

THE NEW CONSUMER PROTECTION ROLE:

Jurisdictional And Enforcement Implications

This *Blueprint* highlights the policy implications of new relationships between consumers and their electric supplier and between retail suppliers and regulators. If the regulatory approach for public utilities has historically been dominated by a traditional model of total price and entry controls, the new regulatory model will rely instead on consumer protection and lower barriers to entry for new firms with little or no price regulation. Instead of monopoly power, with its focus on prices and rate design, the new competitive market structure will likely be accused of fostering “unfair” competition, caused by inadequate access to information by buyers and unequal bargaining power between buyers and sellers. These are crucial defects for a commodity widely regarded as a necessity.

If states are to transform their approach to a truly competitive market, they must acquire new tools for working effectively with the electric industry, and make innovative use of old ones. Examples of new tools include

- setting licensing criteria as a screening function to reinforce standards or norms defined in regulations;

- educating customers to participate in the competitive market based on informed choice;
- responding quickly to unfair and deceptive marketing and advertising practices;
- policing standards of conduct between holding companies and affiliates to assure the development of a competitive market structure; and
- umpiring disputes between competitors and between customers and their suppliers.

Jurisdiction of the State Utility Commission

The degree to which an existing state public utility commission will have jurisdiction over non-traditional suppliers of electricity, i.e., retail electric suppliers, will be decided by state legislation. Jurisdictional areas that might be addressed include

- licensing;
- disclosure requirements for advertising, terms of service contracts, and monthly bills;
- contract terms;
- prevention of unfair trade and marketing practices;

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- authority to resolve customer disputes;
- the interaction of retail sales affiliates with parent utility holding companies or distribution utilities; and
- establishment of minimum billing, credit and collection practices.

In some states, the utility commission may share its jurisdiction with the Attorney General's office. However, no state has enacted retail electric competition by relying entirely on state and federal Unfair Trade Practice Acts or their equivalent. Nevada's electric restructuring law includes a reorganization of its consumer protection and public advocacy functions by combining them in one division of the Attorney General's office, while at the same time granting concurrent jurisdiction to the public utility commission to license and regulate the conduct and contract terms of competitive suppliers.

Whether state public utility statutes already contain sufficient jurisdictional authority for the commission to regulate retail electric suppliers, as well as aggregators and brokers who do not take title to electricity, will require detailed state analysis. Some jurisdictional statutes for public utilities link the state authority with ownership or control of property in the state or require utilities to own generating facilities to qualify. These restrictions do not allow jurisdiction over aggregators, brokers, or marketers without additional legislation. In addition, legislative guidance is necessary to establish

California's original electric restructuring legislation (AB 1890) granted the PUC jurisdiction over competitive suppliers for registration and certain complaints, but deferred to other state agencies for key consumer protection oversight. In August, 1997, a comprehensive consumer protection bill applicable to suppliers expanded the PUC's jurisdiction and required significantly more oversight in registration criteria and regulation of contract terms and disclosures. *SB 477 (Stats. 1997, ch. 275).*



policies for regulation of retail suppliers and the manner in which regulation should be different from traditional price and entry regulation applied to utilities and future distribution companies.

Because most states have assumed that some legislative changes will be required in any case to implement full retail competition, it will be important for such legislation to clarify the regulatory commission's role in licensing, monitoring, regulating, and enforcing minimum market standards of conduct on all major participants. Indeed, all state electric restructuring statutes enacted to date either assume or make clear commission jurisdiction over new market entrants for the purposes of registration or licensing and, at a minimum, consumer complaints.



Recently enacted **Illinois** restructuring legislation created a separate unit within the Attorney General’s office to handle consumer protection issues related to the electric industry. This action will concentrate resources and develop expertise that exists only at the utilities commission in other states.

The typical state approach to date has been to define “retail electric supplier” (or an equivalent term) to refer to those entities that will sell or offer to sell electricity to retail consumers. This definition of retail supplier includes the retail sales affiliates of traditional public utilities, newly formed entities which sell electricity from supplier-owned generation facilities located both in or out-of-state, as well as aggregators, marketers and brokers who market electricity from generation facilities which they do not directly own or operate. From the viewpoint of consumer protection, it will be important for a state to regulate any entity that seeks to promote or market the sale of electricity, whether or not the entity owns generation supplies. The term does not usually include entities which offer only to sell demand-side management or energy efficiency services, or metering equipment, or other enhancements to the sale of electricity.

Each state must also decide how the new competitive market will apply to

publicly-owned utilities, such as municipal or rural electric cooperatives. Commission jurisdiction over these entities differs from state to state. However, policymakers involved in this debate will want to consider that exempting publicly-owned electric companies from licensing and consumer protection requirements imposed on other retail electric suppliers will grant them a more favorable market position. If publicly-owned electric departments or cooperatives seek to enter the competitive market to sell electricity to the general public, it seems reasonable to include



The **Pennsylvania** *Customer Choice Act, Section 2803* defines “electric generation supplier



or electricity supplier” as “a person or corporation, including municipal corporations, which chooses to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter; brokers and marketers, aggregators or any other entities, that sell... electricity or related services, utilizing the jurisdictional, transmission, or distribution facilities; or an electric distribution company that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers, utilizing the jurisdictional, transmission and distribution facilities of an electric distribution company.”



Maine's electric restructuring legislation clarifies the Public Utilities

Commission's jurisdiction over retail electric suppliers to include

- licensing, including renewal and revocation;
- informational filings; public information disclosures;
- standard consumer protection provisions;
- penalties of up to \$5,000 for each violation;
- dispute resolution;
- cease and desist orders;
- restitution; and
- court enforcement by the PUC directly or through the Attorney General.

them in the same overarching consumer protections adopted by the state for other competitive suppliers.

Access to Books and Records; Enforcement Tools

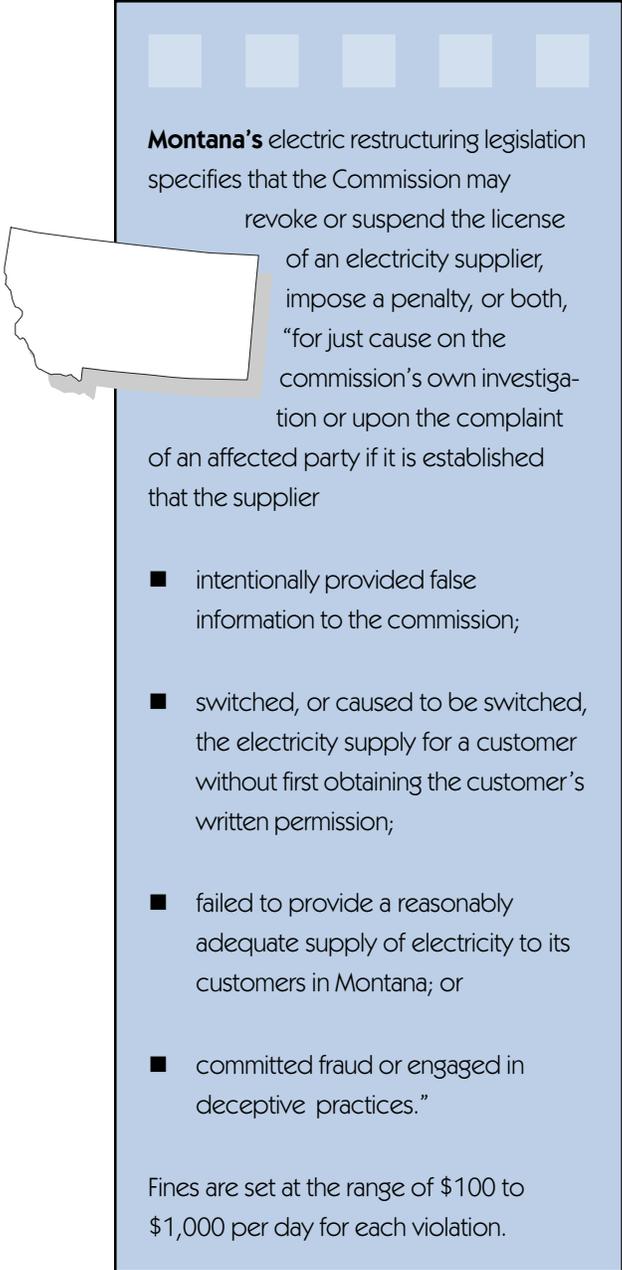
In addition to clarifying commission jurisdiction over competitive suppliers, state legislation may also need to make clear the extent of a commission's ability

to obtain access to a supplier's books and records. As a practical matter, a commission is unlikely to conduct routine audits, but legislation should address regulatory authority to conduct investigations upon reasonable cause and to obtain access to books and records for enforcement purposes.

Furthermore, if a commission does not already have the authority to order restitution to affected consumers or levy fines or penalties, such authority should be considered as part of state restructuring legislation. While a commission without such authority may have wielded its regulatory powers via rate cases and other certification procedures required for traditional public utilities (such as providing a lower rate of return in response to inefficient management or poor service quality), these rate case tools will not be available to change the behavior of errant retail suppliers in a competitive market.

If a commission does not obtain authority to order restitution or fines, it will most likely be unable to respond promptly and forcefully to an emerging pattern of fraud or violation of consumer protection rules, and may be forced to make use of its license revocation authority when a lesser penalty might be more appropriate. For example, under current statutory authority, the New Jersey Board of Public Utilities may only seek a fine of up to \$500 per violation against public utilities. While this may even be inadequate for enforcement against public utilities, the existence of ratemaking treatment amelio-

The Role of the Consumer Advocate



Montana's electric restructuring legislation specifies that the Commission may revoke or suspend the license of an electricity supplier, impose a penalty, or both, "for just cause on the commission's own investigation or upon the complaint of an affected party if it is established that the supplier

- intentionally provided false information to the commission;
- switched, or caused to be switched, the electricity supply for a customer without first obtaining the customer's written permission;
- failed to provide a reasonably adequate supply of electricity to its customers in Montana; or
- committed fraud or engaged in deceptive practices."

Fines are set at the range of \$100 to \$1,000 per day for each violation.

rates this defect to some extent. Without such rate case tools, this small penalty would probably be inadequate to prevent widespread abuse of consumer protection rules by competitive suppliers who are not subject to price regulation.

In most states, residential consumers are represented before the public utilities commission by independent legal consumer advocates. While commissions themselves are re-thinking their new regulatory roles, so are consumer advocates. State consumer advocates are often housed in the Attorney General's office or as part of the Executive Branch. Should the consumer advocate be given authority to participate in any commission rulemaking, licensing, or other policy decision with respect to supervision of retail electric suppliers? Should consumer complaints that find their way to the public advocate be coordinated with the utility commission or the Attorney General? States that have adopted legislation to date provide a continuing significant role for the consumer advocate with authority to participate in commission proceedings during the transition to competition.

Public advocates are also exploring new roles as participants in statewide consumer education programs and have, in some states, taken a lead role in coordinating the exploration of innovative aggregation options for residential customers. Several consumer advocates have sought increased legislative appropriations to pay for intensive participation in key proceedings and customer outreach efforts that need to be quickly accomplished in preparation for retail competition. Furthermore, most consumer advocates expect to play an

important role in monitoring commission compliance with statutory directives in a competitive marketplace, to use their authority to appeal commission decisions before the courts, and to seek customer restitution for violations.

The Role of the State Energy Office

For states with a strong energy office, such as **Massachusetts** and **California**, electric restructuring legislation imposes important new authority with respect to energy efficiency, environmental disclosures associated with energy sales, and renewable energy development. In those two states, as in others, the state energy offices took a lead role in policy discussions leading to adoption of electric restructuring legislation. The Massachusetts Department of Energy Resources (DOER) proposed a complete plan to achieve customer choice in that state and submitted it to the Department of Public Utilities and to the State Legislature. The DOER and the Attorney General (within which the public advocate resides) then took the lead role in negotiating settlements with major utilities that ultimately formed the basis for many policies adopted by the State Legislature.

Similarly, the California Energy Commission played a key role in design and implementation of environmental disclosures, and has responsibility for the State Trust Fund to support “the operation of existing, and the development of new and emerging, in-state renewable resource technologies.”⁵²



Massachusetts' electric restructuring legislation authorizes the Department of Energy Resources to promulgate rules that define minimum demand-side efficiency programs operated by distribution utilities. The funding level for such programs starts at 3.3 mills per kWh in 1998 and phases down to 2.5 mills in 2002, with a total of about \$500 million. Included in this funding amount is a permanent set-aside of .25 mills for low-income energy efficiency programs. Funding for renewable energy averages 0.7 mills per kWh for the first five years (about \$150 million), and 0.5 mills thereafter.



California's *Senate Bill 1305* requires that all retail suppliers selling electricity in California disclose their sources of electricity, using a format developed by the California Energy Commission. The bill also requires suppliers to report fuel type and fuel consumption information to system operators and make such information available to the Commission to verify their customer disclosures.

