

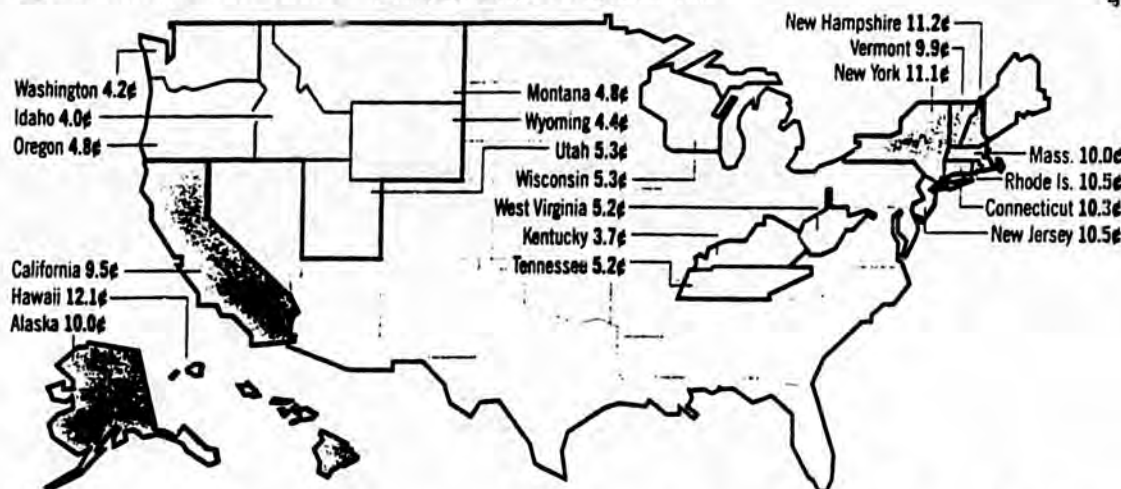
ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 86/2

2499 SCOMM 109: JNT. COMM. ELEC. UTILITY RESTRUCTURING, 1998

ELECTRICITY

THE 20 STATES WITH THE CHEAPEST—AND COSTLIEST—POWER

□ LOWEST rates per kilowatt-hour in 1996 □ HIGHEST rates per kilowatt-hour in 1996



price: direct, producer-to-user price competition will be thwarted for years.

Here's what's happening in California. First, to make sure the state's utilities don't overwhelm would-be competitors on the generation side of the business, regulators have pushed the utilities to sell off their gas-fired generating plants. California also rolled back rates the big private utilities can charge homeowners to what they were in June 1996. At about a dime, that's better than the 12 to 13 cents Californians had been paying, so complaints are few. Lower rate freezes apply for commercial and industrial customers.

Are the utilities screaming? No, because regulators also devised a process to help them recover losses on those "stranded," or devalued-by-competition, assets. Their costs will drop sharply in the next few years. Remember that California utilities, like others elsewhere, were forced to sign contracts for overpriced power generated by independent producers; many of these contracts were already due to expire in the next few years. If, as expenses drop, it then costs the utilities, say, only 7 cents to deliver a kilowatt, they get to pocket the 3 cents and use it to write off their overpriced, stranded assets. They have four years to make, buy, and deliver power as cheaply as possible. In 2002, the fixed price disappears, and California's big three utilities—Southern California Edison, Pacific Gas & Electric, and San Diego Gas & Electric—will have a harder time recovering any remaining stranded costs. (Some version of California's plan will probably be adopted in other states.)

"Whoa," a California resident might say, "now that I can buy from anybody, why

can't I buy some of that 2.5-cent power, instead of the 10-cent stuff from SCE or PG&E?" Simple. That 2.5-cent or so cost of generating power is only about a quarter of your total bill. The rest is pretty well fixed. The new laws say California homeowners will still have to pay their utility for: transmission (0.7 cents), the wires and poles distributing electricity to your house (2.4 cents), and state-mandated help for the poor (0.1 cents). Billing and other services typically add another 0.4 cents. And everybody will have to pay an additional 3 to 4 cents to help the power companies pay off their stranded costs.

CALIFORNIA AUCTION

Even if you wanted to, you might not find cheaper electricity. Under the new rules in California, that power company in Utah with cheap electricity has no incentive to sell it to you at a bargain. More likely, those in Utah will get a better price by selling it to the soon-to-be-created California Power Exchange (PX), a nonprofit clearinghouse mandated by state officials.

Here's how it will work. Every day, the PX will take bids on the power it will need for each hour of the following day, and take the cheapest power offered. Anybody can buy or sell on the exchange. However, Cal-

ifornia's three big utilities must sell and buy all their electricity through the PX. Let's say that a company we'll call Cheapo Electric offers and sells ten megawatts of power at a penny per kilowatt for 7 A.M. the following day. But for 8 A.M., demand is expected to rise to 15 megawatts. Cheapo won't be able to provide enough one-penny power to meet all demand, but Outtastate Heat & Light offers the additional five megawatts at the next lowest price: 2 cents. Under the PX rules, both Cheapo and Outtastate get paid 2 cents for that hour of power, even though one offered power at a lower price.

By 3 P.M., with hot winds blowing in off the desert, California will need all the power it can find, and the out-of-state transmission lines are full. So ElectroGouge Illuminating, a startup that bought old, inefficient power plants when the California utilities auctioned them off, offers \$1.50 per kilowatt. If the PX pays ElectroGouge \$1.50 per kilowatt for that last bit of power, everybody else, even Cheapo, will get paid \$1.50. So in one day, exchange prices have fluctuated between \$0.01 and \$1.50.

Negotiating megawatts with a beady-eyed trader won't be much fun for the average corporate facilities manager.

LOWBALLERS FRUSTRATED

The Power Exchange is not great news for Enron, PacificCorp, and other

big power providers that hoped to come to California, offer cheap out-of-state power, and develop a cozy relationship with big industrial customers. Indeed, the PX is another inconvenient product of politics, a stopgap measure to help utilities cover stranded costs. "It will not be easy for a customer to beat the PX price," says Alex Miller, vice president for California operations at PacificCorp, an Oregon utility

with coal plants in several Western states. That's because with Edison and PG&E buying from the PX and tacking on the same transmission and stranded-cost charges as other providers, everybody's price will be about the same.

Lincoln Anderson, the head of Enron's operations in California, is rethinking how Enron will attack the California electricity business. He can't succeed for now, he says, by treating retail electricity as a commodity to be sold at the lowest price. Instead, Enron intends to build relationships with customers by delivering energy-related services. They can, for instance, finance and install new heating, cooling, and lighting equipment.

California's retail electricity business will change sharply in 2002, though, says Anderson. By then prices will move freely. The 3- or 4-cent surcharge to help the utilities pay stranded costs will disappear, and the PX may be disbanded. With rapidly fluctuating prices, he says, Enron will flourish. Want a guaranteed flat rate per kilowatt for two years? Want one contract price for your factory's steady electric load, and another that limits the top price you'll pay per kilowatt during peak periods? Enron, and others, will offer that.

AlliedSignal's \$15,000, refrigerator-sized generator will let small companies make their own power and could threaten many utilities.

BE PREPARED

Negotiating megawatts with a beady-eyed Enron trader won't be much fun for the average corporate facilities managers.

So get ready now, says Catherine Luthin, a consultant whose work includes managing Columbia University's \$11-million-per-year electric bill. Big commercial and industrial power users should analyze how their buildings and factories use electricity, she says. "You should have at least a year's worth of data, gathered in 15-minute increments." Most utilities will collect the information for a small fee. Of what use is this data? Power prices will probably fluctuate wildly, every hour, once competition starts. You may have negotiated a flat fee with Enron for up to two megawatts of power a day, but could have to pay a fortune for anything extra you use on a hot August afternoon.

By studying how and when each facility uses electricity, a company will know how to cut power consumption appropriately or negotiate favorable power-supply contracts. Several firms already sell software that helps companies analyze their electricity usage.

THE MIGHTY MICROTURBINE

If you think the utilities get to relax once they've sold off their generators, cozy in the thought of all those billions' worth of power lines running down Main Street, you're wrong. There is a new threat: the microturbine.

In big cities, where the cost of providing electricity on wires be-

low ground is eight times higher than providing it on poles, an overwhelming portion of every customer's electric bill is for distribution—the wires connected to

your house or office. What if you decide you don't want to pay those distribution charges anymore?

AlliedSignal, the jet engine and auto parts company, hopes you will detach from the power lines and make your own electricity. The company has developed a line of small generators, including one for \$15,000

There is a new threat that will come to haunt utilities. It is the microturbine. Con Edison executives pooh-pooh it.



that can produce power for 3.5 to 4.3 cents per kilowatt-hour. It appears to be a masterpiece of simplicity: a turbine, with one moving part, that emits virtually no noise or pollution and can burn natural gas. Heat from the exhaust can be used to boil water or warm a building. It probably won't be economical for a home, but a Taco Bell stand in Brooklyn, say, which probably uses 75 kilowatts an hour, could pay it off in two years, claims Tony Prophet, an Allied executive.

Executives at Con Ed pooh-pooh the threat. New York real estate is too valuable to waste on generator space, says one. Apartment dwellers wouldn't want a high-pressure gas line running to a rooftop generator, scoffs another. Con Ed's counterpart in Chicago, however, is not so sanguine. When the Allied generators are mass-produced next year, Commonwealth Edison's parent company will have an exclusive franchise to sell them in the territory of all rival utilities in ten neighboring states.

The electricity business hasn't changed much over the past 60 years, so it isn't surprising that there is still a strain of denial among those—certain utility officials in New York, say—who'd rather see things continue as they were. But when a supposedly quiescent, fossilized utility like Commonwealth Edison contemplates assaulting its neighbors, it seems inevitable that competition will wring every inefficiency from this long-protected industry. This is a revolution, it's already begun, and it's about time. ■

STEVE LABOVITZ

COLUMBIA STEEL CASTING CO., INC., an
Oregon corporation, Plaintiff-Appellee,
v.
PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon corporation, Defendant-Appellant.
COLUMBIA STEEL CASTING CO., INC., an
Oregon corporation, Plaintiff-Appellant,
v.
PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon corporation; Public Utility
Commission of the State of Oregon, Defendants-
Appellees.

Nos. 93-35902, 93-35958.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 3, 1995.

Decided July 20, 1995.

Opinion Withdrawn Dec. 27, 1996.

Decided Dec. 27, 1996.

As Amended on Denial of Rehearing
and Rehearing En Banc
April 3, 1997.

Industrial customer brought action against electric utilities and Oregon Public Utility Commission (PUC), alleging that utilities had conspired to divide market for electricity in city in violation of Sherman Antitrust Act, and that purported division of city into exclusive service territories was beyond scope of PUC order. Cross-motions for summary judgment were filed. The United States District Court for the District of Oregon, Helen J. Frye, J., 770 F.Supp. 562 and 1993 WL 36071, granted summary judgment for customer, rejecting utility's contention that it was entitled to federal antitrust immunity under state-action doctrine. Utility moved for reconsideration. The District Court, 1992 WL 161031 and 1993 WL 191637, denied motions. Utility appealed, and customer cross-appealed and moved for attorney fees on appeal. The Court of Appeals, William A. Norris, Circuit Judge, held that: (1) PUC did not forthrightly state policy of state that was clear in its purpose to displace competition in city market with territorial monopolies and, thus, utility was not protected under state-action doctrine from liability to customer under Act section governing combinations in

restraint of trade; (2) under Oregon law, PUC's subsequent order, declaring that it had intended in its order issued 20 years earlier to displace competition in city with regulation, was not entitled to preclusive effect as to issue of availability of antitrust state-action doctrine; (3) alleged foreseeability of territorial division of city market, as result of PUC order approving exchange of property and customers between utilities in city, did not render utility entitled to immunity under state-action doctrine; (4) utility's refusal to wheel another utility's electricity to customer's plant was overt act that restarted statute of limitations on customer's claim against refusing utility; (5) utility was not entitled to regulatory justification defense or business justification defense; (6) antitrust immunity under Noerr-Pennington doctrine for attempt to influence legislation or public officials was inapplicable to utility; (7) filed rate doctrine did not apply so as to bar customer from recovering damages for utility's violation of Act; and (8) customer was entitled to damages from utility beginning with other utility's earlier refusal to sell customer power at its lower rates, rather than beginning with that utility's later entry into contract with customer for provision of electricity to customer's plant.

Affirmed in part, vacated in part, and motion for attorney fees on appeal granted.

Opinion, 103 F.3d 1446, superseded.

[1] MONOPOLIES $\S$ 12(1.5)

265k12(1.5)

Agreement among competitors to allocate territories is per se violation of Sherman Antitrust Act section governing combinations in restraint of trade. Sherman Act, $\S$ 1, as amended, 15 U.S.C.A. $\S$ 1.

[2] MONOPOLIES $\S$ 12(15.6)

265k12(15.6)

State-action doctrine cloaks anticompetitive conduct with antitrust immunity only if state's intent to displace competition with regulation is clearly articulated and affirmatively expressed as state policy. Sherman Act, $\S$ 1 et seq., as amended, 15 U.S.C.A. $\S$ 1 et seq.

[3] MONOPOLIES $\S$ 12(15.6)

265k12(15.6)

Midcal test for federal antitrust state-action doctrine is rigorous one that ensures that private parties can claim state-action immunity from Sherman Antitrust Act liability only when their anticompetitive acts are truly product of state regulation. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[4] MONOPOLIES ⇨ 12(15.6)

265k12(15.6)

Midcal test for federal antitrust state-action doctrine guarantees that private party's anticompetitive conduct promotes state policy, rather than merely party's individual interests, and limits spread of immunity that is disfavored, much as are repeals of antitrust laws by implication, because of Congress' overarching and fundamental policies protecting competition. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[5] MONOPOLIES ⇨ 12(16)

265k12(16)

Under state-action doctrine, to the extent that public utility provider obtains lawful and valid contract for allocation of territories and customers through provisions of Oregon territorial allocation statutes, that provider is immune from federal antitrust violations. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; ORS 758.400-758.475.

[6] MONOPOLIES ⇨ 12(16)

265k12(16)

For protection under federal antitrust state-action doctrine, under Oregon statutory provisions authorizing Oregon Public Utility Commission (PUC) to approve contracts between public utilities allocating exclusive service territories, utility companies must enter into contract which allocates service territories and designates service to customers, and utility companies must make application to and receive order from PUC approving and establishing allocation of these territories; these requirements must be met to receive immunity which is provided by state statutory scheme from federal antitrust laws. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; ORS 758.400-758.475.

[6] PUBLIC UTILITIES ⇨ 114

317Ak114

For protection under federal antitrust state-action doctrine, under Oregon statutory provisions authorizing Oregon Public Utility Commission

(PUC) to approve contracts between public utilities allocating exclusive service territories, utility companies must enter into contract which allocates service territories and designates service to customers, and utility companies must make application to and receive order from PUC approving and establishing allocation of these territories; these requirements must be met to receive immunity which is provided by state statutory scheme from federal antitrust laws. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; ORS 758.400-758.475.

[7] MONOPOLIES ⇨ 12(16)

265k12(16)

Oregon Public Utility Commission (PUC) did not forthrightly state policy of state that was clear in its purpose to displace competition in city market with territorial monopolies, either in its initial order approving exchange of property, facilities, and customers between electric utilities in city or in its subsequent orders, and, thus, utility was not protected under state-action doctrine from liability to industrial customer under Sherman Antitrust Act section governing combinations in restraint of trade; neither initial order nor agreement it approved said anything about exclusive service territories in city, initial order did not cite statutory provisions governing PUC authority to approve contracts allocating exclusive service territories in approving exchange of property, and subsequent orders did not amend initial order to clarify it as expression of state policy to displace competition but, at best, recited that utilities had stopped competing within territories they had defined. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 757.480, 758.400-758.475; Portland, Or., Ordinance 134416 (Apr. 26, 1972).

[8] MONOPOLIES ⇨ 12(16)

265k12(16)

Oregon statutory provisions authorizing Oregon Public Utility Commission (PUC) to approve contracts between public utilities allocating exclusive service territories did not themselves satisfy clear articulation prong of Midcal test for state-action immunity from liability under Sherman Antitrust Act section governing combinations in restraint of trade, for purposes of industrial customer's action against electric utility, which had agreed to territorially divide city with another electric utility, alleging that first utility and other utility had conspired to divide market for electricity in city; state's clearly

articulated policy was to have Commission decide whether to sanction anticompetitive conduct and, thus, Court of Appeals had to look to decisions of Commission to determine whether first utility's conduct was part of clearly articulated state policy. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 758.400-758.450.

[9] MONOPOLIES ⇨ 12(15.6)
265k12(15.6)

Clear articulation and active supervision Midcal elements for federal antitrust state-action doctrine are both directed at ensuring that particular anticompetitive mechanisms operate because of deliberate and intended state policy. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[10] MONOPOLIES ⇨ 12(15.6)
265k12(15.6)

Under federal antitrust state-action doctrine, mere state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[11] ELECTRICITY ⇨ 8.1(4)
145k8.1(4)

Under Oregon law, order of Oregon Public Utility Commission (PUC), declaring that it had intended, in its order issued 20 years earlier, to displace competition in city with regulation, was not entitled to preclusive effect as to issue of availability of antitrust state-action doctrine in industrial customer's action against electric utility, alleging violation of Sherman Antitrust Act section governing combinations in restraint of trade; issue decided in order was whether earlier PUC had intent to approve allocation of exclusive service territories, but state-action immunity issue turned on whether displacement of competition with monopolies was clearly articulated and affirmatively expressed as state policy. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 757.480, 758.400-758.475; Portland, Or., Ordinance 134416 (Apr. 26, 1972).

[12] JUDGMENT ⇨ 715(1)
228k715(1)

Under Oregon law, one tribunal may give preclusive effect to prior determination of issue by another tribunal only if issue in the two proceedings is identical.

[13] JUDGMENT ⇨ 713(1)
228k713(1)

Under Oregon law, second tribunal may give preclusive effect to earlier decision on issue by another tribunal only if party sought to be precluded has had full and fair opportunity to be heard on that issue.

[14] MONOPOLIES ⇨ 12(15.6)
265k12(15.6)

State-action immunity is question of federal antitrust law that turns on clarity of state's expression of its policy, not subjective intent of its policymakers. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[15] MONOPOLIES ⇨ 12(15.6)
265k12(15.6)

Federal antitrust state-action immunity is not issue of fact, and cannot be decided simply by ferreting out extrinsic evidence in effort to ascertain subjective intent of state; issue of state-action immunity must be decided by applying rigorous test of whether state clearly articulated and affirmatively expressed its intent to displace competition with regulation as matter of state policy. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[16] JUDGMENT ⇨ 815
228k815

Order or judgment is not entitled to full faith and credit if issuing tribunal had no subject matter jurisdiction over matter before it. U.S.C.A. Const. Art. 4, § 1.

[17] MONOPOLIES ⇨ 12(16)
265k12(16)

Alleged foreseeability of territorial division of city market, as result of Oregon Public Utility Commission (PUC) order approving exchange of property and customers between electric utilities in city, did not render utility entitled to immunity under state-action doctrine from liability to industrial customer under Sherman Antitrust Act section governing combinations in restraint of trade, where, in its order, PUC did not expressly authorize utility to maintain exclusive service territory but, rather, merely approved exchange of property and customers. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 757.480, 758.400-758.475; Portland, Or., Ordinance 134416 (Apr. 26, 1972).

[18] FEDERAL COURTS ⇨612.1
170Bk612.1

Court of Appeals would exercise its discretion to consider issue raised for first time on appeal by electric utility and Oregon Public Utility Commission (PUC), that federal antitrust state-action immunity applied to utility because territorial division of city market was foreseeable result of PUC's prior order approving exchange of property and customers between electric utilities in city, in industrial customer's action against utility, alleging violation of Sherman Antitrust Act section governing combinations in restraint of trade, where foreseeability issue was pure issue of law, and consideration of issue would not prejudice customer. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 757.480, 758.400-758.475; Portland, Or., Ordinance 134416 (Apr. 26, 1972).

[19] FEDERAL COURTS ⇨612.1
170Bk612.1

Court of Appeals will review issue that has been raised for first time on appeal under certain narrow circumstances, including when issue is purely one of law.

[20] MONOPOLIES ⇨12(15.6)
265k12(15.6)

Express authorization is necessary predicate for foreseeability test regarding reach of federal antitrust immunity under state-action doctrine. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[21] MONOPOLIES ⇨12(16)
265k12(16)

In absence of state-action immunity, agreement between electric utilities to territorially divide city market for electricity constituted per se violation of Sherman Antitrust Act section governing combinations in restraint of trade. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[22] LIMITATION OF ACTIONS ⇨58(1)
241k58(1)

Electric utility's refusal to wheel another utility's electricity to industrial customer's plant was overt act that restarted statute of limitations on customer's claim against refusing utility under Sherman Antitrust Act section governing combinations in restraint of trade, based on prior agreement between utilities to territorially divide city between them;

utility's refusal was not mere reaffirmation of utilities' agreement to stop competing, because agreement was not permanent and final decision that controlled utility's later act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[23] MONOPOLIES ⇨12(2)
265k12(2)

Electric utility was not entitled to regulatory justification defense or business justification defense in industrial customer's action against utility, alleging violation of Sherman Antitrust Act section governing combinations in restraint of trade, arising from utility's refusal to wheel another utility's electricity to customer's plant after Oregon Public Utility Commission (PUC) order approving exchange of property and customers between utilities in city, where order did not approve allocation of exclusive service territories, and language of order was permissive. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 757.480, 758.400-758.475, 758.450(2); Portland, Or., Ordinance 134416 (Apr. 26, 1972).

[24] MONOPOLIES ⇨12(16.5)
265k12(16.5)

Antitrust immunity under Noerr-Pennington doctrine was inapplicable to electric utility in industrial customer's action alleging violation of Sherman Antitrust Act section governing combinations in restraint of trade, arising from utility's refusal to wheel another utility's electricity to customer's plant after Oregon Public Utility Commission (PUC) order approving contract for exchange of property and customers between utilities in city; applying to agency for approval of anticompetitive contract was not "lobbying activity" within meaning of doctrine, and liability was not based on filing application that resulted in order approving contract but, but on agreeing with other utility to replace competition with area monopolies. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1; ORS 757.480; Portland, Or., Ordinance 134416 (Apr. 26, 1972). See publication Words and Phrases for other judicial constructions and definitions.

[25] MONOPOLIES ⇨12(16.5)
265k12(16.5)

Applying to administrative agency for approval of anticompetitive contract is not "lobbying activity" within meaning of Noerr-Pennington doctrine governing federal antitrust immunity for attempt to

influence legislation or public officials. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

[26] MONOPOLIES ⇨12(2)

265k12(2)

Filed rate doctrine did not bar industrial customer from recovering damages for electric utility's violation of Sherman Antitrust Act section governing combinations in restraint of trade, based on utility's refusal to wheel another utility's electricity to customer's plant due to agreement between utilities to territorially divide city, despite contention that refusing utility could not charge rate offered by other utility or transfer customer to other utility without Oregon Public Utility Commission (PUC) approval; conduct challenged was not refusal to sell electricity to customer at lower rate but, rather, noncompetition agreement between utilities that prevented customer from buying electricity at other utility's lower prices. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[27] MONOPOLIES ⇨12(2)

265k12(2)

"Filed rate doctrine" generally forbids recovery of treble damages under Sherman Antitrust Act based on payment of rates that are established by regulated tariffs, even if defendants engaged in illegal price-fixing. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

[28] MONOPOLIES ⇨12(2)

265k12(2)

Industrial customer's requirements contract to purchase electricity from electric utility did not bar customer from suing utility under Sherman Antitrust Act for agreeing with another electric utility to stop competing in city market. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[29] MONOPOLIES ⇨28(9)

265k28(9)

Industrial customer was entitled to damages beginning with electric utility's earlier refusal to sell customer power at its lower rates, rather than beginning with that utility's later entry into contract with customer for provision of electricity to

customer's plant, in customer's action against another electric utility, arising from other utility's refusal to wheel first utility's electricity to plant due to agreement between utilities to territorially divide city, alleging violation of Sherman Antitrust Act section governing combinations in restraint of trade; first utility was coconspirator at time of its initial refusal, and other utility was liable for acts of first utility in furtherance of their conspiracy not to compete in city. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

*1431 Allan M. Garten and Barbee B. Lyon, Tonkon, Torp, Galen, Marmaduke & Booth, Portland, Oregon, for Portland General Electric Company.

Michael C. Donen, Heller, Ehrman, White & McAuliffe, Portland, Oregon, for Columbia Steel Casting Co., Inc.

Jas. J. Adams, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, for the Public Utility Commission of Oregon.

Robert B. Nicholson and David Seidman, United States Department of Justice, Washington, DC, for the United States as amicus curiae.

Appeals from the United States District Court for the District of Oregon, Helen J. Frye, District Judge, Presiding. D.C. Nos. CV-90-00592-HJF, CV-90-00524-HJF.

*1432 ORDER

The opinion filed on December 27, 1996, 103 F.3d 1446, is amended as follows:

[Editor's Note: Amendments incorporated for purpose of publication.]

With the above amendments, the panel, as continued above, has voted unanimously to deny the petition for rehearing. Judge Browning has voted to reject the suggestion for a rehearing en banc, and Judges Reavley and Norris have recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

Before: BROWNING, REAVLEY (FN*), and NORRIS, Circuit Judges.

FN* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

ORDER

The Petition for Rehearing, filed August 3, 1995, is hereby GRANTED.

The Opinion filed July 20, 1995, and reported at 60 F.3d 1390, 1396 (9th Cir.1995), is WITHDRAWN and the attached Opinion is ordered filed instead.

OPINION

WILLIAM A. NORRIS, Circuit Judge:

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This appeal arises out of an antitrust action that Columbia Steel Casting Co., a large consumer of electric power in Portland, Oregon, brought against two electric utilities, Portland General Electric (PGE) and Pacific Power & Light (PP & L), charging them with dividing the city of Portland into exclusive service territories in violation of the Sherman Act, 15 U.S.C. §§ 1-2. (FN1) PGE raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission which, PGE argued, approved a division of the Portland market into exclusive service territories. See *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The district court rejected this state-action immunity defense and awarded summary judgment to Columbia Steel. PGE appeals the summary judgment in favor of Columbia Steel and

the denial of its own motion for summary judgment. Columbia Steel cross-appeals the amount of its damage *1433 award. We affirm the summary judgment in favor of Columbia Steel on PGE's antitrust liability and vacate and remand the damage award for further proceedings.

FN1. Only PGE is a party to this appeal.

I. Facts and Procedural History

The facts are undisputed. Until 1972, PGE and PP & L competed for customers throughout Portland. This competition resulted in the duplication of transmission lines and poles, substations, and transformers throughout the city. For many years the two utilities attempted to gain regulatory approval for a division of the Portland market into exclusive service territories. In 1962, for example,

PGE applied to Oregon's Public Utilities Commission (OPUC) for an allocation of an exclusive service territory in the city of Portland. [FN2] These efforts to secure exclusive service territories within Portland were unsuccessful, however, in part because of opposition from the city. Portland had a longstanding policy of encouraging competition among utilities, and the city charter provided that "[n]o exclusive franchises shall be granted." Portland City Charter, § 10-206. See, e.g., Portland, Or., Resolution 28879 (1962) (opposing PGE's 1962 application to the OPUC for an "allocation of exclusive areas for electric service within ... Portland").

FN2. In 1961, the Oregon legislature enacted a statute vesting in the OPUC exclusive authority to approve the creation of exclusive service territories in order to promote "[t]he elimination and future prevention of duplication of utility facilities." Or.Rev.Stat. § 758.405. The statute authorizes the OPUC to approve contracts between competitors that divide markets into exclusive service territories. Or.Rev.Stat. §§ 758.410-758.425, 758.450.

In 1972, PGE and PP & L jointly submitted to the city of Portland a plan to eliminate competition between them by dividing the city into exclusive service territories. This plan provided, inter alia, that "[s]ubject to the necessary regulatory approvals ... it is proposed that Parcels A & B [two defined areas within the city of Portland] be served exclusively by PP & L," and that "[s]ubject to the necessary approvals, it is proposed that Parcel C [a defined area within the city of Portland] ... be exclusively served by PGE." CR 269, exh. 47 at 2-3.

The Portland City Council disapproved the utilities' 1972 plan to displace competition with territorial monopolies in Portland. The City Council agreed, however, that the duplication of facilities should be eliminated for aesthetic, safety, and economic reasons. In the ordinance it passed, the City Council declared, "both [PGE and PP & L] operate under non-exclusive franchises and ... the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (Apr. 26, 1972). The only action that the ordinance approved was "the sale, transfer and exchange of plant and property between PGE and PP&L." [FN3] Id.

FN3. The Ordinance states, in part:

An Ordinance consenting to exchange of certain property within the City between [PGE] and [PP & L] on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains: Section 1. The Council finds that both [PGE] and [PP & L] operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an interchange of properties between the companies should be permitted as hereinafter set forth; ... now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE] and [PP & L] as follows

....
Portland, Or., Ordinance 134416 (Apr. 26, 1972) (emphasis added).

After securing the City Council's approval of the exchange of utility properties, but not the establishment of exclusive service territories, PGE and PP & L entered into an agreement, dated July 18, 1972 (the "1972 Agreement"), which they submitted to the OPUC for approval. In contrast to the plan submitted to the Portland City Council, the 1972 Agreement said nothing about exclusive service territories in Portland. The "whereas" *1434 clauses of the 1972 Agreement recited that one of its purposes was to comply with the terms of the Portland ordinance, which had approved an exchange of plant and property, but had disapproved exclusive service territories. The 1972 Agreement recited:

WHEREAS, [PGE] and [PP & L] wish to provide for the elimination of duplicating electric facilities in [the city of Portland]; and

WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by [PGE] and [PP & L] of certain properties located within the city;

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed....

1972 Agreement at 1-2.

The 1972 Agreement used the following language to effect the exchange of facilities:

1. Exchange of Facilities

(a) [PP & L] shall transfer and convey to [PGE] and [PGE] shall acquire from [PP & L] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PP & L] in ... the area [in Portland] designated as Parcel C....

(b) [PGE] shall transfer and convey to [PP & L] and [PP & L] shall acquire from [PGE] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PGE] in the areas [in Portland] designated as Parcels A and B....

1972 Agreement at 2-3.

The 1972 Agreement was approved by an order of the OPUC issued in December 1972. The 1972 Order provided, in relevant part:

The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480.... On July 18, 1972, [PP & L] and [PGE] entered into an agreement whereby an exchange of property and utility facilities would be made between [PGE and PP & L] in the City of Portland.... This exchange ... also involves the transfer of customers from one party to the other.

....
ORDERED that [PP & L] may transfer to [PGE] electric distribution plant ... situated within or used for providing utility service within the boundaries of Parcel A ... [and] Parcel B....

ORDERED that [PGE] may transfer to [PP & L] all electric distribution plant ... used for providing utility service within the boundaries of [Parcel C]....

....
ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be provided by that agreement between the companies herein, dated July 18, 1972.

Pub. Util. Comm'n of Or., Order 72-970 (Dec. 15,

1972) (the "1972 Order"). [FN4]

FN4. The only reference to customer accounts in the 1972 Agreement is in Section 7, which provides in relevant part:

7. Transfer of Customer Accounts

The transfer of customer accounts between [PGE] and [PP & L] shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved....

There is no reference to customer accounts in Section 1 of the 1972 Agreement, which provides for the exchange of facilities. In referring to the transfer of customers, Section 7 does not use the "shall transfer and convey" language used in Section 1. Thus the language and structure of the 1972 Agreement, as well as the language of the 1972 Order quoted in the text, suggest that the transfer of customers was treated as a necessary incident to the exchange of facilities. For a further discussion of the transfer of customers, see *infra* pp. 1456-57.

In approving the exchange of property in the city of Portland, the OPUC did not cite any of the statutory provisions that give the OPUC its authority to approve contracts between *1435 utility companies allocating exclusive service territories. See Or.Rev.Stat., ch. 758 ("Utility ... Territory Allocation ..."). [FN5] Unlike the Portland City Council ordinance—which had expressly disapproved exclusive service territories—but like the 1972 Agreement, the 1972 Order said nothing about exclusive service territories in Portland. The OPUC cited as authority for its approval of the 1972 Agreement Chapter 757 of the Oregon Revised Statutes ("Utility Regulation Generally"), specifically Or.Rev.Stat. § 757.480, [FN6] which gives the OPUC authority to approve the sale, lease, assignment or other disposition of public utility property.

FN5. Chapter 758 of the Oregon Revised Statutes speaks of "allocated" territories and defines that term in a way that means exclusive service territories. Section 758.400(1) defines "allocated territory" as "an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory". Or.Rev.Stat. § 758.400(1). Section 758.410(1) permits "[a]ny person providing a utility service [to] contract with any other person providing a similar

utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties." Or.Rev.Stat. § 758.410(1). Section 758.425 authorizes the OPUC to approve the "contract as filed" and provides that "[i]f the commission approves [the] contract ... the contract shall be deemed to be valid and enforceable...." Or.Rev.Stat. § 758.425. Section 758.450(2) provides that "no other person shall offer, construct or extend utility service in or into an allocated territory." Or.Rev.Stat. § 758.450(2).

FN6. Section 757.480 provides in pertinent part:

(1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$10,000, or sell, lease, assign or otherwise dispose of any franchise, permit, or right to maintain and operate such public utility or public utility property, or perform any service as a public utility;

...

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

Or.Rev.Stat. § 757.480.

After the OPUC issued its 1972 Order, PGE and PP & L stopped competing with each other in Portland. Each utility served customers exclusively in the parcels in which it had acquired the electric distribution facilities of the other.

Columbia Steel operates a steel casting plant located in the area which PGE began serving exclusively after the issuance of the 1972 Order. In 1987, Columbia Steel asked PP & L to service its plant because PP & L's rates were lower than PGE's. PP & L refused, citing the fact that the plant was located in the territory being served exclusively by PGE.

In 1989, Columbia Steel again asked PP & L to service its casting plant. This time, PP & L agreed and offered to enter into a supply contract with Columbia Steel. PGE objected, however, citing its 1972 Agreement with PP & L. PGE took the position that the 1972 Agreement gave it the

exclusive right to service Columbia Steel's plant because it was located in the service territory allegedly "allocated" to PGE by the 1972 Agreement. Undeterred, Columbia Steel wrote PGE on May 30, 1990, asking it to "wheel" electricity generated by PP & L to the casting plant until PP & L could build a substation which would enable it to deliver power directly to the plant. PGE refused, reasserting that it had the exclusive right to service Columbia Steel's plant.

[1] On June 19, 1990, Columbia Steel filed this antitrust action against PGE, PP & L, and the OPUC, on the theory that the division of Portland into exclusive service territories violated the Sherman Act, 15 U.S.C. §§ 1- 2. [FN7] The defendants raised the *1436 state-action doctrine as an affirmative defense, contending that the division of the Portland market was cloaked with antitrust immunity by the 1972 Order of the Oregon OPUC approving the 1972 Agreement.

FN7. An agreement among competitors to allocate territories is a per se violation of § 1 of the Sherman Act. E.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50, 111 S.Ct. 401, 402-03, 112 L.Ed.2d 349 (1990); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378, 93 S.Ct. 1022, 1030, 35 L.Ed.2d 359 (1973) (contracts that purported to restrict defendant's ability to wheel power "were 'in reality, territorial allocation schemes,' " and "were per se violations of the Sherman Act") (citation omitted).

In July 1990, PP & L entered into a contract with Columbia Steel and began servicing the casting plant in July 1991, when PGE began transmitting PP & L's power to the plant over PGE's power line. Columbia Steel later dismissed all its claims against PP & L, which explains why PP & L is not a party to this appeal.

On July 3, 1991, the district court rejected PGE's state-action defense in an order granting Columbia Steel's motion for partial summary judgment. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F.Supp. 562 (D.Or.1991). The district court held that the OPUC's 1972 Order did not articulate a state policy to allocate exclusive service territories in Portland as required by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). *Pacificorp*, 770 F.Supp. at 569-71. As the district court

interpreted the OPUC's 1972 Order, it approved a one-time exchange of property and customer accounts, but not an allocation of exclusive service territories. *Id.* at 570-71.

On February 4, 1993, the district court granted summary judgment for Columbia Steel on the remaining issues, ruling that PGE had violated section 1 of the Sherman Act in agreeing with PP & L not to compete in the Portland market. The court awarded Columbia Steel \$508,425 in treble damages and \$901,671.62 in attorneys' fees and costs.

II. State-Action Immunity

A. The Midcal Clear Articulation Requirement

[2][3][4] The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (upholding state wine pricing system because "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance"). The *Midcal* test is a "rigorous" one that "ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation." *Patrick v. Burget*, 486 U.S. 94, 100, 108 S.Ct. 1658, 1662, 100 L.Ed.2d 83 (1988). It guarantees that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests," *id.* at 101, 108 S.Ct. at 1663, and limits the spread of an immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S.Ct. 2169, 2176, 119 L.Ed.2d 410 (1992), because of Congress's "overarching and fundamental policies" protecting competition. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). See also Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 214e (1978).

[5][6] The district court acknowledged that the provisions of chapter 758 of the Oregon Revised Statutes, which authorize the OPUC to approve contracts between public utilities allocating exclusive service territories, "articulate the policy of the State of Oregon to remove market competition as the basis

for determining the customers of the providers of electricity." *Pacificorp*, 770 F.Supp. at 570. As the district court put it:

To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, [Or.Rev.Stat.] 758.400 to 758.475, that provider is immune from antitrust violations.

....
[Or.Rev.Stat.] 758.400(1) states that "[a]llocated territory" means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into "1437 a contract which allocates service territories and designates service to customers, and the utility companies must make application to and receive an order from the [O]PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

Id.

Notwithstanding the clarity with which chapter 758 expresses a legislative policy of authorizing the OPUC to approve allocations of exclusive service territories, the district court rejected PGE's state-action immunity defense because the OPUC failed to exercise that authority in issuing the 1972 Order. *Id.* at 571. The district court explained that the 1972 Agreement between PGE and PP & L, which the 1972 Order approved, did not establish exclusive service territories in the city of Portland. As the district court read the 1972 Agreement, PGE and PP & L had agreed "only to an exchange of facilities within the area relevant to this action." *Id.* at 571. In other words, the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*.

[7][8][9] We agree with the district court that the 1972 Order fails to "speak" with sufficient clarity to satisfy the *Midcal* test. [FN8] Neither the 1972 Order nor the 1972 Agreement it approved says

anything about exclusive service territories in the city of Portland. This omission becomes glaring when the language of the 1972 Order as it pertained to Portland is compared with the language of the same order as it pertained to the city of Rainier. Although the 1972 Order said nothing about exclusive service territories in approving the exchange of property in Portland, it expressly used such language in approving a provision of the 1972 Agreement which transferred to PGE an area within the city of Rainier that had previously been served exclusively by PP & L. See 1972 Order at 8 ("ORDERED that the application of [PP & L] to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to [PGE] is approved.") (emphasis added). The contrast between the "transfer and exchanging of utility property and facilities and customers" language used in the 1972 Order to describe the utilities' agreement with respect to the city of Portland, 1972 Order at 8, and the "exclusively served territory" language used in the 1972 Order to describe the utilities' agreement *1438 with respect to the Rainier area, *id.*, is striking.

FN8. PGE argues that the clear articulation prong of the Midcal is satisfied because Or.Rev.Stat. §§ 758.400-758.450 "encourage exactly the kind of division that PGE and PP & L carried out," and that whether or not the OPUC clearly authorized PGE's challenged conduct is relevant only to the active supervision prong of Midcal. 445 U.S. at 105, 100 S.Ct. at 943 (state action immunity only applies if the state actively supervises the challenged anticompetitive conduct). Resp. of Portland General Elec. Co. to Appellant's Pet. for Reh'g and Amicus Brief of United States at 18. In making this argument, PGE relies on *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 612 (11th Cir.1995) ("If [the defendant engaged in anticompetitive conduct] presumably because of a territorial agreement, but the area in question was never approved by the Commission, the [defendant's] action would not merit state action immunity because of the lack of 'active state supervision.'") (quoting *FTC v. Ticor Tide Ins. Co.*, 504 U.S. 621, 636, 112 S.Ct. 2169, 2178, 119 L.Ed.2d 410 (1992)), cert. denied, — U.S. —, 116 S.Ct. 1678, 134 L.Ed.2d 781 (1996).

Praxair does not help PGE. As the Court explained in *Ticor*, the case on which *Praxair* relies, "Midcal's two elements ... [are both] directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636, 112 S.Ct. at 2178. *Praxair*

is nothing more than a fact specific application of the Midcal test. The anticompetitive conduct had been authorized by a Florida Public Service Commission order approving an allocation of service territories, and the Eleventh Circuit merely held that the order was intended to include a particular county in the exclusive service territories created. See *Praxair*, 64 F.3d at 613. Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. Cf. *Ticor*, 504 U.S. at 636-37, 112 S.Ct. at 2178-79 (first prong of Midcal test intended to ensure state has not acted through inadvertence).

Like the part of the 1972 Order relating to Rainier, the ordinance passed by the Portland City Council earlier in 1972 also referred to exclusive service territories. It did so, however, in disapproving, not approving, the elimination of competition in favor of a territorial division between PGE and PP & L. The ordinance reminded the utilities that they "operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (1972).

Our second reason for agreeing with the district court is that in approving the exchange of property in Portland, the 1972 Order does not cite any of the statutory provisions governing the allocation of exclusive service territories. Rather than citing chapter 758 or any of its provisions, the OPUC cited a provision of chapter 757, the chapter governing "Utility Regulation Generally," specifically Or.Rev.Stat. § 757.480, which authorizes the approval of exchanges of utility facilities. We are struck by the precision and care with which the OPUC cited various statutory provisions in issuing the 1972 Order. As authority for approving the transfer to PGE of the exclusively served territory in Rainier previously allocated to PP & L, the OPUC cited the statutory provision governing transfers of previously allocated service territories (Or.Rev.Stat. § 758.460 [FN9]). It did not cite any section of chapter 758 in approving the provisions of the 1972 Agreement relating to Portland. [FN10] As authority for approving the exchange of facilities in Portland, the OPUC cited only the statutory provision governing transfers of utility facilities

(Or.Rev.Stat. § 757.480).

FN9. Section 758.460 provides in relevant part:

(1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest.

Or.Rev.Stat. § 758.460.

FN10. In particular, there is no reference in the 1972 Order to Or.Rev.Stat. § 758.410, which permits utilities to contract with each other "for the purpose of allocating territories and customers between the parties." Nor is there any reference to § 758.425, which gives the OPUC its authority to approve such contracts, even though an exclusive service territory can be established only "by a contract between persons furnishing a similar utility service and approved by the commission or ... by an order of the commission approving an application for the allocation of territory." Or.Rev.Stat. § 758.400(1) (defining "allocated territory").

In sum, the OPUC did not "forthrightly state[]" a policy of the state of Oregon that was "clear in its purpose" to displace competition in the Portland market with territorial monopolies. [FN11] *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943.

FN11. Columbia Steel argues that PGE and PP & L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the City Council certainly had the effect of creating ambiguity in the 1972 Order.

The OPUC argues that, despite the failure of the 1972 Order to say anything about exclusive service territories in the city of Portland, the Order nonetheless immunized the division of the Portland market because the "statutory import of the 1972 Order was necessarily an allocation of service territory in the City of Portland as between PGE and PP & L." Opening Brief of Pub. Util. Comm'n of Or. at 9. The OPUC asserts that the 1972 Agreement "effectively" allocated exclusive service territories because "[e]xchanging customers is logically the only way to reallocate established

service territory into exclusive zones." *Id.* at 9-10. The OPUC adds that "[t]he only way that the OPUC could lawfully have approved the transfer of customers between existing utilities was under the authority of the territorial allocation statutes." *Id.* at 10. See also Resp. of Portland General Elec. Co. to Appellant's Pet. for Reh'g and Amicus Brief of United States at 7 ("The allocation statutes speak of the allocation of 'territories and customers.' The 1972 Agreement and the 1972 Order explicitly allocate customers, whether they explicitly allocate *1439 territories or not.") (citation omitted) (emphasis in original).

In response, Columbia Steel argues that nothing in the relevant statutory provisions rules out a one-time exchange of customers as an incident of an exchange of facilities without the establishment of permanent territorial monopolies. According to Columbia Steel, such a one-time exchange of customers is a practical consequence of an exchange of facilities:

When, as in this case, a utility sells the power line that distributes electricity directly to a customer, it makes sense that the account of the customer served by that line would be transferred to the new owner of the line. Thus, the transfer of customer accounts was only an incident of the transfer of utility property. It is the practical consequence of a transfer of facilities, but it is not the perpetual grant of monopoly power. As a practical matter, unless another source of electricity is available, the customer will take service from the utility that owns the facilities connected to that customer's premises. But the utility serves that customer because it is practical to do so, not because the utility has an exclusive right to serve that customer.

Pet. for Reh'g at 13-14.

Columbia Steel's argument has considerable force. It is buttressed by the fact that PP & L was able to take a good customer away from PGE simply by building a substation in PGE's "territory" to transmit power to Columbia Steel's plant at rates that were more competitive than PGE's. Thus, although the transfer of facilities, and the transfer of customers incidental thereto, gave each utility a temporary competitive advantage, it did not immunize them from competition forevermore. That PGE's advantage proved to be transitory is not surprising given the competitive pressures that technology and deregulation have been exerting on utility markets

where monopolies have traditionally reigned.

In any case, we need not resolve the dispute over whether, as the OPUC argues, an exchange of customer accounts is, as a practical matter, the factual equivalent of an allocation of exclusive service territories. Even if this were the case, it would merely be evidence that might tend to support a permissive inference that the OPUC intended to approve a displacement of competition in Portland with monopolies, and any such inference could not transform the 1972 Order into the forthright and clear statement that it takes to satisfy Midcal's stringent requirements.

PGE and the OPUC also argue that the OPUC's failure to cite any provision of chapter 758 as authority for the 1972 Order as it pertains to Portland renders the 1972 Order nothing more than an "imperfect regulation" which may still confer state-action immunity, citing *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir.1985) ("actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law").

PGE and the OPUC's reliance on *Llewellyn* is misplaced. In *Llewellyn*, the administrator of a state agency promulgated a fee schedule for health care providers, as he was authorized to do under state statute, but bypassed statutory rulemaking procedures. We held that although the administrator had acted in a "procedurally improper manner," the state government was nonetheless entitled to state-action immunity. *Id.* at 773. *Llewellyn* is inapposite here. There the state legislature had clearly articulated an intention to authorize the administrator to promulgate a fee schedule, and the administrator had exercised that authority in clearly articulating his intent to adopt such a fee schedule, notwithstanding that he did not follow the required rulemaking procedures of the state's Administrative Procedure Act. *Id.* at 772. In contrast, the OPUC did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland; indeed, it did not speak to the issue at all. So rather than exercising its authority "imperfectly," the OPUC failed altogether to exercise its authority to approve exclusive service territories with any clarity whatsoever.

Finally, PGE and the OPUC argue that even if the

1972 Order did not clearly authorize *1440 an allocation of exclusive service territories within the city of Portland, later orders issued by the OPUC clarify the 1972 Order. In particular, the PGE and the OPUC rely upon a 1974 Order of the OPUC, which, they assert, confirmed that the 1972 Order did, in fact, confer state-action immunity. [FN12]

FN12. PGE also cites Pub. Util. Comm'n of Or., Orders 73-688 (Oct. 25, 1973), 75-704 (Aug. 13, 1975), and 79-055 (Jan. 12, 1979).

None of the OPUC orders relied on by PGE establishes state-action immunity. First, to the extent that there is language in the orders relevant to the division of the Portland market, it merely recognizes the undisputed fact that PGE and PP & L had stopped competing with each other in that city. [FN13] For instance, the 1974 Order, on which PGE relies most heavily, states that PGE and PP & L "no longer competitively serve the same areas. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff'd sub nom. American Can Co. v. Davis*, 28 Or.App. 207, 559 P.2d 898 (1977) (the "1974 Order"), at 25; see also Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975) (noting that PP & L serves customers "in parts of Portland"). That language is merely a description of the status quo; it is not an expression of a state policy to replace competition with regulation. Although the quoted language might tend to support a permissive inference that the commissioners in 1974 thought that the commissioners in 1972 had defined exclusive service territories in Portland when they issued the 1972 Order, the OPUC can not confer state-action immunity by forming an intent that is not expressed forthrightly and clearly.

FN13. As *Columbia Steel* puts it, "(w)hether, as a matter of fact, the utilities competed is an entirely different inquiry from whether, as a matter of law, the utilities secured lawful allocations of exclusive service territory." *Columbia Steel Reply Brief* at 11.

Second, the "respective areas of service" language in the 1974 Order, as well as the language in the other OPUC orders stating that PGE and PP & L had stopped competing in Portland, cannot be construed as a product of the OPUC's exercise of its statutory authority to approve contracts allocating

exclusive service territories. Because there were no such contracts before the OPUC when it issued these later orders, the orders were not issued pursuant to the provisions of Or.Rev.Stat. ch. 758 authorizing approval of such contracts. The 1974 Order, for example, was issued pursuant to Or.Rev.Stat. §§ 757.205, 757.210, and 757.215, which pertain to changes in tariffs charged by utilities. The 1974 Order approved PP & L's revised tariff schedule, which equalized PP & L's rates in Portland with the higher rates it charged in other areas of the state. As a result, PP & L's rates for customers in Portland became higher than the rates charged by PGE. The "respective areas of service" language in the 1974 Order was recited merely to establish a rationale for the OPUC's action approving the new rates:

A rate differential between Portland and [other areas] was formerly justified on the basis of competing electric service in Portland between [PP & L] and [PGE]. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.

The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

1974 Order at 25.

[10] As a matter of law, then, neither the 1974 Order nor any of the other subsequent orders of the OPUC amend the 1972 Order to clarify that Order as an expression of state policy to displace competition with regulation. At best, these orders recite that the utilities have stopped competing with each other within territories they have defined. As our court has said, mere "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 736 (9th Cir.1981) (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93, 96 S.Ct. 3110, *1441 3118-19, 49 L.Ed.2d 1141 (1976)), cert. denied, 459 U.S. 1145, 103 S.Ct. 785, 74 L.Ed.2d 992 (1983).

In sum, we agree with the district court that the elimination of competition between PGE and PP & L in Portland was not cloaked with state-action immunity. As the district court put it, the OPUC did

not "specifically and clearly authorize[] by the relevant statutory process" a division of the Portland market into exclusively served territories. *Pacificorp*, 770 F.Supp. at 571.

B. Issue Preclusion

After Columbia Steel filed this antitrust action in federal district court, PGE applied to the OPUC for a declaration that the 1972 Order allocated exclusive service territories in Portland. In response, the 1992 OPUC issued an order declaring that the 1972 OPUC had intended to do so, and amended the 1972 Order, *nunc pro tunc*, to that effect. In its 1992 Order, the OPUC acknowledged that "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP & L." Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992) (the "1992 Order"), at 14. [FN14]

FN14. The 1992 Order states, in relevant part:

[B]ecause [the 1972 Order] did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, ... perhaps it did not unambiguously allocate exclusive service territories to PGE and PP & L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.

For the foregoing reasons, it appears to the Commission that [the 1972 Order] is not a complete and accurate memorial of the 1972 decision of the Commissioner the order omits a reference to the statute under which its findings were actually made when the Commissioner approved the PGE/PP & L contract. Pursuant to ORS 756.568, the Commission will amend [the 1972 Order], *nunc pro tunc*, to conform to the actual decision intended and followed.

1992 Order at 14-15.

[11] Armed with the OPUC's 1992 Order, PGE moved for reconsideration of the district court's summary judgment rulings in favor of Columbia Steel, arguing that the OPUC's 1992 Order was entitled to full faith and credit. The district court denied the motion, reasoning that:

[t]he availability of the defense of state action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943)] and the authorities which have interpreted *Parker*. ... The fact that the [O]PUC did not do what it now concludes that it intended to do in the 1972 Order does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that [the 1972 Order] neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel.

Unpublished Opinion, filed June 29, 1992, at 7-9.

[12][13][14] We agree and hold that the 1992 Order is not entitled to preclusive effect because the issue decided by the OPUC in that order is not identical to the state-action immunity issue. [FN15] The issue decided by the *1442 1992 OPUC is whether the 1972 OPUC had the intent to approve the allocation of exclusive service territories in the city of Portland. The state-action immunity issue is different. It does not turn on the fact issue of the subjective intent of the OPUC at the time it issued the 1972 Order. Rather, the state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the Portland market was "clearly articulated and affirmatively expressed as state policy," *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943. As the district court said, "the availability of the defense of state-action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [and its progeny]." Unpublished Opinion, filed June 29, 1992, at 7-8. In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers.

FN15. Oregon law provides that one tribunal may give preclusive effect to the prior determination of an issue by another tribunal only if "the issue in the two proceedings is identical." *Hickey v. Senesier*, 318 Or. 196, 864 P.2d 372, 375 (1993).

Oregon law also provides that the second tribunal may give preclusive effect to an earlier decision only if "the party sought to be precluded has had a full and fair opportunity to be heard on that issue." *Id.* Columbia Steel argues that it was not given such

an opportunity before the OPUC issued the 1992 Order. Columbia Steel denies having waived its right to a hearing on the merits, pointing to record evidence that it only agreed to postpone the submission of evidence to the OPUC until the OPUC ruled on Columbia Steel's motion to dismiss for lack of jurisdiction. We need not decide whether Columbia Steel was denied a fair opportunity to be heard in the proceeding before the OPUC because, as we explain in the text, the issue in that procedure is not "identical" to the issue of state-action immunity in this federal antitrust action. *Id.*

[15] In declaring what the 1972 OPUC intended to do, the 1992 OPUC approached the 1972 Order as though it were interpreting a contract. After finding ambiguity in the 1972 Order, the 1992 OPUC went on to decide, as an issue of fact, the intent of the 1972 OPUC by looking to extrinsic evidence such as the behavior of the parties between 1972 and 1990. See 1992 Order at 12-15. To repeat, state-action immunity is not an issue of fact. It cannot be decided simply by ferreting out extrinsic evidence in an effort to ascertain the subjective intent of the state. The issue of state-action immunity must be decided by applying the "rigorous" test, *Patrick*, 486 U.S. at 100, 108 S.Ct. at 1662-63, of whether the state "clearly articulated and affirmatively expressed" its intent to displace competition with regulation as a matter of state policy. *Midcal* 445 U.S. at 105, 100 S.Ct. at 943. [FN16]

FN16. For the same reason, there can be no issue preclusion based on the judgment of the Marion County Court affirming the 1992 Order on the ground that the it was "supported by substantial evidence." See *Columbia Steel Casting Co. v. Public Util. Comm'n of Or.*, Marion County Circuit Court No. 92C-12005, judgment affirming Public Utility Commission of Oregon Order Nos. 92-557 & 92-1135, at 2, *aff'd without opinion*, Oregon Ct. of Appeals (Dec. 15, 1993).

[16] In sum, the 1992 OPUC could not satisfy the *Midcal* test retroactively by amending the 1972 Order years after PGE entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity. [FN17] In other words, the state of Oregon cannot satisfy the objective *Midcal* clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier. [FN18]

FN17. It is fundamental that an order or judgment is

not existed to full faith and credit if the issuing tribunal had no subject matter jurisdiction over the matter before it. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-05, 102 S.Ct. 1357, 1365-66, 71 L.Ed.2d 558 (1982). We do not know whether the OPUC and the Marion County Court had subject matter jurisdiction as a matter of state law to amend the 1972 Order retroactively. We believe, however, that it is questionable whether either had subject matter jurisdiction to decide the federal antitrust question of state-action immunity that is now before us. We need not decide this jurisdictional question because the lack of identity between the issue decided in the 1992 Order and the issue of state-action immunity deprives the 1992 Order of any preclusive effect in this federal antitrust action.

FN18. PGE's reliance on *California Aviation, Inc. v. City of Santa Monica*, 806 F.2d 905 (9th Cir.1986), and the cases on which it relies, for the proposition that Midcal can be satisfied retroactively is misplaced. In *California Aviation*, the later statute "articulate[d] and affirm[ed] a pre-existing state policy of allowing [particular anticompetitive conduct]." *Id.* at 909 (emphasis added). In contrast, there was no pre-existing state policy to eliminate competition in the Portland market for the OPUC to articulate or affirm in its 1992 Order.

C. Foreseeability: PGE's New Argument on Appeal

[17][18][19] PGE, joined by the OPUC, argues for the first time on appeal that state-action immunity applies because the division of the Portland market was a foreseeable result of the 1972 Order. According to PGE, "state action immunity must apply where the [challenged] conduct is the 'foreseeable result' of the state's policy." Opening Brief of Appellant Portland General Elec. Co. at 23 (citing *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir.1992), cert. denied, 508 U.S. 908, 113 S.Ct. 2336, 124 *1443 L.Ed.2d 247 (1993)). "We will review an issue that has been raised for the first time on appeal under certain narrow circumstances," including "when the issue is purely one of law." *Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1488 (9th Cir.1995). Because the foreseeability issue raised by PGE and the OPUC is a pure issue of law, and because consideration of it will not prejudice Columbia Steel, see *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir.1994), we exercise our

discretion to consider it.

In our original opinion, we agreed with PGE. We held that "[u]nder [*Nugget and Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir.1988)], private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 60 F.3d 1390, 1396 (9th Cir.1995), herewith withdrawn. Although we said that "the 1972 Order is not particularly clear regarding the [OPUC's] intention to permit a permanent division of the Portland market, as opposed to a one-time exchange of facilities and customer accounts," *id.* at 1396, we nonetheless "conclude[d] that the elimination of competition between PGE and PP & L was a natural and foreseeable result of the 1972 Order," *id.* at 1399, "justify[ing] the inference that it was intended by the [OPUC]." *Id.* Accordingly, we held that PGE's conduct enjoyed state-action immunity from Sherman Act liability.

We are persuaded by Columbia Steel's petition for rehearing and an amicus curiae brief filed by the Antitrust Division of the Department of Justice that we erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*. In doing so, we misconstrued *Medic Air* and *Nugget*. In *Medic Air*, we used *Midcal*'s clear articulation test, not a foreseeability test, in deciding that state-action immunity shielded a monopoly granted to Air Ambulance Authority in the market of dispatching air ambulances in Washoe County, Nevada. 843 F.2d at 1189. We did use a foreseeability test in *Medic Air*, but only in deciding the reach of the antitrust immunity that protected Air Ambulance Authority's monopoly in the dispatching market. Specifically, we held that Air Ambulance Authority was not shielded from antitrust liability in using its immunized monopoly power to gain a competitive advantage in a different market, the market for air ambulance services. *Id.* We reasoned that Air Ambulance Authority's antitrust immunity in the dispatching market did not extend to the ambulance service market because anticompetitive conduct in the service market was "not a 'necessary or reasonable consequence' of the decision to establish an exclusive dispatcher." *Id.* (citation omitted). As we explained, "[t]he state and its agencies have not granted Air Ambulance an

exclusive [ambulance service] franchise. That they might have done so is irrelevant. The state must act if immunity is to exist.... The Protocols [governing dispatching procedures] did not interfere with existing competition. The District Board did not seek to displace competition or limit entry into the ambulance market. The District Board did not even consider the dispatch program's effect upon competition." *Id.*

The anticompetitive conduct at issue in *Nugget* was also expressly authorized by state action independently of any foreseeability inquiry. A California statute authorized the California Public Utility Commission to "specify the prices, terms, and conditions" for the sale of power by a private power producer like *Nugget* to a utility." 981 F.2d at 434 (quoting statute). In exercising that statutory authority, the California PUC clearly expressed an intention to regulate such sales in detail. The California PUC's implementing Guidelines provided that private power producers would "generally bear the risk of failing to develop their power facility before the five year deadline and that only rarely will permitting delays qualify as force majeure events." *Id.* The Guidelines specified that a utility was "expect [ed] ... [to] negotiate [force majeure claims] only in instances where it is convinced that a settlement, versus adjudication, is in the ratepayers' best interest." *Id.* (quoting Guidelines). We held in *Nugget* that state-action immunity extended to the anticompetitive effects of a utility's rejection of a private power supplier's force majeure claim for an extension of *1444 the contract period because the anticompetitive effects were a foreseeable result of the California PUC's implementing Guidelines. *Id.*

Our rejection of PGE's argument that it is entitled to state-action immunity because the division of the Portland market was a foreseeable result of the 1972 Order is consistent with *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), upon which we relied in *Nugget*. The issue in *Town of Hallie* was whether the city's anticompetitive activities were protected by state-action immunity "when the activities are authorized, but not compelled, by the State." *Id.* at 36, 105 S.Ct. at 1715 (emphasis added). The Supreme Court held that the challenged action of the city was protected by the state-action immunity doctrine because the city's conduct was "a foreseeable result of empowering the City to refuse

to serve unannexed areas." *Id.* at 42, 105 S.Ct. at 1718. However, the Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior. See *Id.* In contrast, the OPUC did not expressly authorize PGE to maintain an exclusive service territory; it merely approved the exchange of property and customers.

[20] In sum, neither *Medic Air* nor *Nugget* applies a foreseeability test as a substitute for the threshold Midcal clear articulation test. As the Antitrust Division puts it, "express authorization [is] the necessary predicate for the Supreme Court's foreseeability test." Brief of Amicus Curiae United States at 9. PGE cites no case to the contrary and we know of none.

III. PGE's Other Defenses

[21] In the absence of state-action immunity, an agreement between PGE and PP & L to divide the Portland market for electricity constitutes a per se violation of § 1 of the Sherman Act. See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50, 111 S.Ct. 401, 402-03, 112 L.Ed.2d 349 (1990) (agreement among competitors to allocate territories to diminish competition is a per se § 1 violation). There is no genuine issue of material fact regarding the existence of such an agreement that would prevent the entry of summary judgment against PGE on liability. See *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir.1996). We therefore address PGE's affirmative defenses other than state-action immunity. Although the district court found only one of these defenses worthy of discussion, we discuss each of them in turn.

A. Statute of Limitations

[22] PGE argues that Columbia Steel's antitrust action, which was filed on June 19, 1990, is time-barred because it was filed four years after any overt act in furtherance of PGE and PP & L's agreement to divide the Portland market. See 15 U.S.C. § 15(b) (establishing 4-year limitations period for Sherman Act violations); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir.1987) ("even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act"). PGE argues that the

acts relied upon by the district court in finding Columbia Steel's antitrust claims timely were insufficient to restart the running of the statute because they were merely "reaffirmations" of the original 1972 Agreement to divide the Portland market. See *id.* at 238.

On May 30, 1990, Columbia Steel wrote to PGE and stated that it would terminate its contract with PGE and take power from PP & L as of July 1, 1990, if PGE would agree to wheel power for PP & L so it could serve Columbia Steel's casting plant. PGE said no, declaring in a letter dated May 30, 1990, that "[Columbia Steel] is within PGE's exclusive territory. If it desires to purchase electricity, it must do so from PGE." The district court held that PGE's refusal to wheel PP & L's electricity to Columbia Steel's casting plant was an overt act that restarted the statute of limitations.

We agree with the district court. PGE's refusal was not a mere reaffirmation of PGE and PP & L's 1972 Agreement to stop competing in the Portland market because the 1972 Agreement was not a permanent and final decision that controlled the later act. *1445 See *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300-01 (9th Cir.) (limitations period restarted each time tour guides shepherded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy between tour operators and other vendors) (quoting and distinguishing *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), cert. denied, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979), in which later acts were mere affirmations of earlier "irrevocable, immutable, permanent and final" decisions that "completely and permanently excluded [plaintiff] from the market"), cert. denied, 479 U.S. 886, 107 S.Ct. 279, 93 L.Ed.2d 254 (1986). [FN19] *Hennegan* also distinguishes *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), cert. denied, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981), the only Ninth Circuit case other than *Multidistrict Air Pollution* that is cited by PGE on the statute of limitations issue, on the same ground. *Hennegan*, 787 F.2d at 1301-02.

FN19. Columbia Steel also argues that the refusal in 1987 of PGE's coconspirator PP & L to service the steel casting plant over the objection of PGE was also an overt act that restarted the statute of limitations. We need not consider the significance of the events in 1987 to the statute of limitations

question because we hold that the statutory period was restarted in 1990. The 1987 events are, however, relevant to Columbia Steel's cross-appeal regarding damages, which we address in Part V, *infra*.

B. Justification defenses

[23] PGE asserts that the 1972 Order required it to stop competing with PP & L in the city of Portland, and that "had PGE failed to conform to the commands of the OPUC ... it could have subjected itself to treble damages for violation of Oregon utility law." Opening Brief of Appellant Portland Gen. Elec. Co. at 29. PGE argues that as a result it is entitled to raise a regulatory justification defense, see *Phonezele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir.1981) (no antitrust liability when defendant reasonably concludes that its actions are necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority), cert. denied, 459 U.S. 1145, 103 S.Ct. 785, 74 L.Ed.2d 992 (1983), and a business justification defense, see, e.g., *City of Anaheim v. Southern Cal. Edison*, 955 F.2d 1373, 1381 (9th Cir.1992) (utility not liable for using high-powered transmission line to the exclusion of competitors in order to keep rates low).

These justification defenses are not available to PGE. When it stopped competing with PP & L in Portland after the 1972 Order issued, it was under no compulsion to do so because the 1972 Order did not approve the allocation of exclusive service territories. Had the 1972 Order done so, a justification defense would arguably have been available to PGE because the Oregon statutes provide that only the utility that has been allocated a territory may serve that territory. See *Or.Rev.Stat. § 758. 450(2)* ("Except [under circumstances not relevant here], no other person shall offer, construct or extend utility service in or into an allocated territory."). In light of this provision, it is significant that in approving an exchange of facilities, the 1972 Order used permissive language. See 1972 Order at 8-9 ("ORDERED that [PP & L] may transfer to [PGE] all electric distribution plant ... that [PGE] may transfer to [PP & L] all electric distribution plant ... that the manner and method for accomplishing the transfer and exchange of property ... and the terms and conditions governing this transfer, shall be as provided by [the 1972 Agreement]") (emphasis added). Because the

language of the 1972 Order was permissive, it did not require PGE and PP & L to perform the 1972 Agreement and did not prevent them from rescinding it before the property was exchanged. Given the statutory prohibition against serving a territory allocated to another utility, see Or.Rev.Stat. § 758.450(2), the permissive language in the 1972 Order would have been incongruous if the 1972 Order had approved an allocation of exclusive service territories.

C. The Noerr-Pennington Doctrine

[24][25] PGE argues that it is entitled to antitrust immunity under the Noerr-Pennington doctrine. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 529, 5 L.Ed.2d 1446 464 (1961) (the Sherman Act does not prohibit competitors from "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly"); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965). The Noerr-Pennington doctrine, which is rooted in the First Amendment protection of political activity, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707, 82 S.Ct. 1404, 1414-15, 8 L.Ed.2d 777 (1962), does not apply here. Applying to an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of the Noerr-Pennington doctrine. In any case, PGE is not being held liable for filing the application that resulted in the 1972 Order. PGE is being held liable for agreeing with PP & L to replace competition with area monopolies in the Portland market.

D. The Filed Rate Doctrine

[26][27] PGE argues that the filed rate doctrine bars Columbia Steel from recovering damages even if PGE did violate the Sherman Act. The filed rate doctrine generally forbids the recovery of treble damages under the Sherman Act based on the payment of rates that are established by regulated tariffs, even if the defendants engaged in illegal price-fixing. See, e.g., *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922). According to PGE, the filed rate doctrine applies in this case as follows:

(1) Because PGE could charge only the rates approved by the OPUC, it could not charge the same rate offered by PP & L to Columbia Steel; (2) PGE could not "transfer" its customer Columbia Steel to PP & L without OPUC approval; (3) thus, the district court could not award damages based on the difference between the rate charged by PGE and the "rate that might have been approved absent the conduct at issue." Opening Brief of Appellant Portland General Electric Co. at 32.

We reject PGE's reasoning. The conduct challenged in this case is not PGE's refusal to sell electricity to Columbia Steel at a lower rate. Rather, the challenged conduct is the non-competition agreement that prevented Columbia Steel from buying electricity at PP & L's lower rates. The filed rate doctrine is inapplicable. To hold that it is applicable would be to "allow a blockade of a competitor to escape scrutiny. This would overextend Keogh's reach and could produce a rule that one who pays for services governed by [a regulatory body's] tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir.1993).

IV. Damages

[28] PGE argues that Columbia Steel suffered no damages at any time because (1) at all relevant times, Columbia Steel was obligated on its requirements contract with PGE to purchase electricity from PGE, and (2) PGE could not transfer Columbia Steel as a customer to PP & L without prior OPUC approval. These arguments are to no avail. First, Columbia Steel's requirements contract with PGE did not bar it from suing PGE under the Sherman Act for agreeing with PP & L to stop competing in the Portland market. See, e.g., *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139-40, 88 S.Ct. 1981, 1984-85, 20 L.Ed.2d 982 (1968) (franchise agreement does not defeat franchisee's standing to bring antitrust suit against franchisor); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 781 (3d Cir.1967) ("captive customer" having valid lease agreement with defendant for use of certain equipment could nonetheless sue for antitrust violation based on defendant's refusal to sell the equipment), *aff'd* on other grounds, 392 U.S. 481,

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U.S.A.

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners:

Sam Cotten, Chairman
Alyce A. Hanley
Dwight D. Ornquist
Tim Cook
James M. Posey

In the Matter of the Complaint Filed)
by the MUNICIPALITY OF ANCHORAGE)
d/b/a MUNICIPAL LIGHT & POWER)
DEPARTMENT Against CHUGACH ELECTRIC)
ASSOCIATION, INC., and the Cross-)
Complaint Filed by CHUGACH ELECTRIC)
ASSOCIATION, INC., Against the)
MUNICIPALITY OF ANCHORAGE d/b/a)
MUNICIPAL LIGHT & POWER DEPARTMENT)

U-97-201

ORDER NO. 3

ORDER GRANTING ML&P'S MOTION FOR SUMMARY
JUDGMENT DISMISSING CHUGACH'S CROSS-COMPLAINT:
DENYING CHUGACH'S MOTION FOR SUMMARY JUDGMENT:
AND REQUIRING ADDITIONAL BRIEFING

BY THE COMMISSION:

Background

On October 13, 1997, the MUNICIPALITY OF ANCHORAGE d/b/a
MUNICIPAL LIGHT AND POWER DEPARTMENT (ML&P)¹ filed a complaint
alleging that CHUGACH ELECTRIC ASSOCIATION, INC. (Chugach), offered
to provide electric power to customers located in ML&P's service
area, outside the service area specified in Chugach's Certificate
of Public Convenience and Necessity (Certificate) No. 8. ML&P

¹ML&P is authorized to provide electric public utility service
in Anchorage under Certificate No. 121.

1 contends that Chugach's actions are illegal and in violation of
2 Chugach's tariff and AS 42.05.221(a).

3 In its complaint, ML&P requests that the Commission
4 institute an investigation into Chugach's customer recruitment
5 practices to determine where else Chugach has offered to provide
6 electric service outside the service area specified in its
7 Certificate. Additionally, ML&P requests that the Commission
8 declare that Chugach's provision of electric service outside the
9 service territory specified in its Certificate is illegal and order
10 Chugach to desist from contacting any person about providing retail
11 electric service outside its certificated service area. Lastly,
12 ML&P requests that the Commission order Chugach to pay all costs
13 incurred by the Commission and ML&P relating to this proceeding and
14 order Chugach to conduct "goodwill advertising" for a period of at
15 least one year to compensate ML&P for the harm allegedly caused by
16 Chugach's actions.

17 On November 3, 1997, Chugach filed its answer to ML&P's
18 complaint and, additionally, filed a cross-complaint against ML&P.
19 In its answer, Chugach admits that it has offered to sell electric
20 power to the Boardwalk Condominiums Owners Association and to
21 Columbia Alaska Regional Hospital, customers located in ML&P
22 certificated service area. (Chugach Answer ¶¶ 5-6.) Chugach
23 contends, however, that its sales to these customers are legal. In
24 its cross-complaint, Chugach contends that ML&P's refusal to wheel
25 power over the latter's transmission and distribution systems on
26

1 Chugach's behalf to customers located in ML&P's certificate
2 service area violates federal antitrust law.

3 Chugach requests that the Commission (1) declare tha
4 neither Alaska law nor any of the Commission's Orders in Docket
5 U-71-16 clearly articulate a policy permitting ML&P to monopoliz
6 sales of electric power in ML&P's certificated service area
7 (2) order ML&P to immediately commence transmission and distribu
8 tion services on behalf of Chugach to deliver power to customers i
9 ML&P's certificated service area; and (3) order ML&P to immediatel
10 submit a tariff setting forth the terms and conditions for deliver
11 services over its transmission and distribution system.

12 On November 10, 1997, Chugach filed a motion for summar
13 judgment seeking a declaratory ruling on the relief it requests i
14 its cross-complaint. Chugach contends that there are no dispute
15 facts and that the Commission can rule on the motion as a matter o
16 law.

17 On December 4, 1997, ML&P filed its opposition to
18 Chugach's motion for summary judgment and cross-moved for summar
19 judgment to dismiss Chugach's cross-complaint. In its oppositio
20 and cross-motion for summary judgment, ML&P agrees that for
21 purposes of ruling on the pending motions there are no disputed
22
23
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25
26

1 issues of fact.² On January 20, 1998, the Commission heard oral
2 argument from the parties on the pending motions.

3
4 Issues

5 Chugach argues that federal antitrust law, in particular
6 the state action doctrine, is the starting point for analyzing
7 whether the Commission may allow ML&P to retain an exclusive right
8 to sell power in its service territory. Chugach then applies the
9 principles of this doctrine and contends that there is no clearly
10 articulated state policy expressed in Alaska statutes that would
11 allow the Commission to restrict competition implemented through
12 retail-wheeling arrangements. (Chugach Memorandum at 16-24.)
13 Hence, Chugach concludes that principles of federal antitrust law
14 require the Commission to declare that ML&P is not authorized to
15 refuse Chugach's requests for retail wheeling.

16 Based on this argument and ML&P's opposition, the
17 Commission will address in its discussion below the following legal
18 issues:

19 (1) Is federal antitrust law the starting point for
20 analyzing whether the Commission may authorize ML&P to
21 retain an exclusive right to serve customers in its
22 certificated service area?

23
24
25 ²In its opposition, ML&P identified various factual issues in
26 dispute concerning the difficulty ML&P would have if ordered to
wheel power on behalf of Chugach over ML&P's transmission and
distribution system. (See Affidavit of Robert R. Regan, ¶¶ 15-17.)

(2) Does the Commission have authority under state law to require Chugach to apply for a certificate of public convenience and necessity (certificate) before seeking to sell retail power outside its service territory through retail-wheeling arrangements?

(3) Does the Commission have authority under state law to allow ML&P to retain an exclusive right to sell power in its service area?

(4) Under principles of federal antitrust law, will a Commission decision allowing ML&P to retain an exclusive right to serve the customers in its service territory satisfy the state action doctrine?

Discussion

I. The Starting Point Is State Law, Not Federal Antitrust Law

Chugach argues that principles of federal antitrust law particularly the state action doctrine, should control the Commission's interpretation of its authority to make policy determinations in this Docket. However, the Commission finds that this would be contrary to the U.S. Supreme Court's purpose for creating the state action defense.

The state action doctrine was first enunciated by the Supreme Court of the United States in the case of *Parker v. Brown*, 317 U.S. 343 (1943). The *Parker* case concerned a producer and packer of raisins who filed suit under the Sherman Act to enjoin

1 the California State Director of Agriculture and other state
2 officials from administering a state marketing program designed to
3 restrict competition among raisin growers. The issue before the
4 Supreme Court was whether the Sherman Act restrains state action.
5 The Supreme Court held that "[t]here is no suggestion of a purpose
6 to restrain state action in the [Sherman] Act's legislative
7 history." *Id.* at 351. Accordingly, the Court held that the
8 California state official's administration of the marketing program
9 was not prohibited by the Sherman Act. The Court explained that:

10 It is the state which has created the machinery for
11 establishing the prorate program. Although the organiza-
12 tion of a prorate zone is proposed by producers, and a
13 prorate program, approved by the Commission, must also be
14 approved by referendum of producers, it is the state,
15 acting through the Commission, which adopts the program
16 and which enforces it with penal sanctions, in the
17 execution of a governmental policy.

18 *Id.* at 352 (emphasis added).

19 Subsequent U.S. Supreme Court decisions have confirmed
20 that the state action doctrine is based on principles of federalism
21 and respect for state sovereignty. *City of Columbia v. Omni*
22 *Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991). The Supreme
23 Court created the doctrine to allow state officials (like this
24 Commission) to freely administer and develop state policy in
25 accordance with state law free from restraint under the Sherman
26 Act. Of course, the Commission's policy decisions must be
authorized by state law, but this is true for any action by the
Commission.

1 If the Commission accepts Chugach's assertion that
2 federal antitrust law controls the Commission's decisions in this
3 Docket, then the Supreme Court's purpose for creating the state
4 action doctrine is defeated, and the principles of federalism and
5 state sovereignty underlying the doctrine are undermined. *Id.* at
6 371-72. The fact that the Commission's decisions subsequently may
7 be reviewed in the context of a federal antitrust lawsuit against
8 a utility, like ML&P, does not mean that federal antitrust law now
9 should control how the Commission interprets its authority or
10 otherwise makes policy determinations in this Docket.

11
12 II. ML&P Shall Retain an Exclusive Right To Serve the Customers in
13 Its Service Territory until the Commission Determines Other-
14 wise

15 There is no Alaska statute that specifically addresses
16 the issue of retail competition in the electric industry and retail
17 wheeling. The Commission's authority to decide these matters
18 derives from its general powers to regulate utilities
19 (AS 42.05.141), to require certificates (AS 42.05.221(a)), and to
20 eliminate competition that it finds is not in the public interest.
21 (AS 42.05.221(d)).

22 The Legislature has given the Commission broad authority
23 to regulate public utilities in this state. In AS 42.05.141, the
24 Legislature has delegated to the Commission broad authority "to do
25 all things necessary or proper to carry out the purposes and
26 exercise the powers expressly granted or reasonably implied in this
chapter, including:

1 (1) regulate every public utility engaged or
2 proposing to engage in a utility business inside the
state, except to the extent exempted by AS 42.05.711. .

3

4 (3) make or require just, fair, and reasonable
5 rates, classifications, regulations, practices, services,
and facilities for a public utility.

6 The Legislature has broadly defined "public utility" or "utility"
7 to include:

8 [E]very corporation whether public, cooperative, or
9 otherwise, company individual, or association of individ-
uals, their lessees, trustees, or receivers appointed by
10 a court, that owns, operates manages, or controls any
plant, pipeline, or system for

11 (A) furnishing, by generation,
12 transmission, or distribution, electrical
service to the public for compensation; . . .

13 AS 42.05.990(4).

14 With few exceptions,³ the Legislature requires all public
15 utilities operating in the state to apply for a certificate before
16 providing an intrastate "commodity" or a "service" to the public.

17 The certificate requirement in AS 42.05.221(a) states that:

18 A public utility may not operate and receive compensation
19 for providing a commodity or service without first having
20 obtained from the commission under this chapter a
21 certificate declaring that public convenience and
22 necessity require or will require the service. Where a
public utility provides more than one type of service, a
separate certificate of convenience and necessity is
required for each type. A certificate must describe the
nature and extent of the authority granted in it,

24 ³Some exceptions to the certificate requirement can be found
25 in AS 42.05.711(e) (an electric or telephone utility grossing less
26 than \$50,000 annually) or AS 42.05.325 (a utility operating
strictly as an alternate operator service would only need to
register with the Commission).

1 including, as appropriate for the services involved, a
2 description of the authorized area and scope of operations of the public utility.

3 The Legislature did not define the term "commodity" but defined the
4 term "service" broadly to generally include "commodity":

5 unless the context indicates otherwise, every commodity,
6 product, use, facility, convenience or other form of
7 service that is offered for and provided by a public
8 utility for the convenience and necessity of the public.

AS 42.05.990(6).

9 The restrictions on the Commission's authority to grant
10 a certificate are set forth in AS 42.05.241. This statute provides
11 that:

12 A certificate may not be issued unless the commission
13 finds that the applicant is fit, willing and able to
14 provide the utility services applied for and that the
15 services are required for the convenience and necessity
16 of the public. The commission may issue a certificate
17 granting an application in whole or in part and attach to
18 the grant of it the terms and conditions it considers
19 necessary to protect and promote the public interest
20 including the condition that the applicant may or shall
21 serve an area or provide a necessary service not contemplated by the applicant. The commission may, for good
22 cause, deny an application with or without prejudice.

23 The issue of competition is addressed generally in AS
24 42.05.221(d), which states that:

25 In an area where the commission determines that two or
26 more public utilities are competing to furnish identical
utility service and that this competition is not in the
public interest, the commission shall take appropriate
action to eliminate the competition and any undesirable
duplication of facilities. This appropriate action may
include, but is not limited to, ordering the competing
utilities to enter into a contract that, among other
things, would:

(1) delineate the service area boundaries of each
in those areas of competition;

1 (2) eliminate existing duplication and paralleling
2 to the fullest reasonable extent;

3 (3) preclude future duplication and paralleling;

4 (4) provide for the exchange of customers and
5 facilities for the purposes of providing better public
6 service and of eliminating duplication and paralleling;
7 and

8 (5) provide such other mutually equitable arrange-
9 ments as would be in the public interest.

10 The Legislature's charge in AS 42.05.221(d) to the
11 Commission to eliminate competition that the Commission finds is
12 not in the public interest impliedly authorizes the Commission to
13 grant monopolies when competition is not in the public interest.
14 The Legislature is fully aware of the Commission's authority to
15 grant monopolies as evidenced by AS 45.50.572(d), which provides
16 that the state's antitrust laws do not apply to utilities operating
17 pursuant to a certificate issued by the Commission.

18 In the Commission's view, the statutory framework,
19 discussed above, provides it with comprehensive control over public
20 utilities and the services they provide to the public in this
21 state. Importantly, they give the Commission policymaking
22 authority to determine when and how to implement competition among
23 public utilities in the public interest. The Commission may decide
24 that it is in the public interest to allow only one electric
25 utility to serve a community, as it recently decided in Docket
26 U-94-2, in which it granted Alaska Power Company the exclusive
right to serve Klawock. See Order U-94-2(19); see also Order

1 U-95-9(3)/U-95-30(3) (allowing the City of Thorne Bay to retain an
2 exclusive right to serve the customers in its service territory)

3 Or, the Commission may decide to grant multiple certifi-
4 cates and allow competition in an area as it has done on pas-
5 occasions once it finds that competition is in the public interest.
6 See Re: Far North Sanitation Service, Inc., 3 APUC 333 (1981); Re
7 Matanuska Telephone Association, Inc., 3 APUC 348 (1981); Re
8 Colville Environmental Services, 4 APUC 131 (1982); Re: Claude C
9 Bailey d/b/a Valley Refuse, 7 APUC 97 (1985).

10 Chugach seeks to circumvent the Commission's certifica-
11 tion requirement by characterizing its proposed sales of electric
12 power as "commodity" sales, and then arguing that AS 42.05.221(a)
13 does not allow the Commission to restrict this category of sales.
14 Chugach reaches this conclusion by arguing that the absence of the
15 word "commodity" in the last sentence of AS 42.05.221(a) demon-
16 strates that the Legislature intended to authorize the Commission
17 to establish an "authorized area" for the provision of a "service,"
18 but not for a "commodity." (Chugach Memorandum at 21-22.)

19 The Commission rejects Chugach's unsupported assertion
20 that its proposed sales of electric power through retail-wheeling
21 arrangements with ML&P constitute a "commodity" rather than a
22 "service." Neither the Legislature nor the Commission has defined
23 the term "commodity." On the other hand, the Legislature has
24 broadly defined a "service" to generally include every type of
25 commodity, product, use, facility, or form of service "unless the
26

1 context indicates otherwise." AS 42.05.990(6). The Commission is
2 not persuaded that the absence of the word "commodity" in the last
3 sentence in AS 42.05.221(a) evidences a legislative intent to
4 restrict the Commission's authority to regulate electric power
5 sales implemented through retail-wheeling arrangements, which
6 Chugach characterizes as "commodity" sales. Because the Legisla-
7 ture broadly defined the term "service" in AS 42.05.990(6)
8 generally to include every type of commodity, the Legislature
9 logically may have decided that it was unnecessary to include the
10 word "commodity" in the last sentence.

11 Even assuming that Chugach's proposed sales of electric
12 power through retail-wheeling arrangements may be characterized as
13 a "commodity" sale rather than a "service," the Commission still
14 rejects Chugach's interpretation of AS 42.05.221(a) because it
15 contradicts the primary purpose for imposing a certificate
16 requirement expressed in the first sentence of the statute, which
17 is that a public utility may not provide either a "commodity" or a
18 "service" to the public without first having obtained a certificate
19 from the Commission.⁴

20 Additionally, Chugach does not cite any legislative
21 history to support its novel interpretation of AS 42.05.221(a), and
22

23
24 ⁴The Commission questions how any of Chugach's arguments
25 regarding the distinction it makes between a "commodity" sale
26 versus a "service" would give it a right to serve customers located
in ML&P's certificated service territory since Chugach is only
authorized pursuant to its Certificate to furnish "ELECTRIC
SERVICE."

1 the Commission has found none either. This statute and most of AS
2 42.05 was substantially rewritten in 1970, and there have been
3 relatively minor amendments since then. See ch. 113 SLA 1970 (SCS
4 CSHB 202). In general, the 1970 amendments were designed to
5 strengthen the Commission's jurisdiction over utilities, including
6 municipal utilities, in part, to allow the Commission to resolve
7 conflicts between competing utilities. *APUC v. Chugach Electric*
8 *Ass'n*, 580 P.2d 687, 693 (Alaska 1978) (holding that whatever
9 property right Chugach may have had in its Certificate prior to
10 1970 was extinguished by the Legislature in 1970 to allow the
11 Commission to modify certificates as needed to resolve conflicts
12 between competing utilities).

13 Chugach's interpretation of AS 42.05.221(a) would
14 restrict the Commission's control over competing utilities and
15 create a loophole with respect to an undefined category of power
16 sales Chugach describes as "commodity" sales. In the Commission's
17 view, this result is contrary to the Legislature's intent in 1970
18 of expanding the Commission's regulatory powers over public
19 utilities and the conflicts that can arise between them.

20 Furthermore, the Commission finds that Chugach's
21 interpretation of AS 42.05.221(a) would not serve the public
22 interest because it would deny the Commission the opportunity to
23 determine whether the retail-wheeling arrangements Chugach proposes
24 are in the public interest. One of the most effective means of
25 ensuring Commission review and regulation of utility service to a
26

1 area is the certificate requirement in AS 42.05.221(a), which
2 Chugach seeks to bypass with its novel interpretation.

3 Chugach also argues that the Commission's authority to
4 eliminate competition in AS 42.05.221(d) is restricted to
5 situations involving only the duplication of facilities, and it
6 contends that its proposed sales of power to customers in ML&P's
7 service territory through retail wheeling would not result in the
8 duplication of facilities. (Chugach Memorandum at 22-23.)

9 Assuming as true Chugach's factual assertion that its
10 proposed sales of power to customers located in ML&P's certificated
11 service territory will not result in a duplication of facilities,
12 the Commission still rejects Chugach's interpretation because it is
13 contrary to the plain language in AS 42.05.221(d). The fallacy in
14 Chugach's interpretation is that it is the duplication of "ser-
15 vices" between competing utilities, not the duplication of
16 "facilities" as Chugach would have it, that triggers Commission
17 action in AS 42.05.221(d). When competing utilities provide
18 identical service to an area and the Commission finds that this
19 competition is not in the public interest, the Commission is
20 required to eliminate the competition and any "undesirable
21 duplication of facilities." The Commission may take additional
22 "appropriate action" to eliminate the competition as described in
23 AS 42.05.221(d)(1)-(5).

24 Chugach attempts to support its interpretation of
25 AS 42.05.221(d) by referring to the Commission's regulations at
26

1 3 AAC 52.110 - 3 AAC 52.150, which Chugach argues underscore the
2 focus on the elimination of duplicative facilities. (Chugach
3 Memorandum at 22.) These regulations though are broader than
4 Chugach suggests. For example, 3 AAC 52.110 states broadly that:

5 The purpose of 3 AAC 52.110 - 3 AAC 52.150 is to prevent
6 duplication of electric facilities and services in those
7 geographical areas of the state in which two or more
8 electric utilities compete.

9 (Emphasis added.)

10 The provisions of 3 AAC 52.120(a) specifically prohibit
11 an electric utility from competing with another electric utility to
12 provide an electric service connection for a customer without
13 approval from the Commission or otherwise complying with the
14 requirements in 3 AAC 52.120(b).

15 Therefore, the Commission concludes that AS 42.05.221(a)
16 applies to Chugach's proposed sales of electric power to customers
17 located in ML&P's certificated service territory through retail
18 wheeling and that if Chugach wishes to serve these customers, it
19 will have to apply in accordance with the statute to serve them.
20 The Commission further concludes that AS 42.05.221(d) does not
21 restrict its authority to eliminate competition between electric
22 utilities to situations where a duplication of facilities might
23 result. Together, AS 42.05.221(a) and AS 42.05.221(d) ensure that
24 the Commission will review and regulate all forms of utility
25 service to an area and determine when and how competition among
26 utilities may be implemented in the public interest.

1 Lastly, following from the conclusions just discussed,
2 it is evident that unless the Commission concludes that it is in
3 the public interest to authorize a second utility to provide retail
4 electric service to customers in ML&P's certificated service
5 territory, ML&P is the exclusive provider of retail electric
6 service to customers in its certificated service territory.

7
8 **III. The Commission's Decision in This Docket Should Satisfy the
 State Action Doctrine**

9 The last issue for discussion is whether the Commission's
10 decision herein confirming ML&P's exclusive right to serve
11 customers in its service territory will satisfy the state action
12 doctrine. Although the Commission is not empowered to and surely
13 cannot guarantee immunity to utilities like ML&P from the federal
14 antitrust laws, the Commission feels compelled to elaborate on its
15 views regarding the state action doctrine, given the considerable
16 arguments Chugach has made on the subject in this Docket.⁵

17 As discussed in section I above, the U.S. Supreme Court
18 carved out an exception to liability under the federal antitrust
19 law referred to as the "state action" doctrine. In respect of the
20

21
22 ⁵The parties have presented divergent views on whether the
23 Sherman Act would apply to ML&P's retail electric operations. For
24 purposes of analysis only, the Commission will assume that there is
25 a sufficient nexus between ML&P's retail sales of electric power
26 and interstate commerce to satisfy the jurisdictional prerequisites
 necessary to support Sherman Act jurisdiction. See *McLain v. Real
 Estate Board of New Orleans, Inc.*, 444 U.S. 239, 243 (1980); *Musick
 v. Burke*, 913 F.2d 1390, 1394-95 (9th Cir. 1990). The Commission
 recognizes that this is a complicated jurisdictional issue that
 ultimately would need to be resolved by the courts.

1 principles of federalism and state sovereignty, the Court create
2 the exemption to allow state policy makers (like this Commission
3 the freedom to develop and administer state policy free from
4 federal antitrust concerns. *Columbia v. Omni Outdoor Advertising*
5 *Inc.*, 499 U.S. 365, 370 (1991).

6 In *California Liquor Dealers Assn. v. Midcal Aluminum*
7 445 U.S. 97 (1980), the U.S. Supreme Court articulated the two
8 prong test used today for determining whether private action will
9 be immune from antitrust liability under the state action doctrine
10 The Court explained that:

11 First, the challenged restraint must be "one clearly
12 articulated and affirmatively expressed as state policy";
13 second, the policy must be "actively supervised" by the
14 State itself.

15 *Id.* at 105.

16 In *Midcal*, Midcal Aluminum, a wine distributor, success-
17 fully challenged California's wholesale wine-pricing program under
18 the Sherman Act. The Court held that the wine-pricing program
19 satisfied the first prong of the test but failed the second prong
20 because the California statutes did not provide for state oversight
21 of the price schedules and did not otherwise monitor the program
22 *Id.* at 105-06.

23 In explaining the *Midcal* test to the Commission, Chugach
24 has asserted that the first prong of the test can only be satisfied
25 if Alaska statutes clearly and affirmatively express a legislative
26 policy against competition. (Chugach Memorandum at 17-18.)
Chugach then argues that the only statute that speaks to the issue

1 of eliminating competition is AS 42.05.221(d), which as discussed
2 above, Chugach narrowly interprets. Chugach thus concludes that no
3 state statute authorizes the Commission to allow ML&P to refuse
4 Chugach's requests for retail wheeling; and, therefore, a Commis-
5 sion decision allowing ML&P to retain an exclusive right to serve
6 customers in its certificated service territory would not satisfy
7 the state action doctrine in the context of a federal antitrust
8 lawsuit. Chugach's discussion of the first prong of the *Midcal*
9 test, however, is misleading.

10 Since the *Midcal* decision, the U.S. Supreme Court has
11 provided additional guidance regarding how the first prong of the
12 *Midcal* test may be satisfied. Critical to an understanding in this
13 Docket, is the Supreme Court's decision in *Southern Motor Carriers*
14 *Rate Conference, Inc. v. U.S.*, 471 U.S. 48 (1985). In *Southern*
15 *Motor*, the U.S. Dept. of Justice filed a lawsuit against the
16 Southern Motor Carriers Association, Inc., and North Carolina Motor
17 Carriers Association, Inc., for engaging in collective ratemaking
18 activities. These entities were "rate bureaus" operating in four
19 states (North Carolina, Georgia, Mississippi, and Tennessee), which
20 were authorized by each of the states to submit joint rate
21 proposals to the public service commissions in each state to
22 establish the common carriers' intrastate rates for the transporta-
23 tion of goods. The public service commission in each state would
24 make the final decision regarding the intrastate rates.

1 The U.S. Dept. of Justice argued that the rate bureau
2 had violated the Sherman Act by conspiring with their members t
3 fix the intrastate rates. The rate bureaus argued that thei
4 conduct was exempt from the federal antitrust laws by virtue of th
5 state action doctrine. The Supreme Court applied the *Midcal* tes
6 to determine whether the rate bureaus were exempt from the federa
7 antitrust laws and explained that because the government ha
8 conceded that the state public service commission supervised th
9 collective ratemaking activities of the rate bureaus, the secon
10 prong of the *Midcal* test was satisfied. *Southern Motor*, 471 U.S
11 at 62.

12 The critical issue, therefore, was whether the collectiv
13 ratemaking activities supervised by the four public servic
14 commissions were authorized by their respective state legislature
15 and would satisfy the first prong of the *Midcal* test. With respec
16 to North Carolina, Georgia, and Tennessee, their state legislature
17 explicitly permitted collective ratemaking by common carriers
18 With respect to Mississippi, however, its legislature had no
19 passed a statute that specifically authorized its public servic
20 commission to permit collective ratemaking. The Supreme Cour
21 therefore articulated the issue in the following way:

22 We therefore must consider whether, in the absence of a
23 statute expressly permitting the challenged conduct, the
 first prong of the *Midcal* test can be satisfied.

24 *Southern Motor*, at 63.
25
26

1 On this issue, the Court observed that the Mississippi
2 statutes provided the state public service commission with general
3 authority to regulate common carriers and to prescribe "just and
4 reasonable" rates for the intrastate transportation of goods. *Id.*
5 On this basis, the Supreme Court held that:

6 The legislature thus made clear its intent that intra-
7 state rates would be determined by a regulatory agency,
8 rather than by the market. The details of the inherently
9 anticompetitive rate-setting process, however, are left
10 to the agency's discretion.

11

12 If more detail than a clear intent to displace
13 competition were required of the legislature, States
14 would find it difficult to implement through regulatory
15 agencies their anticompetitive policies. Agencies are
16 created because they are able to deal with problems
17 unforeseeable to, or outside the competence of, the
18 legislature. Requiring express authorization for every
19 action that an agency might find necessary to effectuate
20 state policy would diminish, if not destroy, its useful-
21 ness. . . . Therefore, we hold that if the State's
22 intent to establish an anticompetitive regulatory program
23 is clear, as it is in Mississippi, the State's failure to
24 describe the implementation of its policy in detail will
25 not subject the program to the restraints of the federal
26 antitrust laws.

18 *Id.* at 64-65 (emphasis added).

19 The *Southern Motor* case makes it clear that for purposes
20 of satisfying the state action doctrine, the Alaska Legislature's
21 intent to displace competition in the utility industry may be
22 evidenced by the general regulatory structure it has created for
23 utilities in AS 42.05, which this Commission administers. It is
24 not necessary, as Chugach has asserted, that the Alaska Legislature
25 set forth the details of the state's policy in the Alaska statutes
26

1 regarding how or when competition may be limited; this matter may
2 be generally delegated to the Commission, which, subject to some
3 exceptions,⁵ the Legislature has done in AS 42.05.221(d). See also
4 AS 4..50.572(d) (which exempts from the state's antitrust laws
5 public utilities operating pursuant to a certificate issued by the
6 Commission).

7 In *City of Columbia v. Omni Outdoor Advertising, Inc.*,
8 499 U.S. 365 (1991), the U.S. Supreme Court elaborated further on
9 this issue and observed that if the first prong of the *Midcal* test
10 were applied too restrictively by federal courts, then federal
11 courts then would become the standard reviewer of state agency
12 action. This, the Court explained, would undermine the very
13 interests of federalism the state action doctrine was designed to
14 protect. *Id.* at 372. Accordingly, the Court held that the City
15 of Columbia's general grant of zoning authority, which the City
16 relied on to promulgate anti-competitive ordinances restricting the
17 location, size, and space of billboards, satisfied the first prong
18 of the *Midcal* test. In so holding, the Court explained that:

19 Besides authority to regulate, however, the *Parker*
20 defense also requires authority to suppress competition
21 -- more specifically, 'clear articulation of a state
22 policy to authorize anticompetitive conduct' by the
23 municipality in connection with its regulation. . . . We
24 have rejected the contention that this requirement can be
met only if the delegating statute explicitly permits the
displacement of competition, . . . It is enough, we have

25 ⁵When the Legislature wishes to require the Commission to
26 implement competition, it has explicitly stated so as in the case
with intrastate long distance telephone service. See AS 42.05.800-
890.

1 held, if suppression of competition is the 'foreseeable
2 result' of what the statute authorizes

3 Id. at 372-73 (emphasis added).

4 For the reasons discussed in section II above and in
5 accordance with the U.S. Supreme Court's decisions in *Southern*
6 *Motor* and *City of Columbia*, the Commission concludes that the
7 Alaska Legislature has evidenced its intent to displace competition
8 in the utility industry by creating a comprehensive regulatory
9 structure, which the Commission administers, and furthermore
10 delegating to the Commission the power to determine when to
11 eliminate or implement competition in the public interest pursuant
12 to AS 42.05.221(d). The Commission believes its decision to allow
13 ML&P to retain an exclusive right to sell power to customers in its
14 certificated service territory should satisfy the state action
15 doctrine in the context of a federal antitrust lawsuit.

16 The Ninth Circuit decision in *Columbia Steel Casting Co.*
17 *Inc. v. Portland General Electric Company*, 111 F.3d 1427 (9th Cir.
18 1997), which Chugach relies on, does not contradict the U.S.
19 Supreme Court precedent discussed above. In *Columbia Steel*,
20 Portland General Electric (PGE) refused to wheel power on behalf of
21 Pacific Power & Light (PP&L) to Columbia Steel Casting Co.
22 (Columbia Steel) on the ground that PGE held an exclusive right to
23 provide service to Columbia Steel that derived from a 1972
24 Agreement in which PGE and PP&L agreed to exchange facilities in
25 Portland. In a written order, the Oregon Public Utility Commission
26 (Oregon PUC) had approved the utilities' agreement in 1972. When

1 sued by Columbia Steel, PGE asserted immunity under the state
2 action doctrine based on the Oregon PUC's 1972 approval and
3 subsequent course of conduct and correspondence with the Oregon
4 PUC.

5 The Ninth Circuit held that the Oregon PUC had not stated
6 clearly enough in its 1972 order its policy intent to displace
7 competition. *Id.* at 1438. The Ninth Circuit rejected the Oregon
8 PUC's 1992 order, which attempted to clarify the Oregon PUC's
9 intent in 1972 to displace competition. The Ninth Circuit reasoned
10 that the state action doctrine can only be satisfied based on a
11 objective reading of the Oregon PUC's 1972 order. *Id.* at 1442.

12 The *Columbia Steel* decision does not bar this Commission
13 from making policy decisions, including anti-competitive ones, that
14 it is authorized to make in accordance with state law. Nor is the
15 Commission confining itself in this Docket to an interpretation of
16 its prior Orders in Docket U-71-16. To avoid the problems that
17 arose in the *Columbia Steel* case, the Commission hopes that the
18 decision herein will make it absolutely clear for purposes of
19 satisfying the state action doctrine that its policy decision in
20 this Docket is to confirm ML&P's exclusive right to provide retail
21 electric service to customers in its certificated service territory
22 unless the Commission decides otherwise.

23 Chugach also relies on an Idaho district court decision
24 in *Snake River Valley Elec. Ass'n v. PacifiCorp*, 1997 WL 241086 (D
25 Idaho, April 25, 1997). In that decision, the defendant PacifiCorp
26

1 refused to sell power to Snake River Valley Electric Association
2 (SRVA) on the ground that Idaho's Electric Supplier Stabilization
3 Act (ESSA) permitted such refusal. The ESSA apparently was
4 designed to promote harmony among electric suppliers in Idaho by
5 prohibiting one supplier from serving the customer of a second
6 supplier without the latter's consent. *Id.* at 3. SRVA argued that
7 PacifiCorp's refusal to sell it power violated the Sherman Act
8 because SRVA then was unable to compete and sell power to customers
9 in PacifiCorp.'s service territory.

10 The district court agreed with PacifiCorp that the
11 utility could, in accordance with the ESSA, lawfully refuse to sell
12 power to SRVA. The district court therefore easily found that the
13 first prong of the *Midcal* test was satisfied. *Id.* at 3-4. The
14 district court, however, found that the second prong of the *Midcal*
15 test was not satisfied because the court determined that Idaho did
16 not actively administer and supervise the ESSA. The district court
17 stated that "there was no provision for an agency review or any
18 other type of supervision" of the anticompetitive conduct. *Id.*
19 at 4. Therefore, the district court held that PacifiCorp was not
20 entitled to immunity under the state action doctrine. *Id.* at 6.

21 The *Snake River* decision does not pose a problem since
22 this Commission regularly supervises and monitors the conduct of
23 utilities in the state, including ML&P's retail electric opera-
24 tions. One of the most effective means of ensuring Commission
25 review of utility service to an area is the certificate requirement
26

1 in AS 42.05.221, which Chugach seeks to bypass. The review
2 procedures are in place, and Chugach must comply with them.
3 Furthermore, Chugach has not even alleged that the Commission's
4 review procedures would fail to satisfy the second prong of the
5 Midcal test.

6 In view of the above conclusions, the Commission has
7 determined that the parties should be required to file briefs on
8 the issue of what relief, if any, should be provided to ML&P, and
9 what sanctions, if any, should be imposed on Chugach for its
10 attempts to sell power to customers located in ML&P's certificated
11 service territory. The briefing requirement shall consist of both
12 utilities filing briefs and reply briefs, and the deadlines for
13 filing the briefs will be simultaneous.

14
15 ORDER

16 THE COMMISSION FURTHER ORDERS:

17 1. The motion by Chugach Electric Association, Inc.,
18 for declaratory judgment (summary judgment) is denied.

19 2. The motion by the Municipality of Anchorage d/b/a
20 Municipal Light & Power Department for summary judgment to dismiss
21 the cross-complaint filed by Chugach Electric Association, Inc., is
22 granted.

23 3. By 4 p.m., June 10, 1998, the parties shall submit
24 briefs addressing the issue of what relief, if any, should be
25 provided to the Municipality of Anchorage d/b/a Municipal Light &
26 Power Department and what sanctions, if any, should be imposed or

1 Chugach Electric Association, Inc., for its attempts to sell power
2 to customers located in the certificated service territory of the
3 Municipality of Anchorage d/b/a Municipal Light & Power Department.

4 4. By 4 p.m., June 25, 1998, the parties shall submit
5 reply briefs in response to the briefs required by Ordering
6 Paragraph No. 3 of this Order.

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8 DATED AND EFFECTIVE at Anchorage, Alaska, this 20th day of May,
1998.

9 BY DIRECTION OF THE COMMISSION



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1 in the proceeding identified above to the persons indicated on the
2 attached service list.

3 DATED at Anchorage, Alaska, this 21st day of May, 1998.
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U-97-201

May 20, 199
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NATIONAL CONFERENCE OF STATE LEGISLATURES

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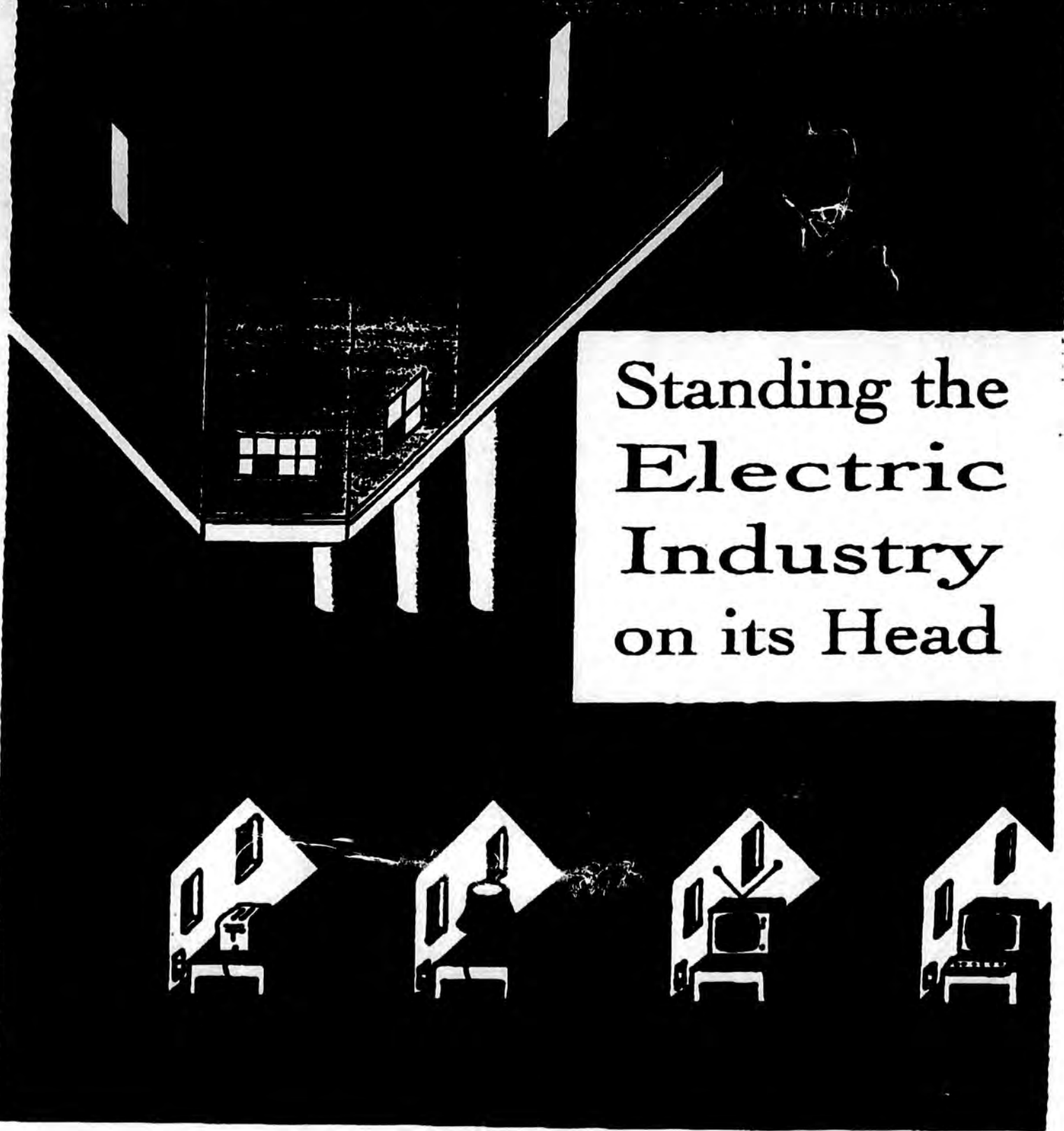
Environment, Energy & Transportation

Message: Here are two brief articles which offer a brief outline of electric industry restructuring. More information will follow by mail. Please call me if you have any questions. Thank you.

Note: Since these articles were written, The total number of states who have passed restructuring legislation has increased to 13. These states are: AZ, CA, CT, IL, ME, MA, MT, NV, NH, OK, PA, RI + VA.

Number of Pages: 8**Date Sent:** July 9, 1998

STATE LEGISLATURES



Standing the
Electric
Industry
on its Head

Standing the Electric Industry on its Head

After years as a regulated monopoly, the electric industry is on unfamiliar competitive ground and so are the states that are letting it happen.

By Matthew H. Brown

In June 1995 the New Hampshire legislature did something that would have been unthinkable a year before. It passed a law to let 17,000 New Hampshire residents choose their electric company. Frustrated with electric rates that were among the highest in the nation and believing that the state's monopoly utilities should face some real competition for their business, the legislature was the first in the nation to establish this kind of experimental program.

It was a harbinger of things to come around the country. Now a few states have passed far-reaching legislation to let all electric customers in the state choose where they want to buy their electricity. And almost every other state is considering the merits of taking the nation's most capital intensive industry from monopoly to competition. Known as "retail wheeling," this move to let customers choose their electric company, just as we all now choose our long distance phone company, is already putting the electric industry through some of its most fundamental changes in half a century.

The traditionally stodgy and predictable electric industry will look different five to 15 years from now, but no one knows just how it will look. Between now and the time that new industry emerges from today's confusion, it will have become very clear just how much the electric industry permeates every aspect of our lives. Legislators will have to make decisions that affect their states' economy, jobs, environment, tax revenue and the reliability of the electric system.

Matthew H. Brown runs the NCSL Energy Project, which offers remote assistance on utility restructuring to state legislatures, a national e-mail discussion group and an array of other resources. Call him to participate in the discussion group or to arrange technical assistance, (303) 830-2200.

A GLIMPSE OF THE NEW INDUSTRY

Close to two years after the New Hampshire legislature passed HB 168, the state's experiment with retail wheeling has taken off and gives a glimpse of the shape of tomorrow's electric industry. "Only by trying it could we see how a competitive electric industry might work," says Representative Clifton Below. The pilot experiment took place at the same time legislators were working on much more

comprehensive legislation to restructure the electric industry, Below says. "This gave us a chance to incorporate some of the lessons from the program into our legislation."

In New Hampshire, 31 different electricity suppliers wooed the pilot program's 17,000 customers with marketing ploys and incentives. Some offered electricity at extraordinarily low prices of less than 1.5 cents per kilowatt hour, others offered savings bonds or different prices for buying different amounts of electricity. One power supplier offered free birdhouses to those who signed up. A few

companies tried to identify themselves as clean or "green" power providers, guaranteeing that they would supply power that was generated only from certain "clean" sources, although the definition of what was clean varied from one company to another.

What was new about this was associating a brand name and identity with electrons. Companies began to try to distinguish themselves from each other by becoming the "cheap" power company, the "green" power company or the power company that was a responsible corporate citizen. At no other time has anyone needed to or tried to associate electricity with brand identity. This change alone was a fundamental shift in the character of the previously staid industry.

It was not only the old power companies that were



GIVING THE GO-AHEAD TO ELECTRIC INDUSTRY COMPETITION



competing for customers. Working Assets, the company that made its name by offering a credit card associated with environmentalism, became one of the "power marketers" competing for customers. Working Assets signed long-term contracts to buy power that came from environmentally friendly sources rather than, for instance, big polluter plants. It then sold that power through traditional mass marketing techniques. Working Assets and the other power marketers selling in New Hampshire were typical of a new breed of company in the electric business; they own no utility plants and no power lines, but make money by buying power cheaply from an open market of electricity, and selling it for more.

Elsewhere across the country, hundreds of wholesale power marketers, some of them affiliates of the nation's old utilities, and some of them companies that have not before tried to sell electricity, are buying and selling power. That is, they buy power on the open market and sell it to utilities. These power marketers claim that they can offer savings by selling directly to customers if states allow retail wheeling.

The new choices of services and companies were not necessarily what New Hampshire's customers wanted to see, and sometimes they engendered confusion. Some customers grew tired of having to think about their power company and the large array of options available to them. Others expected that their power rates would be lower than they actually were. Although the companies had advertised their electricity at rock-bottom prices, the final bill read an average of 10 cents per kilowatt hour—still a substantial reduction from what they had been paying, but much higher than what they had expected.

The difference between the 1.5 cents that was advertised and the 10 cents that most of the 17,000 New Hampshire customers ended up paying was partly made up of what has become known as "stranded costs." In New Hampshire's case, Public Service New Hampshire, one of New Hampshire's dominant electric companies, had built Seabrook, an expensive nuclear power plant, as well as a number of other power plants that produced power at rates higher than the market price for electricity. These power plants could become "stranded." That is, they might not be able to compete in a highly competitive power market. Saddled with the costs of these expensive power plants, Public Service New Hampshire could be in big financial trouble.



But Public Service New Hampshire pointed out that the state had approved the building of the power plants years ago, and that all these plants had been built as a result of a planning process in which the state had been heavily involved. Although some people still claim that these decisions to build expensive plants were simply bad business choices, the state elected to let the utilities recover most of the stranded costs that arose from the pilot program. These stranded costs, and the cost of sending the power over electric lines from power plants to customers, made up the difference between the low advertised cost of energy and the 10 cents per kilowatt hour or so that the customers were paying.

These stranded costs will not be limited to New Hampshire. Depending on who is doing the estimating, the nation's electric utilities could face a total of between \$50 billion and \$250 billion in stranded costs, mostly from expensive and noncompetitive power plants. In some cases, the stranded costs exceed the equity value of the utility that owns the stranded power plants. When these utilities make the transition from monopoly to competition, a few could go belly-up unless the states step in to help them. Yet the cost of helping some of these utilities through the transition could be enormous. Connecticut, with four problem-ridden nuclear power plants that will have lots of trouble producing power to compete with other cheap sources of electricity, is a prime example of a state in this dilemma.

An experimental program like New Hampshire's creates a

model of how an electric industry would change and what obstacles might arise in the transition from monopoly to competition in a state with very high electric rates. Not every state has

electric rates as high as New Hampshire's, and some states have far lower rates and a vastly different electric industry. Although it is instructive, not all of New Hampshire's experience is helpful to every other state. A few other states have begun pilot programs akin to New Hampshire's. Almost every other state is considering whether and how to make its electric energy business competitive and is facing issues that the pilot program did not address. Now legislation that several states have enacted and others are considering begins to deal with some of these other important issues, like taxation, the role of municipal utilities, rural electric cooperatives and

ANOTHER FEDERAL "SOLUTION?"

Although the states have gotten a jump on the federal government in moving toward a plan that lets customers choose their electricity suppliers, the final word may come from Washington. Congress and federal regulators are seriously considering preemption of state authority over electric utilities. A "one size fits all" federal solution could be imposed that extends federal control to retail markets.

The federal role in electric utility regulation up to this point has been limited and largely focused on the wholesale market. The passage of the Public Utilities Regulatory Policy Act (PURPA) in 1978 set in motion the federal effort to increase competition. PURPA sought to encourage development of power sources that did not use fossil fuels as a way of mitigating U.S. dependence on foreign oil. The federal efforts to spur competition increased markedly with the adoption of the Energy Policy Act of 1992. The Federal Energy Regulatory Commission (FERC) established rules for the sale of wholesale electricity between utilities. The rules require utilities to allow other companies to send electricity over their power lines for a reasonable, non-discriminatory price.

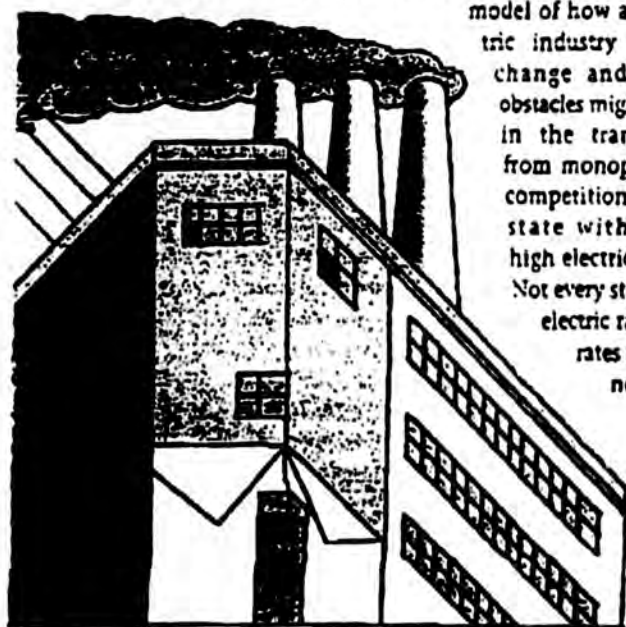
Now Congress and federal regulators are considering more broadly based efforts to open the retail electricity market to consumer choice. During the 104th Congress, bills surfaced not only to reform PURPA, but also, in the case of a proposal by Congressman Dan Schaefer, to require states to allow competition in the retail electricity market. The Schaefer proposal would give FERC authority to impose retail wheeling on any states that did not enact legislation to allow the practice themselves.

Over the course of the 104th Congress, a dozen or so hearings on these proposals were held by both House and Senate committees and drew the attention of a variety of well-financed stakeholders who stepped up both their lobbying efforts and their contributions to candidates for Congress. They are expected to be influential in any action taken this session.

Former Senator Bennett Johnson of Louisiana will be a player representing a group of utilities seeking retail wheeling. Schaefer's efforts are likely to be bolstered by the Commerce Committee chair, Congressman Tom Bliley of Virginia, who has expressed sympathy for "breaking up monopolies of utilities."

Major power outages during the summer of 1996 pushed the Clinton administration to get involved. It established a multi-agency team to develop the president's legislative initiative on the issue. As a result, the U.S. Department of Energy has been drafting a comprehensive package of federal legislation that would let customers throughout the country choose their electricity supplier.

States have a lot to lose in the battle that is sure to take place in Washington this session as special interests jockey for market advantages. The issue is not simply whether the electric retail market is deregulated, but who does it.



other so-called "public power" firms in competitive markets, and the role of energy efficiency and renewable energy in competitive markets.

WHAT ABOUT TAXES?

"We are very nervous about going full tilt at retail wheeling without making sure the tax piece is taken care of," says Representative Carl Holmes of the Kansas task force committee on electric industry reform. "We could see some big tax revenue losses if we jump into utility reform without thinking hard about how to do it. I am also convinced that some tax policy will ultimately have a big effect on how competitive these markets really are."

In fact Representative Holmes' predictions about tax revenue are already ringing true in Wilmington, Vt. New England Power, one of New England's largest utilities, recently sent Wilmington's town manager a letter notifying her that it was about to sell all its power plants, including a plant located there. That power plant contributes more than \$250,000 in property tax revenue to the town budget; if New England Power sells that plant, the town could see its property tax revenues decline by 50 percent or more because of revaluation. In another example, the Ohio school board association recently released a study that predicted property tax revenues could decline by as much as \$275 million statewide if the state decides to open the doors to competition.

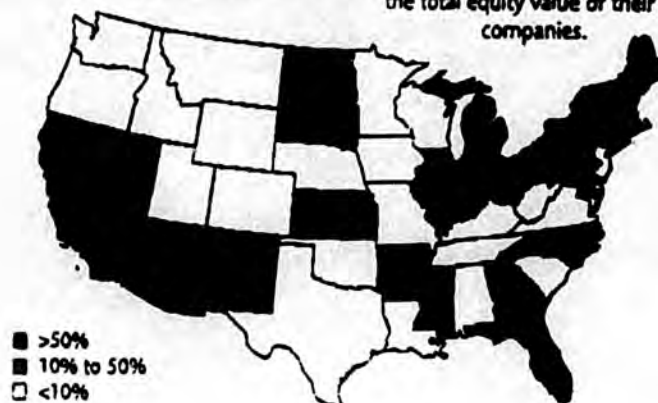
HOW TO DEAL WITH ENERGY EFFICIENCY

States are finding new ways to keep energy efficiency and renewable energy programs alive in competitive markets.

- Massachusetts has suggested that everyone pay 0.4 cents per kwh to fund energy efficiency and renewable energy programs.
- Rhode Island's law requires everyone to make a 0.23 cent per kwh contribution.
- California requires customers to pay up to 0.3 cents per kwh to create a \$500 million fund over four years.
- Vermont is looking at a requirement that retail sellers of electricity include among their portfolio of generating resources some renewable energy such as wind or solar power. If a retailer doesn't happen to have any renewables in its portfolio, it could buy tradeable credits from a company that has such resources.

STRANDABLE COSTS

Some utilities stand to lose a lot of money if they have to face competition. Because of differences in the way people estimate these losses, or strandable costs, the national figure ranges from \$50 to \$238 billion. But the potential for big losses varies from region to region and state to state. Utilities in some states face losses of more than 50 percent of the total equity value of their companies.



Source: L. Baxter and E. Hirst, *Estimating Potential Stranded Commitments for U.S. Investor-Owned Electric Utilities*, Oak Ridge, Tenn: Oak Ridge National Laboratory, 1995.

Property tax revenues are not the only revenue source that could decline. A recent study by Deloitte and Touche, sponsored jointly by the National Conference of State Legislatures and the National Association of Regulatory Utility Commissioners, noted that utilities are often taxed on the basis of their total revenues while power marketers and other companies competing with utilities are taxed on the basis of total revenues minus expenses. These latter taxes on income are lower and generate less revenue for state budgets as a result. Other states and localities may also have to change their franchise fee structure, or face the loss of franchise fee revenues. At this point, no state has passed legislation that tries to solve these tax problems, although Minnesota, Ohio, New Hampshire, Kansas, Oklahoma, Nevada and a few others have spent some time working on it.

PUBLIC POWER

Of the close to 3,200 utilities in the United States, only about 225 are investor-owned. The remainder are a mixture of small rural electric cooperatives, municipal utilities, state-run authorities and federal power agencies. But because these 225 investor-owned utilities generate 75 percent of the electricity in the nation, they tend to dominate the discussions in many parts of the country.

U.S. INDUSTRIAL POWER PRICES

Electricity costs for businesses vary across the country. The cheapest electricity is in states with cheap coal or hydro-power such as Idaho, Wyoming, Utah and Kentucky. States with the highest costs (in red) are apt to be the ones looking seriously at doing away with regulated monopolies.



Up to 4 ¢/kWh
Between 4 ¢/kWh and 5 ¢/kWh
Between 5 ¢/kWh and 9 ¢/kWh

Particularly in the West, however, public power agencies have become an important part of the industry structure. But they have a different history, a different financial structure, a different set of regulations and customer base from many investor-owned utilities. Some of these small utilities feel threatened by competition, fearing that the well-heeled large competitors will pick off their best customers, leaving them to serve only the remaining small customers, without the financial resources to do so. In Colorado's 1996 legislative session a consortium of public power agencies blocked restructuring legislation before it even left committee.

California's AB 1890, enacted in the fall of 1996, required that all electric customers pay a fee of up to 0.3 cents per kWh through their electric bill to support renewable energy, energy efficiency and research and development programs. California is set to raise about \$500 million over the four years for renewable energy (like wind, solar, hydro or biomass power) alone.

California devised this plan at the end of a lengthy set of negotiations because the Legislature became convinced that without outside funding, renewable energy, energy efficiency and research and development programs would wither and disappear when faced with competition from cheap fossil fuels. Because renewable energy sources are marginally more expensive than, for instance, a natural gas fired power plant, the competitive market would shut them out without a subsidy. This subsidy in California and other states may allow these programs to continue.

California's 1996 legislative session a consortium of public power agencies blocked restructuring legislation before it even left committee.

A HARBINGER OF THINGS TO COME?

Now that almost every state is looking at its electric business with an eye to using competition to lower costs, is it a sure thing that every state will follow in the footsteps of those few that have passed legislation? Legislators in New Hampshire, Rhode Island, California and Pennsylvania became convinced that retail wheeling would make their states more attractive to industry, bring efficiency to the industry and lower costs to everyone. Other states aren't so sure, but the 1997 legislative session is witnessing even more legislation than in the past two years.

State legislatures are forced to perform a balancing act as they try to replace monopoly and regulation with competition. "Without any experience with full-blown retail wheeling to draw on," says Senator Michael Sanchez of New Mexico, "we don't know for sure whether competition will result in lower rates, or simply more volatile rates. We don't know for certain if competition might do little more than bring the nation back to an age of unregulated monopolies that control electricity markets at the expense of true competition. And, we don't know whether the environment or the nation's diversity of fuel resources will suffer or improve as companies begin to base their business decisions more heavily on short-term economic considerations."

The transition to competition is a leap of faith, in hopes that competitive markets will be able to manage a complex, capital-intensive industry better than regulation. It will be years before we know if it has worked.

PILOT PROGRAMS

Before launching statewide initiatives, eight states are running pilot programs to see how a competitive electric market might work. Most of these programs are just beginning.

Watch what happens in these small-scale applications of a big idea in:

Idaho
Illinois
Massachusetts
Michigan
New Hampshire
New York
Pennsylvania
Washington

STATESTATS

Electric Monopoly Shifting to Competition

In the past two years 10 states—New Hampshire, Rhode Island, California, Pennsylvania, Oklahoma, Montana, Maine, Nevada, Illinois and Massachusetts—have passed legislation allowing consumers to choose their electricity provider. This fundamental change in the nation's most capital intensive industry follows fast on the heels of new federal regulations that encourage competition among utilities for wholesale electricity sales to one another.

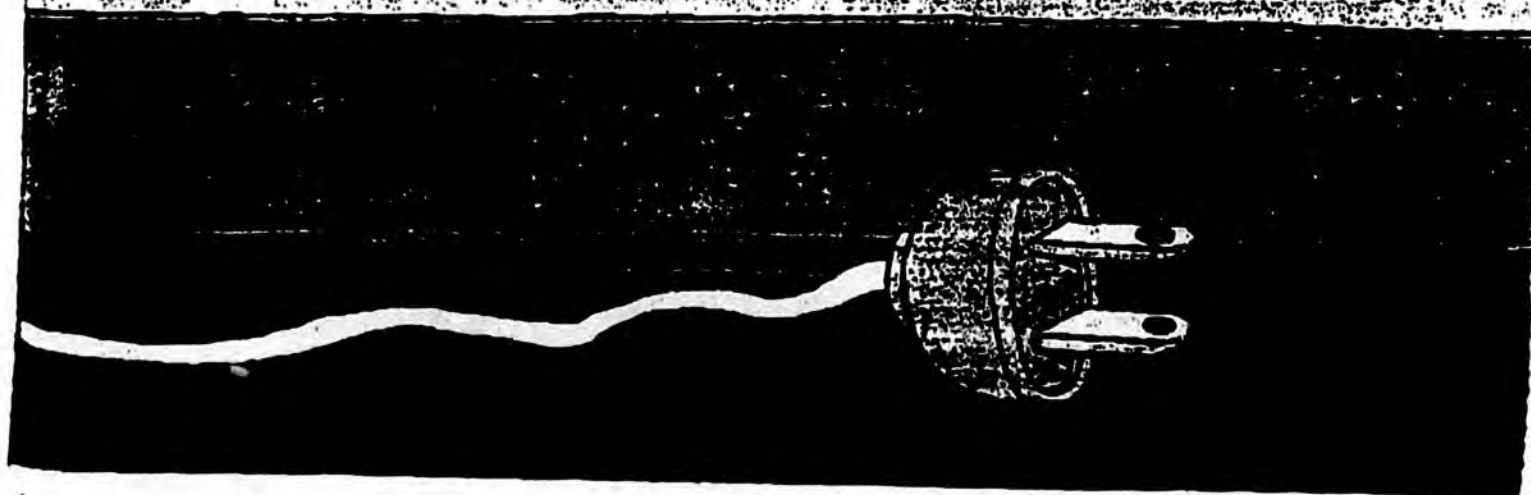
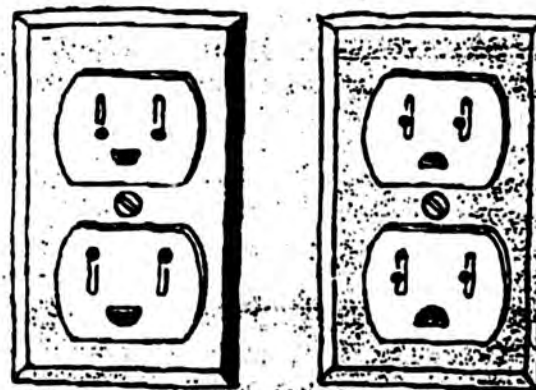
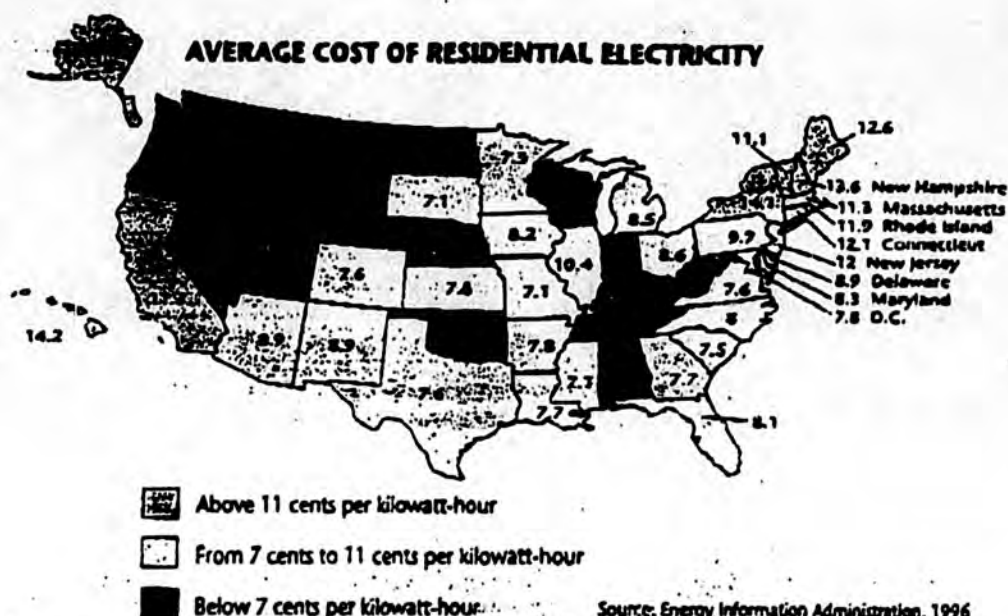
With the exception of Oklahoma and Montana, residents in the states that passed electric industry restructuring legislation pay electricity prices that are above the national average of 8.39 cents per kilowatt-hour. Electricity rates also have been on an upward trajectory in these high-cost states. Their state legislatures hope that competition will reduce electric rates by 10 percent to 20 percent over the next few years.

Residents of Oklahoma and Montana pay below average electric rates that have been trending downward for the past five years. State legislatures there hope to reduce electric rates still further while preparing their home utilities for competition in what

until now has been a monopoly.

This move to competition will mean that at least 25 million customers around the country will be able to choose their electric company at the beginning of 1998. By 2002, at least three times that number will be choosing their electric company. Watch closely as the nation's last heavily regulated industry begins its most fundamental shift in 50 years.

AVERAGE COST OF RESIDENTIAL ELECTRICITY



Glossary

One of the difficulties with discussing restructuring the electric industry is that terms mean different things to different people. This results in poor communication and misunderstandings about the proposals being discussed. To avoid some of this confusion, the following glossary is provided to clarify what the Council means when it uses certain terms. The glossary from the NARUC publication "Affected with the Public Interest" was used as the base of this list. Supplemental material was taken from many sources, including the Public Utilities Commission of Ohio, and a report by the Texas Ratepayers' Organization to Save Energy, Inc. titled "Electric Utility Restructuring, Can the Small Consumer Afford It?"

- Access Charge
- Aggregator
- Average Cost
- Avoided Cost
- Bilateral Contract
- Bottleneck Facility
- BPA
- Broker
- Bulk Power Supply
- Buy Through
- Capacity Release
- Captive Customer
- Commercialization
- Contract Path
- Contracts for Differences (CfD)
- Co-op
- Deintegration
- Demonstration
- Deregulation
- Derivatives
- Direct Access
- Disaggregation
- Distributed Generation
- Distribution
- Distribution Utility (Disco)
- Divestiture
- DSM (Demand-Side Management)
- Economic Efficiency
- Economies of Scale
- EEL
- ELCON
- Electric Utility
- Embedded Costs Exceeding Market Prices (ECEMP)
- Energy Efficiency
- EPA
- EPAct
- ESCO
- Exempt Wholesale Generator (EWG)
- Feebates
- Federal Energy Regulatory Commission (FERC)
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From NCSL
Web Site

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- Research and Development (R&D)
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- Rules of Conduct
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- Sunk Cost

- Supply-Side
- Sustained Orderly Development
- SWRTA
- System Integration (of new technologies)
- Taking
- Tariff
- Time-of-Use (TOU) Rates
- Transition Costs
- Transmission-Dependent Utility
- Transmitting Utility (Transco)
- Unbundling
- Universal Service
- Utility
- Vertical Integration
- Volumetric Wires Charge
- WATSCO
- Wheeling
- Wholesale Competition
- Wholesale Power Market
- Wholesale Transmission Services
- Wires Charge
- WRTA
- WSSCC
- WSSP

Access Charge A charge levied on a power supplied, or its customer, for access to a utility's transmission or distribution system. It is a charge for the right to send electricity over another's wires.

Aggregator -- An entity that puts together customers into a buying group for the purchase of a commodity service. The vertically integrated investor owned utility, municipal utilities and rural electric cooperatives perform this function in today's power market. Other entities such as buyer cooperatives or brokers could perform this function in a restructured power market. This is opposed to marketer which will be defined as an entity that represents different suppliers.

Average Cost The revenue requirement of a utility divided by the utility's sales. Average cost typically includes the costs of existing power plants, transmission, and distribution lines, and other facilities used by a utility to serve its customers. It also included operating and maintenance, tax, and fuel expenses.

Avoided Cost The cost the utility would incur but for the existence of an independent generator or other energy service option. Avoided cost rates have been used as the power purchase price utilities offer independent suppliers (Qualifying Facilities).

Bilateral Contract A direct contract between the power producer and user or broker outside of a centralized power pool or POOLCO.

Bottleneck Facility A point on the system, such as a transmission line, through which all electricity must pass to get to its intended buyers. If there is limited capacity at this point, some priorities must be developed to decide whose power gets through. It also must be decided if the owner of the bottleneck may, or must, build additional facilities to relieve the constraint.

BPA -- Bonneville Power Administration. One of five federal power marketing administrations that sell low-cost electric power produced by federal hydro electric dams to agricultural and municipal users. BPA serves Idaho, Oregon, and Washington as well as parts of Nevada and Wyoming.

Broker -- A retail agent who buys and sells power. The agent may also aggregate customers and arrange for transmission, firming and other ancillary services as needed.

Bulk Power Supply -- Often this term is used interchangeably with wholesale power supply. In broader

terms, it refers to the aggregate of electric generating plants, transmission lines, and related-equipment. The term may refer to those facilities within one electric utility, or within a group of utilities in which the transmission lines are interconnected.

Buy Through -- An agreement between utility and customer to import power when the customer's service would otherwise be interrupted.

Capacity Release -- A secondary market for capacity that is contracted by a customer which is not using all of its capacity.

Captive Customer A customer who does not have realistic alternatives to buying power from the local utility, even if that customer had the legal right to buy from competitors.

Commercialization -- Programs or activities that increase the value or decrease the cost of integrating new products or services into the electricity sector. (See "Sustained Orderly Development.")

Contract Path -- The most direct physical transmission tie between two interconnected entities. When utility systems interchange power, the transfer is presumed to take place across the "contract path," notwithstanding the electrical fact that power flow in the network will distribute in accordance with network flow conditions. This term can also mean to arrange for power transfer between systems. (See also Parallel path flow)

Contracts for Differences (CfD) -- A type of bilateral contract where the electric generation seller is paid a fixed amount over time which is a combination of the short-term market price and an adjustment with the purchaser for the difference. For example, a generator may sell a distribution company power for ten years at 6/kWh. That power is bid into Poolco at some low /kWh value (to ensure it is always taken). The seller then gets the market clearing price from the pool and the purchaser pays the producer the difference between the Poolco selling price and 6/kWh (or vice versa if the pool price should go above the contract price).

Co-op -- This is the commonly used term for a rural electric cooperative. Rural electric cooperatives generate and purchase wholesale power, arrange for the transmission of that power, and then distribute the power to serve the demand of rural customers. Co-ops typically become involved in ancillary services such as energy conservation, load management and other demand- side management programs in order to serve their customers at least cost.

Deintegration -- (See disaggregation)

Demonstration -- The application and integration of a new product or service into an existing or new system. Most commonly, demonstration involves the construction and operation of a new electric technology interconnected with the electric utility system to demonstrate how it interacts with the system. This includes the impacts the technology may have on the system and the impacts that the larger utility system might have on the functioning of the technology.

Deregulation -- The elimination of regulation from a previously regulated industry or sector of an industry.

Derivatives A specialized security or contract that has no intrinsic overall value, but whose value is based on an underlying security or factor as an index. A generic term that, in the energy field, may include options, futures, forwards, etc.

Direct Access -- The ability of a retail customer to purchase commodity electricity directly from the wholesale market rather than through a local distribution utility. (See also Retail Competition)

Disaggregation -- The functional separation of the vertically integrated utility into smaller, individually owned business units (i.e., generation, dispatch/control, transmission, distribution). The terms "deintegration," "disintegration" and "delamination" are sometimes used to mean the same thing. (See also "Divestiture.")

Distributed Generation -- A distributed generation system involves small amounts of generation located on a utility's distribution system for the purpose of meeting local (substation level) peak loads and/or displacing the need to build additional (or upgrade) local distribution lines.

Distribution The delivery of electricity to the retail customer's home or business through low voltage distribution lines.

Distribution Utility (Disco) -- The regulated electric utility entity that constructs and maintains the distribution wires connecting the transmission grid to the final customer. The Disco can also perform other services such as aggregating customers, purchasing power supply and transmission services for customers, billing customers and reimbursing suppliers, and offering other regulated or non-regulated energy services to retail customers. The "wires" and "customer service" functions provided by a distribution utility could be split so that two totally separate entities are used to supply these two types of distribution services.

Divestiture -- The stripping off of one utility function from the others by selling (spinning-off) or in some other way changing the ownership of the assets related to that function. Most commonly associated with spinning-off generation assets so they are no longer owned by the shareholders that own the transmission and distribution assets. (See also "Disaggregation.")

DSM (Demand-Side Management) -- Planning, implementation, and evaluation of utility-sponsored programs to influence the amount or timing of customers' energy use.

Economic Efficiency -- A term that refers to the optimal production and consumption of goods and services. This generally occurs when prices of products and services reflect their marginal costs. Economic efficiency gains can be achieved through cost reduction, but it is better to think of the concept as actions that promote an increase in overall net value (which includes, but is not limited to, cost reductions).

Economies of Scale Economies of scale exist where the industry exhibits decreasing average long-run costs with size.

EEI -- Edison Electric Institute. An association of electric companies formed in 1933 "to exchange information on industry developments and to act as an advocate for utilities on subjects of national interest."

ELCON -- Electricity Consumers Resources Council. ELCON is an association of 28 large industrial consumers of electricity. ELCON members account for over five percent of all electricity consumed in the United States. ELCON was formed in 1976 "to enable member companies to "work cooperatively for the development of coordinated, rational and consistent policies affecting electric energy supply and pricing at the federal, state, and local levels."

Electric Utility -- Any person or state agency with a monopoly franchise (including any municipality), which sells electric energy to end-use customers; this term includes the Tennessee Valley Authority, but does not include other Federal power marketing agency (from EPAct).

Embedded Costs Exceeding Market Prices (ECEMP) -- Embedded costs of utility investments exceeding market prices are: 1) costs incurred pursuant to a regulatory or contractual obligation; 2) costs that are reflected in cost-based rates; and 3) cost-based rates that exceed the price of alternatives in the marketplace. ECEMPs may become "stranded costs" where they exceed the amount that can be recovered through the asset's sale. Regulatory questions involve whether such costs should be recovered by utility shareholders and if so, how they should be recovered. "Transition costs" are stranded costs which are charged to utility customers through some type of fee or surcharge after the assets are sold or separated from the vertically-integrated utility. "Stranded assets" are assets which cannot be sold for some reason. The British nuclear plants are an example of stranded assets which no one would buy. (Also referred to as Transition Costs.)

Energy Efficiency -- Using less energy/electricity to perform the same function. Programs designed to use electricity more efficiently -- doing the same with less. For the purpose of this paper, energy efficiency is distinguished from DSM programs in that the latter are utility-sponsored and -financed, while the former is a broader term not limited to any particular sponsor or funding source. "Energy conservation" is a term which has also been used but it has the connotation of doing without in order to save energy rather than using less energy to do the same thing and so is not used as much today. Many people use these terms interchangeably.

EPA -- The Environmental Protection Agency. A federal agency charged with protecting the environment.

EPAct -- The Energy Policy Act of 1992 addresses a wide variety of energy issues. The legislation creates a new class of power generators, exempt wholesale generators (EWGs), that are exempt from the provisions of the Public Utilities Holding Company Act of 1935 and grants the authority to FERC to order and condition access by eligible parties to the interconnected transmission grid.

ESCO -- Efficiency Service Company. A company that offers to reduce a client's electricity consumption with the cost savings being split with the client.

Exempt Wholesale Generator (EWG) Created under the 1992 Energy Policy Act, these wholesale generators are exempt from certain financial and legal restrictions stipulated in the Public Utilities Holding Company Act of 1935.

Feebates -- A feebate is a revenue neutral strategy which imposes a fee on polluting resources and rebates those fees to cleaner technologies. This can be accomplished directly through the revenue paid to generators by the Poolco or through incorporation of these values into the dispatch/pricing mechanism of the pool.

Federal Energy Regulatory Commission (FERC) -- The Federal Energy Regulatory Commission regulates the price, terms and conditions of power sold in interstate commerce and regulates the price, terms and conditions of all transmission services. FERC is the federal counterpart to state utility regulatory commissions.

Forwards A forward is a commodity bought and sold for delivery at some specific time in the future. It is differentiated from futures markets by the fact that a forward contract is customized, non-exchange traded, and a non-regulated hedging mechanism.

FPA -- Federal Power Act of 1935. Established guidelines for federal regulation of interstate energy sales. It is the primary statute governing FERC regulation of the electric sector.

Futures Market -- Arrangement through a contract for the delivery of a commodity at a future time and at a price specified at the time of purchase. The price is based on an auction or market basis. Standardized, exchange-traded, and government regulated hedging mechanism.

Generation Company (Genco) -- A regulated or non-regulated entity (depending upon the industry structure) that operates and maintains existing generating plants. The Genco may own the generation plants or interact with the short term market on behalf of plant owners. In the context of restructuring the market for electricity, Genco is sometimes used to describe a specialized "marketer" for the generating plants formerly owned by a vertically-integrated utility.

Generation Dispatch and Control -- Aggregating and dispatching (sending off to some location) generation from various generating facilities, providing backup and reliability services. Ancillary services include the provision of reactive power, frequency control, and load following. (Also see "Power Pool" and "Poolco" below.)

Grid A system of interconnected power lines and generators that is managed so that the generators are dispatched as needed to meet the requirements of the customers connected to the grid at various points. Gridco is sometimes used to identify an independent company responsible for the operation of the grid.

Hedging Contracts -- Contracts which establish future prices and quantities of electricity independent of the short-term market. Derivatives may be used for this purpose. (See Contracts for Differences, Forwards, Futures Market, and Options.)

IOU -- An investor owned utility. A company, owned by stockholders for profit, that provides utility services. A designation used to differentiate a utility owned and operated for the benefit of shareholders from municipally owned and operated utilities and rural electric cooperatives.

Integrated Resource Planning (IRP) -- A public planning process and framework within which the costs and benefits of both demand- and supply-side resources are evaluated to develop the least-total-cost mix of utility resource options. In many states, IRP includes a means for considering environmental damages caused by electricity supply/transmission and identifying cost-effective energy efficiency and renewable energy alternatives. IRP has become a formal process prescribed by law in some states and under some provisions of the Clean Air Act Amendments of 1992.

Integrated Resource Planning Principles -- The underlying principles of IRP can be distinguished from the formal process of developing an approved utility resource plan for utility investments in supply- and demand-side resources. A primary principle is to provide a framework for comparing a variety of supply- and demand-side and transmission resource costs and attributes outside of the basic provision (or reduction) of electric capacity and energy. These resources may be owned or constructed by any entity and may be acquired through contracts as well as through direct investments. Another principle is the incorporation of risk and uncertainty into the planning analysis. The public participation aspects of IRP allow public and regulatory involvement in the planning rather than the siting stage of project development.

IPP -- Independent Power Producer. An private entity that operates a generation facility and sells power to electric utilities for resale to retail customers.

ISDN -- Integrated Services Digital Network. A 128 Kbps (kilobytes per second) digital telephone service available in many parts of the country though not universally available that may be able to substitute for fiber optic cable in every respect except possibly television transmission.

ISO -- Independent System Operator. A neutral operator responsible for maintaining instantaneous balance of the grid system. The ISO performs its function by controlling the dispatch of flexible plants to ensure that loads match resources available to the system.

Load Centers A geographical area where large amounts of power are drawn by end-users.

Marginal Cost In the utility context, the cost to the utility of providing the next (marginal) kilowatt-hour of electricity, irrespective of sunk costs.

Market-Based Price A price set by the mutual decisions of many buyers and sellers in a competitive market.

Marketer -- An agent for generation projects who markets power on behalf of the generator. The marketer may also arrange transmission, firming or other ancillary services as needed. Though a marketer may perform many of the same functions as a broker, the difference is that a marketer represents the generator while a broker acts as a middleman.

Monopoly -- The only seller with control over market sales.

Monopsony -- The only buyer with control over market purchases.

Municipalization -- The process by which a municipal entity assumes responsibility for supplying utility service to its constituents. In supplying electricity, the municipality may generate and distribute the power or purchase wholesale power from other generators and distribute it.

Municipal Utility A provider of utility services owned and operated by a municipal government.

NARUC -- The National Association of Regulatory Utility Commissioners. An advisory council composed of governmental agencies of the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of utilities and carriers. "The chief objective is to serve the consumer interest by seeking to improve the quality and effectiveness of public regulation in America."

NASUCA -- The National Association of Utility Consumer Advocates. NASUCA includes members from 38 states and the District of Columbia. It was formed "to exchange information and take positions on issues affecting utility rates before federal agencies, Congress and the courts."

Natural Monopoly -- A situation where one firm can produce a given level of output at a lower total cost than can any combination of multiple firms. Natural monopolies occur in industries which exhibit decreasing average long-run costs due to size (economies of scale). According to economic theory, a public monopoly governed by regulation is justified when an industry exhibits natural monopoly characteristics.

NCSL -- The National Conference of State Legislatures. A national advisory council which provides services to state legislatures "by bringing together information from all states to forge workable answers to complex policy questions."

NOPR -- A Notice of Proposed Rulemaking. A designation used by the FERC for some of its dockets.

NRTA - Northwest Regional Transmission Association. A subregional transmission group within the Western Regional Transmission Association.

NUG -- A non-utility generator. A generation facility owned and operated by an entity who is not defined as a utility in that jurisdictional area.

Obligation to Serve The obligation of a utility to provide electric service to any customer who seeks that service, and is willing to pay the rates set for that service. Traditionally, utilities have assumed the obligation to serve in return for an exclusive monopoly franchise.

Oligopoly -- A few sellers who exert market control over prices.

Options An option is a contractual agreement that gives the holder the right to buy (call option) or sell (put option) a fixed quantity of a security or commodity (for example, a commodity or commodity futures contract), at a fixed price, within a specified period of time. May either be standardized, exchange-traded, and government regulated, or over-the-counter customized and non-regulated.

Parallel Path Flow -- As defined by NERC, this refers to the flow of electric power on an electric system's transmission facilities resulting from scheduled electric power transfers between two other electric systems. (Electric power flows on all interconnected parallel paths in amounts inversely proportional to each path's resistance.)

Peak Load or Peak Demand The electric load that corresponds to a maximum level of electric demand in a specified time period.

Performance-Based Regulation (PBR) -- Any rate-setting mechanism which attempts to link rewards (generally profits) to desired results or targets. PBR sets rates, or components of rates, for a period of time based on external indices rather than a utility's cost-of-service. Other definitions include light-handed regulation which is less costly and less subject to debate and litigation. A form of rate regulation which provides utilities with better incentives to reduce their costs than does cost-of-service regulation.

Portfolio Management -- The functions of resource planning and procurement under a traditional utility structure. Portfolio management can also be defined as the aggregation and management of a diverse portfolio of supply (and demand-reduction) resources which will act as a hedge against various risks that

may affect specific resources (i.e., fuel price fluctuations and certainty of supply, common mode failures, operational reliability, changes in environmental regulations, and the risk of health, safety, and environmental damages that may occur as a result of operating some supply resources). Under a more market-driven power sector with a "power pool" or POOLCO wholesale market structure, a portfolio manager would: aggregate and manage a diverse portfolio of spot-market purchases, contracts-for-differences, futures contracts and other market-hedging-type contracts and mechanisms.

Power Authorities Quasi-governmental agencies that perform all or some of the functions of a public utility.

Power Pool -- An entity established to coordinate short-term operations to maintain system stability and achieve least-cost dispatch. The dispatch provides backup supplies, short-term excess sales, reactive power support, and spinning reserve. Historically, some of these services were provided on an unpriced basis as part of the members' utility franchise obligations. Coordinating short-term operations includes the aggregation and firming of power from various generators, arranging exchanges between generators, and establishing (or enforcing) the rules of conduct for wholesale transactions. The pool may own, manage and/or operate the transmission lines ("wires") or be an independent entity that manages the transactions between entities. Often, the power pool is not meant to provide transmission access and pricing, or settlement mechanisms if differences between contracted volumes among buyers and sellers exist.

Poolco -- Poolco refers to a specialized, centrally dispatched spot market power pool that functions as a short-term market. It establishes the short-term market clearing price and provides a system of long-term transmission compensation contracts. It is regulated to provide open access, comparable service and cost recovery. A poolco would make ancillary generation services, including load following, spinning reserve, backup power, and reactive power, available to all market participants on comparable terms. In addition, the Poolco provides settlement mechanisms when differences in contracted volumes exist between buyers and sellers of energy and capacity.

Provider of Last Resort A legal obligation (traditionally given to utilities) to provide service to a customer where competitors have decided they do not want that customer's business.

Public Interest Goals -- Public interest goals of electric utility regulation include: 1) inter- and intra-class and intergenerational equity; 2) the equal treatment of equals (horizontal equity); 3) balancing long- and short-term goals that have the potential to affect intergenerational balance; 4) protecting against the abuse of monopoly power; and 5) general protection of the health and welfare of the citizens of the state, nation, and world. Environmental and other types of social costs are subsumed under the equity and health and welfare responsibilities.

PURPA The Public Utility Regulatory Policy Act of 1978. Among other things, this federal legislation requires utilities to buy electric power from private "qualifying facilities," at an avoided cost rate. This avoided cost rate is equivalent to what it would have otherwise cost the utility to generate or purchase that power themselves. Utilities must further provide customers who choose to self-generate a reasonably priced back-up supply of electricity.

PUHCA -- The Public Utility Holding Company Act of 1935. This act prohibits acquisition of any wholesale or retail electric business through a holding company unless that business forms part of an integrated public utility system when combined with the utility's other electric business. The legislation also restricts ownership of an electric business by non-utility corporations.

Qualifying Facility (QF) Under PURPA, QFs were allowed to sell their electric output to the local utility at avoided cost rates. To become a QF, the independent power supplier had to produce electricity with a specified fuel type (cogeneration or renewables), and meet certain ownership, size, and efficiency criteria established by the Federal Energy Regulatory Commission.

Real-Time Pricing -- The instantaneous pricing of electricity based on the cost of the electricity available for use at the time the electricity is demanded by the customer.

Reliability -- Electric system reliability has two components -- adequacy and security. Adequacy is the ability of the electric system to supply the aggregate electrical demand and energy requirements of the customers at all times, taking into account scheduled and unscheduled outages of system facilities. Security is the ability of the electric system to withstand sudden disturbances such as electric short circuits or unanticipated loss of system facilities.

Renewable Resources -- Renewable energy resources are naturally replenishable, but flow-limited. They are virtually inexhaustible in duration but limited in the amount of energy that is available per unit of time. Some (such as geothermal and biomass) may be stock-limited in that stocks are depleted by use, but on a time scale of decades, or perhaps centuries, they can probably be replenished. Renewable energy resources include: biomass, hydro, geothermal, solar and wind. In the future they could also include the use of ocean thermal, wave, and tidal action technologies. Utility renewable resource applications include bulk electricity generation, on-site electricity generation, distributed electricity generation, non-grid-connected generation, and demand-reduction (energy efficiency) technologies.

Reregulation -- The design and implementation of regulatory practices to be applied to the remaining regulated entities after restructuring of the vertically-integrated electric utility. The remaining regulated entities would be those that continue to exhibit characteristics of a natural monopoly, where imperfections in the market prevent the realization of more competitive results, and where, in light of other policy considerations, competitive results are unsatisfactory in one or more respects. Reregulation could employ the same or different regulatory practices as those used before restructuring.

Research and Development (R&D) -- Research is the discovery of fundamental new knowledge. Development is the application of new knowledge to develop a potential new service or product. Basic power sector R&D is most commonly funded and conducted through the Department of Energy (DOE), its associated government laboratories, university laboratories, the Electric Power Research Institute (EPRI), and private sector companies.

Resource Efficiency -- The use of smaller amounts of physical resources to produce the same product or service. Resource efficiency involves a concern for the use of all physical resources and materials used in the production and use cycle, not just the energy input.

Restructuring -- The reconfiguration of the vertically-integrated electric utility. Restructuring usually refers to separation of the various utility functions into individually-operated and -owned entities.

Retail Competition a system under which more than one electric provider can sell to retail customers, and retail customers are allowed to buy from more than one provider. (See also Direct Access)

Retail Market -- A market in which electricity and other energy services are sold directly to the end-use customer.

Retail Wheeling -- See Direct Access.

RD&D -- Research, development and demonstration (see definitions above for "Research and Development" and "Demonstration").

RTG -- A Regional Transmission Group. A voluntary organization of transmission owners, users, and other entities interested in coordinating transmission planning, expansion, operation, and use on a regional and inter-regional basis. Such groups are subject to FERC approval.

Rules of Conduct -- Rules set in advance to delineate acceptable activities by participants, particularly participants with significant market power.

Securitize -- The aggregation of contracts for the purchase of the power output from various energy projects into one pool which then offers shares for sale in the investment market. This strategy diversifies project risks from what they would be if each project were financed individually, thereby reducing the cost of financing. Fannie Mae performs such a function in the home mortgage market.

Self-Generation -- A generation facility dedicated to serving a particular retail customer, usually located on the customer's premises. The facility may either be owned directly by the retail customer or owned by a third party with a contractual arrangement to provide electricity to meet some or all of the customer's load.

Self-Service Wheeling -- Primarily an accounting policy comparable to net-billing or running the meter backwards. An entity owns generation that produces excess electricity at one site, that is used at another site(s) owned by the same entity. It is given billing credit for the excess electricity (displacing retail electricity costs minus wheeling charges) on the bills for its other sites.

Special Contracts -- Any contract that provides a utility service under terms and conditions other than those listed in the utility's tariffs. For example, an electric utility may enter into an agreement with a large customer to provide electricity at a rate below the tariffed rate in order to prevent the customer from taking advantage of some other option that would result in the loss of the customer's load. This generally allows that customer to compete more effectively in their product market.

Stranded Costs/Stranded Assets -- See Embedded Costs Exceeding Market Prices.

Stranded Benefits -- Public interest programs and goals which could be compromised or abandoned by a restructured electric industry. These potential "stranded benefits" might include: environmental protection, fuel diversity, energy efficiency, low-income ratepayer assistance, and other types of socially beneficial programs.

Sunk Cost In economics, a sunk cost is a cost that has already been incurred, and therefore cannot be avoided by any strategy going forward.

Supply-Side Activities conducted on the utility's side of the customer meter. Activities designed to supply electric power to customers, rather than meeting load through energy efficiency measures or on-site generation on the customer side of the meter.

Sustained Orderly Development -- A condition in which a growing and stable market is identified by orders that are placed on a reliable schedule. The orders increase in magnitude as previous deliveries and engineering and field experience lead to further reductions in costs. The reliability of these orders can be projected many years into the future, on the basis of long-term contracts, to minimize market risks and investor exposure. (See also "Commercialization.")

SWRTA -- The Southwest Regional Transmission Association. A subregional RTG within WRTA, and awaiting FERC approval.

System Integration (of new technologies) -- The successful integration of a new technology into the electric utility system by analyzing the technology's system effects and resolving any negative impacts that might result from its broader use.

Taking -- Reducing the value of someone's property through government action without just compensation.

Tariff -- A document, approved by the responsible regulatory agency, listing the terms and conditions, including a schedule of prices, under which utility services will be provided.

Time-of-Use (TOU) Rates -- The pricing of electricity based on the estimated cost of electricity during a particular time block. Time-of-use rates are usually divided into three or four time blocks per twenty-four hour period (on-peak, mid-peak, off-peak and sometimes super off-peak) and by seasons of the year (summer and winter). Real-time pricing differs from TOU rates in that it is based on actual (as opposed to forecasted) prices which may fluctuate many times a day and are weather-sensitive, rather than varying with a fixed schedule.

Transition Costs -- See Embedded Costs Exceeding Market Prices.

Transmission-Dependent Utility A utility that relies on its neighboring utilities to transmit to it the power it buys from its suppliers. A utility without its own generation sources, dependent on another utility's transmission system to get its purchased power supplies.

Transmitting Utility (Transco) -- This is a regulated entity which owns, and may construct and maintain, wires used to transmit wholesale power. It may or may not handle the power dispatch and coordination functions. It is regulated to provide non-discriminatory connections, comparable service and cost recovery. According to EPAct, any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale. (See also "Generation Dispatch & Control" and "Power Pool.")

Unbundling -- Disaggregating electric utility service into its basic components and offering each component separately for sale with separate rates for each component. For example, generation, transmission and distribution could be unbundled and offered as discrete services.

Universal Service -- Electric service sufficient for basic needs (an evolving bundle of basic services) available to virtually all members of the population regardless of income.

Utility -- A regulated entity which exhibits the characteristics of a natural monopoly. For the purposes of electric industry restructuring, "utility" refers to the regulated, vertically-integrated electric company. "Transmission utility" refers to the regulated owner/operator of the transmission system only. "Distribution utility" refers to the regulated owner/operator of the distribution system which serves retail customers.

Vertical Integration An arrangement whereby the same company owns all the different aspects of making, selling, and delivering a product or service. In the electric industry, it refers to the historically common arrangement whereby a utility would own its own generating plants, transmission system, and distribution lines to provide all aspects of electric service.

Volumetric Wires Charge A type of charge for using the transmission and/or distribution system that is based on the volume of electricity that is transmitted.

WATSCO -- The Western Association for Transmission System Coordination.

Wheeling -- The transmission of electricity by an entity that does not own or directly use the power it is transmitting. Wholesale wheeling is used to indicate bulk transactions in the wholesale market, whereas retail wheeling allows power producers direct access to retail customers. This term is often used colloquially as meaning transmission.

Wholesale Competition A system whereby a distributor of power would have the option to buy its power from a variety of power producers, and the power producers would be able to compete to sell their power to a variety of distribution companies.

Wholesale Power Market -- The purchase and sale of electricity from generators to resellers (who sell to retail customers) along with the ancillary services needed to maintain reliability and power quality at the transmission level.

Wholesale Transmission Services -- The transmission of electric energy sold, or to be sold, at wholesale in interstate commerce (from EPAct).

Wires Charge A broad term which refers to charges levied on power suppliers or their customers for the use of the transmission or distribution wires.

WRTA -- The Western Regional Transmission Association, an RTG.

WSSCC -- The Western System Coordinating Council. A voluntary industry association created to enhance reliability among western utilities.

WSSP -- The Western Systems Power Pool. A FERC approved industry institution that provides a forum for short-term trades in electric energy, capacity, exchanges and transmission services. The pool consists of approximately 50 members and serves 22 states, a Canadian province and 60 million people. The WSSP is headquarter in Phoenix, Arizona.

88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

As for PGE's second argument, the only authority it cites is the 1972 Order stating that "[t]here can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customers," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP & L for the transfer of tens of thousands of customers without the customers' permission. It has *1447 no application, therefore, to Columbia Steel's request to be transferred, as a customer, from PGE to PP & L. In the absence of any further analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP & L, we cannot hold that it has any merit.

V. Columbia Steel's Cross-Appeal on Damages

[29] Columbia Steel argued to the district court, and now argues on its cross-appeal, that it was entitled to damages beginning with PP & L's refusal in 1987 to sell Columbia Steel power at its lower rates. The district court rejected this argument, stating that "Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP & L. Even where officials of PP & L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP & L and not an act by PGE." Unpublished Opinion, filed Feb. 5, 1993, at 24. The district court therefore limited recovery of damages to the period from July 1990, when Columbia Steel entered into a contract with PP & L and was thus "willing and able to actually purchase power at a lower rate from PP & L," and

July 1991, when PGE began wheeling PP & L's power to Columbia Steel over PGE's transmission lines. *Id.* at 25.

We agree with Columbia Steel that the district court erred in not awarding damages beginning in 1987. The district court mistakenly held that PGE could not be liable for PP & L's refusal to sell power to Columbia Steel in 1987. PP & L was a coconspirator in 1987, and PGE is liable for the acts of PP & L in furtherance of their conspiracy not to compete in Portland. See *Beitz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir.1980) ("If [plaintiff] can establish the existence of a conspiracy in violation of the antitrust laws and that [defendants] were a part of such a conspiracy, [defendants] will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the nature of [defendants'] own actions.").

VI. Conclusion

The partial summary judgment holding PGE liable to Columbia Steel under § 1 of the Sherman Act is **AFFIRMED**. The partial summary judgment awarding Columbia Steel \$508,425 in treble damages is **VACATED** and the case is remanded to the district court for a redetermination of Columbia Steel's damages in accordance with this opinion. Columbia Steel's motion for attorney's fees on appeal pursuant to 15 U.S.C. § 15 is **GRANTED**. The amount of the fees shall be determined by the district court.

END OF DOCUMENT

ALASKA STATE LEGISLATURE

Joint Committee on Electric Utility Restructuring

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Senator Loren Lemmon

Senator Robin Taylor

Senator Al Adams

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Rep. Alan Austerman

Rep. Fred Dyson

Rep. John Davies

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TO: Members, Joint Committee on Electric Utility Restructuring

FROM: Janet Seitz *Janet*
Rep. Rokeberg's Office

DATE: July 30, 1998

RE: Packets for August 6, 1998 Meeting

Enclosed are two additional items for your review:

- a. NCSL's "Comparison of Selected Electric Restructuring Legislation"
- b. IBEW's "Will Deregulation Short-Circuit North America's Electric Power Supply". [Note: IBEW's Washington, DC, office is sending additional copies of the pamphlet. As soon as they are received, you will receive one (the original pamphlet is in color and the graphs show up better).]

Comparison Of Selected Electric Restructuring Legislation



National Conference of State Legislatures

COMPARISON OF SELECTED ELECTRIC RESTRUCTURING LEGISLATION

(Revised March 31, 1998)

Start Date of Retail Competition

Nevada A.B. 366 July 16, 1997	Customers may begin obtaining generation, aggregation, and any other potentially competitive services from an alternative seller no later than 12/31/99, unless the PUC determines that a different date is necessary to protect the public interest. (Section 39, p. 12)
California H.B. 1890 August 31, 1996	3/31/98 (p. 30, 42)
Maine H-568 (LD 1804) May 23, 1997	Beginning on 3/1/00, all consumers have the right to purchase generation services from competitive providers. (p. 1)
Montana S.B. 390 May 2, 1997	On or before 7/1/98, customers with loads greater than 1000 kW must have opportunity to choose an electric supplier. Co-ops may file notice with PSC, within one year after effective date of Act, electing not to participate in retail access. (p. 4, 11)
New Hampshire H.B. 1392 May 21, 1996	PUC to implement in most expeditious manner and no later than 1/1/98. PUC may delay to 7/1/98 but not longer without legislative approval. (p. 9)
Oklahoma S.B. 500 April 25, 1997	All retail customers are permitted to choose their retail electric energy suppliers by 7/1/02. (p. 3-4)
Pennsylvania H.B. 1509 November 26, 1996	Transition period to begin on 1/1/97. All customers to have retail access by 1/1/01. (p. 39, 84)
Rhode Island 96-H 8124 Substitute B August 7, 1996	By 1/1/97 each distribution company shall file with PUC a plan for transferring ownership of generation, transmission, and distribution facilities into separate affiliates. Company shall implement plan within 3 months after retail access is available to 40 percent of kWh sales in New England. PUC may extend time if necessary. (p. 17-18)
Massachusetts H.B.5117	3/1/98 for all customers

COMPARISON OF SELECTED ELECTRIC RESTRUCTURING LEGISLATION

(Revised March 31, 1998)

Oklahoma S.B. 500	Legislature directs Corporation Commission to study all relevant issues relating to restructuring and develop a proposed industry restructuring framework under the direction of the legislative Task force. Commission shall address appropriate steps to achieve an orderly transition and may include, in addition to the directives in this Act, other provisions Commission deems necessary and appropriate. However, Commission is expressly prohibited from promulgating rules or orders relating to restructuring without prior express legislative authorization. A defined period for transition shall be established. (p. 4)
Pennsylvania H.B. 1509	As of 1/1/99, maximum of 33 percent of peak load in each customer class will have direct access; 66 percent by 1/1/00; 100 percent by 1/1/01. PUC may extend 1/1/99 implementation date for 6 months. PUC to conduct milestone reviews to ensure technically workable and equitable transition. (p. 35, 39-41)
Rhode Island 96-H 8124 Substitute B	On 7/1/97, distribution companies required to offer retail access from non-regulated power producers to all new commercial and industrial customers with anticipated annual demand of 200 kW or more, all existing manufacturing customers over 1500 kW, and all state accounts, not to exceed 10 percent of total kW sales. On 1/1/98 access to include all existing manufacturers over 200 kW and all towns in state, not to exceed 20 percent of total kW sales. Access for all customers within 3 months after access is available to 40 percent or more of the kW sales in all New England states, but not later than 7/1/98. PUC may extend final deadline up to 6 months. (p. 24-25)
Massachusetts H.B.5117	No phase-in
Illinois H.B. 362	(see above start date info)
Pilot Program	
Nevada A.B. 366	
California H.B. 1890	

CORRECTION

**THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION**



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

COMPARISON OF SELECTED ELECTRIC RESTRUCTURING LEGISLATION

(Revised March 31, 1998)

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Massachusetts H.B.5117	3/1/98 for all customers

COMPARISON OF SELECTED ELECTRIC RESTRUCTURING LEGISLATION

(Revised March 31, 1998)

Illinois H.B. 362	10/99 All large industrial customers, 33% of nonresidential customers 12/00 Remaining 66% of nonresidentials 5/02 All residentials
Phase-in of Retail Competition	
Nevada A.B. 366	PUC may establish different dates for different services and different geographic areas and authorize retail competition in gradual phases. Utilities shall submit to PUC plan for compliance with Act, including information PUC needs to: set rates (e.g., utilities' cost to provide service and estimate of required revenue), allocate costs of service among customers, and adopt regulations for potentially competitive services. PUC may exempt sellers from certain portions of Act if necessary to achieve effective competition. (Section 39, p. 12; Section 49, p. 20)
California H.B. 1890	Full retail access for all customers no later than 1/1/02; phase-in to be equitable to all classes as determined by PUC. (p. 5, 42, 91)
Maine H-568 (LD 1804)	Beginning 3/1/02, electric billing and metering services are subject to competition. The PUC may establish an earlier date except in no case may the date be prior to 3/1/00. (p. 3)
Montana S.B. 390	Transition period begins 7/1/98 for customers with loads greater than 1000 kW; all customers eligible by 7/1/02, unless the PSC determines added time is needed because workable competition does not exist. Full implementation may not be delayed beyond 7/1/04, however, for customers with loads greater than 1000 kW and not beyond 7/1/06 for all other customers. Participating co-ops must adopt transition plans on or before 7/1/01, and the transition period may not extend beyond 7/1/02, although the transition plan may be altered under certain circumstances. (p. 3-5, 9, 12-13)
New Hampshire H.B. 1392	On the effective date of the Act, PUC shall undertake a generic proceeding to develop a statewide industry restructuring plan in accordance with the legislative principles in the bill. Final order is due by 2/28/97. PUC shall require all utilities to submit compliance filings. No utility shall be required, however, to commence implementation until filings representing 70 percent of retail sales have been implemented. (p. 9-10)

COMPARISON OF SELECTED ELECTRIC RESTRUCTURING LEGISLATION

(Revised March 31, 1998)

Oklahoma S.B. 500	Legislature directs Corporation Commission to study all relevant issues relating to restructuring and develop a proposed industry restructuring framework under the direction of the legislative Task force. Commission shall address appropriate steps to achieve an orderly transition and may include, in addition to the directives in this Act, other provisions Commission deems necessary and appropriate. However, Commission is expressly prohibited from promulgating rules or orders relating to restructuring without prior express legislative authorization. A defined period for transition shall be established. (p. 4)
Pennsylvania H.B. 1509	As of 1/1/99, maximum of 33 percent of peak load in each customer class will have direct access; 66 percent by 1/1/00; 100 percent by 1/1/01. PUC may extend 1/1/99 implementation date for 6 months. PUC to conduct milestone reviews to ensure technically workable and equitable transition. (p. 35, 39-41)
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Massachusetts H.B.5117	No phase-in
Illinois H.B. 362	(see above start date info)
Pilot Program	
Nevada A.B. 366	
California H.B. 1890	

COMPARISON OF SELECTED ELECTRIC RESTRUCTURING LEGISLATION**(Revised March 31, 1998)**

Maine H-568 (LD 1804)	
Montana S.B. 390	Beginning 7/1/98, utilities shall conduct pilot programs using samples of residential and small commercial customers. Utilities must file a report with the PSC and the transition advisory committee on or before 7/1/00 analyzing the results of the pilot programs. Co-ops may also establish pilot programs for customers with loads less than 1000 kW. (p. 3-4, 9)
New Hampshire H.B. 1392	
Oklahoma S.B. 500	
Pennsylvania H.B. 1509	PUC has authority to require utilities to submit proposals for pilots to begin 4/1/97. Program must commit 5 percent of peak load for each customer class. Minimum period for pilot is 1 year and shall include an evaluation process as directed by PUC. (p. 42-45)
Rhode Island 96-H 8124 Substitute B	
Massachusetts H.B.5117	
Illinois H.B. 362	

Primary Responsibility for Implementation of Retail Competition

Nevada A.B. 366	PUC shall promulgate regulations to implement Act and shall determine which electric services are potentially competitive. Such services are defined as ones that: will not harm one or more customer classes; will decrease cost; increase quality or innovation, where effective competition is likely to develop; will advance competitive position of state; and won't jeopardize safety or reliability. If PUC determines that market for potentially competitive service does not include effective competition, it shall establish method for determining prices, terms, and conditions of service. Effective competition means an individual seller can't significantly influence the price of service. (Sections 39-52, p. 12-22; Section 337, p. 149)
California H.B. 1890	PUC. (p. 42)
Maine H-568 (LD 1804)	PUC. PUC may impose by rule any additional requirements necessary to carry out the purposes of the Act, except PUC may not regulate the rates of competitive providers. (p. 5)
Montana S.B. 390	All public utilities shall submit a transition plan to the PSC not later than 1 year before retail choice is offered. PSC shall develop a procedural schedule for considering transition plans and issue a final order within 9 months after the plan is filed. On approval of plan, PSC shall enforce the plan in its final order. PSC may extend the transition period if workable competition does not exist. Workable competition exists if competition is sufficient to inhibit monopoly pricing or anti-competitive price leadership. (p. 5, 12-13)
New Hampshire H.B. 1392	PUC authorized to order such charges and other service provisions and to take such other actions substantially consistent with the legislative principles in the bill that are necessary to implement restructuring. (p. 3, 11)

Oklahoma S.B. 500	Legislature directs Corporation Commission to study all relevant issues relating to restructuring and develop a proposed industry restructuring framework under the direction of the legislative task force. Commission shall address appropriate steps to achieve an orderly transition and may include, in addition to the directives in this Act, other provisions Commission deems necessary and appropriate. However, Commission is expressly prohibited from promulgating rules or orders relating to restructuring without prior express legislative authorization. (p. 4)
Pennsylvania H.B. 1509	PUC. (p. 28-29)
Rhode Island 96-H 8124 Substitute B	PUC and the Division of Public Utilities and Carriers. (p. 2)
Massachusetts H.B.5117	Department of Telecommunications and Energy (DTE), Division of Energy Resources (DOER)
Illinois H.B. 362	Public Utility Commission
Independent System Operator (ISO)	
Nevada A.B. 366	
California H.B. 1890	Control of transmission system given to ISO. Utilities cannot collect CTC unless they commit control of their transmission assets to ISO. ISO governed by Oversight Board selected by governor and legislature. (p. 30, 36-39, 87, 90)
Maine H-568 (LD 1804)	The governance of any ISO with responsibility for operations of the regional transmission system must be fully independent of influence by market participants. The PUC shall use all means within its authority and resources to advocate for and promote the interests of Maine ratepayers in any FERC proceeding involving the development, governance, operations, or conduct of an ISO. PUC shall monitor events in the region pertaining to the development of an ISO, the management of competitive access to the regional transmission system, and rights to negotiate potential contracts

	between buyers and sellers. If the PUC determines that there is insufficient independence on the part of the ISO, the PUC shall provide a report to the joint standing committee of the legislature with recommendations to remedy the problem. (p. 20, 22-23)
Montana S.B. 390	
New Hampshire H.B. 1392	
Oklahoma S.B. 500	
Pennsylvania H.B. 1509	All participants encouraged to coordinate plans and transactions through ISO or functional equivalent. ISO should, and PUC shall, set and enforce inspection, maintenance, and repair standards. (p. 23)
Rhode Island 96-H 8124 Substitute B	By 1/1/97, electric licensing committee to submit recommendations to legislature for changes to regional power pool that would facilitate creation of ISO. (p. 22)
Massachusetts H.B.5117	Established as of 3/1/98. Monitored and analyzed by DOER.
Illinois H.B. 362	As of enactment of bill, each electric utility company will file a request to join an ISO. If by 3/31/99, FERC has not approved the ISO application; or if by 6/30/99, all utilities have not applied to be a part of the ISO, an Oversight Board will be formed to oversee creation of ISO.
Power Pool	
Nevada A.B. 366	
California H.B. 1890	Power Exchange established to operate an efficient, competitive auction for electricity open to all suppliers on a nondiscriminatory basis. (p. 5, 39)
Maine H-568 (LD 1804)	