



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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January 14, 2000

The Honorable **Thomas E. Bliley**
Chairman, Committee on Commerce
United States House of Representatives
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

Dear Chairman Bliley:

The Federal Trade Commission is pleased to have this opportunity to provide an analysis of the Electricity Competition and Reliability Act (H.R. 2944 or the Act) which was approved by the House Subcommittee on Energy and Power on October 27, 1999. The Commission is responding to your November 30, 1999 letter seeking agency views on H.R. 2944 as an official request of a Congressional Committee.⁽¹⁾

The Commission welcomes the opportunity to provide comments that may assist the Committee. At the outset, the Commission agrees that energy deregulation holds the promise of providing significant consumer benefits. Competition among market participants will ordinarily provide consumers with the benefits of lower prices, higher quality products and services, and continued innovation.

We recognize that H.R. 2944 attempts to address difficult and complex policy and public interest issues that span a myriad of concerns, from appropriate environmental and labor policy to federal and state jurisdictional roles. Our comments reflect our expertise in competition and consumer protection issues, and do not purport to address other issues that lie outside our competence. From this perspective, the Commission does not support H.R. 2944, as presently drafted, because it is unlikely to reach the Committee's desired result.

Introduction

The purpose of H.R. 2944 is "to benefit American electric consumers through lower electric rates, higher quality services, and a more robust United States economy by encouraging retail and wholesale competition in electric markets and to provide consumers with reliable electric service...."⁽²⁾ As noted in your request, the Commerce Committee plans to consider the Act soon, and the focus will be on "achieving a seamless national retail marketplace for electricity."

The Commission has considerable experience in assessing appropriate competitive market frameworks for enhancing consumer welfare involving a number of industries. In the electric industry, the Commission has provided testimony on market power and consumer protection issues to various Congressional Committees. The staff of the Commission has responded to requests for comments from the Federal Energy Regulatory Commission on aspects of wholesale competition and on the appropriate analytical framework for analyzing mergers. The staff also has responded to requests for comments from a number of states on how to evaluate the impact of existing market power

and to provide consumer protection as they introduce retail competition in the electric power industry. Moreover, the Commission has reviewed several vertical mergers affecting the electric industry that have raised antitrust concerns.⁽³⁾ Finally, the Commission has further assisted states by conducting a public workshop in September 1999, that focused on market power and consumer protection issues of interest to state regulators as they introduce competition into retail electric power markets in their states.

In undertaking these efforts we have noted that the starting point for competition in the electric power industry is not the level playing field characteristic of a newly developing market.⁽⁴⁾ Instead, vertically integrated, regulated monopolies have controlled the generation, transmission, and distribution of electric power in state-authorized geographic territories. In this context, as regulation is reduced and competition is encouraged, there is a significant potential that these utilities will use their existing market power in generation, transmission and distribution services to deter competition that could benefit consumers. For example, one or a few generating firms might obtain and be able to exploit their market dominance in areas of the country where transmission congestion occasionally creates restricted geographic markets for electric energy (load pockets). This concern is heightened because generation and transmission services often are substitutes: market power in generation services often can be remedied by additional transmission capacity and vice-versa (*i.e.*, a transmission constraint often can be alleviated by securing generation services closer to the ultimate destination). In addition, consumers have not previously had choices of electric power suppliers, and thus consumer protection issues need particular attention.

Based on these important market observations and the agency's general expertise, the Commission and the staff have developed four principles that apply to the analysis of competition and consumer protection policies in a deregulated electric power industry. We briefly discuss these principles here, and apply and explain them further in evaluating whether H.R. 2944 will be able to meet its stated goals in a timely manner.

First, traditional antitrust analysis recognizes that the benefits of competition are most likely to accrue to consumers when markets operate unburdened by substantial and durable market power. Accordingly, economically practicable policies that lessen existing market power in electric power markets by broadening product markets, expanding geographic markets, and lowering entry barriers are likely to enhance consumer welfare. This is particularly true where high concentrations of ownership of generation may allow the exercise of market power even after competition is first introduced in wholesale and retail markets.⁽⁵⁾ In light of this possible situation, tools to identify and remedy horizontal market power in generation are critical to increased competition in electric power markets.

Second, market power at the transmission level is likely to give a vertically integrated firm the incentive to exercise that market power. Indeed, the Federal Energy Regulatory Commission (FERC) very recently concluded that, even when vertically integrated utilities have functionally unbundled their generation assets from their transmission assets, they have a continuing opportunity to engage in undue discrimination in access to their transmission facilities and thus to impede competitive markets.⁽⁶⁾ In addition to discrimination against competitors seeking access to their transmission facilities, vertically integrated firms may exercise their market power through cross-subsidization in favor of their unregulated affiliates. Both forms of behavior will likely reduce the degree of competition facing the integrated firm's generation assets, although continued regulation of the firm's transmission assets may well prevent the full exercise of transmission market power. These two forms of anticompetitive behavior, plus the costs of regulation, may be significant enough in some circumstances that separating the operation (and/or ownership) of the transmission grid from the ownership of affiliated power marketing interests should be the preferred solution to address horizontal market power at the transmission level.

Third, the benefits of a competitive electricity market will be substantially reduced unless the information presented to consumers through advertising and other means is accurate and non-deceptive. In determining whether an advertising representation is deceptive, the Commission relies on the principle that if at least a substantial minority of consumers takes a particular message from an advertisement, and if that message is likely to mislead consumers to their detriment, then the advertisement is deceptive.⁽⁷⁾ Moreover, consumer confidence in any competitive market is based on informed choices. Accordingly, the information provided to consumers also must be substantiated using a reasonable basis, and the substantiation must be verifiable by third parties, including the government. As a practical

matter, consumers cannot verify for themselves the attributes of the electric power they purchase (e.g., they cannot verify that the electricity they are purchasing is generated through wind power).

Fourth, uniform disclosure of terms, prices and relevant attributes of electric power also will help ensure that consumers are able to make well-informed choices and thereby reap the benefits of competition. Consumers have had no prior experience in choosing an electric service provider. A uniform disclosure containing standardized information that electric service providers would use to inform consumers in their advertising -- similar to what has been done with nutrition labeling on food or energy efficiency labels on appliances -- will help ensure that consumers are not misled or confused. It also would facilitate national marketing of electric power.

As previously noted, the Commission does not believe that H.R. 2944, as presently drafted, will attain its stated goals. The letter discusses why Congress may wish to provide FERC, in consultation with the federal antitrust agencies, the tools to analyze and address (if necessary) existing market power in the electric power industry that cannot be effectively addressed by the antitrust laws. In addition, the discussion highlights those provisions that we believe may not further the goals of the Act. Finally, the letter briefly highlights those provisions of the Act that are likely to enhance consumer welfare through increased competition or consumer protection. Where H.R. 2944 provides the Federal Trade Commission with new authority, we have suggested language amendments to help ensure that we fully implement Congress' intent. The staff of the Commission is available to provide technical assistance to Congress as the legislation is considered further.

I. Provisions Needed to Address Existing Horizontal Market Power

As the Commission previously testified before Congress,⁽⁸⁾ outside the merger context, concerns with horizontal market power focus on the possibility that one or a few generating firms might obtain and be able to exploit market dominance in areas of the country where transmission congestion occasionally creates restricted geographic markets for electric energy (load pockets). Market concentrations of electric power generation may be high in some areas, in part because state and federal regulators assumed that rate and service regulation would remain in place indefinitely and thus may have assumed there was no need for antitrust scrutiny to restrain the growth of horizontal market power. As regulations are relaxed for generation and retail trades of electricity, however, existing market power in generation may prevent consumers from realizing the full benefits of competition.

Current antitrust laws are not designed to address the mere possession of market power or the legitimate acquisition of or increase in market power through lawful regulatory processes. Instead, the antitrust laws are designed to address increases in market power brought about by mergers or unfair methods of competition, such as predation, discrimination, and raising rivals' costs. Although individual states may be able to address these issues, the success of these efforts may be limited by the difficulty of identifying market power problems, distinguishing between predatory and vigorous competitive conduct, and tracing the effects of that conduct. This is especially true in markets where market power, conduct, and effects all tend to be interstate (regional) in nature. In addition, a state acting alone will not be able to implement the most effective remedies, which are likely to be regional.

In light of these issues, Congress may wish the Act to authorize FERC specifically to work in consultation with the Federal Trade Commission and the Department of Justice to identify, evaluate, and (where necessary) remedy horizontal market power that might impede the competitive operation of the industry. The federal antitrust agencies can significantly contribute to a market power assessment by FERC in the following ways.⁽⁹⁾ First, the analytical methods and principles that the federal antitrust agencies use to analyze mergers and unfair methods of competition are equally applicable to evaluating an existing generation market power problem in a wholesale or retail electric market. Second, the remedies applied to address the unlawful accretion or exploitation of market power in merger and non-merger cases can also be applied to alleviate existing market power in the electric power industry. Based on information provided at our workshop⁽¹⁰⁾ and examination of the industry, it is apparent that potential entrants and many states are concerned about this issue and recognize the benefits the federal antitrust agencies can provide.

Although H.R. 2944 contains a provision (Section 104) that could mitigate possible generation market power by alleviating regional transmission constraints through regional transmission siting agencies, expansion of the transmission grid is likely to remain a difficult, time-consuming, and uncertain process. This difficulty stems from the many local environmental, health, and aesthetic considerations involved in the siting approval process for transmission expansion. Accordingly, Federal Trade Commission and Department of Justice expertise may prove even more valuable when addressing existing generation market power, which has the potential to remain a serious competitive concern.

II. Areas That Might Benefit from Substantial Modification

A. Retail Consumer Protection Issues

1. Section 302: Consumer Privacy

Section 302 of the Act requires the Federal Trade Commission to promulgate rules requiring any person who obtains "consumer information" in connection with the sale or delivery of electric energy to a retail electric consumer to obtain that consumer's prior written approval before using, disclosing, or permitting access to that information. This "opt-in" choice provides consumers with a high level of privacy protection by prohibiting (with exceptions) disclosure of certain information without prior consumer approval, while permitting disclosure of aggregated consumer information without consumer authorization.

We have several concerns with the intended scope, purpose, and operation of this provision. First, it is unclear what kinds of consumer information the Act intends to protect. "Consumer information" is defined as "information that relates to the quantity, technical configuration, type, destination, or amount of use of electric energy delivered to any retail electric consumer."⁽¹¹⁾ This definition is ambiguous in several ways. The distinction between "quantity" and "amount of use" is not apparent. It is unclear to what "technical configuration" and "type" refer, because electricity is a homogeneous product. Although consumers under retail competition will have the ability to purchase power generated by particular types of sources -- for example, hydro power -- this choice will not affect the type of power delivered to them. Further, it is unclear whether "destination" refers to the name and address of the retail electric consumer. Congress also may wish to consider whether there are other types of information available to local distribution companies as a result of their historical relationship as the monopoly provider of electric power that may need protection.

Second, uncertainty about the intended scope of protected information arises from the exceptions to the requirement of consumer authorization. For example, the scope of the second exception appears to be so broad as to cover most anticipated uses of consumer information. Specifically, under Section 302(b)(2), access to consumer information is permitted "[t]o initiate, render, bill, or collect for the sale or delivery of electric energy to retail electric consumers or for related services." This section may be read to allow access to consumer information in order to market electricity and "related services"⁽¹²⁾ to consumers.

Third, Congress may wish to consider the relative sensitivity of information about consumers' electric power usage in determining whether an opt-in choice is appropriate. In other words, one size may not fit all. There may be reasons to subject such information to a high level of protection given the monopoly status of local distribution companies (that is, consumers will not have a choice of local distribution company from which to purchase electric power generation services).⁽¹³⁾ On the other hand, there may be instances where over-protective privacy provisions may unduly limit marketing of generation services and thereby hinder competition.

Based on these concerns, Congress may wish to provide the Commission flexibility in its rulemaking proceeding to determine the appropriate form of consent for release of the information, regardless of the level of privacy protection that Congress determines is appropriate for any piece of information.⁽¹⁴⁾

2. Section 303: Electric Supply Unfair Trade Practices

Subsections (a) and (b) of Section 303 require the Federal Trade Commission to promulgate rules addressing slamming (unauthorized supplier switching) and cramming (unauthorized billing). Although slamming and cramming are egregious practices meriting specific rules, the Commission suggests that its rulemaking authority here be permissive rather than mandatory. At this point, it is unclear what the extent of the problem will be -- as well as to what extent marketers will engage in self-regulation that obviates the need for federal rules. In addition, it is likely that states will craft legislation or promulgate rules as part of state restructuring of this industry. Therefore, Congress may wish to revise both subsections (a) and (b) to state that the FTC "may promulgate rules" to address slamming and cramming.

Subsections (a)(2) and (b)(2) prohibit changes in a retail electric consumer's supplier and charges to a consumer's bill except pursuant to FTC rules. This structure is problematic for two reasons. First, it does not account for the possibility that federal regulations may be unnecessary. Second, if federal regulations are necessary, these subsections do not account for the time period before any FTC rules can be issued. As a consequence, the statute might inadvertently prohibit even legitimate switches in suppliers or charges to electricity bills, simply because rules on permissible switches or charges would not yet exist. Competition would be enhanced and consumers would be better protected if the statute prohibited slamming and cramming independently of compliance with FTC rules.

Section 303(b), the cramming section, directs the Commission to promulgate rules for obtaining "the consent of a retail electric consumer for purchase of goods and services other than those expressly authorized by law or any agreement for the purchase of electric energy or related services entered into by the electric consumer and for the assessment of penalties for violation of these rules." The purpose of this section is to prevent firms from charging consumers for products or services that the customers have not authorized. This purpose could be more directly accomplished if the Act referred to consent for the "billing for," rather than for the "purchase of." In addition, the addition of commas around the phrase "other than ... electric consumer" and the insertion of the word "by" before "any agreement" would clarify the section's meaning.

B. Competition Issues

1. Section 401: Electric Company Mergers and Disposition of Property

Strong antitrust merger review is critical in guiding the evolution of the industry toward lower electric rates and higher quality services.⁽¹⁵⁾ Section 401 of the Act requires FERC to act on a merger within 180 days and if no action is taken by FERC within that time, the merger is deemed approved. So strict a deadline may restrict FERC's ability to review fully the effects on competition that complex utility mergers might have as well as provide incentives to the merging parties to delay the review process in the hope that FERC will not meet the deadline. In addition, we believe that competitive markets could benefit if FERC would regularly consider the effect of a proposed merger on retail electric generation markets in light of the regional nature of those markets. Giving FERC this authority is important because individual states often lack the legal authority or resources to examine the likely effects of a merger that are regional in scope and may require region-wide remedies. Thus, we believe that tying FERC's hands by imposing such a tight deadline on its merger review process may not promote and enhance competitive markets.

2. Section 103: Authority to Establish Regional Transmission Organizations

Section 103 of the Act provides FERC with authority to approve voluntarily formed RTOs. Fully effective RTOs may well be a key element if H.R. 2944 is to reach its goals of lower consumer prices and increased services because they can be structured flexibly to meet marketplace demands.⁽¹⁶⁾ The physical reality is that all generation and transmission activity within each of the three interconnected areas of the United States affects prices, availability, and reliability within that entire interconnected area. Fully effective RTOs⁽¹⁷⁾ hold considerable promise for advancing the

goals of the Act by broadening geographic markets, increasing consumer choices among suppliers and services, and diminishing discrimination in access to transmission services.

Congress may wish to clarify that FERC has authority to order the establishment of independent RTOs.⁽¹⁸⁾ Of course, FERC authority in this area will not foreclose its ability to encourage the development of flexible RTOs that are tailored to address specific market conditions and needs that exist in any geographic area or region. FERC authority in this area also would not preclude other marketplace developments from occurring that could enhance competition as well.

3. Section 101(b): Clarification of Federal and State Jurisdiction

Section 101(b) eliminates FERC's jurisdiction over "transmission of any bundled retail sale of electric energy" -- *i.e.*, the sale of both generation and transmission to an end user. This provision could discourage competitive markets by allowing utilities to structure retail sales as bundles of both generation and transmission services, and thereby escape FERC jurisdiction of the transmission component of the sale. Moreover, because states would have differing rules and regulations for transmission access, this provision might contribute to the balkanization of wholesale markets rather than encouraging broader markets.

C. Section 3: State Laws or Regulations Not Affected

Section 3 of the Act allows state laws or regulatory orders already in force, or those promulgated up to three years after the enactment of H.R. 2944, to supersede all of the consumer protection provisions (Title III) and the retail competition provisions (Section 531 (Aggregation), Section 532 (Interconnection), and Section 702 (Net Metering)) if the state law or regulatory order addresses any of the matters in these sections. Although we recognize that many states have taken the lead in encouraging retail competition in electric power and we appreciate the need to be sensitive to state activities in this area, we are concerned that these broad exemptions of federal consumer protection and retail competition policies have the potential to harm interstate commerce because the flow of electric power does not respect state lines or boundaries. In addition, the exemption may raise practical problems (and thus reduce possible competition) for the many utilities and independent power producers that provide interstate services, because such firms could be subject to a number of different laws regarding interconnection standards, information disclosures, net metering requirements, etc. Thus, this provision might have the unintended consequence of balkanizing electric power markets at the very time when expansion of geographic markets may be critical to bringing the benefits of competition to consumers.

III. Positive Features for Consumers in the Act

A. Provisions Enhancing Consumer Welfare -- Section 301: Electric Supplier Information Disclosure

Section 301 of the Act requires the Federal Trade Commission to promulgate and enforce rules for the disclosure of information to consumers regarding price, other charges, and generation source and emissions characteristics. These mandatory information disclosures are likely to help ensure that consumers receive, prior to purchase, accurate information important to their purchasing decisions.⁽¹⁹⁾ In addition, providing a uniform format for disclosure of this information will reduce costs to market participants by enabling them to use one disclosure throughout the country. Consumer research conducted thus far indicates that when standard disclosures are provided by all marketers, consumers are more likely to (1) believe they had adequate information to make a choice, (2) correctly identify the lowest priced product among several offers, and (3) correctly identify the product with the least environmental impact among sample products.⁽²⁰⁾

Notwithstanding our general support for this section, the five following suggestions (corresponding to the order in which the issues arise in Section 301) may help clarify and improve the disclosures that the consumer receives. First,

Section 301(a) requires that the rules be promulgated no later than January 1, 2001. To ensure adequate time for public comment and to conduct a thorough rulemaking, it might be preferable to require that the rules be promulgated within one year of the Act's enactment instead of by a date certain.

Second, Section 301(b) states that a retail electric supplier that sells, makes an offer to sell, or solicits the purchase of electric energy shall provide consumers with "a statement" containing certain categories of information.⁽²¹⁾ Section 301(b) could be interpreted as meaning that *all* the enumerated information must be provided in *every* solicitation. It would be preferable for the Act to reserve some flexibility to the Commission during the rulemaking to determine when and in which solicitations the required information should be disclosed. For example, it may be appropriate to include details of the variable and other charges in the terms of service statement but not in television or radio advertising.

Third, Section 301(c) provides that in every sale of electric energy for resale (e.g., wholesale sales from generators to an electric power marketer), the seller shall provide to the purchaser such information respecting generation source and emissions characteristics as may be required by rules under subsection (a). Our concern is that this requirement not foreclose various methods that electric power marketers may use to substantiate the claims made in their labels. For example, if a tagging system⁽²²⁾ is used to substantiate claims regarding generation source and emissions characteristics, the sale of electricity will *not* trigger the need to provide information on characteristics. Thus, in order to accommodate a tagging system, it is important that Section 301(c) require that information be provided if needed to make the disclosures. In addition, subsection (c) refers only to generation source and emissions characteristics. However, under Section 301(b)(1)(D), the Commission might require the disclosure of other information concerning the product's generation. In that event, sellers for resale should be required to provide that other information to their purchasers as well, so that they in turn can disclose it to retail electric consumers. As rewritten, Section 301(c) might read: "Any person who sells electricity shall provide to any purchaser for resale such information respecting the source of the electricity, the emissions characteristics, and other information to enable a retail electric supplier to make the disclosures required by the rules under subsection (a)."

Fourth, Section 301(d), as well as Sections 302(d) and 303(c), treat violation of a rule promulgated under Sections 301, 302, and 303 as a violation of a rule promulgated under Section 18 of the Federal Trade Commission Act. To ensure the Commission's ability to seek civil penalties for violation of the rules, the Act should refer to violation of a rule promulgated under Section 18 of the Federal Trade Commission Act "regarding unfair or deceptive acts or practices." To maximize the important consumer protections provided by these sections, the Commission suggests that concurrent authority to enforce these sections also be given to the states, with notice of the action provided to the Commission.⁽²³⁾

Fifth, Section 301(e) permits states to enforce additional laws that are "not inconsistent" with FTC rules promulgated pursuant to this section. Although this provision may allow states to prescribe additional important protections, this section could be read to allow variations within the disclosure prescribed pursuant to Section 301. To facilitate comparison shopping by consumers and lower the costs of market participation by competitors, it is important to have one uniform disclosure containing the basic information that will be prescribed by rules pursuant to Section 301(a). If states require the disclosure of additional information, such information should be supplied in locations outside the uniform format (e.g., it would be permissible to place additional information beneath the required format). This would be analogous to the "Nutrition Facts" label required by federal law on food packaging. Although marketers are free to provide additional information regarding their product (consistent with federal law), they cannot include that information within the "Nutrition Facts" label. Accordingly, this section should make clear that states may not change the content or format of any "Electricity Facts" label prescribed under Section 301(a).⁽²⁴⁾

B. Provisions Enhancing Wholesale and Retail Competition

H.R. 2944 contains various provisions that clarify FERC's authority to facilitate competitive wholesale markets. As discussed above, from a competition perspective alone, provisions that broaden product markets, expand geographic markets, and lower entry barriers are likely to increase competition in the generation of electricity. Included in these

provisions are Section 101(e) (providing FERC authority to determine, based on a variety of factors, whether a particular transmission facility is subject to its jurisdiction); Section 102 (providing FERC authority over the transmission systems of state and municipal utilities and rural cooperatives); Section 104 (facilitating states' formation of compacts to establish regional transmission siting agencies); and provisions of Title VI (integrating federal electric utilities into the transmission reform process).(25)

Title II of the Act adds a new provision, § 218, to the Federal Power Act, that creates a statutorily sanctioned electric reliability organization overseen by FERC to replace the current voluntary system that lacks FERC oversight. In exercising its oversight capacity, FERC will be able to approve reliability standards and operating procedures that enhance and preserve electric power reliability. In light of FERC's technical expertise, it should be able to distinguish between standards that enhance and preserve reliability and strategic anticompetitive behavior undertaken under the guise of enhancing reliability.

In addition, proposed § 218(m) of the Federal Power Act contains a proposed narrow exemption from per se antitrust treatment for relevant activities of the reliability organization and its members, and requires these activities to be analyzed under a rule-of-reason approach. A limited exemption appears reasonable in light of the goals of promoting both efficiency-enhancing coordination and increased competition in the industry.(26) Indeed, the Supreme Court has noted that the "potential for procompetitive benefits . . . has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations."(27)

Provisions that enhance consumers' buying power are also likely to reduce horizontal market power in generation. Section 531 of the Act permits retail electric consumers to designate an entity that aggregates consumers in order to negotiate the purchase of retail electric energy. In addition, no state may prohibit a municipal or cooperative electric utility from serving as an aggregation entity. This section eliminates state and local barriers to aggregations of various types that permit competitive suppliers of retail electricity to obtain blocks of retail- household customers. This section is likely to be important for consumers because it can facilitate entry of new generators and retail power merchants and therefore diminish prospective generation and transmission market power.(28)

Section 532 of the Act also has the potential to increase competition and choices for consumers by removing impediments to the development of distributed generation (DG) facilities by providing for uniform standards for interconnection to the local distribution system, subject to FERC oversight.(29) DG has the potential to provide an alternative to the monopoly transmission and distribution facilities of a public utility. The chief risk to competition is that transmission and distribution owners will discriminate against DG in connecting such devices to the distribution or transmission grid. Section 532 is likely to prevent such discrimination.(30)

Another provision of the Act that is likely to mitigate a utility's generation and transmission market power is Section 702, which provides retail electric consumers with the ability to request net metering service (*i.e.*, a two-way meter at the customer's premises), which is not now offered by all electric utilities. Competition would likely be enhanced further, however, if this provision were broadened to apply to the use of "real-time" net metering, rather than just simple aggregation of net electricity flow. Real-time net metering could provide clearer price signals for distributed resources. All consumers benefit when real-time net metering is used because consumers are more likely to reduce their demands on the grid during peak periods, when higher prices are charged. This behavior could reduce transmission congestion and thereby alleviate load pockets.

Although the foregoing provisions are likely to help foster competition in wholesale electric power markets, they alone are not enough to complete the job in a timely manner. See discussion in Sections I and II *supra*.

Conclusion

Although H.R. 2944 provides means well-suited to reach its goals in some regards, we find that the likelihood of success would be enhanced by (1) adding a provision to address existing market power in generation; (2) clarifying FERC's authority to order the creation of RTOs; (3) modifying the retail consumer protection provisions to provide the

Commission with flexibility in implementing the uniform information disclosure , slamming and cramming rules; and (4) clarifying the consumer privacy provisions. We believe that these suggestions are likely to facilitate "a seamless national retail marketplace for electricity."

By direction of the Commission.

Robert Pitofsky
Chairman

cc:

The Honorable John D. Dingell
Ranking Minority Member

1. See Commission Rule 4.11(b), 16 C.F.R. § 4.11(b).
2. Section 2(b).
3. See, e.g., Federal Trade Commission, "Analysis To Aid Public Comment In the Matter of Dominion Resources, Inc. and Consolidated Natural Gas Company," FTC File No. 991 0244 (Nov. 8, 1999) <<http://www.ftc.gov/os/1999/11/dominionana.htm>>.
4. See Testimony of the Federal Trade Commission Before the Committee on the Judiciary, United States House of Representatives, at 2 (July 28, 1999) <<http://www.ftc.gov/os/1999/07/electricityHR.htm>>.
5. In recent testimony to the Subcommittee on Energy and Power, the Commission noted that following implementation of electric industry restructuring in the United Kingdom, empirical research determined that the two private generating firms that dominated the industry were exercising market power. These findings prompted subsequent orders for divestiture of generating capacity in the U.K. In addition, evidence from the initial deregulatory efforts in California indicates that market power problems in generation also exist there. See Testimony of the Federal Trade Commission Before the Committee on Commerce, Subcommittee on Energy and Power, United States House of Representatives, at 8-9 (May 6, 1999) <<http://www.ftc.gov/opa/1999/05/electricites.htm>>.
6. FERC Order No. 2000, Regional Transmission Organizations at 35, 70 (Dec. 17, 1999).
7. See Federal Trade Commission's Policy Statement on Deception, letter to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), appended to *Cliffdale Associates*, 103 F.T.C. 110, 174 (1984).
8. See *supra* n. 5.
9. See Commission Testimony, *supra* n. 4, at 3.
10. See, e.g., Testimony of Commissioner Nora Mead Brownell, Pennsylvania Public Utility Commission, Transcript of Federal Trade Commission Public Workshop: Market Power and Consumer Protection Issues Involved with Encouraging Competition in the U.S. Electric Industry at 272 (Sept. 13, 1999) <<http://www.ftc.gov/bcp/elecworks/index.htm>>.
11. Section 302(f)(2).

12. The intended scope of "related services" is uncertain. It might be read to cover such things as electric meters, energy efficiency devices, and energy appliance repair services, but also could arguably be interpreted to cover such things as home security services, Internet access, or telecommunications services.

13. If that is the rationale, however, it is unclear why the provision applies to companies other than a consumer's local distribution company. Section 302(a) is written broadly and covers not just local distribution companies but "any person who obtains consumer information in connection with the sale or delivery of electric energy to a retail electric consumer." The only reference to local distribution companies is found in Section 302(c), which permits the use and disclosure of *aggregate* consumer information and requires local distribution companies to make such information available to retail electric suppliers upon request.

14. The requirement that approval be "written" (Section 302(a)) is unusual and may inadvertently hinder consumer choice. There may be new technology options, such as providing a password electronically, that would be less costly to implement. In addition, telephone or online verification may be sufficient under certain circumstances.

15. Since enactment of the Energy Policy Act of 1992, there has been an increase in the number of mergers among investor owned utilities (IOUs) and a consequent increase in the concentration of generation capacity among these utilities. In 1992, the 10 largest utilities, ranked according to generation capacity, owned 33 percent of all IOU generation capacity in the United States. Taking into account mergers completed since 1992 and assuming that all pending mergers (as of December 1999) will be completed in 2000, the 10 largest companies' share will increase to 51 percent. More important, these nationwide figures may underestimate the level of concentration in many regional markets. See Energy Information Administration, *The Changing Structure of the Electric Power Industry 1999: Mergers and Other Corporate Combinations* at 18 (Dec. 1999).

16. See FERC Order No. 2000, *supra* n.6 (explaining the importance of RTOs to competitive markets).

17. One proposed subsection (new § 202(h)(2)(A) of the Federal Power Act) provides a "safe harbor" to passive, nonvoting interests in an RTO or ownership of five percent or less of the voting interests in an RTO, such that the owner of these interests shall not be deemed to control the RTO. By enacting an inflexible "safe harbor," H.R. 2944 may inadvertently allow generators in the RTO's area of operation to recreate their ability and incentives to discriminate in transmission access that prompted separation of generation from transmission in the first instance. The goals of the Act are likely to be better reached by providing more flexibility to FERC in assessing how best to limit RTO ownership interests.

18. A grandfather exemption of previously established Independent System Operators and RTOs (new Federal Power Act § 202(h)(5)) also is likely to prevent full realization of the goals of the Act. Technological advances are likely to make larger RTOs technically and economically feasible over time, and a freeze of current boundaries may prevent the efficient operation of the transmission grid.

19. Although it will be relatively straightforward for the Commission to assess the accuracy of marketers' claims regarding price and other contract terms, verification of the fuel source and emissions characteristics of electric power will likely be much more difficult. It is important to develop a credible means to substantiate and verify the contents of the label.

20. "Label Testing: Results of Mail Intercept Study," National Council on Competition and the Electric Industry (Oct. 1998), available on the National Council's website at <<http://eetd.lbl.gov/nationalcouncil/publications.html>>.

21. These categories include the nature of the service being offered, the price of electric energy (including a description of any variable charges), and a description of all other charges associated with the service being offered, as well as other information that the Commission determines will assist consumers in making purchase decisions. Rather than mandate the disclosure of any single piece of information (and also to allow the marketplace to develop), Congress may wish to provide the Commission with flexibility to determine which information "is technologically and

economically feasible to provide and is of assistance to retail electric consumers in making purchase decision." Section 301(b)(2).

22. For a discussion of the two suggested methods of substantiating claims (tagging and contracts), see Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission to the National Association of Attorneys General at 3 (Aug. 12, 1999) <<http://www.ftc.gov/be/v990012.htm>>.

23. See, e.g., Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-08, as implemented by the FTC Telemarketing Sales Rule, 16 C.F.R. § 310.7.

24. If Congress wishes to effectuate uniform "Electricity Facts," Section 3(1), which allows states to supersede all of the consumer protection provisions of this Act by passing a law or regulatory order within three years of enactment, should be amended. See discussion in Section II C, *supra*.

25. Although Section 105(a), which provides FERC with authority to order the expansion or improvement of the interstate transmission grid, has the potential to increase generation competition in wholesale markets, it also is likely to place additional facilities under monopoly control. From a competition policy point of view, other provisions in H.R. 2944 designed to alleviate generation *and* transmission horizontal market power in the long run appear preferable. Moreover, the pace of the transition to competition will likely increase if firms are motivated to adjust to competition by profit incentives as well as regulatory mandates. Regulatory mandates alone are less likely to be effective than an approach that also employs changed business incentives to bring the benefits of competition to consumers quickly and completely.

26. We note that this exemption to per se antitrust treatment is applied in proposed § 218(m)(1)(B) to the reliability organization's members' activities only if those activities are undertaken in good faith. It is unclear whether this "good faith" standard is also meant to imply activities undertaken for a "legitimate business purpose." If so, the latter standard may be added to provide more certainty to market participants.

27. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

28. Congress may wish to apply this provision not only to consumers, but to small business and commercial customers as well.

29. DG (and distributed resources generally) also may significantly enhance system reliability and reduce prices by alleviating transmission constraints and increasing the price sensitivity of demand for transmission services.

30. Congress may wish to make one language change to this section to ensure various new technologies with functions similar to DG are not excluded from the reach of this section. This could be accomplished through the use of the term "distributed resources" rather than "distributed generation facility."