

# **Prepared Statement of the Federal Trade Commission**

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**Before the**

**Committee on Commerce  
Subcommittee on Energy and Power  
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This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own, and do not necessarily represent the views of the Commission or any individual Commissioner.

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## **I. Introduction**

Mr. Chairman and members of the Committee, the Federal Trade Commission is pleased to appear before you today to present testimony concerning the important topic of consumer protection in a deregulated electric power market. I will concentrate my remarks today on the Commission's likely consumer protection role as retail competition develops in the electric power industry.

Three weeks ago, the Commission testified before this Committee regarding the impact of market power and the importance of competition on the future of the electric power industry. More specifically, the Commission stated that "competition between market participants will ordinarily provide consumers with the benefits of low prices, good products, and greater innovation."<sup>(1)</sup> We believe that the antitrust and consumer protection parts of our mission are closely integrated because consumers will not benefit from competitive markets unless they are also able to make confident purchase choices based on complete and accurate information.

The Commission has been preparing for a deregulated electric power market over the past several years, beginning with our self-education by talking to industry members and to state regulators. For example, Commission staff have been actively participating in conferences and meetings of the National Association of Regulatory Utility Commissioners (NARUC), the National Association of State Utility Consumer Advocates (NASUCA), and in meetings sponsored by the National Association of Attorneys General (NAAG).<sup>(2)</sup> As we have done with the state competition regulators, we in turn have shared our knowledge of consumer

protection issues with state officials by, among other things, submitting written comments to various states about consumer protection issues they were considering.<sup>(3)</sup> We are also participating in NAAG's process to develop environmental marketing guides for electricity. In addition, to further assist states in examining consumer protection issues and to identify industry trends as states deregulate their electricity markets, the Commission will hold a public workshop on September 13-14, 1999, on market power and consumer protection considerations in restructuring the electric power industry.

## **II. The FTC's Jurisdiction**

The FTC is a law enforcement agency whose statutory authority covers a broad spectrum of the American economy, including the electric power industry. The keystone of the FTC's consumer protection law enforcement effort is Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."<sup>(5)</sup> The scope of Section 5 encompasses a wide range of business practices, including advertising, marketing, billing and collection. The Commission takes action against deceptive activity under Section 5 either through administrative law enforcement actions or through federal district court actions seeking temporary and permanent injunctive relief and, ultimately, restitution to injured consumers.

Experience demonstrates that competition among market participants will ordinarily provide consumers with the benefits of low prices, good products, and greater innovation. In principle, these benefits should be provided in the electric power industry as a century of regulation gives way to competition. These benefits, however, will not be achieved without, among other things, vigilant consumer protection.

One of our first priorities has been to conduct business education.<sup>(6)</sup> Because a competitive market will rely on advertising and promotional activities, we are engaged in efforts to educate electric power providers about existing consumer protection laws that will apply to their business practices. For example, staff recently participated in a conference the Edison Electric Institute (EEI) sponsored to educate its member utilities about consumer protection principles.<sup>(7)</sup>

The Commission anticipates that, as electric power markets become competitive, the agency will focus closely on two areas of consumer protection. The first is the policing of electric service providers' advertising claims, particularly claims about the price and environmental attributes of the power being sold. The second is the policing of unfair or deceptive business practices such as slamming or cramming.

## **III. Advertising Claims**

In a competitive retail electricity market, electricity service providers are likely to make a broad range of advertising claims, including claims about the nature of the service provided, the company selling the electricity, and the price for the service. The FTC, as well as state attorneys general and public utility commissions, will be active in policing against false and misleading advertising for electricity products, just as they do now for most other products.

Huge resources are at stake in this industry, whose total annual revenues are estimated at \$200 billion. Although advertising by electric power companies is a small fraction of that for many other consumer products, it is growing rapidly as deregulation advances. For example, ad spending by the electric power industry grew 65% in 1997 and 12% in 1998.<sup>(8)</sup>

We have already seen the use of environmental advertising in those states that have opened their markets to retail competition. Many consumers are interested in the environmental qualities of the electric power they buy, and some consumers are willing to pay a premium for "environmentally friendly" electric power. There is, however, a potential for abuse of environmental claims because of the premium price, and because consumers cannot verify any of these advertising claims themselves.<sup>(9)</sup>

The types of environmental claims already appearing in electricity ads include:

- claims about the level of emissions of a product ("20% lower than average" or "doesn't pollute the air or water");
- the sources it is produced from ("nuclear free" or "all solar");
- overall effect on the environment ("help prevent global warming" or "reduce acid rain" or "green power"); or
- the activities of the company selling it ("we support environmental organizations" or "10% of profits go to rainforest preservation").

All of the FTC's general principles about advertising will apply to these kinds of claims; that is, advertising claims must be truthful and they must be substantiated with appropriate evidence at the time they are made. Under FTC case law, deception occurs "if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material."<sup>(10)</sup> It also is deceptive to omit "material information, the disclosure of which is necessary to prevent [a] claim, practice, or sale from being misleading."<sup>(11)</sup> Express claims, or deliberately made implied claims, used to induce the purchase of or payment for a particular product or service, are presumed to be material.<sup>(12)</sup> Substantiation of claims about electricity sources or characteristics presents many challenges because new tracking systems must be developed for competitive markets, and they must provide a means of independent verification.

The FTC's Guides for the Use of Environmental Marketing Claims,<sup>(13)</sup> which were developed for environmental claims about any type of product, also will provide guidance to electricity marketers on acceptable advertising practices. In addition, NAAG is developing similar green guidelines for electricity. The intent of that project is to assist states in their efforts to encourage fair competition and to provide some consistency in enforcing truth in advertising laws in the electric power industry. The FTC staff has been involved in the process by submitting comments to NAAG and participating in their workshop.

The Administration's recently introduced "Comprehensive Electricity Competition Act" (CECA), would authorize the Department of Energy to promulgate information disclosure regulations for advertising and promotional materials, in consultation with the Federal Energy Regulatory Commission, the Environmental Protection Agency and the FTC, requiring electricity suppliers and marketers to disclose in a standard format certain information about the electricity they sell, including price and other charges, the type of energy resource used to generate the electricity, and environmental attributes of the electricity, such as emissions levels. The FTC, along with state authorities, would be responsible for enforcing the disclosure requirements.

#### **IV. Unfair or Deceptive Business Practices**

The second major area where the FTC expects to be active in a deregulated electricity market is in the policing of various unscrupulous business practices.<sup>(14)</sup> Based on the deregulation of the telecommunications industry, we may see practices like "slamming" (changing a customer's electricity supplier without authorization) and "cramming" (placing unauthorized charges on a customer's bill) by dishonest electricity service providers as markets are deregulated. Indeed, the CECA bill provides for the FTC to issue and enforce regulations to combat slamming and cramming in the sale of electric power.

The FTC has significant experience combating cramming on telephone bills, where unauthorized charges appear on a customer's bill, sometimes completely unrelated to phone service. Cramming was our fifth most common consumer complaint last year. In addition, the Commission has been active in taking law enforcement actions targeting billing practices associated with cramming. In *FTC v. International Telemedia Associates, Inc.*, the Commission sued a billing aggregator and a vendor regarding charges for audio entertainment services delivered through collect callbacks.<sup>(15)</sup> The complaint alleged that the defendants failed to disclose the costs of the services to the consumers that they induced to call toll-free numbers to obtain the callback. In *FTC v. Hold Billing Services, Ltd.*,<sup>(16)</sup> the FTC targeted a billing aggregator and a vendor for practices allegedly resulting in unauthorized telephone bill charges for a package of services. The defendants allegedly induced consumers to enter a purported sweepstakes without adequately disclosing that they construed each completed entry form as an authorization to bill charges to the telephone number filled in on the form.

Several contributing factors lead us to believe that cramming also may become a problem in deregulated electricity markets. Billing formats used by electricity providers are often confusing, and there are many line item charges that consumers may have trouble identifying, making it more difficult for consumers to notice fraudulent charges. In competitive markets, the billing system will have to accommodate multiple vendors, some of whom may offer services unrelated to electricity. Moreover, billing may be handled by aggregators or service companies rather than the utility or service providers themselves.

The FTC also will be watching for other unscrupulous practices like pyramid schemes, investment scams and telemarketing violations in this newly deregulated market. The FTC already enforces rules and laws against these practices in other industries, and we may see

them in electricity markets as well. For example, the FTC late last year settled charges with FutureNet, which was an alleged pyramid scheme. FutureNet was purporting to sell electricity service, even though at the time, no state had deregulated the sale of electric power to consumers. The FTC's settlement barred the defendants from engaging in pyramid schemes in the future, and required that they post a \$1 million bond before engaging in any multilevel marketing plans in the future.<sup>(17)</sup>

The Commission enforces other consumer protection rules that will apply to the sale of electricity in a competitive market. The Telemarketing Sales Rule, 16 C.F.R. Part 310, protects consumers from deceptive and abusive telemarketing practices, for example, by requiring telemarketers promptly to tell consumers that the call is a sales call and to inform them of the nature of the product being offered; by prohibiting misrepresentations regarding the cost and other aspects of the offered goods or services; and by prohibiting calls before 8 a.m. and after 9 p.m.

The Commission's Cooling Off Rule, 16 C.F.R. Part 429, applies to door-to-door sales and other sales made away from the seller's principal place of business. It requires that a seller in a door-to-door sale of consumer goods or services (with a purchase price of \$25 or more) furnish the buyer with certain oral and written disclosures of the right to cancel the contract with three business days from the date of the sales transaction. It requires that this notice be included on the sales contract or receipt and that sellers provide consumers with a copy to keep for themselves. The Rule also requires a seller, within 10 business days after receipt of a valid cancellation notice from the buyer, to honor the buyer's cancellation by refunding all payments made under the contract.<sup>(18)</sup>

Finally, the Commission enforces several statutes and implementing credit rules, such as the Truth in Lending Act (TILA),<sup>(19)</sup> and the Equal Credit Opportunity Act (ECOA).<sup>(20)</sup> Although utilities whose rates are set by state regulatory agencies are, under some circumstances, exempted from certain aspects of these requirements, once electric power rates are set by market forces rather than regulators, utilities and other sellers and advertisers of these services may be subject to these rules as well.<sup>(21)</sup>

## V. Conclusion

Deregulation in a number of industries has proven to be beneficial to many consumers and the competitive process. The Commission stands ready to meet both its consumer protection and competition enforcement responsibilities to protect consumer gains that should follow the introduction of market forces to the electric power industry.

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1. Testimony of the Federal Trade Commission Before the Committee on Commerce, Subcommittee on Energy and Power at 2 (May 6, 1999).

2. For example, during 1997-1998, Wisconsin Attorney General James Doyle, then-President of NAAG, made the theme of his presidency consumer protection and competition issues in the deregulated utility markets.

FTC staff attended NAAG hearings held around the country to examine these issues.

3. These comments may be found on the Commission's website at <http://www.ftc.gov/be/advofile.htm>. Other federal agencies also have been engaged in efforts to assist state decision makers about consumer protection issues that are relevant in a deregulated environment. The Department of Energy has released a report entitled "Retail Electric Competition: A Blueprint for Consumer Protection," that comprehensively reviews the variety of consumer protection issues raised by retail electric competition, including the various state laws in effect in this area.<sup>(4)</sup>

4. Barbara Reid Alexander, *Retail Electric Competition: A Blueprint for Consumer Protection* (Oct. 1998).

5. 15 U.S.C. § 45.

6. The Commission devotes significant resources to such activities in order to assist business who desire to comply with the law. We routinely provide advice and guidance on consumer protection issues, based on our substantial expertise in consumer protection issues arising in many different industries.

7. "Advertising--Labeling and Disclosure: Are You Aware of the Rules of the Road?" EEI, May 3-4, 1999.

8. EEI EnergyADSmart, "Electric Power Ad Spending Rises Slightly in 1998" (May 1999), <http://www.eei.org/7online/adsmart/9905/powerad.htm>.

9. It may be worth noting how environmental claims can be made for what would appear to be a homogeneous, undifferentiated product. In general, customers receive electricity from power lines that are attached to a "grid" into which numerous generators, using a wide variety of fuel sources and generation systems, transmit their electricity. Once on the grid, all electricity is mixed together and its origins become indistinguishable. When a customer has a demand ("load") for electricity -- for example, to turn on lights -- the amount needed to meet the load is, in effect, drained off the grid. The electricity passing through the circuit nearest to that customer's line goes to the customer's meter and meets the load.

In this situation, it is impossible to ensure that electricity used by a particular customer came directly and exclusively from that customer's supplier or to verify the precise sources of the electrons used by the customer. It is possible, however, to track the financial transactions that occur as power is supplied to the grid and then to the customer. A customer's usage is measured at the customer's meter. The customer is billed for that usage, and the proceeds go to the retail supplier. The supplier must in turn pay the middlemen who provided the power, and the middlemen must pay the generators whose power they bought to service the supplier. In this way, the customer's usage is linked, through the financial process, to identifiable generation plants and the characteristics (e.g., fuel type, emissions, etc.) associated with those plants. Thus, it can reasonably be said that the customer's power purchase did result in electricity, possessing the characteristics advertised by the supplier, being generated and placed on the grid. Accordingly, companies may claim to be selling electricity generated by particular power sources or having particular environmental characteristics, so long as such claims are substantiated, even though the source of the electricity that arrives at the customer's house or workplace is impossible to determine.

An alternative system for tracking electricity, referred to as a tradeable tags system, also is under consideration. In this system, each characteristic would be assigned a tag, which could be traded separately from the electricity itself. The system would work similarly to the system of sulphur emissions certificates administered by the Environmental Protection Agency. Although no state has yet adopted a tradeable tags system, it could be considered by some states in the future. See "Uniform Consumer Disclosure Standards for New England," National Council on Competition and the Electricity Industry (Jan. 1998) <http://www.rapmaine.org/nccei/altindex.html>.

10. Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C.

110, 165, *appeal dismissed sub nom. Koven v. FTC*, No. 84-5337 (11th Cir. 1984) (Deception Statement).

11. *Id.* at 177.

12. *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Information concerning the cost of a product or service also has been found to be material. Deception Statement at 174.

13. 16 C.F.R. Part 260 (FTC Green Guides).

14. Enforcement of consumer protection laws also promotes competition by helping to ensure that honest competitors are not denied entry to the market due to the actions of unscrupulous competitors and that they do not lose market share to unscrupulous competitors. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713 (Spring 1997).

15. No. 1-98-CV-1935 (N.D. Ga., filed July 10, 1998).

16. No. SA-98-CA-0629 (W.D. Texas, filed July 15, 1998).

17. *FTC v. FutureNet*, No. 98-1113GHK (AIX) (C.D. Cal. 1998).

18. Some sellers of deregulated utilities are already marketing their services door to door.

19. 15 U.S.C. § 1601 *et seq.*

20. 15 U.S.C. § 1691 *et seq.*

21. The TILA and ECOA are implemented by Regulation Z, 12 C.F.R. § 226, and Regulation B, 12 C.F.R. § 202, respectively. Although the Federal Reserve Board promulgates these regulations, the Commission enforces these requirements for most non-bank entities around the nation. *See* Section 108(c) of the TILA, 15 U.S.C. § 1607(c) and Section 704(c) of the ECOA, 15 U.S.C. § 1691c(c).