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

Before the
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,CHARLESTON

In the matter of a Proposed Rulemaking Related to Restructuring the Electric Utility Industry in West Virginia

Comment of the Staff of the
Bureaus of Economics and Consumer Protection
of the Federal Trade Commission(1) (2)

General Order No. 255

May 19, 2000

I. Introduction and Summary

The staff of the Bureaus of Economics and Consumer Protection of the Federal Trade Commission (FTC) submits this comment in the above-captioned proceeding concerning restructuring the electric utility industry in West Virginia. With this proceeding and associated recent legislation, West Virginia is joining a growing list of states that are establishing regulatory reforms to bring the benefits of increased competition (lower prices, improved service, and innovation) in the electric power industry to their citizens and businesses.

The FTC is an independent administrative agency responsible for maintaining competition and safeguarding the interests of consumers. The staff of the FTC often analyzes regulatory or legislative proposals that may affect competition or the efficiency of the economy. In the course of this work, as well as in antitrust research, investigation, and litigation, the staff applies established principles and recent developments in economic theory and empirical analysis to competition issues.

The staff of the FTC has a longstanding interest in regulation and competition in energy markets, including proposals to reform regulation of the electric power and natural gas industries. The staff has submitted numerous comments concerning these issues at both the federal and state levels.(3) Moreover, the FTC has reviewed proposed mergers involving electric power and natural gas utility companies.

The West Virginia Public Service Commission (PSC) has identified several areas where it will be necessary to promulgate rules pursuant to the PSC's Restructuring Plan (which was adopted into law by the West Virginia Legislature on March 11, 2000 (the Plan)) before customers can begin to select their electricity supplier on January 1, 2001. The PSC also requests recommendations as to whether additional rules, other than the areas identified, may be necessary. This comment first suggests that the PSC may wish to ensure that consumers obtain the full benefits of competition by conducting a study of existing market power (pursuant to its transition authority (Plan, Section 22)) before consumers begin to choose their electric power supplier. In addition, the comment suggests that the PSC may wish to consider implementing standardized information disclosures given that consumers have not previously had a choice of electric power suppliers. The PSC also may wish to consider further the effects on competition of an affiliate's use of an incumbent electric utility's name and logo, as it implements the Plan's marketing provisions, and ways to protect consumer privacy without dampening incentives for entrants to market to consumers. The comment

also provides suggestions the PSC may wish to consider as it implements interconnection standards for distributed energy resources and emergency service provider requirements.

II. The PSC May Wish to Examine Whether Competition Is Workable Prior to Opening the Retail Electricity Market to Competition

Section 22 of the Plan provides the PSC with the authority to determine whether there is "workable competition" in the provision of retail electric service prior to lifting price caps on the cost of power supply.(4) The FTC recently noted the importance of addressing existing market power to ensure that the benefits of competition flow to consumers (*i.e.*, "workable competition") when it provided its views to Chairman Thomas E. Bliley, United States House of Representatives, Committee on Commerce, on the Electricity Competition and Reliability Act, H.R. 2944. The Commission recognized:

[T]raditional 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. . . .

[O]utside 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.(6)

Examining whether market power can be exercised prior to the start of retail competition may be instructive in determining whether customers in West Virginia are likely to receive the full benefits of competition. If market power is allowed to go unchecked, it can result in higher consumer prices, inefficient allocation of scarce resources, and distortions in consumer choices. Further, competitive wholesale markets are a prerequisite to consumers' obtaining the benefits of retail competition. FTC staff recently submitted a comment to the Arkansas Public Service Commission evaluating its proposal to examine existing market power at the wholesale and retail levels; that comment may be of interest if the PSC determines to assess existing market power.(7)

III. Standardized Information Disclosure Requirements Are Likely to Assist Consumer Choice of Electric Power Suppliers

After restructuring of the electricity industry occurs, advertising will be one of the primary sources from which consumers obtain information about the products they will choose to purchase. Advertising, however, does not always provide consumers with all the information they need to make an informed choice. In competitive electricity markets, consumers are likely to face a wide variety of price offers, contract terms, and environmental or service claims that may prove to be confusing, difficult to evaluate, or even misleading.

One approach to this problem is to standardize some of the information that suppliers disclose to consumers -- similar to what has been done with nutrition labeling on food, care labels on clothing, or energy efficiency labels on appliances. In fact, consumers in an electricity competition pilot project in New Hampshire noted the difficulty of comparing competing products when suppliers were allowed to present whatever information they chose about the product in any format they chose.(8) Standardized product labeling can alleviate this common consumer complaint by ensuring that consumers receive the relevant information they need to make an informed choice.

Various regulatory groups have recommended developing appropriate uniform disclosure requirements as a means to facilitate customer choice, provide consumer protections, and enhance market efficiency.(9) Laws or regulations calling for some degree of mandatory uniform disclosures have been enacted in a number of states, including California, Connecticut, Illinois, Maine, Massachusetts, Michigan, Nevada, New Hampshire, Pennsylvania, and Vermont.(10) Other states are considering disclosure requirements as well. In addition, various bills introduced in the United States Congress propose federal disclosure requirements, including the bill supported by the Department of Energy.(11) Indeed, the FTC has noted that mandatory disclosures are "likely to help ensure that consumers receive, prior to purchase, accurate information important to their purchasing decisions," and that disclosures should be uniform to "reduce costs to market participants by enabling them to use one disclosure throughout the country."(12) Although existing laws and FTC rules prohibiting unfair or deceptive claims would govern electricity advertising, uniform disclosures would provide an important additional consumer benefit in a new market where consumers have had no prior experience with choice.

Uniform disclosure, however, raises many issues, including determining which types of information are important to consumers in choosing a supplier. Information that may be suitable for uniform disclosure includes price, price variability, environmental attributes of power supply (generation source and emissions characteristics),(13) and contract terms (minimum length, termination fees, transfer charges, etc.).

Another issue when mandating uniform disclosure rules is the format for disclosure of information. The chosen format should present information simply and clearly, and take a minimum of time to review and comprehend. A format that is overly restrictive, or that prohibits any additional claims elsewhere in the advertisement, may place unconventional or innovative products at a competitive disadvantage. California currently requires environmental disclosures using a standard label format, and the NECPUC Model Rule includes a sample label format.(14)

If disclosures are standardized, the PSC must confront whether they will be mandatory (required of all marketers regardless of claims made) or claims-based (required of marketers only when certain claims are made). One consumer study suggests that when standard disclosures are provided by all marketers, consumers are more likely (1) to think they had adequate information to make a choice, (2) to correctly identify the lowest priced product among several samples, and (3) to correctly identify the product with the least environmental impact among sample products.(15) If disclosures are mandatory, the PSC may wish to consider allowing suppliers to use a "default" label, and to determine the default label's content.(16) Another consideration is the placement of standardized disclosures -- that is, whether they must appear only in advertising that gives consumers the opportunity to select a competing supplier, or in all print advertising, or whether some alternative form of disclosures should appear in small-format print advertising and in non-print media.(17)

Each of these issues relating to label format and content raises cost concerns as well. Mandatory disclosure requirements will impose some level of costs on companies subject to them. The cost of tracking and maintaining the data necessary for the disclosure will vary depending on the type of information mandated and the degree of precision required for the information disclosed. It is likely that these costs, as well as the actual costs of making the disclosures, will be passed on to consumers. Therefore, the cost of requiring disclosures should be weighed against the benefit when deciding which items of information to include and what manner of disclosure to require.

IV. Code of Conduct Provisions Can Enhance Retail Competition

Section 17 of the Plan sets forth minimum provisions that are to be included in a code of conduct that governs the relationship between an incumbent electric utility (which will continue to control the utility's transmission and distribution system) and its unregulated affiliates offering electric power supply services. For example, an incumbent electric utility is prohibited from providing an affiliate any undue preference over a non-affiliate, and from discriminating against a non-affiliate in various ways. The Plan also prohibits incumbents from cross-subsidizing unregulated affiliates and from tying unregulated products and services to an incumbent's regulated services. The PSC may wish to consider two specific issues in order to implement the code of conduct in a procompetitive manner.

A. Restriction on the Sharing of Customer Information

The Plan prohibits an incumbent electric utility from disclosing to any affiliated electric energy supplier or unaffiliated electric energy supplier, any information, including customer load and usage information, obtained as a result of its role in providing retail electric distribution service, unless the customer so requests.(18) This requirement provides a high degree of privacy protection to a customer's information and requires customers to "opt in" to the sharing of their information with affiliated and unaffiliated electric power marketers.

The PSC may wish to consider the relative sensitivity of information about consumers' electric power usage in determining how to implement this requirement. There may be reasons to subject such information to a high level of privacy 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). On the other hand, there may be instances where over-protective privacy provisions unduly limit marketing of generation services and thereby hinder competition. For example, access to such information could allow marketers to target their marketing efforts efficiently in an industry with high costs to acquire new customers.

The PSC may wish to consider establishing a procedure through which an affiliate or a third-party marketer can request certain information from the incumbent electric utility for marketing purposes, depending upon the sensitivity of the information requested. If that request were granted, all other licensed marketers would be notified, either by the incumbent or by the requesting party, to ensure non-discriminatory sharing of information.

B. Affiliate Use of the Incumbent's Name and Logo

The Plan also prohibits an incumbent electric utility from participating in joint advertising, joint marketing, joint sales calls, or joint proposals with its affiliates.(19) As part of implementing this provision, the PSC may wish to consider how an affiliate's use of the name and logo of the incumbent utility may affect the success of retail competition in West Virginia in light of possible anticompetitive cross-subsidization and consumer confusion.

First, the relationship between a regulated utility and its unregulated affiliates may create a competitive advantage for affiliates of the incumbent utility, in light of possible cross-subsidization. For example, cross-subsidization could take the form of cost-shifting among inputs used for both regulated and unregulated products, such as the use of a corporate logo in marketing the affiliate's products and services as well as the regulated parent utility's products and services. Costs of shared inputs could be assigned in a biased manner (i.e., with additional costs assigned to the regulated side of the business) so that the regulated entity could justify higher rates. Such a biased assignment of costs, which is often difficult for regulators to detect and remedy, distorts competition and produces inefficiencies in the unregulated business as well.

The risk of failing to detect anticompetitive cross-subsidization is heightened if (1) the reputation of the regulated parent utility is effectively embodied or represented by its logo; (2) the regulated parent firm can improve its reputation by incurring costs of the type that regulators would traditionally include in the rate base of the regulated firm; and (3) the unregulated affiliate can enhance its own reputation among consumers by using the logo of the regulated parent firm, even if elements of the regulated firm's reputation do not apply to the affiliate. When these factors are present, a regulated incumbent will have a heightened incentive to overinvest in reputation-building because it can expect to incorporate a greater share of these investments into its rate base than if the assets were

not shared with the affiliate. Moreover, the affiliate would realize additional profits from its increased sales in the unregulated market. The principal obstacle to deterring this conduct is that it may be extraordinarily difficult to distinguish competitive from anticompetitive levels of investment in reputation-building. Harm to competition and consumers may result from such overinvestment and subsequent cross-subsidization.

Harm to competition may occur because the unregulated affiliate's access to the logo of its regulated parent gives it a cost advantage through potential cross-subsidization that otherwise equally efficient competitors cannot match. The anticompetitive results may include (1) higher-than-necessary average operating (i.e., non-logo-related) costs for the industry and higher prices for consumers due to the continued operation of the affiliate, which can survive with higher-than-necessary costs due to the cross-subsidization; (2) greater market concentration and less competition than would occur absent the cross-subsidization;(20) and (3) discouragement of potential entry that likely would have occurred absent the cross-subsidization, including entry involving innovative products and production processes.

Second, consumers may be deceived by the fact that an affiliate has a name very similar - and a logo identical -- to those of the incumbent, when in fact the affiliate is a firm separate from the incumbent. For example, an element of a parent firm's reputation might be the credibility of its pledges of high-quality services that are backed by the parent's financial stability as a government-franchised monopoly. If a consumer imputed this same credibility to an affiliate's promises of high-quality service because of its use of the parent's logo and similar-sounding name, when in fact the affiliate did not have access to the revenues of the monopoly, the consumer could be injured if the affiliate were unable to fulfill its promises in the way the consumer expected. Under such circumstances, the use of the logo by the unregulated affiliate could harm consumers and competition in much the same way as deceptive advertising.

At the FTC Public Workshop on Market Power and Consumer Protection Issues Involved with Encouraging Competition in the U.S. Electric Industry, the Commission heard testimonial evidence of consumer confusion when an affiliate of the incumbent utility used a name and logo similar to those of the incumbent utility.(21) Indeed, even the use of disclaimers that described the relationship, or lack thereof, between the incumbent and the affiliate did not clarify consumers' misimpressions about the relationship between the incumbent and the utility. The risk of consumer deception in West Virginia is heightened by the fact that the Plan includes detailed information on separating the operations of an incumbent electric utility and its affiliates, such that even the use of the term "affiliate of the electric utility" in this circumstance may mislead consumers. On the other hand, simply prohibiting affiliate use of the incumbent utility's name and logo may not solve the problem either, because affiliates can still choose a name that is similar to the prohibited one.(22)

As an alternative to the prohibition of an affiliate's using the name and logo of the incumbent utility, the PSC may wish to require the affiliate (and any other firms granted the right to use the logo) to pay the parent for the right to use the logo.(23) Because the logo is an asset, use of the logo by other firms, including affiliates, represents an asset transfer from the parent firm, and the PSC may wish to treat it like other asset transfers.(24) To avoid cross-subsidization in such a transaction, the use of the parent logo must be fairly valued, or determined by competitive bidding.(25)

V. DER Interconnection to the Transmission and Distribution Grid

Section 6 of the Plan requires the PSC to establish grid interconnection standards not only to ensure distribution safety and reliability, but also to prevent barriers to new technology. One such new technology is distributed energy resources (DER), which the PSC has recognized as holding significant promise to benefit both consumers who use it and consumers who elect to continue to rely exclusively on power from the transmission and distribution (T&D) grid.(26) Indeed, the Commission has noted that DER "has the potential to provide an alternative to the monopoly transmission and distribution facilities of a public utility."(27)

The competitive concern is that incumbent utilities have the incentive, and may have the ability, to manipulate grid interconnection standards in order to raise the connection and operating costs of DER facilities located on the customer side of the meter.(28) Incumbent utilities are likely to have these incentives because DER is a substitute both for electric power generation services and for T&D services. For these reasons, interconnection rules should

minimize or eliminate the discretion that incumbents may have to increase the costs, risks, and lags associated with connecting DER facilities to the T&D grid and with subsequently operating them.(29)

To maximize the benefits of DER to consumers, the PSC may wish to provide a regulatory setting as neutral as possible so that DER can be tested fairly by the market in competition with other forms of generation, transmission, and distribution. This may require establishing rules or procedures for interconnection that prohibit discrimination against DER by incumbent, regulated distribution (and transmission) companies. Incumbent utilities are likely to have incentives to discourage diffusion of DER beyond their own use of such units. In considering such interconnection rules, the PSC may wish to balance the need for system reliability and safety(30) with rules and procedures that are no more restrictive than necessary for these purposes, and also to avoid giving incumbent generation and T&D suppliers substantial discretion to discriminate against use of DER by customers, entrants, and marketers.

Another element in providing a fair market test for DER technologies is to facilitate entry and diffusion of complementary technologies. In particular, the economic viability of DER technologies often rests on the ability to obtain and react to accurate and timely electric power price information.(31) Typically, this means access to time-of-day metering. To ensure a successful fair market test, the PSC may wish to remove any regulatory impediments to obtaining time-of-day metering for customers contemplating DER investments.

In crafting these rules, the PSC may wish to coordinate with other states in the region and across the country in adopting DER interconnection standards. State-by-state differences in DER interconnection rules may themselves raise the costs and undermine the viability of DER. A number of other states are considering interconnection standards, as are professional societies.(32) To promote efficient uniformity among state rules, the PSC may wish to announce that it is expecting to incorporate national interconnection standards (when they are completed) into its own standards, even if the national standards have not been completed by Janaury 1, 2001.(33)

Lastly, the PSC has asked whether ownership of DER assets by incumbent utilities is appropriate.(34) This question raises the same discriminatory access issues discussed in FERC Order Nos. 888, 889, and 2000. The record is compelling that behavioral rules often are not adequate to prevent discriminatory conduct (or the appearance of discriminatory conduct that also increases the perceived risk of investing). Structural remedies are likely to be more effective. The PSC, however, has allowed distribution utilities to continue to own substantial generation assets in other contexts.

The PSC may wish to determine whether ownership of DER investments by the regulated distribution utility creates unique incentives or means to raise costs of DER connections on the customer side of the meter. If there are such unique incentives or abilities, then specific prohibitions against DER investments by incumbents may be appropriate. If not, then additional restrictions may not provide any relief from incentives to discriminate.(35)

VI. Emergency Service Rules to Provide Power to a Customer Whose Supplier Exits

The PSC requests comment on the rules it should establish to provide protection to consumers and emergency service providers in the event a supplier defaults or fails to deliver. In the event a consumer's designated supplier fails, assuming the consumer remains connected to the grid,(36) it is preferable to have the backup or alternative suppliers designated in advance. Depending upon the method used to select a backup supplier, the consumer may face higher than expected prices and/or the backup supplier may not be that consumer's preferred alternative supplier. For example, a consumer who has selected a "green" supplier may be concerned that an arbitrarily selected alternative supplier is less environmentally oriented than other available alternative suppliers.

There are a range of methods to select a backup supplier, including (1) conditioning supplier licenses or certifications on the supplier's having a suitable backup plan, (2) implementing bonding requirements for suppliers, (3) having the independent transmission grid operator or distribution company provide backup services, (4) soliciting bids for the service, (5) requiring the consumer to select the backup supplier,(37) or (6) allowing the PSC to designate the default

provider. The backup supplier would be obliged to supply power to the consumer in the event the consumer's existing supplier exits.

Regardless of the option chosen, designation as the alternative supplier may impose costs on the alternative supplier in terms of acquiring the generation contracts of the failed supplier or maintaining additional reserves.(38) Thus, the provision of insurance in the form of "emergency supply" would carry a charge. One policy to minimize these charges would be for the state to allow competition for the alternative supplier designations as well as for the primary supplier designation.(39)

VII. Conclusion

The benefits of competition in the electric power industry may be realized sooner if the PSC conducts a study of existing market power and implements standardized information disclosures before consumers begin to choose their electric power supplier. As it implements the Plan's prohibition on joint marketing, the PSC may wish to consider the competitive implications of restricting an affiliate's use of an incumbent electric utility's name and logo and ways to protect consumer privacy without dampening incentives for new entrants to compete for customers. The PSC also may wish to consider certain competition issues as it implements interconnection standards for distributed energy resources and emergency service provider requirements.

Respectfully submitted,

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1. This comment represents the views of the staff of the Bureaus of Economics and Consumer Protection of the Federal Trade Commission. They are not necessarily the views of the Federal Trade Commission or any individual Commissioner.

2. This comment represents the views of the staff of the Bureaus of Economics and Consumer Protection of the Federal Trade Commission. They are not necessarily the views of the Federal Trade Commission or any individual Commissioner. Inquiries regarding this comment should be directed to John C. Hilke (303-844-3565).

3. The staff of the FTC has commented to FERC on electric power regulation in Docket No. RM99-2-000 (regional transmission organizations) (Aug. 16, 1999); Docket EL99-57-000 (Entergy transco proposal) (May 27, 1999); Docket RM98-4-000 (Sept. 11, 1998) (merger filing guidelines); Docket No. PL98-5-000 (May 1, 1998) (ISO Policy); Docket Nos. ER97-237-000 and ER97-1079-000 (New England ISO) (Feb. 6, 1998); Docket No. RM96-6-000 (merger policy) (May 7, 1996); Docket Nos. RM95-8-000 and RM94-7-001 (open access) (Aug. 7, 1995). The staff of the FTC also has submitted comments to various state agencies, including the Arkansas Public Service Commission, Docket No. 00-048-R (Apr. 13, 2000) (market power analysis) (Arkansas Market Power Comment); Virginia State Corporation Commission, Case No. PUE990349 (Feb. 11, 2000) (regional transmission entities); New Mexico Public Regulation

Commission, Utility Case No. 3106 (affiliate codes of conduct) (Dec. 6, 1999); Public Utilities Commission of the State of California, Docket No. R.98-12-015 (distributed generation) (Mar. 17, 1999) (California Distributed Generation Comment); Alabama Public Service Commission, Docket No. 26427 (restructuring in general) (Jan. 11, 1999) (Alabama Competition Comment); Louisiana Public Service Commission, Docket No. U-21453 (affiliate transactions) (Oct. 30, 1998); Mississippi Public Service Commission, Docket No. 96-UA-389 (Transco proposal) (Aug. 28, 1998); Louisiana Public Service Commission, Docket No. U-21453 (stranded costs) (Aug. 7, 1998); West Virginia Public Service Commission, Case No. 98-0452-E-GI (electric restructuring) (July 15, 1998); and Maine Department of the Attorney General and Public Utilities Commission, "Interim Report on Market Power in Electricity" (May 29, 1998). The FTC staff comments are available at: <http://www.ftc.gov/be/advofile.shtm>.

4. The Plan provides that price caps will be applied to the unbundled cost of electric power for a transition period. At the end of the transition period, the price caps will be lifted gradually. Plan, Section 9.

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/electrictes.shtm>.

6. Letter to the Honorable Thomas E. Bliley, Chairman, United States House of Representatives, Committee on Commerce, regarding the Electricity Competition and Reliability Act, H.R. 2944 (Jan. 14, 2000) <http://www.ftc.gov/be/v000002.shtm> (Bliley Letter).

7. Arkansas Market Power Comment, *supra* n. 2.

8. "Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups," Regulatory Assistance Project (Mar. 19, 1997) <http://www.rapmaine.org>.

9. The National Association of Attorneys General (NAAG) adopted a resolution in March 1997 supporting "the establishment of appropriate and adequate consumer safeguards [in] . . . the restructured retail electricity marketplace," including uniform disclosures in plain language of "price, duration of contract, quantities, and other material terms." The National Association of Regulatory Utility Commissioners (NARUC) and the New England Governors' Conference, Inc. also have issued resolutions supporting states' adoption of mandatory, uniform disclosure standards (NARUC in November 1996 and the Governors' Conference on June 3, 1997).

10. On March 3, 1998, the New England Conference of Public Utility Commissions (NECPUC) issued a Model Rule on Information Disclosure, intended as "a common starting point for commissions in the region developing information disclosure policies," based on the belief that "a uniform regional approach is in the public interest." The Model Rule is available from the Regulatory Assistance Project web page at <www.rapmaine.org/nepage.html>.

11. S. 1047, introduced May 13, 1999 by Sen. Frank Murkowski and referred to the Senate Committee on Energy and Natural Resources and the House Commerce Committee.

12. Bliley Letter, *supra* n. 5, at 4.

13. The feasibility of requiring disclosure of fuel source may depend on availability of tracking mechanisms through which sources of supply may be substantiated and verified. Likewise, reasonably reliable data for emissions must be available to substantiate any required disclosures. Other questions would be whether fuel source and emissions data would be based on historical or projected information, and the degree of precision required for such data.

14. Information about the California uniform disclosure and label requirements is available at <http://www.energy.ca.gov/sb1305/documents/index.html>; the NECPUC proposal is available at <http://www.rapmaine.org/nepage.html>.

15. "Label Testing: Results of Mall Intercept Study," National Council on Competition and the Electric Industry (April 1998) <eetd.lbl.gov/nationalcouncil/publications.html>.

16. For suppliers that do not wish to incur the expense of maintaining and substantiating information for the label, the PSC may wish to allow suppliers to report system average information or to indicate that supplier-specific information is not shown.

17. For example, some contract terms may be more suitable for required disclosure in a contract document, whereas in advertising, it may be advisable to require that only the one or two most important terms be disclosed.

18. Plan, Section 17(b)(3).

19. Plan, Section 17(b)(12).

20. If entry is difficult or delayed, market share gained through cross-subsidization also may have persistent effects even after the cross-subsidization has been discontinued.

21. See, e.g.,Testimony during Panel IV: Affiliate Rules and Codes of Conduct, Transcript of Federal Trade Commission Public Workshop: Market Power and Consumer Protection Issues Involved with Encouraging Competition in the U.S. Electric Industry (Sept. 14, 1999).

22. We note that one interpretation of Section 17(b)(8)(c), which prohibits an incumbent electric utility or any of its affiliates from stating or implying that generation services are being provided by the incumbent electric utility rather than the affiliated electric energy supplier, could be to prohibit an affiliate from using the exact name of the incumbent.

23. Payments to the incumbent utility for use of its logo could reduce prices for distribution services by substituting for revenues that the firm otherwise would be authorized to collect through distribution charges.

24. In some situations, firms may sell the right to use a logo to independent entities, contingent upon conditions and restrictions placed on use of the logo to avoid, for example, consumer deception.

25. The Maine Public Utilities Commission has established rules requiring affiliates to pay the incumbent utility for use of the goodwill reflected in the utility's name. The payment is determined according to how soon the utility succeeds in earning its authorized return on equity. Maine Public Utilities Commission, Docket No. 98-077 (July 7, 1998). The rules provide a three-year initial payment period followed by a reassessment, with an additional three years of payments, if necessary, to bring down the value of the goodwill asset to zero. *Corporate Goodwill*, Public Utilities Fortnightly 16 (Oct. 15, 1998).

26. In most locations DER applications are expected to operate in conjunction with the grid. An expected application of DER is for it to operate only during periods when electric power prices are relatively high. This benefits the customer with DER, which is less expensive than power from the grid during these periods. DER customers also may benefit from having a connection to the local utility's distribution grid because (a) the grid may be a backup supply of power when the DER unit requires maintenance; and (b) the grid may afford the DER customer an opportunity to sell power to other electric power consumers if the DER unit has excess capacity. At the same time, customers who rely exclusively on power from the grid may benefit because reduced load on the grid during peak periods may allow the grid operator to avoid dispatching the highest-cost plants during peak periods.

27. Bliley Letter at 14.

28. Another competitive concern is that utilities will attempt to raise the costs of providing natural gas service to fuel DER facilities. Where the same utility provides both electric and gas distribution services to an area, the utility may have incentives to raise the costs of DER rivals by manipulating both electric and gas interconnections. The PSC may wish to include provisions on natural gas access for DER facilities in areas served by a gas/electric combination utility. *See, e.g.*, Federal Trade Commission, "Analysis of Agreement Containing Consent Orders To Aid Public Comment in 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.shtm>.

29. A useful analogy may be the rapid pace of innovation in customer-installed telephone technologies once telephone companies' discretion to block interconnection was effectively eliminated. *Use of the Carterfone Device in Message Toll Telephone Services*, 13 F.C.C.2d 420, *recon. denied*, 14 F.C.C.2d 571 (1968). These same concerns for economy, certainty, and timeliness are likely to be important in designing dispute resolution mechanisms for DER interconnections.

30. Safety and reliability considerations are likely to be important both in original equipment and in equipment service and repair.

31. In many areas, the most economically viable application of DER technologies is likely to be peak-load shaving - producing power from DER equipment primarily during peak load periods. To have an incentive and ability to pursue a peak-load shaving generation strategy, the DER owner must face prices that reflect the higher costs of power from the grid during peak demand periods. The DER owner following a peak-load shaving strategy must also be able to determine the onset and end of peak demand periods.

32. The State of California, for example, is considering interconnection rules. In addition, the Energy Policy Committee of the Institute of Electrical and Electronics Engineers (IEEE) USA is developing interconnection standards for distributed generation.

33. If any particular conditions require unique interconnection rules for some end uses in West Virginia, the PSC may wish to address them separately.

34. In this discussion, we are not commenting on situations where the incumbent utility might lease DER facilities to customers who control the operation of DER facilities on the customer side of the meter.

35. We note that even if the incumbent regulated distribution monopoly does not have generation assets, it has incentives to raise costs of DER interconnections because DER substitutes for T&D services as well as generation services provided from the grid.

36. Because electric power is essential to consumer health and safety, the PSC may wish to ensure that, in the event of a supplier default, the consumer remains connected to the grid. Regarding the transition period between the two suppliers, the PSC may wish to adopt rules ensuring that the entity supplying electric power to the grid to serve the customer's continued load is paid for these services and that consumers are charged accordingly.

37. Designation of an alternative supplier could be completed as part of the same process as designating the primary supplier. For example, each customer could be asked to list a first and second preference among available suppliers. Designating an alternative supplier is akin to the common industrial practice of having primary and secondary suppliers, where a secondary supplier is retained to reduce the risk of costly supply interruptions. It is possible, however, that some consumers may be deterred from choosing a new supplier altogether if they have to choose an alternative supplier in addition to a new primary supplier.

38. The least costly scenario would likely be to supply the customer with electric power purchased from the wholesale spot market. Although this type of service may involve few costs for reserves, it would likely involve exposure of the consumer to the risk of high wholesale spot market prices. If generation services used to satisfy a consumer's load are removed from the grid, it may be important to transfer the failed supplier's generation contracts or facilities to an alternative supplier in order to maintain grid stability in the event of failure of a supplier.

39. Where advanced metering and billing technologies allow a customer to purchase power from different suppliers at different times of the day, the customer may effectively have already expressed a preference for alternative suppliers.