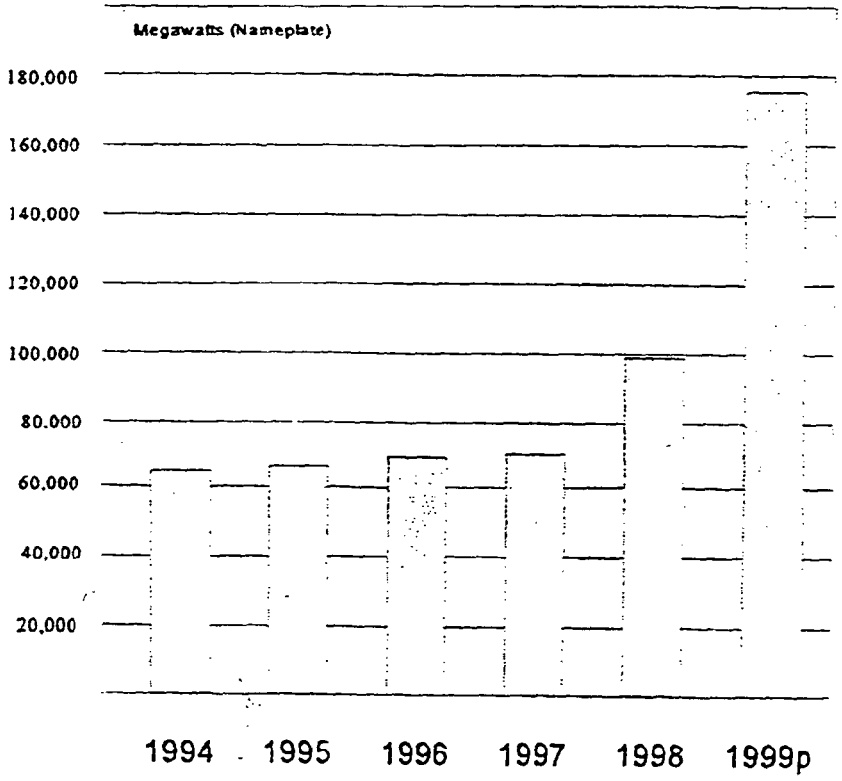
UTILITY GENERATING CAPACITY SOLD TO NON-ELECTRIC UTILITY GENERATORS DURING 1999
By State and Utility Type
Megawatts (Nameplate)

State	Total Electric Utility Industry	Investor-Owned Utilities	Cooperatives	Subtotal Government	Municipal Utilities	Federal	Power Districts, State Projects
California	6,600	6,600	-	-	-	-	-
Connecticut	3,160	3,160	-	-	-	-	-
Florida	639	-	-	639	639	-	-
Illinois	15,859	15,859	-	-	-	-	-
Maine	1,099	1,099	-	-	-	-	-
Maryland	19	19	-	-	-	-	-
Massachusetts	1,057	1,057	-	-	-	-	-
Montana	2,988	2,988	-	-	-	-	-
New Jersey	1,504	1,504	-	-	-	-	-
New York	13,363	13,363	-	-	-	-	-
Pennsylvania	8,781	8,781	-	-	-	-	-
Washington	1	1	-	-	-	-	-
Total	55,070	54,431	-	639	639	-	-

Note: Total may not equal sum of components due to independent rounding.

INSTALLED GENERATING CAPACITY

Non-Electric Utility Generators

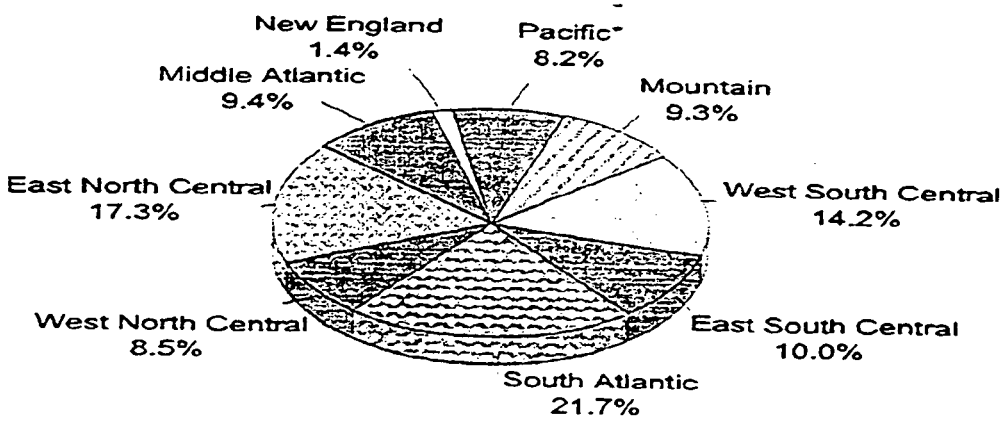


p Preliminary.
Source: Edison Electric Institute's "Capacity and Generation of Non-Utility Sources of Energy" and RDI PowerDat.

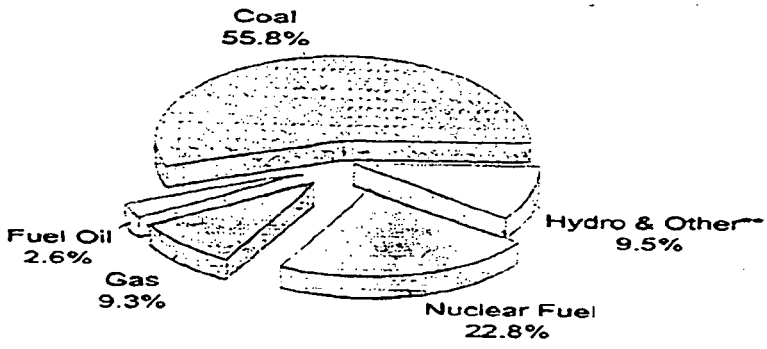
GENERATION

Total Electric Utility Industry -1999

By Census Division



By Energy Source



*Includes Alaska & Hawaii.
**Includes geothermal, wood, waste, wind, and solar.
Note: Sum of components may not add to 100% due to independent rounding.

ELECTRICITY MADE AVAILABLE IN THE UNITED STATES
Gigawatthours

Year	Generation: Investor-Owned Utilities	Generation: Government and Cooperatives	Generation: Total Electric Utility Industry	Generation: Non Utility Sources	Generation: Total United States	Net Imports of Electric Energy	Total Available in U.S.	Estimated Population+ (Thousands) (July 1)	kWh Per Person
1999p	2,444,435	729,236	3,173,671	NA	3,173,671 *	28,320	NA	272,691	NA
1998	2,492,920	719,251	3,212,171	513,775	3,725,946	28,909	3,754,855	270,248 r	13,894

Note: Total may not equal sum of components due to independent rounding.
+ U.S. Department of Commerce. Bureau of Census estimates; excludes Armed Forces overseas.
* Excludes non-utility sources.
p Preliminary. NA Not Available. r Revised.
Sources: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759) and Edison Electric Institute.

TABLE 12

GENERATION
TOTAL ELECTRIC UTILITY INDUSTRY
By Ownership and Type of Prime Mover Driving the Generator
Gigawatthours

Year	Total Electric Utility Industry	Investor-Owned Utilities	Cooperatives	Subtotal Government	Municipal Utilities	Federal	State Projects, Public Power Districts
TOTAL (Generation by All Types of Prime Mover)							
1999	3,173,671	2,444,435	140,613	588,623	122,882	291,044	174,697
1998	3,212,171	2,492,918	146,255	572,998	118,520	284,494	169,984
HYDRO (Generation of Generators Driven by Water Wheels and Turbines)							
1999	293,931	62,994	937	230,000	18,684	151,772	59,544
1998	304,403	76,534	1,142	226,726	17,041	147,291	62,394
CONVENTIONAL STEAM (Generation of Generators Driven by Steam Engines and Turbines)							
1999	2,152,725	1,730,989	139,481	282,255	103,389	93,753	85,113
1998	2,232,189	1,815,016	144,944	272,230	100,754	91,656	79,820
NUCLEAR STEAM (Generation of Generators Driven by Nuclear Reactors)							
1999	725,037	649,484	-	75,553	-	45,519	30,034
1998	673,702	600,392	-	73,310	-	45,547	27,763
INTERNAL COMBUSTION (Generation of Generators Driven by Internal Combustion Engines)							
1999	1,952	950	195	807	801	-	6
1998	1,871	975	169	727	720	-	7
WIND (Generation of Generators Driven by Wind Turbines)							
1999	23	17	-	6	6	-	-
1998	3	*	-	3	3	*	-
SOLAR (Generation of Generators Driven by Photovoltaic and Solar Thermal Energy)							
1999	3	1	-	2	2	-	-
1998	3	1	-	2	2	-	-

Note: Total may not equal sum of components due to independent rounding.
* Less than five hundred thousand kilowatthours.
Source: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759).

TABLE 14

GENERATION IN PERCENT OF TOTAL
TOTAL ELECTRIC UTILITY INDUSTRY
By Ownership and Type of Prime Mover Driving the Generator

Year	Investor-Owned	Cooperatives	Government-Owned	Total	Investor-Owned	Cooperatives	Government-Owned	Total	Investor-Owned	Cooperatives	Government-Owned
	TOTAL+			HYDRO				CONVENTIONAL STEAM			
1999	77.0%	4.4%	18.5%	9.3%	2.0%	* %	7.2%	67.8%	54.5%	4.4%	8.9%
1998	77.6%	4.6%	17.8%	9.5%	2.4%	* %	7.1%	69.5%	56.5%	4.5%	8.5%
				NUCLEAR STEAM				INTERNAL COMBUSTION			
1999				22.8%	20.5%	-	2.4%	* %	* %	* %	* %
1998				21.0%	18.7%	-	2.3%	* %	* %	* %	* %

+ Includes generation by wind and solar.
* Less than one-tenth of one percent.
Source: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759).

GENERATION BY STATE
1999 and 1998 - Gigawatthours

State/Division	Total Electric Utility Industry		Investor-Owned Electric Utilities	
	1999	1998	1999	1998
Total United States	3,173,671	3,212,171	2,444,435	2,492,920
Maine	1,189	3,549	1,186	3,543
New Hampshire	13,876	14,238	13,876	14,238
Vermont	4,735	4,394	4,442	4,203
Massachusetts	4,360	26,037	3,317	24,889
Rhode Island	9	2,061	9	2,061
Connecticut	20,484	15,123	20,474	15,108
New England	44,653	65,401	43,304	64,042
New York	97,009	115,840	62,012	76,386
New Jersey	38,868	35,911	38,824	35,833
Pennsylvania	161,596	173,903	161,538	173,809
Middle Atlantic	297,473	325,655	262,374	286,027
Ohio	140,912	146,448	138,359	143,848
Indiana	114,183	112,772	104,904	103,279
Illinois	149,808	131,274	146,162	127,528
Michigan	87,875	85,146	83,489	80,860
Wisconsin	54,704	52,529	49,568	47,941
East North Central	547,482	528,169	522,482	503,456
Minnesota	44,154	43,977	43,288	42,964
Iowa	37,032	37,085	34,838	34,867
Missouri	73,505	74,894	51,332	53,442
North Dakota	31,260	30,519	3,447	3,250
South Dakota	10,557	9,089	3,865	3,316
Nebraska	29,981	28,720	-	-
Kansas	42,003	41,481	36,657	35,776
West North Central	268,492	265,766	173,427	172,846
Delaware	6,239	6,318	6,056	6,165
Maryland	49,324	48,514	49,318	48,505
District of Columbia	230	244	230	244
Virginia	65,071	63,815	64,735	63,114
West Virginia	91,678	89,605	91,678	89,605
North Carolina	109,882	113,112	108,756	111,598
South Carolina	87,347	84,397	69,413	66,763
Georgia	110,537	108,717	108,851	105,697
Florida	166,914	169,447	128,195	130,578
South Atlantic	687,222	684,168	627,232	622,570
Kentucky	81,658	86,151	45,947	44,446
Tennessee	89,683	94,143	-	-
Alabama	113,909	113,394	70,636	71,449
Mississippi	32,212	31,992	29,304	28,810
East South Central	317,462	325,679	145,887	144,705
Arkansas	44,131	43,199	40,890	39,682
Louisiana	64,837	66,107	51,985	54,153
Oklahoma	50,279	51,454	35,606	36,871
Texas	292,458	293,068	248,323	251,966
West South Central	451,705	453,829	376,804	382,672
Montana	27,597	27,617	21,624	22,008
Idaho	12,456	11,978	8,478	8,652
Wyoming	42,951	44,699	29,774	31,031
Colorado	36,167	35,471	20,580	19,731
New Mexico	31,654	31,428	29,827	29,618
Arizona	83,096	81,299	46,134	44,758
Utah	36,071	35,160	18,706	17,720
Nevada	26,486	26,553	23,727	23,460
Mountain	296,478	294,206	198,650	196,978
Washington	112,072	97,128	15,092	15,306
Oregon	51,696	46,352	15,463	15,806
California	87,875	114,926	57,119	81,275
Pacific	251,645	258,406	87,674	112,387
Alaska	4,609	4,590	149	147
Hawaii	6,452	6,301	6,452	6,301
Alaska & Hawaii	11,061	10,891	6,601	6,449

Note: Total may not equal sum of components due to independent rounding.
Source: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759).

WEEKLY ELECTRIC OUTPUT AND INDEX
TOTAL ELECTRIC UTILITY INDUSTRY
(Excluding Alaska and Hawaii)
Gigawatthours

		Weekly Electric Output							
Week Number	Week Ended		1999	Week Ended		1998	Percent Change 99/98	Weekly Index+ 1999	1998
1	Jan.	2	64,171	Jan.	3	61,946	3.6	149	145
2		9	70,366		10	61,852	13.8	156	139
3		16	68,436		17	65,911	3.8	150	148
4		23	63,563		24	65,196	(2.5)	139	144
5		30	64,258		31	64,547	(0.4)	144	145
6	Feb.	6	65,044	Feb.	7	64,943	0.2	145	146
7		13	63,977		14	64,408	(0.7)	145	147
8		20	64,404		21	62,699	2.7	151	146
9		27	66,347		28	61,327	8.2	158	146
10	Mar.	6	63,625	Mar.	7	61,959	2.7	154	150
11		13	65,531		14	64,390	1.8	164	161
12		20	62,379		21	61,674	1.1	156	154
13		27	60,520		28	59,649	1.5	156	153
14	Apr.	3	58,622	Apr.	4	58,695	(0.1)	154	153
15		10	58,742		11	56,251	4.4	155	148
16		17	59,234		18	56,175	5.4	156	148
17		24	58,935		25	56,527	4.3	154	146
18	May	1	58,751	May	2	56,601	3.8	152	145
19		8	59,075		9	58,363	1.2	151	148
20		15	60,227		16	60,832	(1.0)	150	150
21		22	61,823		23	64,533	(4.2)	152	156
22		29	62,437		30	64,258	(2.8)	155	156
23	June	5	64,740	June	6	66,333	(2.4)	154	154
24		12	71,971		13	64,274	12.0	163	143
25		19	66,604		20	70,713	(5.8)	140	147
26		26	70,063		27	77,400	(9.5)	148	163
27	July	3	74,630	July	4	72,841	2.5	158	154
28		10	77,746		11	73,856	5.3	157	147
29		17	73,996		18	77,565	(4.6)	144	153
30		24	81,144		25	79,676	1.8	158	156
31		31	84,773	Aug	1	76,391	11.0	165	150
32	Aug	7	79,240		8	75,425	5.1	158	151
33		14	79,310		15	77,764	2.0	155	152
34		21	77,982		22	76,283	2.2	155	151
35		28	77,050		29	80,335	(4.1)	154	160
36	Sept.	4	74,253	Sept.	5	75,728	(1.9)	158	162
37		11	73,044		12	69,817	4.6	157	152
38		18	67,221		19	71,953	(6.6)	150	163
39		25	63,508		26	68,881	(7.8)	149	164
40	Oct.	2	65,869	Oct.	3	67,849	(2.9)	157	164
41		9	62,576		10	63,058	(0.8)	152	156
42		16	64,792		17	61,583	5.2	159	152
43		23	62,696		24	60,858	3.0	154	151
44		30	62,561		31	61,192	2.2	153	151
45	Nov.	6	62,748	Nov.	7	61,577	1.9	150	148
46		13	62,652		14	61,761	1.4	149	148
47		20	63,804		21	61,512	3.7	153	148
48		27	60,765		28	58,753	3.4	146	142
49	Dec.	4	65,608	Dec.	5	60,029	9.3	156	142
50		11	67,347		12	63,764	5.6	155	146
51		18	68,160		19	65,135	4.6	156	147
52		25	67,900		26	65,747	3.3	165	158

Note: Weekly Electric Output is the total of that reported by the individual utilities which consists of the net electric energy generated by each respondent utility plus energy received from others less energy delivered for resale. These figures are based on the reports of investor-owned utilities, large municipal systems, and state and Federal agencies.

+ Seasonally adjusted - 1982 average = 100.

SOURCES OF ENERGY FOR ELECTRIC GENERATION
TOTAL ELECTRIC UTILITY INDUSTRY
By State and Energy Source
Year 1999 - Gigawatthours

State/Division	Total Generation	Coal	Fuel Oil	Gas	Nuclear Fuel	Hydro	Other+
Total United States	3,173,671	1,771,627	82,977	294,743	725,039	293,932	5,350
Maine	1,189	-	673	-	-	516	-
New Hampshire	13,873	3,327	1,486	45	8,676	339	-
Vermont	4,734	-	22	18	4,059	421	214
Massachusetts	4,360	1,074	300	866	1,931	189	-
Rhode Island	9	-	9	-	-	-	-
Connecticut	20,484	-	5,794	1,180	12,675	368	467
New England	44,649	4,401	8,284	2,109	27,341	1,833	681
New York	97,011	10,949	11,735	16,834	37,019	20,124	350
New Jersey	38,868	6,388	532	3,122	28,971	(145)	-
Pennsylvania	161,597	85,952	2,692	913	70,885	1,155	-
Middle Atlantic	297,476	103,289	14,959	20,869	136,875	21,134	350
Ohio	140,912	122,846	474	747	16,422	423	-
Indiana	114,184	112,884	267	621	-	407	5
Illinois	149,808	64,956	333	3,042	81,356	52	67
Michigan	87,875	69,136	1,263	2,448	14,591	435	-
Wisconsin	54,705	39,977	143	1,013	11,495	1,734	343
East North Central	547,484	409,803	2,480	7,871	123,864	3,051	415
Minnesota	44,154	28,959	82	523	13,316	857	417
Iowa	37,031	31,946	128	364	3,640	931	22
Missouri	73,505	61,250	281	1,587	8,587	1,740	50
North Dakota	31,259	28,610	40	(*)	-	2,609	-
South Dakota	10,556	3,674	24	181	-	6,677	-
Nebraska	29,981	17,794	29	348	10,091	1,719	-
Kansas	42,003	29,649	311	2,886	9,157	-	-
West North Central	268,489	201,882	895	5,899	44,791	14,533	489
Delaware	6,239	2,762	1,234	2,243	-	-	-
Maryland	49,323	29,352	3,897	1,340	13,312	1,422	-
District of Columbia	230	-	230	-	-	-	-
Virginia	65,071	31,743	3,035	2,800	28,301	(608)	-
West Virginia	91,678	91,152	186	37	-	303	-
North Carolina	109,883	68,569	284	814	37,524	2,654	38
South Carolina	87,348	35,246	301	322	50,814	650	15
Georgia	110,537	74,068	663	1,654	31,478	2,674	-
Florida	166,914	64,982	34,396	35,789	31,526	140	81
South Atlantic	687,223	397,874	44,226	44,799	192,955	7,235	134
Kentucky	81,659	78,545	104	453	-	2,557	-
Tennessee	89,683	55,221	502	234	27,227	6,499	-
Alabama	113,909	73,221	154	1,882	30,892	7,760	-
Mississippi	32,211	13,037	3,141	7,605	8,428	-	-
East South Central	317,462	220,024	3,901	10,174	66,547	16,816	-
Arkansas	44,131	24,612	141	3,765	12,920	2,693	-
Louisiana	64,837	21,166	397	30,162	13,112	-	-
Oklahoma	50,279	30,588	8	16,614	-	3,069	-
Texas	292,458	138,077	146	116,358	36,760	1,117	-
West South Central	451,705	214,443	692	166,899	62,792	6,879	-
Montana	27,598	15,982	15	20	-	11,581	-
Idaho	12,456	-	*	-	-	12,456	-
Wyoming	42,951	41,719	46	16	-	1,170	-
Colorado	36,167	32,605	32	2,050	-	1,480	-
New Mexico	31,855	28,068	40	3,263	-	243	41
Arizona	83,096	37,994	46	4,557	30,416	10,083	-
Utah	36,072	34,125	29	515	-	1,247	156
Nevada	26,485	16,908	35	6,735	-	2,807	-
Mountain	296,480	207,401	243	17,156	30,416	41,067	197
Washington	112,072	8,656	10	578	6,086	96,472	270
Oregon	51,699	3,698	8	2,759	-	45,234	-
California	87,872	-	52	12,973	33,372	38,842	2,633
Pacific	251,643	12,354	70	16,310	39,458	180,548	2,903
Alaska	4,609	156	798	2,657	-	817	181
Hawaii	6,448	-	6,429	-	-	19	-
Alaska & Hawaii	11,057	156	7,227	2,657	-	836	181

Note: Total may not equal sum of components due to independent rounding.
+ Includes generation by geothermal, wood, waste, wind and solar. ( ) Denotes negative value.
* Less than five hundred thousand kilowatthours.
Source: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759).

SOURCES OF ENERGY FOR ELECTRIC GENERATION
TOTAL ELECTRIC UTILITY INDUSTRY
By State and Energy Source
Year 1999 - Percent of Total

State/Division	Total Generation	Coal	Fuel Oil	Gas	Nuclear Fuel	Hydro	Other+
Total United States	100.0 %	55.8	2.6	9.3	22.8	9.3	0.2 %
Maine	100.0	-	56.6	-	-	43.4	-
New Hampshire	100.0	24.0	10.7	0.3	62.5	2.4	-
Vermont	100.0	-	0.5	0.4	85.7	8.9	4.5
Massachusetts	100.0	24.6	6.9	19.9	44.3	4.3	-
Rhode Island	100.0	-	100.0	-	-	-	-
Connecticut	100.0	-	28.3	5.8	61.9	1.8	2.3
New England	100.0	9.9	18.6	4.7	61.2	4.1	1.5
New York	100.0	11.3	12.1	17.4	38.2	20.7	0.4
New Jersey	100.0	16.4	1.4	8.0	74.5	(0.4)	-
Pennsylvania	100.0	53.2	1.7	0.6	43.9	0.7	-
Middle Atlantic	100.0	34.7	5.0	7.0	46.0	7.1	0.1
Ohio	100.0	87.2	0.3	0.5	11.7	0.3	-
Indiana	100.0	98.9	0.2	0.5	-	0.4	*
Illinois	100.0	43.4	0.2	2.0	54.3	*	*
Michigan	100.0	78.7	1.4	2.8	16.6	0.5	-
Wisconsin	100.0	73.1	0.3	1.9	21.0	3.2	0.6
East North Central	100.0	74.9	0.5	1.4	22.6	0.6	0.1
Minnesota	100.0	65.6	0.2	1.2	30.2	1.9	0.9
Iowa	100.0	86.3	0.3	1.0	9.8	2.5	0.1
Missouri	100.0	83.3	0.4	2.2	11.7	2.4	0.1
North Dakota	100.0	91.5	0.1	(*)	-	8.3	-
South Dakota	100.0	34.8	0.2	1.7	-	63.3	-
Nebraska	100.0	59.4	0.1	1.2	33.7	5.7	-
Kansas	100.0	70.6	0.7	6.9	21.8	-	-
West North Central	100.0	75.2	0.3	2.2	16.7	5.4	0.2
Delaware	100.0	44.3	19.8	36.0	-	-	-
Maryland	100.0	59.5	7.9	2.7	27.0	2.9	-
District of Columbia	100.0	-	100.0	-	-	-	-
Virginia	100.0	48.8	4.7	4.0	43.5	(0.9)	-
West Virginia	100.0	99.4	0.2	*	-	0.3	-
North Carolina	100.0	62.4	0.3	0.7	34.1	2.4	*
South Carolina	100.0	40.4	0.3	0.4	58.2	0.7	*
Georgia	100.0	67.0	0.6	1.5	28.5	2.4	-
Florida	100.0	38.9	20.6	21.4	18.9	0.1	*
South Atlantic	100.0	57.9	6.4	6.5	28.1	1.1	*
Kentucky	100.0	96.2	0.1	0.6	-	3.1	-
Tennessee	100.0	61.6	0.6	0.3	30.4	7.2	-
Alabama	100.0	64.3	0.1	1.7	27.1	6.8	-
Mississippi	100.0	40.5	9.8	23.6	26.2	-	-
East South Central	100.0	69.3	1.2	3.2	21.0	5.3	-
Arkansas	100.0	55.8	0.3	8.5	29.3	6.1	-
Louisiana	100.0	32.6	0.6	46.5	20.2	-	-
Oklahoma	100.0	60.8	*	33.0	-	6.1	-
Texas	100.0	47.2	*	39.8	12.6	0.4	-
West South Central	100.0	47.5	0.2	36.9	13.9	1.5	-
Montana	100.0	57.9	0.1	0.1	-	42.0	-
Idaho	100.0	-	*	-	-	100.0	-
Wyoming	100.0	97.1	0.1	*	-	2.7	-
Colorado	100.0	90.2	0.1	5.7	-	4.1	-
New Mexico	100.0	88.7	0.1	10.3	-	0.8	0.1
Arizona	100.0	45.7	0.1	5.5	36.6	12.1	-
Utah	100.0	94.6	0.1	1.4	-	3.5	0.4
Nevada	100.0	63.8	0.1	25.4	-	10.6	-
Mountain	100.0	70.0	0.1	5.8	10.3	13.9	0.1
Washington	100.0	7.7	*	0.5	5.4	86.1	0.2
Oregon	100.0	7.2	*	5.3	-	87.5	-
California	100.0	-	0.1	14.8	38.0	44.2	3.0
Pacific	100.0	4.9	*	6.5	15.7	71.7	1.2
Alaska	100.0	3.4	17.3	57.6	-	17.7	3.9
Hawaii	100.0	-	99.7	-	-	0.3	-
Alaska & Hawaii	100.0	1.4	65.4	24.0	-	7.6	1.6

Note: Total may not equal sum of components due to independent rounding.
+Includes generation by geothermal, wood, waste, wind and solar. ( )Denotes negative value.
* Less than one-tenth of one percent.
Source: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759).

CONSUMPTION OF FOSSIL FUELS FOR ELECTRIC GENERATION
TOTAL ELECTRIC UTILITY INDUSTRY
By State and Kind of Fuel - Year 1999

State/Division	Coal (Thousand Short Tons)	Fuel Oil (Thousand 42-Gallon Barrels)	Gas (Million Cubic Feet)	Net Generation by Fuels+ (kWh in Millions)
Total United States	896,616	148,868	3,125,417	2,180,530
Maine	-	1,188	-	685
New Hampshire	1,341	2,731	571	4,879
Vermont	-	73	250	42
Massachusetts	558	2,013	8,823	4,048
Rhode Island	-	18	-	12
Connecticut	-	10,329	13,076	7,076
New England	1,899	16,351	22,720	16,743
New York	4,411	20,838	181,171	40,014
New Jersey	2,582	1,215	32,596	10,041
Pennsylvania	34,338	5,613	10,347	89,199
Middle Atlantic	41,331	27,665	224,115	139,252
Ohio	52,133	989	11,507	124,117
Indiana	55,132	557	7,528	113,819
Illinois	35,981	714	39,987	68,226
Michigan	33,748	2,676	51,147	73,132
Wisconsin	23,445	341	14,070	41,116
East North Central	200,439	5,276	124,239	420,410
Minnesota	17,040	207	6,087	29,558
Iowa	20,065	334	5,482	32,500
Missouri	36,584	724	16,624	62,827
North Dakota	24,343	81	-	28,421
South Dakota	2,787	59	2,522	4,613
Nebraska	11,216	72	4,681	18,174
Kansas	18,882	640	36,347	32,856
West North Central	130,917	2,117	71,743	208,948
Delaware	1,244	2,088	19,840	6,236
Maryland	10,928	7,355	16,491	34,712
District of Columbia	-	553	-	232
Virginia	12,422	4,963	23,417	37,390
West Virginia	36,294	321	384	91,843
North Carolina	26,498	622	9,429	69,576
South Carolina	13,661	811	5,110	35,871
Georgia	31,503	1,428	20,502	76,023
Florida	26,081	57,060	320,159	135,507
South Atlantic	158,631	75,201	415,334	487,393
Kentucky	37,977	239	5,761	86,199
Tennessee	23,209	1,048	3,454	55,940
Alabama	33,416	295	20,885	75,229
Mississippi	6,093	5,196	101,349	24,103
East South Central	100,695	6,778	131,449	241,469
Arkansas	14,969	263	39,887	28,528
Louisiana	13,883	862	317,911	51,536
Oklahoma	18,346	26	170,441	47,269
Texas	96,327	265	1,208,352	252,577
West South Central	143,526	1,416	1,736,591	379,909
Montana	10,193	30	288	16,009
Idaho	-	*	-	**
Wyoming	25,631	85	166	41,767
Colorado	17,707	76	13,705	34,057
New Mexico	16,232	72	35,208	31,418
Arizona	19,019	106	50,772	42,581
Utah	14,585	49	5,606	34,570
Nevada	7,760	74	64,994	23,663
Mountain	111,127	492	170,739	224,067
Washington	5,705	19	6,688	9,241
Oregon	2,153	15	23,265	6,461
California	-	123	168,180	15,846
Pacific	7,858	158	198,134	31,547
Alaska	194	2,283	30,353	4,408
Hawaii	-	11,130	-	6,387
Alaska & Hawaii	194	13,414	30,353	10,795

Note: Total may not equal sum of components due to independent rounding.
+ Excludes geothermal, wood, waste, and nuclear fuels, and includes petroleum coke.
* Less than five hundred barrels.
** Less than 500 hundred thousand kilowatthours.
Source: U.S. Department of Energy. Energy Information Administration. "Monthly Power Plant Report" (EIA-759).

ENERGY SALES
TOTAL ELECTRIC UTILITY INDUSTRY
By State and Class of Service
Year 1999p-Gigawatthours

State/Division	Total to Ultimate Customers	Residential	Commercial	Industrial	Street and Highway Lighting	Other Sales
Total United States	3,264,997	1,140,174	973,789	1,050,518	18,468	82,048
Maine	11,994	3,677	3,299	4,949	56	13
New Hampshire	9,337	3,421	3,349	2,440	43	84
Vermont	5,409	1,972	1,796	1,549	28	63
Massachusetts	49,051	16,568	21,538	10,312	485	148
Rhode Island	6,927	2,550	2,746	1,453	69	109
Connecticut	29,202	11,055	11,746	5,895	203	303
New England	111,919	39,243	44,473	26,598	885	720
New York	131,592	40,682	53,452	25,335	1,215	10,908
New Jersey	68,780	23,446	31,295	13,470	551	18
Pennsylvania	127,398	41,812	36,384	47,956	559	687
Middle Atlantic	327,769	105,940	121,131	86,760	2,325	11,613
Ohio	161,123	45,005	38,680	73,714	840	2,884
Indiana	92,938	27,634	19,473	45,288	385	159
Illinois	131,936	40,121	39,896	43,453	1,004	7,463
Michigan	101,425	30,136	34,023	36,336	628	302
Wisconsin	62,633	19,297	16,281	26,295	373	387
East North Central	550,056	162,193	148,352	225,085	3,230	11,195
Minnesota	57,276	17,569	10,492	28,491	296	428
Iowa	37,600	11,985	8,077	16,237	184	1,117
Missouri	69,571	28,578	24,025	15,956	297	717
North Dakota	8,273	3,308	2,317	2,208	61	378
South Dakota	7,879	3,339	2,275	1,886	74	305
Nebraska	23,298	8,250	6,630	6,984	280	1,155
Kansas	34,436	11,962	12,138	9,858	193	285
West North Central	238,334	84,989	65,956	81,619	1,385	4,385
Delaware	10,494	3,376	3,244	3,816	44	13
Maryland	58,320	22,653	24,415	10,445	319	487
District of Columbia	10,341	1,614	8,095	265	110	259
Virginia	90,819	35,084	26,318	20,220	403	8,794
West Virginia	26,762	9,152	6,242	11,270	77	21
North Carolina	114,546	43,361	33,819	35,329	453	1,584
South Carolina	73,085	23,617	16,459	31,916	159	735
Georgia	111,720	41,975	32,943	35,421	606	775
Florida	188,741	96,820	67,710	18,629	784	4,798
South Atlantic	684,827	277,653	219,244	167,312	2,954	17,465
Kentucky	76,396	21,907	12,798	38,635	318	2,739
Tennessee	92,698	35,817	24,974	30,760	1,089	57
Alabama	79,933	27,627	17,758	33,868	439	242
Mississippi	42,903	16,572	10,839	14,742	324	425
East South Central	291,930	101,924	66,369	118,005	2,170	3,463
Arkansas	39,661	14,497	8,249	16,224	168	524
Louisiana	78,309	27,002	17,367	31,303	383	2,253
Oklahoma	48,186	19,725	12,526	13,304	244	2,386
Texas	306,704	111,647	77,649	103,709	1,251	12,448
West South Central	472,860	172,872	115,792	164,540	2,046	17,610
Montana	13,884	3,763	3,331	6,466	54	270
Idaho	21,455	6,683	6,037	8,475	45	214
Wyoming	11,738	2,035	2,503	7,018	32	150
Colorado	39,884	12,791	16,045	10,096	256	695
New Mexico	18,238	4,693	5,734	6,247	116	1,448
Arizona	56,165	21,848	18,540	12,672	316	2,789
Utah	20,847	5,819	6,745	7,585	95	603
Nevada	25,234	8,063	5,686	10,621	164	700
Mountain	207,445	65,695	64,622	69,180	1,080	6,869
Washington	91,756	31,707	22,419	34,138	369	3,123
Oregon	45,489	17,688	14,179	13,198	197	226
California	228,135	75,614	86,141	59,433	1,734	5,212
Pacific	365,379	125,009	122,739	106,770	2,300	8,562
Alaska	5,128	1,787	2,319	826	27	167
Hawaii	9,350	2,670	2,791	3,824	65	-
Alaska & Hawaii	14,477	4,457	5,110	4,650	92	167

Note: Total may not equal sum of components due to independent rounding.
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ENERGY SALES
INVESTOR-OWNED ELECTRIC UTILITIES
By State and Class of Service
Year 1999p-Gigawatthours

State/Division	Total to Ultimate Customers	Residential	Commercial	Industrial	Street and Highway Lighting	Other Sales
Total United States	2,471,793	821,267	785,848	798,399	11,442	54,837
Maine	11,543	3,605	3,291	4,592	47	7
New Hampshire	8,681	3,074	3,163	2,319	36	91
Vermont	4,533	1,578	1,625	1,262	19	48
Massachusetts	42,856	14,430	20,412	7,722	289	3
Rhode Island	6,969	2,577	2,781	1,432	62	118
Connecticut	27,751	10,792	11,464	5,168	171	155
New England	102,334	36,056	42,736	22,495	625	422
New York	105,211	34,815	47,531	19,348	476	3,041
New Jersey	68,525	23,433	31,429	13,162	486	15
Pennsylvania	125,045	40,495	36,255	47,078	493	724
Middle Atlantic	298,782	98,743	115,215	79,588	1,456	3,780
Ohio	147,131	39,339	36,246	67,836	672	3,038
Indiana	77,880	20,483	16,721	40,319	289	68
Illinois	123,760	36,083	37,757	41,194	861	7,866
Michigan	92,516	27,415	31,445	32,975	473	207
Wisconsin	53,086	15,755	15,153	21,543	277	358
East North Central	494,374	139,075	137,322	203,867	2,571	11,537
Minnesota	39,769	9,083	6,258	24,056	158	214
Iowa	28,916	7,990	6,362	13,536	126	902
Missouri	49,126	18,352	19,267	10,838	222	448
North Dakota	4,547	1,684	1,561	1,179	49	74
South Dakota	4,460	1,498	1,546	1,339	44	33
Nebraska	-	-	-	-	-	-
Kansas	25,270	8,867	9,229	7,011	144	19
West North Central	152,089	47,474	44,223	57,959	743	1,690
Delaware	8,400	2,438	2,807	3,118	34	3
Maryland	55,107	20,845	23,712	9,938	269	343
District of Columbia	10,500	1,646	8,212	253	98	281
Virginia	80,680	29,691	24,547	16,966	308	9,169
West Virginia	26,808	9,245	6,290	11,185	68	20
North Carolina	89,161	29,699	26,772	31,055	319	1,315
South Carolina	48,522	13,917	12,182	21,726	112	585
Georgia	75,204	21,680	24,579	28,259	390	296
Florida	148,173	76,109	54,213	12,873	481	4,497
South Atlantic	542,553	205,269	183,314	135,382	2,079	16,509
Kentucky	43,051	12,030	8,966	19,112	155	2,788
Tennessee	1,819	657	364	750	8	39
Alabama	50,274	16,289	12,142	21,643	196	4
Mississippi	21,345	7,270	6,771	6,910	114	280
East South Central	116,489	36,247	28,244	48,416	473	3,111
Arkansas	24,970	8,521	6,368	9,633	120	328
Louisiana	68,153	20,843	14,711	30,046	324	2,229
Oklahoma	36,968	13,605	10,015	10,713	117	2,539
Texas	245,458	82,001	63,702	89,775	925	9,054
West South Central	375,568	124,969	94,798	140,167	1,487	14,150
Montana	8,495	2,429	2,836	3,098	44	89
Idaho	19,070	5,623	5,503	7,907	36	1
Wyoming	8,520	1,204	1,481	5,749	19	67
Colorado	24,535	7,469	11,557	5,230	172	107
New Mexico	13,013	3,557	4,252	4,408	86	710
Arizona	30,456	11,858	10,603	6,914	123	958
Utah	17,110	4,476	5,134	6,971	59	470
Nevada	22,398	7,699	5,303	8,613	145	638
Mountain	143,597	44,313	46,670	48,890	683	3,041
Washington	30,294	13,414	10,732	6,033	102	14
Oregon	32,977	12,817	11,292	8,720	148	-
California	172,917	59,998	68,372	43,028	1,017	502
Pacific	236,188	86,229	90,397	57,781	1,267	516
Alaska	409	170	102	56	1	81
Hawaii	9,410	2,723	2,831	3,798	58	-
Alaska & Hawaii	9,820	2,893	2,934	3,853	59	81

Note: Total may not equal sum of components due to independent rounding.
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ULTIMATE CUSTOMERS
TOTAL ELECTRIC UTILITY INDUSTRY
By State and Class of Service--Average for Year 1999p

State/Division	Total Ultimate Customers	Residential	Commercial	Industrial	Street and Highway Lighting	Other Customers
Total United States	127,002,519	111,373,599	14,142,068	544,048	375,889	566,915
Maine	719,442	622,928	75,444	2,543	17,893	634
New Hampshire	625,086	533,104	83,048	3,370	4,695	668
Vermont	324,972	283,282	39,847	796	393	654
Massachusetts	2,848,776	2,511,744	310,107	14,191	8,009	4,726
Rhode Island	472,196	423,057	45,684	2,543	888	25
Connecticut	1,514,720	1,372,097	131,577	6,066	4,495	485
New England	6,505,193	5,746,213	685,706	29,508	36,573	7,192
New York	8,604,739	7,592,619	966,094	9,123	11,695	25,209
New Jersey	3,560,572	3,123,779	412,846	13,133	10,759	54
Pennsylvania	5,621,370	4,984,799	597,485	29,156	8,636	1,293
Middle Atlantic	17,786,681	15,701,197	1,976,426	51,412	31,090	26,556
Ohio	5,219,663	4,652,988	516,357	31,135	7,562	11,622
Indiana	2,810,047	2,500,533	281,594	18,228	6,533	3,159
Illinois	5,371,507	4,825,341	513,035	5,424	6,111	21,596
Michigan	4,556,052	4,086,976	447,242	13,360	4,854	3,621
Wisconsin	2,575,874	2,287,954	269,391	6,119	6,238	6,173
East North Central	20,533,144	18,353,791	2,027,619	74,266	31,298	46,170
Minnesota	2,278,578	2,019,095	225,358	11,128	6,155	16,841
Iowa	1,423,542	1,232,667	171,452	3,807	1,992	13,625
Missouri	2,740,388	2,409,783	306,793	9,933	3,215	10,662
North Dakota	343,922	289,192	47,790	1,887	869	4,185
South Dakota	380,672	319,375	49,341	1,526	1,276	9,154
Nebraska	887,418	721,654	118,771	8,433	2,400	36,159
Kansas	1,335,053	1,127,898	182,414	11,162	657	12,922
West North Central	9,389,573	8,119,666	1,101,920	47,876	16,564	103,548
Delaware	368,456	329,624	37,367	574	699	193
Maryland	2,180,596	1,958,027	213,572	7,598	1,224	175
District of Columbia	223,577	196,757	26,786	1	31	1
Virginia	3,048,957	2,704,859	296,821	5,278	3,008	38,982
West Virginia	949,435	819,798	115,179	11,291	1,254	1,913
North Carolina	3,960,536	3,436,704	487,864	12,522	10,893	12,553
South Carolina	1,999,913	1,710,118	266,472	4,803	5,421	13,099
Georgia	3,678,490	3,254,935	382,427	11,856	9,775	19,497
Florida	7,890,570	6,957,385	851,832	24,131	10,306	46,916
South Atlantic	24,300,530	21,368,217	2,678,319	78,055	42,611	133,328
Kentucky	1,985,533	1,731,949	224,299	6,940	9,269	13,076
Tennessee	2,727,119	2,348,250	364,924	1,730	12,119	96
Alabama	2,220,357	1,902,682	300,125	6,513	3,073	7,964
Mississippi	1,340,352	1,146,761	180,241	4,552	2,323	6,476
East South Central	8,273,360	7,129,641	1,069,589	19,734	26,784	27,611
Arkansas	1,336,166	1,158,104	137,669	26,217	1,257	12,919
Louisiana	2,049,104	1,799,994	211,769	15,491	2,565	19,285
Oklahoma	1,735,447	1,499,070	204,426	16,028	2,325	13,597
Texas	8,943,402	7,745,452	1,019,523	70,465	26,972	80,989
West South Central	14,064,119	12,202,621	1,573,388	128,201	33,118	126,791
Montana	518,357	425,069	75,260	4,769	3,072	10,187
Idaho	611,158	510,811	90,636	6,578	493	2,640
Wyoming	271,524	219,128	45,270	3,671	664	2,792
Colorado	2,017,532	1,687,796	230,378	4,473	84,092	10,794
New Mexico	825,298	707,769	100,921	6,115	895	9,599
Arizona	2,090,101	1,858,602	197,155	5,363	9,421	19,561
Utah	820,155	727,583	78,430	9,030	3,411	1,701
Nevada	843,206	736,014	104,306	1,300	367	1,219
Mountain	7,997,331	6,872,772	922,354	41,298	102,414	58,492
Washington	2,697,610	2,382,221	271,124	20,229	8,095	15,941
Oregon	1,620,846	1,397,146	200,426	12,013	2,074	9,188
California	13,141,139	11,508,111	1,544,940	40,342	40,050	7,696
Pacific	17,459,596	15,287,478	2,016,490	72,584	50,219	32,825
Alaska	269,224	226,404	37,051	423	944	4,402
Hawaii	423,769	365,600	53,205	691	4,273	-
Alaska & Hawaii	692,992	592,004	90,256	1,113	5,217	4,402

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ULTIMATE CUSTOMERS
INVESTOR-OWNED ELECTRIC UTILITIES
By State and Class of Service--Average for Year 1999p

State/Division	Total Ultimate Customers	Residential	Commercial	Industrial	Street and Highway Lighting	Other Customers
Total United States	93,696,883	82,215,172	10,601,349	405,494	269,412	205,456
Maine	686,440	594,540	71,531	2,370	17,991	8
New Hampshire	539,547	460,666	72,239	3,301	2,687	655
Vermont	247,908	214,957	32,247	72	234	397
Massachusetts	2,461,158	2,170,796	275,431	8,125	6,801	5
Rhode Island	464,765	416,195	45,132	2,511	903	24
Connecticut	1,437,077	1,305,152	121,998	5,867	4,059	1
New England	5,836,895	5,162,306	618,578	22,246	32,675	1,090
New York	7,312,255	6,440,474	835,287	7,695	11,550	17,249
New Jersey	3,470,451	3,042,655	404,089	12,987	10,718	2
Pennsylvania	5,304,206	4,694,195	574,642	28,273	6,808	288
Middle Atlantic	16,086,912	14,177,325	1,814,018	48,955	29,076	17,539
Ohio	4,501,717	4,005,442	452,838	28,550	7,282	7,605
Indiana	2,097,263	1,849,353	228,718	14,729	3,801	662
Illinois	4,853,611	4,355,205	473,590	3,548	2,349	18,919
Michigan	3,983,842	3,572,883	394,684	11,519	3,493	1,263
Wisconsin	2,107,316	1,869,891	228,770	3,544	4,489	622
East North Central	17,543,750	15,652,774	1,778,600	61,889	21,415	29,072
Minnesota	1,350,517	1,181,718	154,423	8,349	3,083	2,943
Iowa	1,027,077	877,707	136,517	2,473	1,086	9,296
Missouri	1,744,324	1,518,964	211,619	7,629	2,398	3,714
North Dakota	212,100	176,863	33,423	800	414	599
South Dakota	202,832	168,529	32,598	546	591	568
Nebraska	-	-	-	-	-	-
Kansas	898,315	783,559	107,655	6,583	249	270
West North Central	5,435,165	4,707,339	676,235	26,380	7,821	17,390
Delaware	261,792	234,243	26,924	317	307	1
Maryland	1,979,752	1,775,678	195,919	7,289	862	3
District of Columbia	221,985	195,299	26,652	1	32	1
Virginia	2,517,810	2,228,205	253,821	4,180	2,377	29,227
West Virginia	930,827	803,915	113,220	11,242	1,277	1,172
North Carolina	2,637,527	2,247,449	367,208	11,037	10,038	1,794
South Carolina	1,151,574	971,596	170,326	3,906	3,440	2,307
Georgia	1,952,975	1,705,197	234,470	9,909	3,388	11
Florida	5,975,012	5,282,230	646,552	18,924	5,044	22,262
South Atlantic	17,629,254	15,443,813	2,035,092	66,806	26,765	56,778
Kentucky	1,104,636	944,660	139,820	4,584	5,775	9,796
Tennessee	44,048	39,051	4,623	198	135	41
Alabama	1,295,973	1,107,998	182,160	5,100	713	1
Mississippi	579,100	488,525	83,289	3,812	552	2,922
East South Central	3,023,756	2,580,234	409,892	13,694	7,175	12,760
Arkansas	794,545	675,031	93,409	23,713	141	2,251
Louisiana	1,559,085	1,363,593	165,904	14,373	2,334	12,881
Oklahoma	1,144,078	988,744	128,796	14,347	1,715	10,475
Texas	6,152,667	5,351,675	701,061	50,090	8,415	41,426
West South Central	9,650,376	8,379,044	1,089,172	102,523	12,604	67,033
Montana	354,886	289,994	57,399	4,045	2,862	586
Idaho	506,879	421,164	79,279	5,966	435	15
Wyoming	170,712	139,853	27,197	3,001	538	123
Colorado	1,253,610	1,034,094	134,966	341	84,128	81
New Mexico	573,401	502,521	63,981	5,091	577	1,231
Arizona	1,174,129	1,047,247	120,280	4,785	1,087	731
Utah	617,104	551,310	53,955	8,742	3,070	27
Nevada	790,435	691,648	97,529	1,103	107	47
Mountain	5,441,157	4,677,832	634,587	33,095	92,802	2,841
Washington	1,209,239	1,065,453	130,690	11,122	1,939	35
Oregon	1,196,545	1,031,023	153,293	10,929	1,300	-
California	10,198,819	8,955,331	1,204,886	7,076	31,451	74
Pacific	12,604,602	11,051,807	1,488,869	29,127	34,690	109
Alaska	24,143	19,808	3,367	92	33	844
Hawaii	420,873	362,890	52,939	688	4,356	-
Alaska & Hawaii	445,015	382,698	56,306	780	4,388	844

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REVENUES
TOTAL ELECTRIC UTILITY INDUSTRY
By State and Class of Service
Year 1999p-Thousands of Dollars

State/Division	Total from Ultimate Customers	Residential	Commercial	Industrial	Street and Highway Lighting	Other Revenues
Total United States	$216,711,904	$93,159,896	$70,180,810	$48,508,168	$2,048,289	$4,814,741
Maine	1,139,365	469,629	337,762	315,799	15,143	1,033
New Hampshire	1,095,529	471,136	379,039	227,348	9,850	8,157
Vermont	523,181	226,611	176,767	111,407	4,472	3,924
Massachusetts	4,619,647	1,736,700	1,958,674	834,459	75,842	13,971
Rhode Island	652,754	275,031	247,347	109,307	11,950	9,119
Connecticut	2,959,493	1,306,202	1,143,267	448,889	42,054	19,081
New England	10,989,969	4,485,309	4,242,856	2,047,208	159,310	55,286
New York	13,886,917	5,496,076	6,047,201	1,239,971	184,058	919,812
New Jersey	6,869,089	2,641,853	3,071,109	1,057,660	96,802	1,664
Pennsylvania	9,859,488	4,105,458	2,922,964	2,672,916	95,997	62,153
Middle Atlantic	30,615,494	12,243,388	12,041,274	4,970,547	376,857	983,429
Ohio	10,128,461	3,874,410	2,884,113	3,138,575	69,397	161,866
Indiana	4,888,507	1,916,015	1,150,845	1,768,475	42,195	10,978
Illinois	9,708,118	3,908,114	3,016,490	2,196,566	70,741	516,207
Michigan	7,074,532	2,584,007	2,583,384	1,807,128	79,959	20,054
Wisconsin	3,355,796	1,368,889	929,845	1,002,955	34,001	20,107
East North Central	35,155,414	13,651,436	10,564,676	9,913,798	296,294	729,210
Minnesota	3,224,724	1,272,869	641,314	1,255,214	30,831	24,496
Iowa	2,241,649	993,385	523,875	640,740	22,808	60,840
Missouri	4,162,928	2,001,227	1,398,487	698,493	25,166	39,554
North Dakota	465,397	212,240	139,865	94,011	4,337	14,944
South Dakota	485,969	240,031	146,369	82,866	5,029	11,674
Nebraska	1,218,445	526,789	351,231	248,487	23,003	68,935
Kansas	2,128,103	905,413	748,992	435,001	20,047	18,649
West North Central	13,927,215	6,151,955	3,950,134	3,454,813	131,221	239,092
Delaware	710,879	304,827	223,053	175,552	6,205	1,243
Maryland	4,010,828	1,889,933	1,619,136	428,192	48,106	25,461
District of Columbia	747,856	127,680	584,705	11,467	3,833	20,170
Virginia	5,278,808	2,607,427	1,436,031	763,150	47,128	425,072
West Virginia	1,337,170	569,757	337,277	421,157	7,598	1,381
North Carolina	7,283,486	3,433,998	2,089,701	1,617,761	46,675	95,352
South Carolina	3,984,393	1,766,576	998,774	1,163,887	16,447	38,708
Georgia	7,037,846	3,185,001	2,245,687	1,481,482	67,131	58,545
Florida	13,026,729	7,556,535	4,202,460	886,102	88,444	293,189
South Atlantic	43,417,995	21,441,733	13,736,824	6,948,750	331,566	959,122
Kentucky	3,136,464	1,215,840	659,904	1,113,778	26,609	120,335
Tennessee	5,126,980	2,237,579	1,525,024	1,267,727	93,563	3,087
Alabama	4,379,362	1,896,651	1,129,372	1,304,246	34,018	15,074
Mississippi	2,527,722	1,151,516	697,397	614,833	32,146	31,829
East South Central	15,170,528	6,501,585	4,011,696	4,300,584	186,335	170,326
Arkansas	2,260,104	1,076,331	473,358	668,132	13,741	28,543
Louisiana	4,460,632	1,888,654	1,107,241	1,286,078	34,527	144,132
Oklahoma	2,582,787	1,281,470	689,009	480,561	17,339	114,409
Texas	18,353,352	8,447,646	4,961,704	4,042,265	140,762	760,974
West South Central	27,656,876	12,694,102	7,231,312	6,477,036	206,368	1,048,057
Montana	656,873	241,893	190,283	204,191	7,386	13,119
Idaho	848,726	348,887	254,932	232,567	3,891	8,448
Wyoming	498,960	126,394	127,935	234,966	2,824	6,841
Colorado	2,337,837	942,380	884,186	433,007	38,712	39,572
New Mexico	1,220,382	410,707	434,929	276,494	11,364	86,888
Arizona	4,058,046	1,874,746	1,398,701	642,376	31,616	110,606
Utah	1,059,879	393,863	374,409	259,150	8,668	23,788
Nevada	1,433,103	558,152	359,501	479,922	9,159	26,370
Mountain	12,113,806	4,897,023	4,024,856	2,762,673	113,621	315,633
Washington	3,645,062	1,576,948	1,047,481	889,909	30,346	100,378
Oregon	2,194,185	1,018,920	689,835	456,709	17,932	10,789
California	20,259,672	7,929,323	8,091,910	3,871,468	185,531	181,440
Pacific	26,098,920	10,525,191	9,829,226	5,218,086	233,809	292,607
Alaska	502,824	203,270	213,746	58,557	5,272	21,978
Hawaii	1,062,863	364,905	334,207	356,114	7,636	-
Alaska & Hawaii	1,565,688	568,175	547,954	414,672	12,908	21,978

Note: Total may not equal sum of components due to independent rounding.
p Preliminary.

REVENUES
INVESTOR-OWNED ELECTRIC UTILITIES
By State and Class of Service
Year 1999p-Thousands of Dollars

State/Division	Total from Ultimate Customers	Residential	Commercial	Industrial	Street and Highway Lighting	Other Revenues
Total United States	$168,785,265	$69,159,896	$58,481,689	$36,550,769	$1,433,144	$3,159,787
Maine	1,109,226	456,102	341,653	297,213	13,780	479
New Hampshire	995,837	406,317	354,565	218,136	8,565	8,254
Vermont	434,437	181,427	161,397	85,801	3,494	2,318
Massachusetts	4,055,731	1,514,002	1,866,887	619,756	54,729	358
Rhode Island	655,030	272,971	253,249	108,254	11,124	9,432
Connecticut	2,851,516	1,263,147	1,134,268	405,142	37,726	11,233
New England	10,101,777	4,093,966	4,112,017	1,734,302	129,418	32,074
New York	11,803,292	4,783,626	5,502,677	1,122,552	100,555	293,682
New Jersey	6,856,061	2,602,722	3,120,556	1,042,180	89,129	1,495
Pennsylvania	9,643,134	3,909,330	2,944,182	2,638,127	89,068	62,427
Middle Atlantic	28,302,508	11,295,678	11,567,615	4,802,859	278,751	357,605
Ohio	9,287,741	3,426,132	2,754,731	2,890,351	56,070	160,456
Indiana	4,040,902	1,422,363	1,013,057	1,565,166	34,832	5,484
Illinois	9,104,548	3,507,076	2,918,674	2,093,162	63,547	522,090
Michigan	6,478,459	2,328,165	2,434,365	1,637,181	65,893	12,865
Wisconsin	2,847,712	1,110,437	875,311	819,582	26,279	16,104
East North Central	31,759,363	11,794,172	9,996,139	9,005,442	246,621	716,989
Minnesota	2,175,293	684,988	397,955	1,059,826	20,286	12,238
Iowa	1,715,304	684,573	430,436	531,896	18,903	49,397
Missouri	2,997,915	1,301,080	1,152,345	500,162	20,580	23,748
North Dakota	254,929	103,255	93,968	50,600	3,546	3,560
South Dakota	282,390	112,029	103,925	61,259	3,199	1,979
Nebraska	-	-	-	-	-	-
Kansas	1,505,136	630,671	546,410	310,626	16,250	1,179
West North Central	8,930,967	3,516,696	2,725,037	2,514,369	82,763	92,101
Delaware	548,910	217,732	188,536	137,516	5,045	82
Maryland	3,761,564	1,711,051	1,587,324	402,910	43,380	16,898
District of Columbia	763,631	127,881	599,797	11,467	3,574	20,913
Virginia	4,580,367	2,158,830	1,330,769	631,382	39,498	419,887
West Virginia	1,335,165	563,307	342,974	420,779	7,013	1,093
North Carolina	5,291,926	2,201,160	1,581,378	1,406,138	34,932	68,318
South Carolina	2,627,189	1,021,950	736,651	829,190	11,194	28,203
Georgia	4,537,529	1,593,961	1,679,264	1,205,748	43,918	14,638
Florida	10,154,234	5,870,541	3,367,252	601,019	61,097	254,325
South Atlantic	33,600,515	15,466,413	11,413,945	5,646,149	249,651	824,358
Kentucky	1,728,484	613,410	438,584	544,917	15,058	116,516
Tennessee	79,523	31,839	18,026	26,799	1,112	1,747
Alabama	2,784,037	1,135,139	781,554	852,559	14,559	226
Mississippi	1,294,834	525,327	431,782	305,594	13,231	17,900
East South Central	5,886,878	2,305,715	1,669,945	1,729,869	43,959	136,390
Arkansas	1,470,478	658,282	359,507	426,956	11,128	14,604
Louisiana	3,783,584	1,437,026	947,608	1,229,257	30,701	138,992
Oklahoma	1,876,989	839,473	530,644	380,029	11,691	115,151
Texas	14,454,828	6,240,830	4,117,097	3,430,359	110,786	555,756
West South Central	21,585,878	9,175,612	5,954,857	5,466,600	164,306	824,503
Montana	453,689	152,624	163,335	127,534	6,343	3,852
Idaho	737,235	286,446	231,958	215,494	3,268	70
Wyoming	337,122	71,035	74,246	187,169	2,165	2,507
Colorado	1,433,082	550,258	624,997	223,568	29,126	5,132
New Mexico	879,851	298,147	331,237	197,887	8,805	43,775
Arizona	2,391,404	1,060,599	878,401	399,240	13,575	39,589
Utah	837,883	298,711	282,273	233,914	6,173	16,811
Nevada	1,333,770	530,173	344,132	428,428	8,326	22,711
Mountain	8,404,036	3,247,993	2,930,580	2,013,234	77,781	134,448
Washington	1,639,222	750,967	617,762	255,832	14,020	641
Oregon	1,665,674	757,839	571,627	321,802	14,407	-
California	15,791,731	6,368,487	6,564,462	2,700,184	124,112	34,486
Pacific	19,096,627	7,877,293	7,753,851	3,277,818	152,539	35,127
Alaska	45,184	19,680	14,849	4,028	233	6,193
Hawaii	1,071,533	365,480	342,833	356,099	7,121	-
Alaska & Hawaii	1,116,717	385,359	357,683	360,128	7,354	6,193

Note: Total may not equal the sum of components due to independent rounding.
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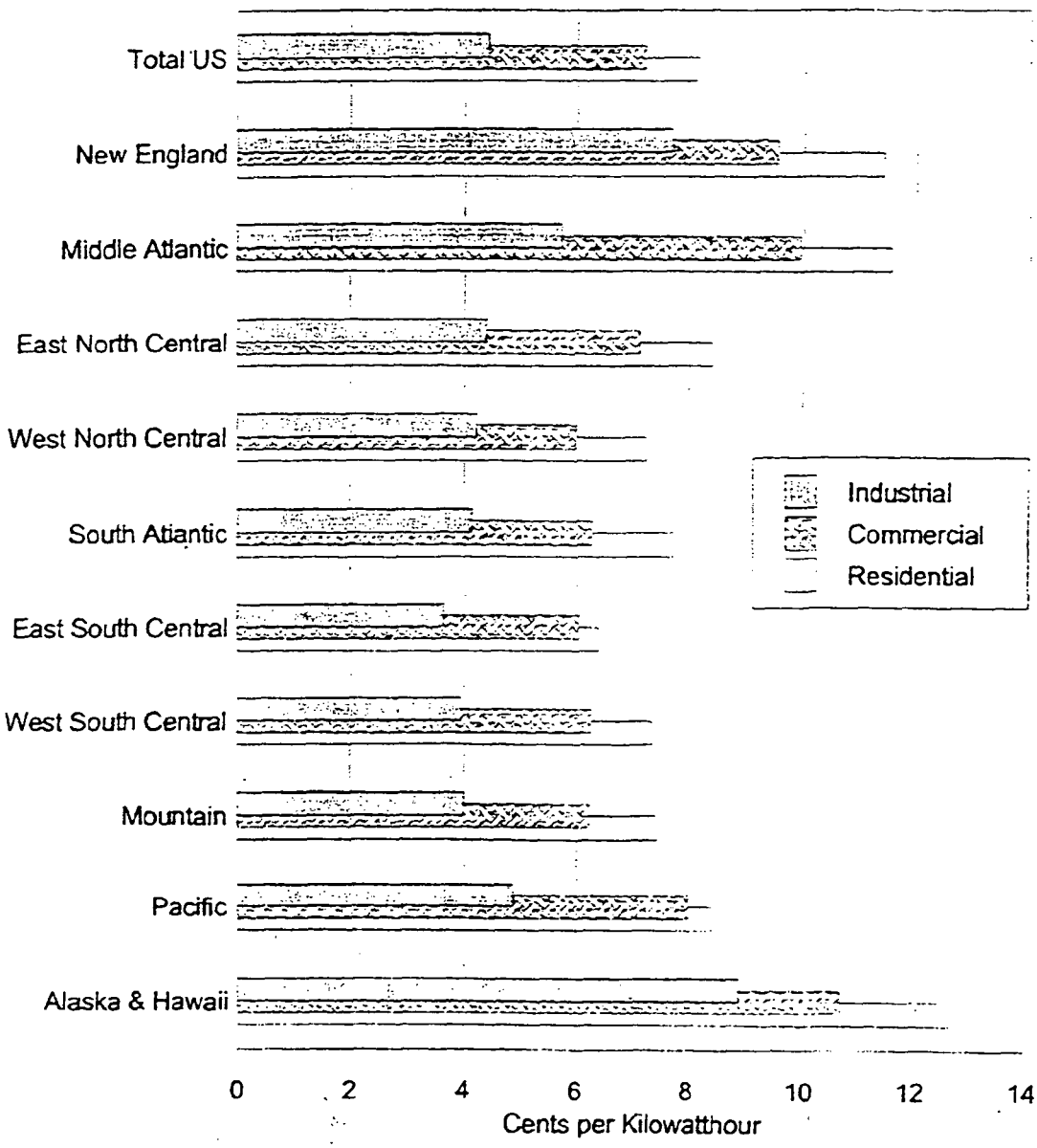
Average Revenue per kWh Sold

Total Electric Utility Industry -1999p



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REVENUE AND USE PER TOTAL ULTIMATE CUSTOMER

By State-Year 1999p

State/Division	Total Electric Utility Industry			Investor-Owned Electric Utilities		
	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer
Total United States	$1,706.36	6.64 ¢	25,708	$1,801.40	6.83 ¢	26,381
Maine	1,583.68	9.50	16,671	1,615.91	9.61	16,816
New Hampshire	1,752.60	11.73	14,937	1,845.69	11.47	16,090
Vermont	1,609.93	9.67	16,643	1,752.42	9.58	18,286
Massachusetts	1,621.62	9.42	17,218	1,647.90	9.46	17,413
Rhode Island	1,382.38	9.42	14,669	1,409.38	9.40	14,995
Connecticut	1,953.82	10.13	19,279	1,984.25	10.28	19,311
New England	1,689.41	9.82	17,205	1,730.68	9.87	17,532
New York	1,613.67	10.55	15,293	1,614.18	11.22	14,388
New Jersey	1,929.21	9.99	19,317	1,975.56	10.01	19,745
Pennsylvania	1,753.93	7.74	22,663	1,818.02	7.71	23,575
Middle Atlantic	1,721.26	9.34	18,428	1,759.35	9.47	18,573
Ohio	1,940.44	6.29	30,868	2,063.16	6.31	32,683
Indiana	1,739.65	5.26	33,074	1,926.75	5.19	37,134
Illinois	1,807.34	7.36	24,562	1,875.83	7.36	25,499
Michigan	1,552.78	6.98	22,262	1,626.18	7.00	23,223
Wisconsin	1,302.78	5.36	24,315	1,351.35	5.36	25,191
East North Central	1,712.13	6.39	26,789	1,810.29	6.42	28,179
Minnesota	1,415.24	5.63	25,137	1,610.71	5.47	29,447
Iowa	1,574.70	5.96	26,413	1,670.08	5.93	28,154
Missouri	1,519.10	5.98	25,387	1,718.67	6.10	28,163
North Dakota	1,353.20	5.63	24,055	1,201.93	5.61	21,436
South Dakota	1,276.61	6.17	20,698	1,392.24	6.33	21,989
Nebraska	1,373.02	5.23	26,254	-	-	-
Kansas	1,594.02	6.18	25,794	1,675.51	5.96	28,131
West North Central	1,483.26	5.84	25,383	1,643.18	5.87	27,982
Delaware	1,929.35	6.77	28,480	2,096.74	6.53	32,088
Maryland	1,839.33	6.88	26,745	1,900.02	6.83	27,835
District of Columbia	3,344.96	7.23	46,254	3,440.01	7.27	47,299
Virginia	1,731.35	5.81	29,787	1,819.19	5.68	32,044
West Virginia	1,408.39	5.00	28,188	1,434.39	4.98	28,800
North Carolina	1,839.02	6.36	28,922	2,006.40	5.94	33,805
South Carolina	1,992.28	5.45	36,544	2,281.39	5.41	42,135
Georgia	1,913.24	6.30	30,371	2,323.39	6.03	38,507
Florida	1,650.92	6.90	23,920	1,699.45	6.85	24,799
South Atlantic	1,786.71	6.34	28,182	1,905.96	6.19	30,776
Kentucky	1,579.66	4.11	38,477	1,564.75	4.01	38,973
Tennessee	1,880.00	5.53	33,991	1,806.38	4.37	41,287
Alabama	1,972.37	5.48	36,000	2,148.22	5.54	38,793
Mississippi	1,885.86	5.89	32,009	2,235.94	6.07	36,859
East South Central	1,833.66	5.20	35,286	1,946.88	5.05	38,525
Arkansas	1,691.48	5.70	29,683	1,850.72	5.89	31,426
Louisiana	2,176.87	5.70	38,216	2,426.80	5.55	43,713
Oklahoma	1,488.26	5.36	27,766	1,640.61	5.07	32,330
Texas	2,052.17	5.98	34,294	2,349.36	5.89	39,894
West South Central	1,966.48	5.85	33,622	2,236.79	5.75	38,917
Montana	1,267.22	4.73	26,785	1,278.41	5.34	23,936
Idaho	1,388.72	3.96	35,106	1,454.46	3.87	37,622
Wyoming	1,837.63	4.25	43,230	1,974.79	3.96	49,911
Colorado	1,158.76	5.86	19,769	1,143.16	5.84	19,571
New Mexico	1,478.72	6.69	22,098	1,534.44	6.76	22,695
Arizona	1,941.56	7.23	26,872	2,036.75	7.85	25,939
Utah	1,292.29	5.08	25,419	1,357.77	4.90	27,726
Nevada	1,699.59	5.68	29,926	1,687.39	5.95	28,336
Mountain	1,514.73	5.84	25,939	1,544.53	5.85	26,391
Washington	1,351.22	3.97	34,014	1,355.58	5.41	25,052
Oregon	1,353.73	4.82	28,065	1,392.07	5.05	27,560
California	1,541.70	8.88	17,360	1,548.39	9.13	16,955
Pacific	1,494.82	7.14	20,927	1,515.05	8.09	18,738
Alaska	1,867.68	9.81	19,046	1,871.54	11.03	16,961
Hawaii	2,508.12	11.37	22,063	2,545.98	11.39	22,359
Alaska & Hawaii	2,259.31	10.81	20,891	2,509.39	11.37	22,066

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REVENUE AND USE PER RESIDENTIAL CUSTOMER

By State-Year 1999p

State/Division	Total Electric Utility Industry			Investor-Owned Electric Utilities		
	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer
Total United States	$836.46	8.17 ¢	10,237	$841.21	8.42 ¢	9,989
Maine	753.91	12.77	5,903	767.15	12.65	6,064
New Hampshire	883.76	13.77	6,417	882.02	13.22	6,672
Vermont	799.95	11.49	6,963	844.02	11.50	7,340
Massachusetts	691.43	10.48	6,596	697.44	10.49	6,647
Rhode Island	650.10	10.79	6,027	655.87	10.59	6,191
Connecticut	951.97	11.82	8,057	967.82	11.70	8,269
New England	780.57	11.43	6,829	793.05	11.35	6,984
New York	723.87	13.51	5,358	742.74	13.74	5,406
New Jersey	845.72	11.27	7,506	856.41	11.11	7,702
Pennsylvania	823.60	9.82	8,388	832.80	9.65	8,627
Middle Atlantic	779.77	11.56	6,747	796.74	11.44	6,965
Ohio	832.67	8.61	9,672	855.37	8.71	9,821
Indiana	766.24	6.93	11,051	769.11	6.94	11,076
Illinois	809.91	9.74	8,315	805.26	9.72	8,285
Michigan	632.25	8.57	7,374	651.62	8.49	7,673
Wisconsin	598.30	7.09	8,434	593.85	7.05	8,426
East North Central	743.79	8.42	8,837	753.49	8.48	8,885
Minnesota	630.42	7.24	8,701	579.65	7.54	7,686
Iowa	805.88	8.29	9,723	780.07	8.57	9,103
Missouri	830.46	7.00	11,858	856.56	7.09	12,082
North Dakota	733.91	6.42	11,439	583.81	6.13	9,519
South Dakota	751.56	7.19	10,456	664.75	7.48	8,892
Nebraska	729.97	6.39	11,432	-	-	-
Kansas	802.74	7.57	10,606	804.88	7.11	11,316
West North Central	757.66	7.24	10,467	747.07	7.41	10,085
Delaware	924.77	9.03	10,241	929.51	8.93	10,409
Maryland	965.22	8.34	11,569	963.60	8.21	11,739
District of Columbia	648.92	7.91	8,201	654.80	7.77	8,426
Virginia	963.98	7.43	12,971	968.86	7.27	13,325
West Virginia	695.00	6.23	11,164	700.70	6.09	11,500
North Carolina	999.21	7.92	12,617	979.40	7.41	13,215
South Carolina	1,033.01	7.42	13,927	1,051.83	7.34	14,324
Georgia	978.51	7.59	12,896	934.77	7.35	12,714
Florida	1,086.12	7.80	13,916	1,111.38	7.71	14,409
South Atlantic	1,003.44	7.72	13,003	1,001.46	7.53	13,291
Kentucky	702.01	5.55	12,649	649.34	5.10	12,735
Tennessee	952.87	6.25	15,253	815.32	4.84	16,833
Alabama	996.83	6.87	14,520	1,024.49	6.97	14,702
Mississippi	1,004.15	6.95	14,451	1,077.38	7.24	14,881
East South Central	911.91	6.38	14,296	893.99	6.36	14,048
Arkansas	929.39	7.42	12,517	975.19	7.73	12,622
Louisiana	1,049.26	6.99	15,001	1,053.85	6.89	15,285
Oklahoma	854.84	6.50	13,158	849.03	6.17	13,759
Texas	1,090.66	7.57	14,415	1,166.15	7.61	15,322
West South Central	1,040.28	7.34	14,167	1,095.07	7.34	14,914
Montana	569.07	6.43	8,852	526.30	6.28	8,375
Idaho	683.01	5.22	13,082	680.13	5.09	13,350
Wyoming	576.81	6.21	9,287	507.92	5.90	8,606
Colorado	558.35	7.37	7,579	532.12	7.37	7,222
New Mexico	580.28	8.75	6,631	593.30	8.38	7,079
Arizona	1,008.69	8.58	11,755	1,012.75	8.94	11,323
Utah	541.33	6.77	7,998	541.82	6.67	8,119
Nevada	758.34	6.92	10,954	766.54	6.89	11,131
Mountain	712.53	7.45	9,559	694.34	7.33	9,473
Washington	661.97	4.97	13,310	704.83	5.60	12,590
Oregon	729.29	5.76	12,660	736.04	5.91	12,431
California	689.02	10.49	6,570	711.14	10.61	6,700
Pacific	688.48	8.42	8,177	712.76	9.14	7,802
Alaska	897.82	11.37	7,895	1,003.65	11.72	8,566
Hawaii	998.10	13.67	7,303	1,007.14	13.42	7,505
Alaska & Hawaii	959.75	12.75	7,529	1,006.95	13.32	7,560

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REVENUE AND USE PER COMMERCIAL CUSTOMER

By State-Year 1999p

State/Division	Total Electric Utility Industry			Investor-Owned Electric Utilities		
	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer
Total United States	$4,962.56	7.21 ¢	68,858	$5,516.44	7.44 ¢	74,127
Maine	4,477.00	10.24	43,725	4,776.29	10.38	46,014
New Hampshire	4,564.07	11.32	40,326	4,908.25	11.21	43,781
Vermont	4,436.20	9.84	45,064	5,004.98	9.93	50,406
Massachusetts	6,316.12	9.09	69,453	6,778.04	9.15	74,108
Rhode Island	5,414.35	9.01	60,104	5,611.28	9.11	61,609
Connecticut	8,688.96	9.73	89,272	9,297.47	9.89	93,958
New England	6,187.57	9.54	64,858	6,647.53	9.62	69,087
New York	6,259.43	11.31	55,327	6,588.01	11.58	56,904
New Jersey	7,438.87	9.81	75,804	7,722.45	9.93	77,776
Pennsylvania	4,892.11	8.03	60,895	5,123.51	8.12	63,091
Middle Atlantic	6,092.45	9.94	61,288	6,376.79	10.04	63,514
Ohio	5,585.50	7.46	74,910	6,083.25	7.60	80,042
Indiana	4,086.89	5.91	69,152	4,429.27	6.06	73,105
Illinois	5,879.70	7.56	77,764	6,162.88	7.73	79,726
Michigan	5,776.25	7.59	76,073	6,167.88	7.74	79,671
Wisconsin	3,451.65	5.71	60,435	3,826.16	5.78	66,238
East North Central	5,210.39	7.12	73,166	5,620.23	7.28	77,208
Minnesota	2,845.76	6.11	46,559	2,577.04	6.36	40,525
Iowa	3,055.52	6.49	47,112	3,152.98	6.77	46,606
Missouri	4,558.40	5.82	78,311	5,445.38	5.98	91,045
North Dakota	2,926.66	6.04	48,493	2,811.45	6.02	46,697
South Dakota	2,966.46	6.43	46,112	3,188.04	6.72	47,432
Nebraska	2,957.20	5.30	55,819	-	-	-
Kansas	4,106.00	6.17	66,543	5,075.57	5.92	85,725
West North Central	3,584.77	5.99	59,855	4,029.72	6.16	65,396
Delaware	5,969.30	6.87	86,827	7,002.56	6.72	104,271
Maryland	7,581.21	6.63	114,319	8,101.94	6.69	121,028
District of Columbia	21,828.60	7.22	302,191	22,504.56	7.30	308,116
Virginia	4,838.04	5.46	88,665	5,242.94	5.42	96,709
West Virginia	2,928.29	5.40	54,190	3,029.26	5.45	55,559
North Carolina	4,283.37	6.18	69,320	4,306.49	5.91	72,907
South Carolina	3,748.14	6.07	61,765	4,324.95	6.05	71,522
Georgia	5,872.20	6.82	86,143	7,161.96	6.83	104,826
Florida	4,933.44	6.21	79,488	5,206.02	6.21	83,849
South Atlantic	5,128.90	6.27	81,859	5,606.57	6.23	90,076
Kentucky	2,942.07	5.16	57,057	3,136.77	4.89	64,128
Tennessee	4,179.01	6.11	68,437	3,899.42	4.95	78,788
Alabama	3,763.00	6.36	59,167	4,290.49	6.44	66,656
Mississippi	3,869.26	6.43	60,138	5,184.13	6.38	81,295
East South Central	3,750.69	6.04	62,051	4,074.11	5.91	68,905
Arkansas	3,438.38	5.74	59,922	3,848.74	5.65	68,171
Louisiana	5,228.53	6.38	82,011	5,711.78	6.44	88,669
Oklahoma	3,370.45	5.50	61,276	4,119.98	5.30	77,755
Texas	4,866.69	6.39	76,162	5,872.66	6.46	90,866
West South Central	4,596.01	6.25	73,594	5,467.32	6.28	87,034
Montana	2,528.36	5.71	44,259	2,845.61	5.76	49,407
Idaho	2,812.71	4.22	66,612	2,925.83	4.22	69,414
Wyoming	2,826.05	5.11	55,301	2,729.88	5.01	54,453
Colorado	3,837.90	5.51	69,648	4,630.77	5.41	85,629
New Mexico	4,309.60	7.59	56,815	5,177.07	7.79	66,453
Arizona	7,094.44	7.54	94,037	7,302.95	8.28	88,156
Utah	4,773.81	5.55	86,004	5,231.69	5.50	95,155
Nevada	3,446.60	6.32	54,509	3,528.51	6.49	54,377
Mountain	4,363.68	6.23	70,062	4,818.09	6.28	73,543
Washington	3,863.47	4.67	82,688	4,726.94	5.76	82,120
Oregon	3,441.85	4.87	70,746	3,728.99	5.06	73,664
California	5,237.69	9.39	55,757	5,448.20	9.60	56,746
Pacific	4,874.42	8.01	60,868	5,207.88	8.58	60,715
Alaska	5,768.95	9.22	62,602	4,410.43	14.54	30,335
Hawaii	6,281.49	11.97	52,458	6,476.01	12.11	53,486
Alaska & Hawaii	6,071.09	10.72	56,622	6,352.50	12.19	52,101

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REVENUE AND USE PER INDUSTRIAL CUSTOMER

By State-Year 1999p

State/Division	Total Electric Utility Industry			Investor-Owned Electric Utilities		
	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer	Avg. Annual Revenue per Customer	Avg. Revenue per kWh Sold	Avg. Annual kWh Use per Customer
Total United States	$85,485.41	4.43 ¢	1,930,929	$90,138.87	4.58 ¢	1,968,954
Maine	124,185.32	6.38	1,946,333	125,397.32	6.47	1,937,358
New Hampshire	67,466.48	9.32	723,989	66,083.48	9.41	702,451
Vermont	140,014.19	7.19	1,946,799	1,199,715.94	6.80	17,650,493
Massachusetts	58,802.36	8.09	726,671	76,279.06	8.03	950,409
Rhode Island	42,987.45	7.52	571,470	43,108.75	7.56	570,282
Connecticut	73,998.07	7.61	971,814	69,048.54	7.84	880,853
New England	69,377.78	7.70	901,388	77,959.70	7.71	1,011,202
New York	135,923.24	4.89	2,777,172	145,885.70	5.80	2,514,400
New Jersey	80,532.30	7.85	1,025,615	80,247.53	7.92	1,013,472
Pennsylvania	91,675.47	5.57	1,644,779	93,309.79	5.60	1,665,138
Middle Atlantic	96,680.25	5.73	1,687,544	98,108.47	6.03	1,625,747
Ohio	100,808.98	4.26	2,367,561	101,238.98	4.28	2,376,065
Indiana	97,019.78	3.90	2,484,516	106,266.56	3.88	2,737,465
Illinois	404,955.71	5.06	8,010,915	590,005.90	5.08	11,611,416
Michigan	135,265.66	4.97	2,719,778	142,123.41	4.96	2,862,556
Wisconsin	163,913.75	3.81	4,297,466	231,280.85	3.80	6,079,367
East North Central	133,490.93	4.40	3,030,813	145,508.95	4.42	3,294,068
Minnesota	112,792.95	4.41	2,560,154	126,933.29	4.41	2,881,120
Iowa	168,325.48	3.95	4,265,446	215,088.95	3.93	5,473,657
Missouri	70,317.39	4.38	1,606,284	65,558.37	4.62	1,420,528
North Dakota	49,830.94	4.26	1,170,597	63,266.63	4.29	1,474,623
South Dakota	54,315.22	4.39	1,236,397	112,205.01	4.58	2,452,379
Nebraska	29,465.81	3.56	828,147	-	-	-
Kansas	38,972.15	4.41	883,162	47,188.39	4.43	1,065,140
West North Central	72,162.25	4.23	1,704,823	95,313.20	4.34	2,197,077
Delaware	305,695.71	4.60	6,645,061	433,397.34	4.41	9,827,154
Maryland	56,356.29	4.10	1,374,770	55,277.99	4.05	1,363,524
District of Columbia	11,341,967.70	4.33	261,680,713	11,383,621.46	4.37	260,673,361
Virginia	144,601.37	3.77	3,831,341	151,038.35	3.72	4,058,531
West Virginia	37,299.36	3.74	998,155	37,427.77	3.76	994,867
North Carolina	129,198.65	4.58	2,821,426	127,402.87	4.53	2,813,708
South Carolina	242,303.12	3.65	6,644,387	212,270.39	3.82	5,561,856
Georgia	124,951.80	4.18	2,987,486	121,684.92	4.27	2,851,935
Florida	36,719.85	4.76	771,976	31,759.48	4.67	680,229
South Atlantic	89,023.68	4.15	2,143,506	84,515.75	4.17	2,026,506
Kentucky	160,492.31	2.88	5,567,217	118,868.36	2.85	4,169,097
Tennessee	732,839.48	4.12	17,781,343	135,049.51	3.57	3,780,629
Alabama	200,249.74	3.85	5,199,958	167,170.48	3.94	4,243,840
Mississippi	135,078.01	4.17	3,238,829	80,174.54	4.42	1,812,952
East South Central	217,922.93	3.64	5,979,640	126,321.39	3.57	3,535,500
Arkansas	25,484.51	4.12	618,812	18,005.33	4.43	406,221
Louisiana	83,020.40	4.11	2,020,704	85,524.77	4.09	2,090,424
Oklahoma	29,982.67	3.61	830,060	26,488.58	3.55	746,729
Texas	57,365.40	3.90	1,471,775	68,484.17	3.82	1,792,289
West South Central	50,522.32	3.94	1,283,445	53,320.94	3.90	1,367,184
Montana	42,815.87	3.16	1,355,776	31,526.41	4.12	765,752
Idaho	35,356.28	2.74	1,288,468	35,997.43	2.73	1,320,812
Wyoming	64,004.70	3.35	1,911,741	62,374.56	3.26	1,915,910
Colorado	96,808.45	4.29	2,257,192	654,716.48	4.27	15,315,683
New Mexico	45,217.47	4.43	1,021,571	38,870.94	4.49	865,869
Arizona	119,789.54	5.07	2,363,067	83,441.76	5.77	1,445,131
Utah	28,700.15	3.42	839,978	26,756.53	3.36	797,402
Nevada	369,115.81	4.52	8,168,882	388,424.67	4.97	7,808,639
Mountain	66,896.35	3.99	1,675,142	60,832.52	4.12	1,477,277
Washington	43,992.13	2.61	1,687,615	23,003.23	4.24	542,421
Oregon	38,017.45	3.46	1,098,643	29,444.35	3.69	797,897
California	95,965.27	6.51	1,473,216	381,583.87	6.28	6,080,565
Pacific	71,889.96	4.89	1,470,974	112,535.50	5.67	1,983,747
Alaska	138,560.37	7.09	1,954,553	43,946.81	7.22	608,342
Hawaii	515,705.72	9.31	5,537,899	517,598.76	9.38	5,519,919
Alaska & Hawaii	372,520.66	8.92	4,177,464	461,910.97	9.35	4,942,459

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CONSOLIDATED BALANCE SHEETS - YEAR ENDED DECEMBER 31st
INVESTOR-OWNED ELECTRIC UTILITIES
Millions of Dollars

ASSETS	1999p	1998r	Percent Change
Gross Property and Equipment	$643,977	$632,247	1.9 %
Less Accumulated Depreciation	256,183	250,655	2.2
Net Property in Service	387,793	381,592	1.6
Construction Work in Progress	13,199	11,038	19.6
Other Property	4,014	3,366	19.3
Net Nuclear Fuel	4,298	4,572	(6.0)
Net Property and Equipment	409,305	400,568	2.2
Total Investments	108,593	86,640	25.3
Total Current Assets	96,875	81,336	19.1
Total Deferred Costs	121,226	103,295	17.4
Total Assets	$735,998	$671,839	9.5 %
CAPITALIZATION AND LIABILITIES			
Common Stock	$78,652	$72,448	8.6 %
Retained Earnings	64,755	50,016	29.5
Other Common Equity	38,384	32,831	16.9
Total Common Equity	181,791	155,295	17.1
Total Preferred Stock	27,294	24,434	11.7
Total Long-Term Debt	227,762	203,332	12.0
Total Capitalization	436,846	409,509	6.7
Current Liabilities			
Total Current Liabilities	137,586	107,963	27.4
Total Other Liabilities and Deferred Credits	161,565	154,367	4.7
Total Capitalization and Liabilities	$735,998	$671,839	9.5 %

Note: Total may not equal sum of components due to independent rounding.
* Includes non-electric utility plant.
( ) Denotes negative value.
p Preliminary. r Revised.
Source: EEI Finance Department.

CONSOLIDATED INCOME STATEMENTS - YEAR ENDED DECEMBER 31st

INVESTOR-OWNED ELECTRIC UTILITIES

Millions of Dollars

	1999p	1998r	Percent Change
TOTAL REVENUES	$328,902	$295,229	11.4 %
Operating Expenses			
Energy Expenses	106,596	93,891	13.5
Operation and Maintenance	84,820	73,983	14.6
Depreciation and Amortization	30,337	28,848	5.2
Other Operating Expenses	46,800	39,422	18.7
Taxes (not income) - Total	13,198	13,611	(3.0)
Income Taxes: Federal and Other	11,804	11,258	4.8
TOTAL EXPENSES	293,556	261,013	12.5
OPERATING INCOME	35,347	34,216	3.3
Total Other Income	5,700	1,719	231.6
Income Before Interest Charges	41,047	35,935	14.2
Net Interest Expense	18,549	17,267	7.4
Net Income Before Preferred Distributions	22,498	18,668	20.5
Total Preferred Distributions	1,778	1,574	13.0
NET INCOME ON COMMON	20,720	17,094	21.2
Extraordinary Items - Total	(1,508)	(1,795)	(16.0)
Income after Extra Items	19,212	15,299	25.6
Basic Earnings per Share	$2.19	$1.76	24.4
Basic Earnings Per Share After Extraordinary Items 1/	$2.03	$1.58	28.5
Diluted Earnings per Share	$2.19	$1.76	24.4
Diluted Earnings per Share after Extraordinary Items 1/	$2.03	$1.57	29.3
Diluted Average Shares (Millions)	9,475	9,736	(2.7)
Annualized Common Dividend	14,188	14,067	0.9
Common Dividends Per Share	$1.50	$1.45	3.4

Note: Revenues are adjusted for intra-industry sales for resale of electricity. Total may not equal sum of components due to independent rounding. Percent changes may reflect rounding.

1/ Extraordinary items include the cumulative effect of a change in accounting principle.

() Denotes negative value.

p Preliminary. r Revised.

Source: EEI Finance Department.

PUBLIC UTILITY LONG-TERM FINANCING
INVESTOR-OWNED ELECTRIC UTILITIES
By Year, Type of Issue, Purpose and Type of Utility
Thousands of Dollars

	1999	1998	1999	1998
	ELECTRIC UTILITIES		ALL OTHER UTILITIES*	
LONG-TERM DEBT:				
New Money	$10,176,334	$9,215,430	$10,591,126	$15,982,760
Refunding	3,251,202	7,270,122	2,500,000	6,540,000
Total Long-Term Debt	13,427,536	16,485,552	13,091,126	22,522,760
PREFERRED STOCK:				
New Money	612,000	1,079,000	580,000	1,082,500
Refunding	1,050,000	1,159,605	-	-
Total Preferred	1,662,000	2,238,605	580,000	1,082,500
COMMON STOCK:				
New Money	-	1,693,631	2,347,809	804,350
Refunding	-	616,386	862,600	1,312,000
Total Common	-	2,310,017	3,210,409	2,116,350
TOTAL CAPITAL:				
New Money	10,788,334	11,988,061	13,518,935	17,869,610
Refunding	4,301,202	9,046,113	3,362,600	7,852,000
Total Capital	$15,089,536	$21,034,174	$16,881,535	$25,721,610

	1999	1998	1999	1998
	GAS UTILITIES+		TOTAL UTILITY FINANCING	
LONG-TERM DEBT:				
New Money	$1,434,600	$1,935,500	$22,202,060	$27,133,690
Refunding	120,000	2,140,000	5,871,202	15,950,122
Total Long-Term Debt	1,554,600	4,075,500	28,073,262	43,083,812
PREFERRED STOCK:				
New Money	-	100,000	1,192,000	2,261,500
Refunding	-	-	1,050,000	1,159,605
Total Preferred	-	100,000	2,242,000	3,421,105
COMMON STOCK:				
New Money	22,206	2,236,525	2,370,015	4,734,506
Refunding	-	3,300	862,600	1,931,686
Total Common	22,206	2,239,825	3,232,815	6,666,192
TOTAL CAPITAL:				
New Money	1,456,806	4,272,025	25,764,075	34,129,696
Refunding	120,000	2,143,300	7,783,802	19,041,413
Total Capital	$1,576,806	$6,415,325	$33,547,877	$53,171,109

Classification as to type of utility is based upon predominant source of revenue.

** "Other Utilities" are water, transit, telephone and telegraph, and does not include railroads.*

+ Includes gas pipe line companies.

Note: Includes negotiated sales of pollution control bonds: 1999, $556 million; 1998, $551 million.

Source: PUFT, Inc. "Public Utility Financing Tracker".

CONSUMER PRICE INDEX - ALL URBAN CONSUMERS
1982-1984 Equals 100

Year	All Items	Food and Beverages	Housing	Transportation	Gas and Electricity	Electricity
1999	166.6	164.6	163.9	144.4	120.9	126.5
1998	163.0	161.1	160.4	141.6	121.2	127.4

Source: U.S. Department of Labor. Bureau of Labor Statistics. "CPI Detailed Report" and "Monthly Labor Review".

TABLE 83

PRODUCER PRICE INDEX
FINISHED GOODS AND SELECTED INDUSTRIAL COMMODITIES
1982 Equals 100

Year	Finished Goods	Metal and Metal Products	Machinery and Equipment	Furniture and Household Durables	Fuels and Related Products and Power
1999p	133.1	124.6	124.3	131.7	80.6
1998r	130.7	127.8	124.9	131.3	75.3

Year	Coal	Gas Fuels	Electric Power	Crude Petroleum	Petroleum Products Refined
1999p	90.5	85.4	129.0	50.3	60.9
1998r	93.6	76.6	129.9	35.7	51.3

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r Revised.
Source: U.S. Department of Labor. Bureau of Labor Statistics. "Producer Price Indexes".

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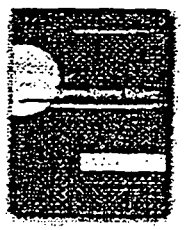

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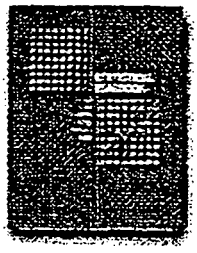

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Model State Legislation

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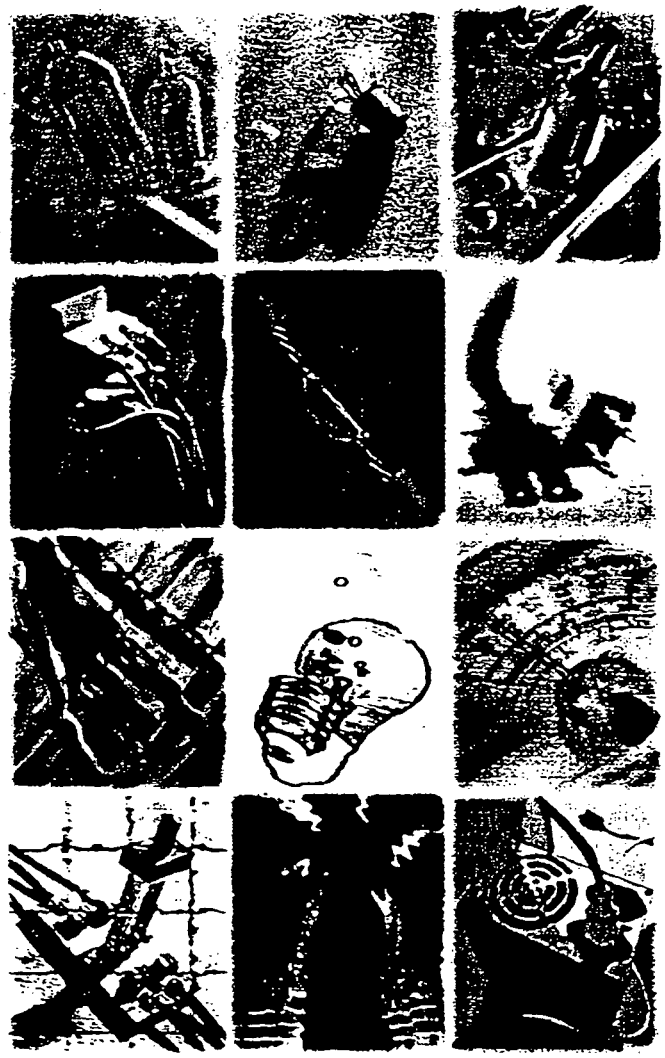

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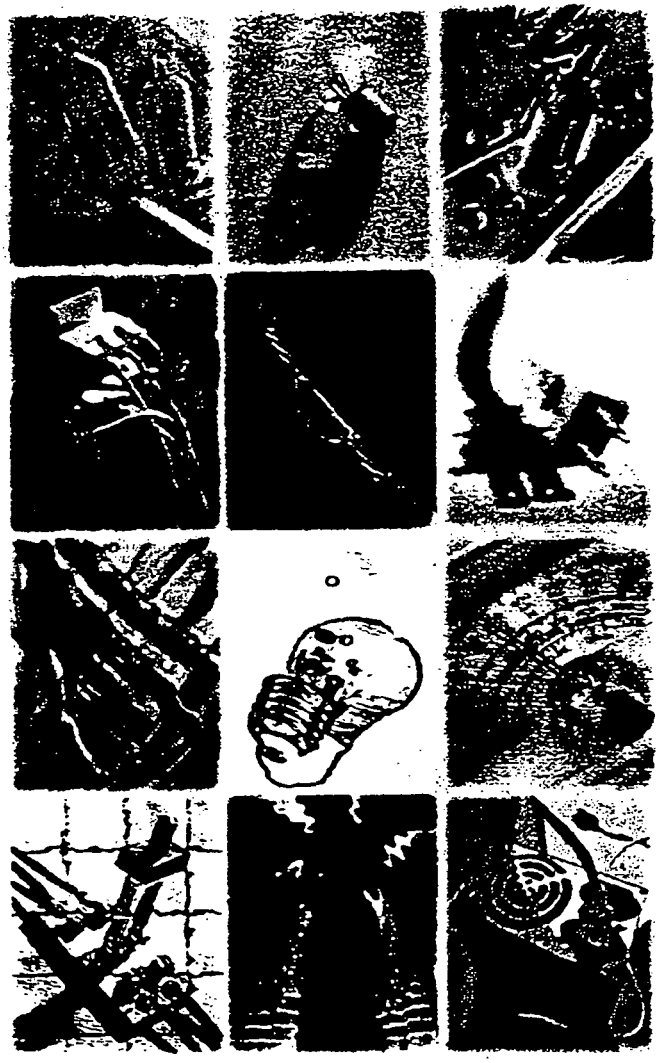

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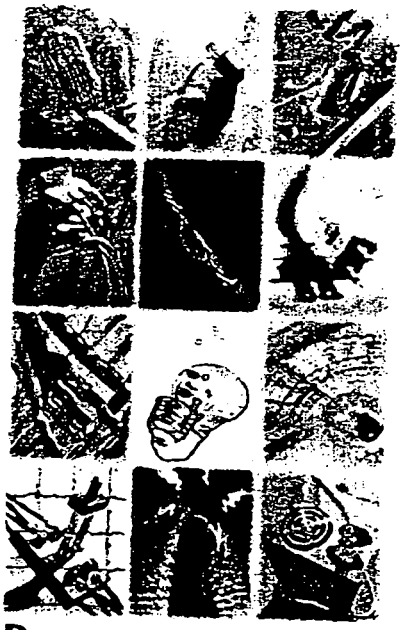

Restructuring

by
National Consumer Law Center
for

AARP

State Legislation Department
Utility Issues Team
601 E Street, NW
Washington, DC 20049
www.aarp.org

The views expressed in this publication are for information, debate and discussion.

1981

DOE003-0625

About AARP

AARP is the nation's leading organization for people age 50 and over. It serves their needs and interests through legislative advocacy, research, informative programs, and community services provided by a network of local chapters and experienced volunteers throughout the country. The organization also offers members a wide range of special membership benefits, including *Modern Maturity* magazine and the monthly *Bulletin*.

The AARP State Legislation Department provides assistance and resources to the Association's volunteers and staff to expand their capacities for influencing state policy-making. The department's goal is the adoption of state public policy that addresses the broad needs of older persons within an intergenerational context that promotes the well-being of all.

The Utility Issues Team of the State Legislation Department seeks, through legislative and regulatory advocacy, to protect the rights of residential utility consumers to reliable utility services, fair rates, privacy, fair marketing of services by utilities, adequate information on available services, and proper representation before state utility commissions.

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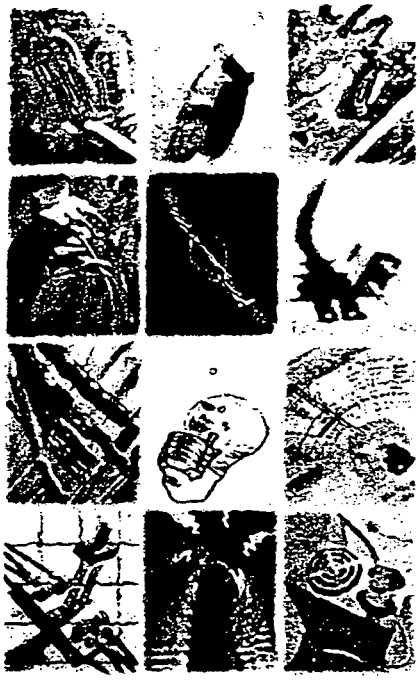

1 Introduction

This model state statute on electric industry restructuring reflects the policy recommendations of AARP on retail electricity competition. As volunteers or friends of AARP, you can take this language to your state representatives, assemblymen, or senators and ask that this bill be used as the basis for electric industry restructuring in your state. You also can use specific sections of this model to strengthen existing bills, or restructuring legislation, in your state.

The policy recommendations of the Association reflect the input and views of AARP's members across the country, through their state, regional, and national development of policy positions. These are the principles that have guided the development of this model statute.

AARP stands at the forefront of consumer organizations, presenting the perspective of the older person, the individual resi-

1985

DOE003-0629

dential consumer. Small consumers face uncertainty with the onset of retail electricity competition. They require protection from higher rates, consumer scams, deteriorating customer service, and other risks of so-called "industry restructuring." This model state statute includes provisions to meet the risks that AARP has identified for the senior household, the small consumer, and the individual consumer at risk in a newly competitive market.

The model statute takes strong pro-consumer or pro-market positions on all the major issues that arise in the typical restructuring debate, such as (a) immediate rate reductions, (b) 50/50 sharing between customers and utilities of uneconomic costs ("stranded costs"), (c) mandatory divestiture of generation assets, (d) limits on the extent of sales a utility's marketing affiliate may make in the utility's service area, (e) required warrants for utility stock in exchange for any stranded cost recovery, and (f) strong consumer protections and protections against abuse of market power.

In some cases, the position reflected in the model language is stronger than language that has been included to date in statutes passed by the 13 states with restructuring legislation. Taken together, they present the strongest responsible pro-consumer positions. In legislation to date, a strong pro-consumer provision in a restructuring statute may be traded-off for a more pro-utility or pro-industry position. It will require judgment and an assessment of the situation in your state to determine where, if at all, to compromise these positions.

To Restructure or Not?

This bill is written as if your state has basically decided to introduce retail competition into the sale of electricity. The fundamental model is that the poles and wires would still be owned by one company, which would thus have a monopoly over the transmission and distribution of power in a certain geographic region (a "service area" or "service territory"). However, the actual electricity running through the poles and wires and being sold to the consumer would be sold by one of a number of competitive firms, probably separate from the utility owning the poles and wires. When policy makers talk about "restructuring" the electric industry, they usually mean introducing this retail competition into the sale of the electricity.

This model statute differs from most that have been passed to date in that it does not assume absolutely that the state will adopt retail competition. Like the Nevada statute, it sets up a list of conditions for whether the state regulatory agency will open up the power market to retail competition.

The reason for making the introduction of competition conditional is that there is a concern among many consumer advocates over the impact of retail electric competition. For example, competition exposes small consumers to the effects of "market segmentation," under which larger customers are the first to reap the rewards of the market.

The introduction of competition makes the most sense in states with high prices. Most of the states with utilities with very high electricity prices, relative to the national or regional averages, have already declared that competition should be introduced. The remaining states are starting to take a wait-and-see attitude. If prices are relatively low in your state, you may well question the wisdom of changing the industry structure that has achieved this result.

Your state regulatory agency or local utility should be able to provide comparative price information, so you can see where your state and your local utility rank in terms of electricity prices for various classes of customers. The U.S. Department of Energy's Energy Information Administration (DOE EIA) has a web site—www.eia.doe.gov—where a detailed summary of utility financial statistics is posted. You can get a sense of the relative rates of your state's utilities and others' from this web site.

If your state is on the path to implementing retail competition, this model statute provides a way to cooperate with that movement, while putting the burden on the pro-competition forces to demonstrate that their approach will benefit all consumers. It also tries to capture the needed protections for consumers against the risks of the market, and the risks that no real market will develop.

Consumer Protection

Many older persons must live on low and limited incomes, and AARP's policies reflect this reality by including provisions to protect those of low or fixed incomes. Older persons, along with other residential consumers, can find the chore of comparison shopping

a daunting task. Hard-sell marketers, and even scam artists, can prey on the unwary in any market, especially the market for a necessity like electricity. Supplier license requirements, consumer protections, anti-slamming, and anti-cramming provisions are among the protections reflected in the model statute.

Lower Rates—True Competition

The promise of lower rates for small consumers may not be delivered if some companies can corner the market for electric power and use their market dominance to keep out competitors. Thus, the model statute contains strong language to prevent any company, including today's monopoly utilities, from having undue market power in a competitive electric industry.

Total electricity prices for many years will be dominated by the so-called "stranded costs" of today's utilities. These uneconomic costs were rung up by the utilities to build power plants or contract for power at prices higher than the cost of new facilities today. The model statute does not assume that utilities will be fully paid for 100 percent of these uneconomic costs. Rather, the statute provides for a sharing of costs. In addition, in exchange for ratepayers funding half of the utilities' stranded investments, the statute provides for a sharing of the company's prospects for future profits. Much as the federal government received stock warrants from Chrysler as a condition of that bail-out, the model statute provides for shares in the utility's future good fortune, in exchange for customer payment of the uneconomic costs of the past.

The statute contains a number of other provisions designed to protect consumers from the risks of electric industry restructuring. While you may not be able to see every provision enacted, the model language should help in strengthening the protections enjoyed by the consumer.

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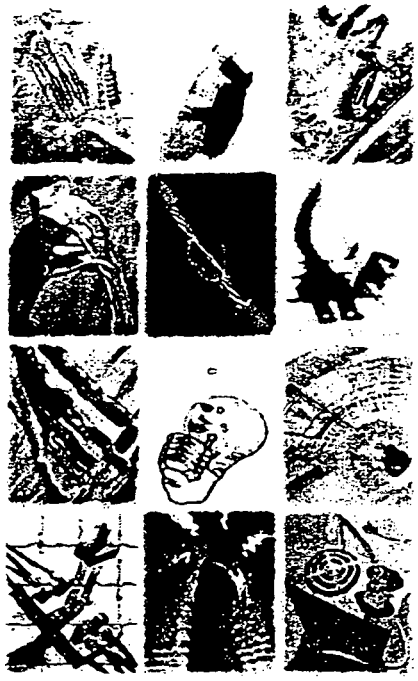


2 How This Handbook Is Organized

This guidebook should help you to understand how the model state statute was put together. It will also explain some of the choices that were made in selecting these particular provisions.

Most of the language for the statute has been drawn from statutes passed by the 13 state legislatures that have enacted electric industry restructuring as of the summer of 1998. The fundamental organization of the statute, and many of the specific provisions, are modeled on the Maine restructuring statute. Footnotes for each provision will help you locate the closest language for that section from an actual statute that has been passed into law. Some provisions have been offered in various states, but not yet enacted. Other provisions were drafted by the authors to deal with issues important to older persons. In these cases, the provisions try to present "state-of-the-art" protections for the small and vulnerable consumer.

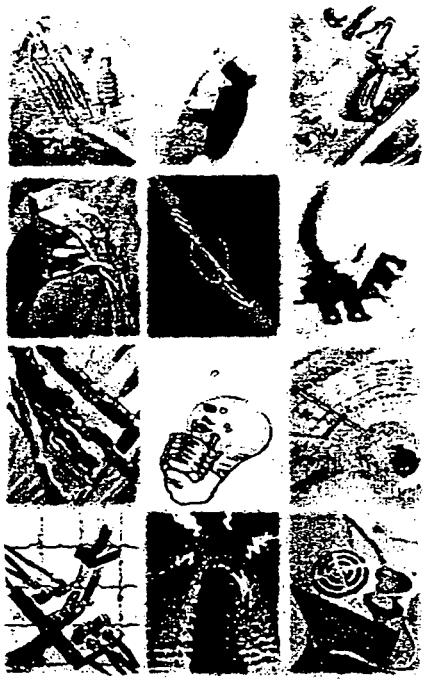
The handbook goes through the model state statute section by section. Sometimes it will not be clear why a certain provision is included. Other times, the statutory language is so technical that its meaning is not instantly apparent. The handbook will discuss these clauses and explain the more arcane provisions. Ideally, once you have read through the statute and this handbook, you should have a pretty good idea what the various sections are intended to accomplish.

There are three appendices to the model bill. Appendix I provides model language for the "retail marketing area" (RMA) concept championed by some consumer advocates in Ohio. The RMA concept is a way of introducing new electricity suppliers to consumers at the beginning of competition, while ensuring that consumers do not face higher bills. Appendix II sets out an alternative to Section XXX-19, the stranded cost recovery section. The stranded cost provisions in Appendix II are modeled on the Connecticut statute.

Appendix III is a list of the citations for state unfair and deceptive acts and practices (UDAP) statutes. In any electric restructuring legislation, advocates need to ensure that the UDAP statutes will apply to all electricity suppliers in the state.

Each state has its own way of writing bills, as well as a slightly different way of regulating public utility electric companies. The language used for different regulatory concepts or agencies in each state is a bit different, so the language used in the model statute is the most commonly used around the country. Also, the most common forms of industry regulation in place today and the most common forms of industry organization found around the country are assumed. But, of course, you will have to take this model and lay it next to your state's public utility code (or compilation of statutes on the regulation of the electric industry) to locate the minor differences in language and conform this model to your state's specific details of regulation.

The supplement at the end of this handbook examines the issue of competitive billing and metering. This model statute does not include language to make either of these services competitive.



3 Section-by-Section Description of Model Statute

Sec. 1. Findings

It is customary in a major piece of legislation to include findings of "legislative fact." In these findings, the legislature sets out its assumptions about the situation facing it that provide the context in which it is proposing the new policies of the statute. These are useful for those trying to understand why the legislature is taking the step of proposing new policies. Legislative findings are used by courts when they interpret the statute.

The findings proposed in this model statute are drawn from the New Hampshire statute. That state was facing a situation in which rates were among the highest in the country. A state with relatively lower electricity prices would have to determine what other factors exist that prompt the state to introduce retail competition.

- The findings proposed here do not include the strong language included in some existing restructuring statutes declaring retail

competition to be the best way to organize the electricity industry. It should not be necessary to make such a declaration in order to justify moving to a system of retail competition. Further, the proposed statute contains standards for determining whether to open certain aspects of the market to competition. The existence of these standards is a recognition by the drafters that policy makers cannot be certain of the future—the introduction of retail competition may not bring the benefits the legislature expects for it. For this reason, the findings do not declare that competition will definitely work to lower rates and improve services.

Sec. 2. [TITLE and CHAPTER OF CODE]

Sec. XXX-1. Purpose

Sec. XXX-2. Statement of Principles

Section 2 begins the restructuring statute proper. The material in this section will be transferred to the code of legislation when it is passed, and become part of the general laws of the state. Thus, a numbering system within a numbering system is required. The provisions that will become part of the code of the state are indicated here in the form "Sec. XXX-#." The first sections are the purpose of the legislation and the statement of principles.

No piece of legislation can cover every situation that will come up when the statute is implemented. It is important to spell out the principles the legislature wants the regulatory commission, the courts, and other agencies of government to follow when giving life to the specifics of the Act. This will help ensure that the will of the people is carried out when other branches of government interpret the general terms of the bill.

Principles to Protect Consumers, Not Abstract Principles

Most restructuring statutes passed to date have something like a statement of principles. Most of the principles set out in the model statute appear in some form in existing restructuring legislation. However, there are important differences between the principles suggested here and the average restructuring bill.

For example, most existing restructuring statutes take for granted that opening up the electricity generation market to retail com-

petition will produce tremendous benefits for consumers. They also appear to assume that competition for retail purchases of electricity will not produce greater risks than the present structure of regulated monopolies. That is, they take the benefits of any market called "competitive" on faith. And they assume, in effect, that what is good for the competitive marketers is good for the customers. Get it right for the competitors and the rest will take care of itself, is the message.

By contrast, the statement of principles here stresses issues of concern to consumers. It does not look at restructuring from the point of view of potential competitive electricity sellers, or even the large industrial consumer. Rather, it looks at restructuring from the point of view of the small consumer.

The principles hold up a standard of performance for the newly regulated industry. Affordable service, universally available, consumer protection from unfair practices, lower rates and true competition, reliable and high quality service—these are what consumers want from an electricity industry. Put together, these principles constitute a set of conditions that any organization of the electricity industry (monopoly regulation, wholesale competition, public power, retail competition, etc.) must meet.

"Burden of Proof" on Market Proponents

The model statute's principles set out a test for whether a new industry structure will be beneficial to consumers. In effect, the model statute puts the burden on proponents of change to demonstrate that their new model will achieve the conditions required by customers.

These conditions, set out in the fifth principle in proposed code Section 2, must be met before the commission can declare that any part of the electricity business should be opened up to competition, and price regulation removed. The model statute does take a favorable view towards the prospect of retail competition for generation sales. There are a number of references in the findings, principles, and statement of purpose to this view. On the other hand, some aspects of the industry, like metering and billing, are not treated as presumptively competitive, and proponents must prove their case before the commission can open the door to retail metering and billing competition.

However, even retail generation competition does not get a free ride. Proponents of this new approach will have to prove to the commission that the conditions for competition are met before regulation of generation sales prices is eliminated in favor of market forces. This is essentially the approach being taken in Nevada, and the conditions for competition are largely drawn from that statute.

Sec. XXX-3. Definitions

Every major statute like this—changing how a whole aspect of industry and government will function—requires a definitions section.

The model statute has a number of new terms that are used frequently in the Act. The definitions section will need to distinguish the various types of providers in the marketplace, since some requirements and opportunities apply to less than all the different providers.

A New Marketplace Needs a Scorecard to Identify the Players

This issue of distinguishing the players also applies to distinctions the definitions draw between existing (vertically integrated) electric utilities, and their successor companies that provide only transmission or distribution service. The statute also provides a basis for distinguishing transmission and distribution monopolies from affiliates who wish to provide competitive supplies of electricity after restructuring, to the extent this will be permitted, if at all. This is necessary in order to discuss and resolve the question of whether existing utilities may continue to sell power in the restructured world, and if so, whether they must set up a separate affiliate.

Issues of market power and the different obligations and opportunities that apply to affiliated competitors versus regulated monopoly poles and wires companies will be important in the new structure. For this reason, the definitions go to some lengths to separate out these different types of entities. This model statute assumes that utilities will be severely limited in continuing to perform both the monopoly transmission and distribution functions, and the competitive supply functions.[1]

[1] Model Section XXX-15 requires most generation-related assets to be sold, and forbids monopoly transmission and distribution utilities from owning such generation assets. Model Section XXX-16 severely limits the extent to which a large electricity utility that provides transmission and distribution service can provide

As a result of the interrelated restrictions of the statute, a company that today owns generators, transmission lines and a distribution network (and sells power it generates to its customers) will in the future be permitted to retain the transmission and distribution network, own only a severely limited amount of local generation for restricted uses, and sell power it buys at wholesale to only a small portion of the retail customers in the area where it has its monopoly distribution network. Even those sales will have to be made by a completely separate affiliate with a strict code of conduct preventing the monopoly poles and wires company (and its customers) from cross-subsidizing the competitive marketing firm to the detriment of the distribution utility customers and the competitive electricity providers against whom the affiliate will compete.

Aggregation—Definition Limited to Value-driven or Customer-driven Entities

Some statutes distinguish various types of players in the new competitive markets, for example, including definitions for brokers, marketers, aggregators, generation suppliers, and the like. Aggregators are defined in the statute because the regulatory commission and the utilities are given specific responsibility under the Act to help consumers voluntarily aggregate their loads to buy electricity in the competitive market (Section XXX-4(C)).

All others who are in the various businesses relating to selling power to retail customers are gathered together under the definition "competitive electricity supplier." There is no need to break these suppliers out into separate groups in this model statute. The obligations placed on competitive suppliers in the statute do not turn on the distinctions between brokers (who would not ordinarily own the power they are arranging to sell to customers), marketers (who similarly might not take title to the power), and generation suppliers who actually have title to power they resell, and so forth.

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marketing services within its service territory. Model Section XXX-16 also limits the proportion of the region's generation a firm or its affiliates can control and still market power in the state. And Section XXX-16 provides that to the extent the corporation is permitted to continue selling electricity, instead of just delivering it for others, it must do so via a separate subsidiary.

Under this model, the obligations of a competitive electricity supplier attach when an entity is in the business of selling power to retail customers. If the firm is a broker, it may be selling someone else's power. Nonetheless, brokers, and all others who sell at retail, must be licensed (Section XXX-9) and must observe the consumer protection requirements of the statute (Sections XXX-10 through XXX-14).

Sec. XXX-4. Retail Access; Deregulation of Prices

Section XXX-4 is the core statement of the terms for introducing retail competition in electricity sales. It provides that customers will have the right to buy energy from competitive electricity suppliers, and utilities must deliver that power to the customers over their poles and wires, if the regulatory commission finds the conditions for competition have been met.

The conditions for competition are essential as a check to prevent jumping into competition without thinking through the pros and cons for the state, and making sure that competition will actually function in the relevant market to deliver the benefits intended:

> **Sec. 2(E) Conditions for Competition.** Regulation of prices is necessary where competitive forces will not adequately discipline a market, where competition will jeopardize the safe and reliable operation of the integrated electricity network, and where segmentation of the market by providers will result in unfair discrimination in prices to different classes of customers. Accordingly, the commission shall determine that an electric service is a potentially competitive service only if it finds, after a public hearing, that provision of the service by alternative sellers:
>
> (1) will not harm any class of customers;
>
> (2) will decrease the cost of providing the service to residential and small commercial customers in this state and also increase the quality or innovation of the service to customers in this state;
>
> (3) is a service for which effective competition in the market is certain to develop;

(4) will advance the competitive position of this state relative to surrounding states; and

(5) will not otherwise jeopardize the safety and reliability of the electric service in this state.

This formulation requires the regulator to be willing to express more certainty about the future market conditions than the Nevada statute language from which it is drawn. In principle, it is impossible to know the future. However, if the language merely requires a finding of "likelihood" of producing the benefits claimed, then there is no rigor to the standard. Thus, the effort here is to force some hard thinking about claims for the new market structure.

The process set out in the statute for evaluating whether the conditions are met requires the regulator to answer a series of questions about the structure of the competitive market and the likely impact of that structure on the extent of true competition and the resulting prices for services in that market.

Transition Dates and Transition Periods—Short or Long?

The statute provides for a target date for competition to begin, a few years after passage of the statute, so long as the regulatory commission has found that the conditions of competition are met. As of the transition date, most aspects of pricing would no longer be controlled by regulators.[2]

The transition period is intended to give time to set up the new market mechanisms that do not exist today. This includes the

[2]Because it is important in creating a working market, most statutes, and this model statute, provide that regulators will continue to have some measure of control over the terms and conditions of selling electricity, which includes not only consumer protections such as advance notice of termination and limits on the grounds for termination, but also limits on fees for switching, limits on late fees and unfair deposits, limits on the price that a designated default supplier can charge, and licensing limits on who may enter the business. The model statute, like other restructuring statutes, also requires clear apples-to-apples information for consumers about electricity price, among other things. But in a retail competition market, other than in the few situations explicitly set out, retailers will be free to ask what price they want for their power, and customers will be free to decide whether to buy it at that price, with no regulator to dictate what the price will be.

divestiture of a utility's generation assets from its monopoly poles and wires (transmission and distribution) business, as provided later in the model statute.[3]

A transition period is also useful to existing utilities that benefit from having more time under the current monopoly regulation regime to write down their uneconomic assets and otherwise prepare for competition. For this reason, a long transition period is generally understood to be favorable to the utility, and worth something to them in the ultimate negotiation over the shape of the bill. On the other hand, customers who do not want to move quickly to a retail market may also see a benefit in a longer transition period. In such a case, of course, the question of whether the bill provides for rapid rate reductions becomes more important.

To summarize, utilities will want to keep current rates in place for as long as possible, and so will favor a longer transition period and a small or non-existent obligation to reduce rates.[4] They may be willing to make concessions on eventual market power controls (such as mandatory divestiture of the generation business from the transmission and distribution business) in order to protect themselves from having to cut rates sharply, or open their systems to retail competition soon.

[3] If your state decides not to require divestiture, this reason for an extended transition period falls away. There may be other reasons—particularly if your state does not expect competition to come of its own accord to small customers, and the model chosen is thus one where everyone has the right to competition soon—but small customers will, in practice, take their power from the incumbent utility or the winner of the bid to provide standard offer power, at regulated standard offer rates.

[4] Be on the lookout for what appears to be a rate reduction, but actually is only a cost deferral. Some utilities may willingly agree to drop rates today by 10 or 15 percent, but only if they can defer any losses that causes them out to the future. This approach, unfortunately, has a great deal of appeal to some politicians, because they can claim to be getting a rate reduction for their constituents, and bank on the hope that no one will trace back later rate increases (or later inability to reduce rates to levels they should have reached) to the restructuring statute's plan for loss deferrals. There are a couple of ways that such schemes are structured. For further information, contact Jerrold Oppenheim, National Consumer Law Center, Boston, Massachusetts.

Big customers and competitive marketers will be eager for a short transition period, so that they can quickly begin doing business with one another.[5] Small customers will differ on whether they see retail competition as more of a promise than a threat. Those who think they will do as well as the big customers will agree that quick movement to competition is more important than near-term rate reductions. The majority of small customers, who see the risks as larger than the rewards, will want a long transition period with guaranteed and substantial rate reductions beginning as soon as possible. Both big and small customers will want to have strong protections against the incumbent utility keeping unfair control over the market, and preventing true competition from arising in the new world without price regulation.

In some states, the transition period to competition is separated from the stranded cost recovery period. And, conceivably, both may be separated from the period during which the present utility (or a supplier chosen by competitive bid) must offer a "standard offer" package of service to customers who do not wish to shop in the competitive market. However your state handles this question, the statute needs to be clear. And you need to understand the implication of the different periods for these various functions.

Aggregation

Section XXX-4 places considerable importance on what has come to be known as "aggregation." Aggregation is a term that does not have a single, clear meaning across the country and among electricity restructuring experts. Generally, it means grouping customers together and supplying electricity to them (as opposed to each individual customer making a one-on-one contract with an electricity generating plant to provide electricity to that customer).[6]

[5] It can be argued that big customers do not care who they do business with, and would just as soon keep buying supply from the incumbent utilities, but they want to have the threat of competitive supply alternatives alive so that they can bargain their prices down.

[6] Because of the way that electricity is delivered, if a customer is plugged into the grid, the customer gets power from the pool of all the output of all generators operating at the moment the customer turns on an electricity appliance.

The proposed model statute defines aggregation as follows:

> **B. Aggregate.** "Aggregate" means to organize individual electricity consumers with common characteristics, such as geography, affiliation, or some other characteristics in common, into an entity for the purpose of purchasing electricity on a group basis.
>
> **C. Aggregator.** "Aggregator" means an entity that aggregates individual customers for the purpose of purchasing electricity.

This model statute, then, uses the aggregation concept to refer to a grouping of customers around a common characteristic. An example might be a municipality that gathers together residents and businesses in the town and arranges purchases of electricity for those who live or do business in the town. Another example would be an automobile club that adds electricity purchasing services to its list of member benefits, and buys electricity for group members who choose to participate, or gets a discount from a chosen supplier who then contracts directly with participating members.

The model statute goes beyond permitting aggregation and includes a requirement that the regulatory commission and the regulated distribution utilities encourage and facilitate aggregation of retail customers. This provision is included to respond to a growing sense that for-profit electricity suppliers are not likely to find it profitable to market to small customers (residential and small commercial accounts). Aggregating customers around common characteristics, by affinity groups, municipal aggregation, or otherwise, is one option for enabling small customers to combine their purchasing power even where mass market suppliers do not see an opportunity to sign up individuals from the group on a retail basis.

In addition to the municipal aggregation and voluntary customer aggregation noted in this model statute, there are other forms of aggregation that have been suggested around the country. For example, the Connecticut statute provides that the state purchasing office will obtain electricity from competitive suppliers not only for the state's uses, but also for low-income customers receiving home energy assistance.

There are a number of ways that aggregation can be accomplished. In effect, the competitive electricity suppliers, the default

suppliers, the municipal aggregation suppliers, those who offer the standard offer, and indeed anyone who sells at retail, all "aggregate" the loads of their various customers. The special push mandated by the statute is for consumer-initiated aggregation, particularly aggregations of small consumers. This is because there are greater barriers to consumer-initiated aggregation than to the grouping together of customers by other means.

In the case of standard offer, default, or municipal aggregation service, there is a ready-made group of customers that a supplier can make sales to, which lowers marketing costs and makes it more likely that competitors will come into the market to sell. In the case of marketers selling to individual customers, they are motivated to gather such customers together and take responsibility to supply them because the marketers will earn their revenues in that fashion. Consumer-initiated aggregators that need assistance in organizing themselves are likely to be made up of small consumers. Much as in the case of food cooperatives, such entities will require large investments of time and commitment to overcome the lack of funding and capital.

Sec. XXX-5. Reduction in Residential Rates; Standard Offer

Section XXX-5 is in some ways the heart of the model statute. This section provides that residential customers will get a 15 percent rate reduction within nine months of passage of the statute, and eventually a further 10 percent reduction, for a total rate reduction of 25 percent, whether they shop for power in the competitive market.

A number of states have imposed rate reductions (California—10 to 20 percent; Massachusetts—15 percent after divestiture; Illinois—10 to 20 percent, depending on the utility, by 2006). The reduction proposed in the model statute is steep and quick: 15 percent shortly after the statute takes effect, moving to a 25 percent reduction within a few years. It is likely that the amount of any near-term rate reduction will be a hotly contested issue in negotiations.

Steep Rate Cuts—Evaluating the Possibilities

You will want to know whether the scale of rate reduction proposed here is within the boundaries of reasonable expectations, considering the situation of the utilities in your state. The lower

your rates are today—relative to a regional average, for example—the more difficult it would be to achieve rate reductions along the lines proposed in this model bill (although even in the highest-cost states steep rate reductions may threaten the financial integrity of the utility). It will be helpful to have an idea of how these reductions compare to the proposals the utilities and others are willing to live with. Be on the lookout for proposals that would reduce rates today but have the effect of requiring ratepayers tomorrow to make the utility whole for any losses the near-term rate reductions cause it to experience.

To get a sense of these parameters, you may want to tap into the analysis being done in your state by the utility consumer advocate (if any), a utility watchdog group, the commission staff, or the major industrial customers regarding the financial situation of the utility, and the impact of various rate reductions. These will help put into perspective the likely claims of the utilities that they cannot withstand the level of rate reductions being proposed. It is also possible to trade an easing of the rate reduction demand for other concessions that may be more palatable to the utilities.

Note also that if the utility loses money in order to provide a rate reduction, it is similar in effect to a disallowance of so-called stranded costs—the uneconomic costs of power plants owned by the utility. Consumers care about rates, but they are mobilized by concerns about "bailing out" the utilities. On the other hand, utilities need to show Wall Street that they are recovering their capital costs, but might be able to agree to rate reductions, gambling that they can make up the shortfalls later.

Because the future is uncertain, there are many forecasts that are plausible. This in turn leaves room for bargaining about what will be fixed as policy into the future, and all sides may come away betting that their vision of the likely future will prove true and benefit them.

In the case of the model statute, the required bill reductions come off the total bill, not just the energy portion of the bill. Be careful when reading the language of statutes proposed in your state that the percentage reductions are stated in apples-to-apples terms. Utility bills historically are made up of base rates, and fuel or energy charges, and sometimes other surcharges or adjustments. If the statute talks in terms of reductions to base rates, this

is not as good a deal for the consumer—base rates can make up as little as one third of the bill, depending on the circumstances.

Standard-offer Bid Process

The model statute provides for a competitive bid process to select an alternate supplier to provide the energy portion of the bill.[7] It is unlikely that such a bid process will result in a supplier willing to sell energy at a sufficient discount that the total bill will be reduced by the target percentage. For example, if energy is one third of the bill, to get a 10 percent reduction on the total bill, the energy portion would have to be reduced by 30 percent.

The model statute provides that the distribution utility shall continue to provide generation services under the standard offer if no competitive seller comes forward to offer service at a price low enough to produce the required rate reductions.[8] The distribution utility need not own the generation supplies it uses to provide this power.[9] Alternate stranded cost recovery language should be used in case the bids come in too high (see Appendix II).

Financial Integrity—Warrants against a Brighter Future

Such large rate reductions could in some cases jeopardize the financial integrity of the distribution utility. To provide for this risk, the model statute first permits the utility to petition the regu-

[7] The Massachusetts statute has utilities providing the electricity themselves unless they run into problems financially; the Maine statute bids it out and sees what happens. The choice to make here is competition or lower rates. Maine opted for certain competition in the hopes that over the long run it would produce lower rates. Massachusetts went for certain lower rates, with the expectation that competition would emerge eventually.

[8] It is conceivable that a middle ground could be provided for in the statute, whereby if a competitive supplier bid to provide at least part of the standard-offer reduction, that supplier could win the bid, and the distribution utility would make up the balance of the rate reduction off the monopoly transmission and distribution rates.

[9] It could buy power on the wholesale market, through a mix of short-term and long-term contracts, and some reliance on the spot market, to make up its supply portfolio for the standard-offer sales. Utilities will resist being forced to divest their generation yet retain an obligation to serve. Remember, however, that if utilities hold on to their generation supplies, they may have undue market power. Also, a divestiture sale is one way of putting a market value on generation, for use in determining the amount of any stranded costs.