

CONCLUSION

The move to retail electric competition in states across the country will be accompanied by the review and revision of many existing public policies and regulatory approaches associated with our 100-year old system of regulating electric service to all homes and businesses. This *Blueprint for Consumer Protection* has explored many issues associated with consumer protection

and universal service. States that have already adopted retail electric competition legislation have provided excellent models. They have recognized that consumer protections are vital to political acceptance of electricity competition. As one commissioner stated at a recent National Association of Regulatory Utility Commissioners meeting, “The safest job in my commission is the consumer complaint specialist!”



ENDNOTES

¹. K. Winneb, M. Herrmann, A. Levy and B. Roe, *Baseline Survey, Consumer Knowledge, Practices and Attitude: Electric Utility Deregulation and Consumer Choice*, National Council on Competition and the Electric Industry (NCCCI), Consumer Information Disclosure Project, January, 1998. This and other NCCCI research can be obtained from their website: <http://eetd.lbl.gov/NationalCouncil/> and at the Regulatory Assistance Project (RAP) website: <http://www.rapmaine.org>.

². Baxter, Lester, *Low-Income Energy Policy in a Restructured Electricity Industry: An Assessment of Federal Options*, Oak Ridge National Laboratory, U.S. Department of Energy, ORNL/CON-443, July, 1997, Figure 1 at 6. Low-income households have a higher energy burden; that is, they spend 10% or more, over 20% in many cases, of their household income on energy compared to households with average income.

³. Schachter, Deborah, "Public Outreach and Education in Electric Utility Restructuring," in Alexander, Barbara, *Consumer Protection Proposals for Retail Electricity Competition: Model Legislation and Regulations*, Regulatory Assistance Project, Gardiner, Maine, October, 1996. Ms. Schachter's paper summarized the results of a study of California's Caller ID Education Program by Dr. Brenda Devlin of Ohio State University for the California PUC, and preliminary results of the New Hampshire Electric Pilot Program. These materials are also available at the RAP website.

⁴. In the *Fair Packaging and Labeling Act*, Congress declared that, "Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons." 15 U.S.C. §1451.

⁵. A reasonable consumer disclosure policy can overcome potential legal hurdles. This footnote summarizes a legal memo by Michael Stoddard of Conservation Law Foundation (May 20, 1997), which summary also appeared in Oppenheim and Alexander, *Model Electricity Consumer Protection Disclosures*, NCCCI, January, 1998; also available at the RAP website.

Commercial speech is that which is solely related to the economic interests of speaker and audience. It may be constitutionally regulated if it is misleading, unlawful (e.g., promoting an unlawful service), or where the government has a substantial interest (such

as consumer protection) that is directly advanced by the regulation and the regulation is narrowly tailored to the objective. Disclosures have been held to be a direct and narrowly tailored means of achieving consumer protection, although a demonstration that it is reasonable to expect deception may be required. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265, 2282, 85 L.Ed.2d 652 (1985), quoting *In re R.M.J.*, 455 U.S. 191, 201, 102 S.Ct. 929, 936, 71 L.Ed.2d 64 (1982). Lack of standardization in the marketplace and public lack of knowledge are among the standards used in such an inquiry.

States may also regulate interstate commerce to further a legitimate state interest, such as protecting consumers and preventing deception or unfair competition. Such state regulation must not, on its face or in practice, discriminate against out-of-state products and services, and may not impose a burden on interstate commerce that is out of proportion to the state interest.

⁶. Alexander, Barbara, *The Transition to Local Telecommunications Competition: A New Challenge for Consumer Protection*, Public Counsel Section, Washington Attorney General, October, 1997. Available at <http://wa.gov/ago/utility/alexander.html>.

⁷. New Hampshire survey results are available from the New Hampshire PUC website: <http://www.state.nh.us/puc>; The national focus group research is summarized in Holt, Edward, *Information Consumers Want in Electricity Choice: Summary of Focus Group Research*, NCCCI, December, 1997.

⁸. T. Austin et al., *Uniform Consumer Disclosure Standards for New England: Report and Recommendations to the New England Utility Regulatory Commissions*, NCCCI, October, 1998.

⁹. *Truth in Lending Act*, 15 U.S.C. §1601, *et seq.* and its implementing Regulation Z, 12 C.F.R. Section 226. For example, for variable rate credit applications and solicitations, creditors must disclose the fact that the rate may vary and state how the rate will be determined, including identifying the index or formula and any margin or spread added to the index or formula. For introductory "teaser" rates that are temporary, the creditor must also disclose the annual percentage rate that will apply after the introductory rate expires. Special rules also govern the accuracy and currency of disclosed rates. *See, e.g.*, 12 C.F.R. 226.5a(b)(1). Variable rate mortgages must disclose how the interest rate would change based on the prior 15-year history of the index used to trigger rate changes.

¹⁰. Both the previously cited New Hampshire survey and the NCEI Report summarizing national focus group research have confirmed this desire for information on supply mix.

¹¹. California Senate Bill 1305 (enacted October 8, 1997) requires all retail suppliers selling electricity in California to disclose the sources of electricity they sell, using a format developed by the California Energy Commission.

¹². Investigation by the Massachusetts Department of Telecommunications and Energy upon its own motion, commencing a Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. §§ 2.00 *et seq.*, establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L.C. 164, Docket 96-100 (February, 1998). Attachments B-1–B-4 contain sample labels.

¹³. The Truth in Lending disclosure requirements are not limited to printed materials, but the New England collaborative has recognized the difficulty of presenting information provided on the Electricity Label in an oral format.

¹⁴. FERC has adopted several criteria to assist in the determination of the boundary between state distribution jurisdiction and FERC transmission jurisdiction in its seminal decision on wholesale competition, Federal Energy Regulatory Commission, Order No. 888, Final Rule issued on April 24, 1996 (Docket Nos. RM95-8-000, *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities*, and RM94-7-001, *Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*).

¹⁵. The distribution system is the source of the vast majority of customer outages. Power reliability related to the long distance transmission system may be the subject of additional federal legislation.

¹⁶. Davis, Vivian, et al., *Telecommunications Service Quality*, National Regulatory Research Institute, Columbus, Ohio, March, 1996.

¹⁷. This section draws heavily on Alexander, Barbara, "How to Construct a Service Quality Index in Performance-Based Ratemaking Plans, *The Electricity Journal*, April, 1996. Additional materials on this topic may be found in a recent NARUC publication, "*Performance-Based Ratemaking Regulation in a Restructured Electric Industry*," particularly the chapters on Quality of Service and Universal Service Indices (NARUC, Washington, D.C., 1998), available from the NARUC website: <http://www.naruc.org>.

¹⁸. Baxter, Lester, *Op. cit.* at 6. Even considering benefits under most common low-income programs, low-income households must allocate over 20% of their monthly budget to retain energy services in some states. Furthermore, targeted energy assistance funds, such as the Low-income Home Energy Assistance Program (LIHEAP) and DOE's Weatherization Assistance Program (WAP) have suffered significant program cuts in recent years.

¹⁹. In Massachusetts, for example, the largest electric utility, the New England Electric System (NEES), supports the continuation of low-income rate discounts as part of their support for electric restructuring. In Maine, the Industry Energy Consumer Group, representing the largest industrial customers, has supported the continuation of funding for low-income programs through the distribution service rate as a condition of the move to retail electric competition, albeit as part of a package of proposals negotiated with consumer and low-income advocates.

²⁰. Maine PUC, *Inquiry Regarding Possible Low-income Assistance Legislation*, Docket No. 97-582, October 7, 1997.

²¹. California PUC, *Interim Opinion on Public Purpose Programs—Threshold Issues*, Decision 97-02-014, February 5, 1997.

²². Pennsylvania PUC, *Final Order Re: Guidelines for Universal Service and Energy Conservation Programs*, Docket No. M-00960890F0010, July 11, 1997.

²³. The Pennsylvania PUC's recent Restructuring Orders for electric distribution companies have increased funding for both the rate payer assistance program (CAP) and the Low Income Usage Reduction Program (an energy management program) as follows:

PECO Energy: The Commission approved a settlement which calls for a \$50 million universal service budget, of which \$5.6 million is energy management.

PP&L: The CAP or rate assistance program was expanded from \$2 million to \$11.7 million; LIURP expanded from \$4 million to \$4.7 million with an added program targeted to baseload electricity usage.

West Penn Power: CAP expanded from \$.9 million to \$5.88 million; LIURP expanded from \$.8 to \$2.2 million.

Duquesne Light: CAP expanded from \$.55 million to \$5.3 million; LIURP expanded from \$.7 million to \$1.75 million.

Pennsylvania Electric Co. (GPU Energy): CAP expanded from \$620,000 to \$4.9 million over 4 years; LIURP expanded from \$652,000 to \$1.9 million.

Metropolitan Edison (GPU Energy): CAP expanded from \$452,000 to \$4.6 million over four years; LIURP expanded from \$772,000 to \$1.8 million.

²⁴. Pennsylvania PUC, *PECO Energy Restructuring Order on Joint Petition for Full Settlement*, Docket No. R-973953, May 14, 1998.

²⁵. While electricity is not often used nationally as a primary heat source, most other forms of heat (fuel oil, natural gas) cannot operate without electricity to power their motors and exhaust fans.

²⁶. RKM Applied Research, (Benchmark Research Summary presented to the N.H. Public Utilities Commission) *Residential Consumer and Small Business Study*, Portsmouth, N.H., October 15, 1997. Most residential and small business respondents had heard only a little (46%) or nothing at all (15%) about the introduction of competition in the electric industry. Fifty-five percent of the respondents said that they were unsure whether their monthly electric bill would increase or decrease under competition, but for those who stated their bill would likely decrease, the average customer thought their bill would decrease 17.6%, far higher than most observers estimate is likely to occur.

²⁷. 15 U.S.C. §1691-1691f. The ECOA is implemented by Regulation B, 12 C.F.R. §202.

²⁸. The Federal Reserve Board's Regulation B exempts public utilities from some specific provisions, such as those relating to the use of spousal credit history and spousal income, but even these exemptions are applicable only to public utilities whose rates are approved by a state regulatory agency. Reg. B, 12 C.F.R. §202.3(a).

²⁹. Sheldon, Jonathan, *Credit Discrimination*, (National Consumer Law Center: Boston, 1993) at 59-60.

³⁰. Regulation B explicitly incorporates the effects test as a basis for discriminatory conduct. Federal Reserve Board Official Staff Commentary, §202.6(a)-2.

³¹. 15 U.S.C. §§1681-1681u. There are no interpretive regulations, but the FTC has issued a Commentary, 16

C.F.R. Part 600, and Notices of Rights and Duties under the Fair Credit Reporting Act, 16 CFR Part 601.

³². 15 U.S.C. §§1601 et seq., Regulation Z, 12 C.F.R. Part 226.

³³. 15 U.S.C. §45(a).

³⁴. Delaware Code §2513(b); Louisiana-LSA-Rev. Stat. 51:1406(1); Maryland Code, Comm. Law, §13-104(2); Ohio Rev. Code §1346.10; West's Rev. Code Washington Ann. §19.86.170.

³⁵. E.g., Maine, Massachusetts, Michigan, Rhode Island, South Carolina, cited in Alperin and Chase, *Consumer Law* (West Publishing Co., 1968), §114.

³⁶. 15 U.S.C. §1692-1692o.

³⁷. 15 U.S.C. §§6101-08, August 16, 1994.

³⁸. 16 C.F.R. Part 310.

³⁹. 16 C.F.R. Part 429.

⁴⁰. This practice was started by telecommunications providers and copied by several energy suppliers in the New Hampshire and Pennsylvania retail competition pilot programs.

⁴¹. A.B. No. 1890, §366(e).

⁴². Chapter 164 of the Acts of 1997 (eff. November 25, 1997), Section 193.

⁴³. *Connecticut Public Act No. 98-28*, eff. 4/29/98, §30.

⁴⁴. See the NCCEL research cited in prior footnotes and available on their website.

⁴⁵. 15 U.S.C. §45

⁴⁶. See *Federal Trade Commission Policy Statement on Deception*, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984); *Federal Trade Commission Statement Regarding Advertising Substantiation*, appended to *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 839 (1984); *Federal Trade Commission Unfairness Policy Statement*, appended to *International Harvester Co.*, 104 F.T.C. 949 (1984).

⁴⁷. 49 Fed. Reg. 30,999 (1984).

⁴⁸. The material terms of this contract will be disclosed in the *Terms of Service* brochure described in Chapter I and subject to the basic consumer protection provisions discussed in Chapter III.

⁴⁹. The state's creation of a Default or Standard Offer, as discussed in Chapter II, is a form of aggregation for those customers who do not choose a supplier; this Chapter, however, focuses on customers who positively select an aggregator or power broker to obtain energy on their behalf.

⁵⁰. This issue is closely related to the state's policy concerning how a customer provides authorization to select or change his or her electric supplier. At the very least, a customer's authorization to select an aggregator as the supplier, thus authorizing the aggregator to obtain electricity on the customer's behalf, should not be more difficult or require additional procedural hurdles, compared to customer selection of a supplier under direct access.

⁵¹. *Prospectus (DRAFT), Community Energy Cooperative*, Prepared by the Community Energy Cooperative Development Team, February 21, 1997, at 1.

⁵². AB 1890, §381, August 31, 1996.