

# REPORT OF THE ELECTRIC UTILITY REGULATION COMMITTEE

## I. INTRODUCTION TO MAJOR FEDERAL ELECTRIC RESTRUCTURING PROPOSALS

Following current state efforts to deregulate the electric utility industry, numerous proposals seeking to ensure competition and customer choice have been introduced in both houses of Congress. In addition to the legislative proposals, the Senate Committee on Energy and Natural Resources held workshops on competitive change in the electric utility industry and the House Subcommittee on Energy and Power held similar field hearings in 1997.<sup>1</sup> These actions indicate that Congress is beginning to concentrate on defining the federal government's role in deregulation and outlining the authority of states to implement retail competition. In addition to congressional action, President Clinton's administration has proposed a comprehensive electric deregulation bill introduced in the Senate in July 1998. The debate over deregulation raises a host of contentious issues including, but not limited to, the following: jurisdictional issues, stranded costs, universal service, reliability, independent system operator (ISO) formation, market power, public power entities, renewable energy, and the federal power marketing administrations. This article summarizes major federal restructuring proposals aimed at removing federal and state barriers to competition in the electric utility industry.

Although no federal restructuring proposal will be passed in the 105th Congress,<sup>2</sup> it is likely that some of these proposals will be reintroduced or used to formulate new proposals. The following summary provides a description of the various issues that are apt to surface in upcoming federal restructuring plans, and covers the following major bills as well as several additional proposals:

### **Senator J. Bennett Johnston (D -LA)**

#### **S. 1526 Electricity Competition Act of 1996 (Johnston Bill)**

**Introduced:** January 25, 1996

**Purpose:** The Johnston Bill would set forth the structure and timeline for state regulatory authorities to initiate proceedings to consider developing retail competition plans.

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1. The Senate Committee on Energy and Natural Resources held workshops in March, May and June of 1997. The House Subcommittee on Energy and Power under the Committee on Commerce held a series of field hearings in April and May of 1997.

2. *House Energy Leaders Pull the Plug on Restructuring Bill for this Year*, ELECTRIC UTILITY WEEK, July 27, 1998, at 1.

**Senator Dale Bumpers (D-AR)****S. 237 Electric Consumers Protection Act of 1997 (S. 237)****Introduced:** January 30, 1997

**Purpose:** S. 237 would mandate retail access, direct the Federal Energy Regulatory Commission (FERC or Commission) to establish the broadest feasible transmission regions and designate an ISO for each region, repeal the Public Utility Holding Company Act of 1935 (PUHCA) and prospectively repeal section 210 of the Public Utility Regulatory Policies Act (PURPA).

**Senator Dale Bumpers (D-AR)****S. 1401 Transition to Electric Competition Act of 1997 (Bumpers Bill)****Introduced:** November 7, 1997

**Purpose:** This proposal would mandate retail competition, direct the establishment of ISOs, repeal PUHCA and repeal prospectively section 210 of PURPA.

**Representative Dan Schaefer (R-CO)****H.R. 655 Electric Consumer's Power to Choose Act of 1997 (Schaefer Bill)****Introduced:** February 10, 1997

**Purpose:** The Schaefer Bill would mandate retail competition, direct the FERC to establish a renewable energy trading program and declare the inapplicability, where retail competition exists, of PUHCA and the mandatory purchase requirement under section 210 of PURPA.

**Amendment to H.R. 655 is expected to be offered by Representative Thomas Bliley, Jr. (R-VA) as a substitute amendment to Representative Schaefer's Bill. (Amendment to H.R. 655)**

**Purpose:** The Amendment to H.R. 655, which incorporates elements of legislation sponsored by Representatives Steve Largent (R-OK), Bill Paxon (R-NY), Dan Schaefer (R-CO), and the Clinton Administration, is expected to be offered as a substitute amendment to the Schaefer Bill.<sup>3</sup> The Amendment to H.R. 655 would mandate retail competition, empower the FERC to order the abandonment of transmission facilities to an independent entity, establish a renewable energy trading program, repeal PUHCA, and prospectively repeal section 210 of PURPA.

**Representative Tom DeLay (R-TX)****H.R. 1230 Consumers Electric Power Act of 1997 (DeLay Bill)****Introduced:** April 8, 1997

**Purpose:** The DeLay Bill would guarantee customers the right to purchase electric service from any electric service provider and would authorize the FERC to remedy market power by ordering the divestiture of assets.

**Senator Craig Thomas (R-WY)****S. 722 Electric Utility Restructuring Empowerment & Competitive Act of 1997 (Thomas Bill)****Introduced:** May 8, 1997

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3. *Draft Legislation on House Side Ready For Member Critiques, Markup*, INSIDE F.E.R.C., June 29, 1998, at 16.

**Purpose:** This proposal would empower states to continue to “take the lead” in promoting retail competition. The Thomas Bill would remove wholesale sales of electric energy from federal regulatory purview, yet grant the FERC jurisdiction over wholesale electric transmission services.

**Representative Edward J. Markey (D-MA)**

**H.R. 1960 Electric Power Competition and Consumer Choice Act of 1997 (Markey Bill)**

**Introduced:** June 19, 1997

**Purpose:** Rather than mandate retail competition, the Markey Bill would establish a voluntary program for the certification of competition by state regulatory authorities and encourage states and public power entities to consider retail competition.

**Senator Jeff Bingaman (D-NM)**

**S. 1276 Federal Power Act Amendments of 1997 (Bingaman Bill)**

**Introduced:** October 8, 1997

**Purpose:** The proposal would permit the FERC to regulate the unbundled transmission of electric energy sold at retail and subject any electric utility, federal power marketing administration (including the Tennessee Valley Authority (TVA)), municipal utility and rural electric cooperative to the Commission’s jurisdiction over transmission.

**Representative Cliff Stearns (R-FL)**

**H.R. \_\_\_ Electric Energy Empowerment Act of 1998 (Stearns Draft)**

**Discussion draft circulated:** March 11, 1998

**Purpose:** The Stearns Draft would not mandate retail competition. It would only encourage and authorize states to pursue mechanisms to develop retail competition plans.

**Senator Don Nickles (R-OK)**

**S. 2187 Electric Consumer Choice Act (Nickles Bill)**

**Introduced:** June 18, 1998

**Purpose:** The Nickles Bill would eliminate any Federal Power Act (FPA) provision or other federal law that establishes an exclusive right to sell electric energy or unduly discriminates against a customer who desires to purchase electric energy in interstate commerce from a supplier.

**Clinton Administration’s Proposal Introduced by Senator Frank Murkowski (R-AK)**

**S. 2287 Comprehensive Electricity Competition Act (Administration’s Bill)**

**Introduced:** July 10, 1998

**Purpose:** As a courtesy to the President, Senator Murkowski introduced the Clinton Administration’s proposal, which would impose a flexible retail competition mandate, provide for the establishment of ISOs, reform PUHCA and prospectively repeal section 210 of PURPA.

**Representatives DeLay and Markey**

**H.R. 4432 Electric System Reliability Act of 1998 (DeLay-Markey Bill)**

**Introduced:** August 6, 1998

**Purpose:** The Delay-Markey Bill would empower the FERC to certify self-regulating reliability organizations, require ISOs, require divestiture of generation facilities and prohibit preferential transmission service.

## II. PROPOSED MAJOR CHANGES TO THE FEDERAL ENERGY REGULATORY COMMISSION'S POWERS AND RESPONSIBILITIES

### A. *Jurisdictional Issues and Modifications to the Commission's Powers*

Numerous proposals that revise the FPA would significantly alter the Commission's traditional scope of responsibility. The Amendment to H.R. 655, expected to be submitted by Representative Bliley, would amend parts I and II of the FPA by expanding the Commission's jurisdiction and clarifying the distinction between federal and state authority. The FPA definition of public utility would be expanded to include "any transmitting utility (other than the Federal power marketing administrations and the TVA) which owns or operates transmission facilities not otherwise subject to the Commission under this Part," but only with respect to determining, fixing, and otherwise regulating the rates, terms, and conditions for the transmission of electric energy under this Part.<sup>4</sup>

The proposal also would amend the FPA to extend the Commission's jurisdiction to the transmission component of any unbundled retail sale,<sup>5</sup> and to clarify that states have jurisdiction over (1) bundled retail sales, (2) the local distribution service component of any unbundled retail sale,<sup>6</sup> (3) the retail sales component of any unbundled retail sale,<sup>7</sup> and (4) the service of delivering retail electric energy.<sup>8</sup>

Similar to the Amendment to House Bill 655, the Bingaman Bill also would amend the FPA to expand the FERC's sphere of responsibility to include control over the unbundled transmission of electric energy sold at retail.<sup>9</sup> However, bundled retail sales and unbundled local distribution

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4. Electric Consumer's Power to Choose Act of 1998, Amendment to H.R. 655, 105th Cong. § 111(a) (1997). The Amendment to H.R. 655 is expected to be offered as a substitute amendment to the Schaefer Bill. The substitute amendment incorporates elements of legislation sponsored by Reps. Largent, Paxon, Schaefer and the Clinton administration.

5. The transmission component of an unbundled retail sale is defined as the delivery to an ultimate consumer, if the energy and the service of delivering it are sold separately, and facilities for transmission in interstate commerce are used for the delivery. *Id.* § 112(c)(5).

6. The term local distribution service component of an unbundled retail sale is defined as the delivery of electric energy to an ultimate consumer if (A) the electric energy and the service of delivering it are sold separately, and (B) the delivery uses facilities for local distribution. *Id.* § 112(c)(4).

7. The retail sales component of an unbundled sale involves the sale of electric energy to an ultimate consumer if the energy and the service of delivering it are sold separately, and the energy is delivered through transmission or local distribution facilities. *Id.* § 112(c)(6).

8. *Id.* § 112(a)(2). The service of delivering retail electric energy is defined as the service, independent of the use of any specific facilities, of delivering electric energy to an ultimate consumer. *Id.* § 112(c)(7).

9. Federal Power Act Amendments of 1997, S. 1276, 105th Cong. § 2(a)(1) (1997). The

service would be subject to state regulation.<sup>10</sup> The Bingaman Bill would amend section 201(e) of the FPA to expand the definition of public utility to include: (1) any electric utility or federal power marketing agency not otherwise under the Commission's jurisdiction;<sup>11</sup> (2) a state or political subdivision; (3) any rural electric cooperative or association; or (4) any corporation or association wholly owned by an above-mentioned entity.<sup>12</sup> The FERC would have jurisdiction only over the rates, terms and conditions of transmission service of these entities. Furthermore, section 3 of the FPA would be amended to revise the definition of transmitting utility to include any public utility as defined by the revised section 201(e)(2).<sup>13</sup>

The jurisdictional component of the Stearns Draft mirrors the Bingaman Bill,<sup>14</sup> in that it would redefine transmitting utility to cover entities that own or operate electric power transmission facilities used for the sale (rather than only the wholesale sale) of electric energy.<sup>15</sup>

Under the Schaefer Bill, if state regulated or non-regulated electric utilities fail to elect to establish choice for retail customers, the FERC, subject to federal court jurisdiction, would be empowered to implement specific authorities as if the elections had been made by December 15,

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proposal defines this term as the transmission of electric energy to an ultimate consumer if (1) the energy and the service of transmitting it are sold separately, and (2) the transmission uses facilities for transmission in interstate commerce. *Id.* § 2(d). Under the Johnston Bill, section 212(h) of the FPA would be amended to provide that the Commission could order the transmission of energy to an ultimate consumer if the delivery of the energy would occur through the provision of unbundled local distribution services under a state retail access plan permitted by the proposal. Electric Competition Act of 1996, S. 1526, 104th Cong. § 11(a) (1996).

10. S. 1276, 105th Cong. § 2(a)(2) (1997). A bundled retail sale is defined as a sale to an ultimate consumer where the generation and transmission service are not sold separately. *Id.* § 2(d)(2). Unbundled local distribution service is defined as the delivery of energy to an ultimate consumer where (1) the energy and the service of delivery are sold separately, and (2) facilities for local distribution are used for delivery. *Id.*

11. Note that the Bingaman Bill's definition of public utility includes federal power marketing agencies and the TVA, unlike the definition of public utility used in the Amendment to H.R. 655. *Id.* § 2(e); Amendment to H.R. 655, 105th Cong. § 101 (1997).

12. A corporation or association would be considered a public utility under the revised definition, if the entity ever received a loan from the Administrator of the Rural Electrification Administration or the Rural Utilities Service (RUS). The TVA also would be included in the revised definition of public utility. S. 1276, 105th Cong. § 2(e) (1997).

13. *Id.* § 2(g).

14. See Stearns Draft, at 3 and 5 (1998) (regarding the Commission's jurisdiction over unbundled transmission of electric energy sold at retail and the definition of public utility). This proposal defines the unbundled transmission of electric energy, sold at retail, and the transmission of electric energy to an ultimate consumer if (A) the electric energy and the service of transmitting it are sold separately, and (B) the transmission uses facilities for transmission in interstate commerce as determined by the Commission under subsection (b)(3). *Id.* § 3(d)(2). As in the Bingaman Bill, section 5 of the Stearns Draft would extend the FERC's jurisdiction to the transmission systems of federal power marketing agencies, the TVA, a state or political subdivision, an entity with RUS loans or any corporation or association owned by one or more of the foregoing. *Id.* § 5(a).

15. *Id.* § 5(c). The FPA definition of interstate commerce would be amended to include consumption in a foreign country. *Id.* § 3(c).

2000. The FERC could require transmitting utilities to provide customers with comparable access to transmission services.<sup>16</sup> The DeLay Bill would grant the FERC the authority "to provide for nondiscriminatory prices, terms and conditions to transmission and distribution services;"<sup>17</sup> however, the FERC would be required to defer to state authorities regarding the regulation of distribution service. To allow generating sources to serve customers and resellers, the Bill would remove federal, state and local government authority to "regulate the pricing, terms, or conditions of service offerings by electric service providers."<sup>18</sup>

Under the Delay-Markey Bill, section 206 of the FPA would be revised to prohibit any public utility from charging or providing "more favorable transmission service to any customer or customer group than is provided to other customers or customer groups."<sup>19</sup> The Bill would redefine transmitting utility under the FPA as:

[a]ny electric utility, qualifying co-generation facility, qualifying small power production facility, or Federal power marketing agency which owns or operates, or proposes to own or operate, electric power transmission or distribution facilities, including facilities used for the transformation of electric energy between the transmission and distribution level or to enhance the capability of transmission or distribution facilities to operate efficiently.<sup>20</sup>

This definition would expand the term "transmitting utility" to include entities making retail as well as wholesale sales and those entities that "propose" to own or operate transmission or distribution facilities. The Commission's interconnection authority under section 210(a)(1) of the FPA would be broadened to permit the consideration of interconnection applications from transmitting utilities. Moreover, the FERC would be empowered to order the interconnection of a transmitting utility with any section 210 applicant.

Several proposals have a state-oriented focus. The Thomas Bill, for example, provides that states should be in the forefront of overseeing the transition to a competitive electric marketplace.<sup>21</sup> Therefore, under his

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16. Section 112 would require the FERC-prescribed verification procedures related to any changes of electric energy services made by a retail customer. Electric Consumer's Power to Choose Act of 1997, H.R. 655, 105th Cong. § 112. Civil liability would be imposed for a violation of the procedures. Representative Schaefer also introduced an electric restructuring Bill in the 104th Congress entitled Electric Consumer's Power to Choose Act of 1996, H.R. 3790, 104th Cong. (1996). Additionally, the Amendment to H.R. 655 would include an anti-slamming provision prohibiting changes in retail customer selection. State regulatory authorities would be required to mandate verification procedures for a retail customer's choice of provider. If a provider violates the verification procedures and collects a charge from a customer, the provider would be liable to the customer for the total amount paid by the customer and would be liable to the original provider for all charges paid by the customer. Electric Consumer's Power to Choose Act of 1998, Amendment to H.R. 655, § 111(a).

17. Consumers Electric Power Act of 1997, H.R. 1230, 105th Cong. § 5(b) (1997). Representative DeLay also introduced an electric restructuring proposal in the 104th Congress entitled the Consumers Electric Power Act of 1996, H.R. 4297, 104th Cong. (1996).

18. H.R. 1230, 105th Cong. § 9 (1997).

19. Electric System Reliability Act of 1998, H.R. 4432, 105th Cong. § 202 (1998).

20. *Id.* § 301(1).

21. Electric Utility Restructuring Empowerment and Competitive Act of 1997, S. 722, 105th

proposal, the federal government would be directed to address matters within federal jurisdiction, but not interfere with state authority.<sup>22</sup> The proposal would permit a state to “regulate the provision of any retail electric supply (including self-generation) or any local distribution service provided to an ultimate consumer of electricity in the State.”<sup>23</sup> The Thomas Bill would amend section 205 of the FPA by exempting contracts and agreements for wholesale sales (entered into after the date of enactment) from the Commission’s regulation of rates and charges under parts II and III of the FPA.<sup>24</sup> The FERC would have jurisdiction over wholesale transmission services, but not over wholesale electric rates. Under revised part II of the FPA, the FERC would have jurisdiction over transmitting utilities and entities that own, operate or control transmission in interstate commerce.<sup>25</sup>

The purpose of the Nickles Bill is to ensure that no federal law prevents a consumer from purchasing electric energy in interstate commerce from any supplier.<sup>26</sup> Section 201 of the FPA would be amended to prohibit states from (1) maintaining an exclusive right to sell or (2) from unduly discriminating against a consumer who elects to purchase electric energy in interstate commerce from any supplier.<sup>27</sup> The Nickles Bill clearly states that nothing in the proposal should be construed as expanding the jurisdiction of the Commission.<sup>28</sup>

#### *B. Jurisdictional Determination of Transmission and Distribution Facilities*

The Bumpers Bill would authorize the Commission, upon the application of a state regulatory authority, to determine whether particular facilities are local distribution facilities subject to state regulation or transmission facilities subject to Commission jurisdiction.<sup>29</sup> Although the

Cong. § 2(a)(3)(E)(i) (1997).

22. *Id.* § 2(a)(8).

23. *Id.* § 3. Retail electric supply is defined as the production, generation, manufacture, aggregation, retail marketing, retail brokering, retail selling, or other retail supply of electricity. Retail supply does not include the transmission of electricity in interstate commerce. A provision granting states exclusive authority over the sale of electric energy to a facility of a department or agency of the United States would be added to section 201 of the FPA. *Id.*

24. *Id.* § 4.

25. *Id.*

26. Electric Consumer’s Choice Act, S. 2187, 105th Cong. § 3 (1998). Under the Markey Bill, the FPA would be amended to prohibit federal law from preempting otherwise applicable state power to review the prudence of any wholesale or retail costs incurred by an electric utility, or to determine the recovery of costs for the sale or delivery of electric energy to a retail customer regardless of the facilities used for such sales or delivery. Electric Power Competition and Consumer Choice Act of 1997, H.R. 1960, 105th Cong. § 103 (1997). If a utility’s rates are subject to the jurisdiction of the Commission, the FERC would review the inclusion of existing contract or transaction costs of an affiliate or associate company. *Id.* Representative Markey also has introduced Electric Power Competition Act of 1996, H.R. 2929, and Electric Power Competition and Consumer Choice Act of 1996, H.R. 3782.

27. S. 2187, 105th Cong. § 4 (1998).

28. *Id.* § 7.

29. S. 1401, 105th Cong. § 111(a) (1997). To empower the Commission to establish transmission

proposal would instruct the Commission to give "the maximum practicable deference" to the state regulatory authority's position, the power to make the determination would remain in the Commission's hands.<sup>30</sup>

A statutory framework for jurisdictional determinations impacting transmission and local distribution facilities (of any transmission or distribution provider) would be incorporated into FPA amendments in the Schaefer Bill. Section 201(b) of the FPA would be revised to require any person providing unbundled retail transmission or distribution service to apply for and obtain a jurisdictional determination from the FERC regarding the distinction between those facilities that are the FERC-jurisdictional retail transmission facilities, and those facilities that are state-jurisdictional local distribution facilities.<sup>31</sup> After conferring with state representatives, the FERC would make a jurisdictional determination within eighteen months after an application is filed.<sup>32</sup>

### C. *Wheeling Authority and Sham Wholesale Transactions*

Under the Amendment to H.R. 655, the Commission's wheeling authority pursuant to sections 211(a) and 212(a) of the FPA would be extended to include retail sales.<sup>33</sup> The prohibition on mandatory retail wheeling and sham wholesale transactions under section 212(h) of the FPA would be repealed.<sup>34</sup> However, section 212(g) would be revised to prevent the Commission from issuing an order requiring transmission to an ultimate consumer, unless the seller is permitted or required to make the

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regions and designate an ISO, the Bumpers Bill would repeal sections 212(f) and 212(j) of the FPA. S. 1401, 105th Cong. § 112(c)(3). Section 212(f) of the FPA establishes an opportunity to submit a petition requesting an evidentiary hearing concerning the issuance of a Commission order requiring the TVA to enter into a contract for the sale or delivery of power. 16 U.S.C. § 824k(f)(1994). Section 212(j) of the FPA restricts the FERC's ability to order an electric utility to provide transmission services. 16 U.S.C. § 824k(j)(1994). The prohibition on orders inconsistent with retail marketing areas found in section 212(g) of the FPA only would apply to orders issued prior to January 1, 2002. S. 1401, 105th Cong. § 112(c)(4). For a discussion of several other proposals that mandate the formation of ISOs, see *infra* Section III.

30. *Id.* § 111(b). Resembling the Bumpers Bill, the Amendment to H.R. 655 also would require the Commission give the maximum practicable deference to the position taken by the state regulatory authority. Amendment to H.R. 655, § 101. Any Commission determinations under part IV of the FPA regarding the rates, terms, and conditions of service, including determinations respecting open access transmission and distribution services, would be subject to sections 205, 206, 210, 211 and 212 of the FPA. The Bingaman Bill and the Stearns Draft both would grant the FERC the authority to make the jurisdictional determination in relation to transmission and distribution facilities. S. 1276, 105th Cong. § 2(b)(2) (1997); Rep. Stearns Draft § 3(d)(2).

31. H.R. 655, 105th Cong. § 114(a) (1997).

32. The proposal lists factors that characterize local distribution facilities as: (1) normally in close proximity to retail customers; (2) primarily radial in character; (3) power flows into, but rarely out, of local distribution systems; (4) power entering a local distribution system is not transported onto another market; (5) power is consumed in a restricted area; (6) meters are located at the transmission/local distribution interface; and (7) local distribution systems operate at reduced voltage. *Id.*

33. Amendment to H.R. 655, 105th Cong. § 114(a)(2)-(3) (1997).

34. *Id.* § 114(b).



sale under state law.<sup>35</sup>

Currently, applicants engaging in sales for resale can request an order from the FERC directing wholesale transmission services. Both the Bingaman Bill and the Amendment to H.R. 655 would expand the FERC's authority beyond the traditional wholesale realm to include all transmission services. Under the Bingaman Bill, the Commission would have the power to order a transmitting utility to provide transmission service for any person generating electric energy for sale.<sup>36</sup> Furthermore, the FPA prohibition against mandatory retail wheeling and sham wholesale transactions would be repealed.<sup>37</sup> As in the Amendment to H.R. 655, the FERC's authority to order retail wheeling would be limited to those sales permitted or required by state law.<sup>38</sup>

Under the Bumpers Bill, FPA section 212(h) would be repealed where a retail supplier seeks access to a transmission facility in order to make a retail sale to a customer located in a state implementing retail competition prior to January 1, 2002.<sup>39</sup> Under the Administration's Bill, if a retail competition notice<sup>40</sup> has been filed and is in effect "or if a distribution utility offers open access to its delivery facilities to the ultimate consumer," the bar, in section 212(h) of the FPA, which precludes the FERC ordering certain retail wheeling transactions, would be removed.<sup>41</sup> Thus, in these circumstances the Commission would have the authority to order transmission to an ultimate consumer.<sup>42</sup> Furthermore, section 206 of the FPA would be amended to grant the Commission jurisdiction over transmission services provided by transmitting utilities that are not public utilities.<sup>43</sup>

#### *D. The Commission's Ability to Order Wholesale Stranded Cost Recovery and Its Backup Authority to Impose Retail Stranded Costs*

The Administration's Bill would amend section 206 of the FPA to approve explicitly the Commission's ability to authorize the recovery of wholesale stranded costs and require open access transmission from public

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35. *Id.*

36. S. 1276, 105th Cong. § 3(a)(1)-(2) (1997).

37. *Id.* § 3(b).

38. *Id.*

39. S. 1401, 105th Cong. § 112(c)(5)(A) (1997).

40. Under the Administration's Bill, a notice of retail competition would be filed at the Commission by a state regulatory authority "with respect to a distribution utility for which it has rate-making authority . . . or [a] non-regulated distribution utility," stating that the distribution utility has implemented or will implement retail competition. Comprehensive Electricity Competition Act, S. 2287, 105th Cong. § 101(a) (1998).

41. *Id.* § 201(b)(2)(D).

42. *Id.* Conforming amendments would be made to section 211(a) and 212(a) of the FPA to extend the Commission's authority beyond the traditional "wholesale" boundary. See *id.* § 201(b)(3)(A)-(D).

43. *Id.* § 201(c).

utilities and transmitting utilities.<sup>44</sup> If the Commission finds that the TVA, federal power marketing administrations, associations with outstanding Rural Utility Service (RUS) debt, or a full-requirements wholesale customer of these entities would not be able to recover stranded costs, the Commission could suspend or modify the application of its open access rules.<sup>45</sup> The Commission could order the imposition of a stranded cost charge, as defined by the Commission, for any electric utility submitting an application and owning generation facilities financed in whole or in part by outstanding RUS loans.<sup>46</sup>

Also under the Administration's Bill, if a state regulatory authority lacks the power to require a stranded cost charge on an ultimate consumer's receipt of energy, the Commission would be empowered to order the imposition of the charge given that the imposition is (1) "just, reasonable, and not unduly discriminatory or preferential;" (2) consistent with the policy of the state regulatory authority; and (3) not specifically prevented by state law.<sup>47</sup> A state regulatory authority must provide the Commission with a notice of retail competition and a determination that a distribution utility should be allowed to impose a charge on a customer's receipt of electricity.

Under the Bumpers Bill, the Commission would have exclusive jurisdiction to determine and award the recovery of wholesale stranded costs.<sup>48</sup> The proposal contains provisions for the formation of a regional board to determine the amount of wholesale stranded costs associated with a generating facility<sup>49</sup> and to allocate costs among the retail electric energy providers affiliated with a public utility holding company. If a regional board is not formed, the Commission would then assume the responsibilities assigned to the board, including the determination of wholesale stranded costs.<sup>50</sup>

The Johnston Bill, an earlier proposal introduced on January 25, 1996, would require the Commission, in determining rates under sections 205 and 206 of the FPA, to provide for the recovery of stranded costs incurred

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44. S. 2287, 105th Cong. § 201(b)(1) (1998). The FPA's definition of transmitting utility would be expanded to include "any entity that owns, controls, or operates electric power transmission facilities that are used for the sale [not limited to wholesale sales] of electric energy." *Id.* § 201(b)(3)(A). This definition could include municipal utilities, cooperatives, TVA, and federal power marketing administrations.

45. *Id.* § 201(c).

46. The proposal would allow the Commission to define stranded costs. *Id.*

47. *Id.* § 203. A utility with outstanding RUS loans that has filed a notice of retail competition under PURPA could request that the Commission issue an order imposing the charge.

48. S. 1401, 105th Cong. § 106(a) (1997).

49. *Id.* § 106(b). The recovery of wholesale stranded costs by a wholesale generating company is intended to cover the situation where an entity seeking recovery is "an affiliate of a public utility holding company [that] owns and/or operates a generating facility and sells power from that facility to two or more affiliates of the same holding company." The entity seeking recovery must not have sold retail energy prior to January 30, 1997. *Id.* § 106(b)(1)(B).

50. *Id.* § 106(b)(2). The wholesale generating company would be entitled to the full recovery of its stranded costs.

by a utility transmitting or distributing energy “not sold by such utility or any of its affiliates” to a customer that was previously served in whole or part by the utility.<sup>51</sup> Under the proposal, the Commission’s definition of stranded costs must include “any legitimate, prudently incurred and verifiable cost previously incurred by a utility in order to provide service to an electric customer, provided that the cost: (A) Is not being, and except as provided in this section would not otherwise be, recovered in rates; and (B) the utility has made reasonable attempts to mitigate.”<sup>52</sup> When determining rates subject to the FERC jurisdiction, the Commission must allow recovery to the extent a state regulatory authority, requiring unbundled local distribution service, has not provided for full recovery or is unauthorized to do so.<sup>53</sup>

### III. INDEPENDENT SYSTEM OPERATORS, TRANSMISSION SYSTEM OPERATION AND RELATED PROPOSALS

#### *A. Proposals Permitting the Commission to Order the Establishment of an ISO*

The Bumpers Bill would instruct the FERC, within two years of the date of enactment of the Bill, to “establish the broadest feasible transmission regions” and appoint an ISO to manage and operate each region starting January 1, 2002.<sup>54</sup> Deference would be given to existing ISOs approved by the Commission if their operation and structure are consistent with the section’s requirements regarding the independence of ISOs and the Commission’s regulation of transmission.<sup>55</sup> However, ISOs must not be under the control of any person owning transmission facilities or any retail suppliers selling to consumers in the same region as the ISO.<sup>56</sup> The Commission would regulate interstate transmission by an ISO within the transmission region and between two or more regions.<sup>57</sup> The Commission would be responsible for establishing rules regulating the

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51. S. 1526, 104th Cong. § 11(b) (1996).

52. *Id.*

53. S. 1526, 104th Cong. § 11(b) (1996).

54. S. 1401 § 112(a). Section 111 of Senate Bill 237 would require the FERC to develop broad transmission regions and designate an ISO to manage and operate the regions by a specific deadline. After an ISO has been designated, each state may join a regional transmission oversight board, which must be composed of an equal number of members from each state that is a member of the board. Each regional transmission oversight board would have the same authority as the FERC has pursuant to section 205, 206, 211 and 212 of the FPA. The boards’ actions must be consistent with FERC precedent. Electric Consumers Protection Act, § 237, 105th Cong. § 111(e)(1) (1997). Where a regional board is not formed, the FERC would continue to have authority over the interstate transmission of electric energy by an ISO within the transmission region and the transmission in interstate commerce between two or more transmission regions. *Id.* § 111(e)(2). The Schaefer Bill would require reasonable and nondiscriminatory access on an unbundled basis; however, there would be no provision for regional regulation.

55. S. 1401, 105th Cong. § 112(a) (1997).

56. *Id.* § 112(b).

57. *Id.* § 112(c).

oversight of ISOs in order to guarantee reliability, efficiency and competition.<sup>58</sup>

The Administration's Bill would amend the FPA by granting the Commission the authority to order the establishment of an ISO and to order a transmitting utility to abandon control of its transmission facilities to an ISO.<sup>59</sup> Although the Bill would grant the FERC the authority to order an ISO, it would not require the formation of ISOs. The proposal would encourage and provide for the development of a regional transmission planning agency to coordinate states in the planning of future generation, transmission, and distribution facilities. Furthermore, under this plan, the Commission would set the criteria for, and approve, the regional transmission planning agreement governing the agency's organization, practices and procedures. However, the regional agency would have all "the authority necessary or appropriate to carry out the agreement" including powers otherwise under the Commission's jurisdiction.<sup>60</sup>

The Amendment to H.R. 655 is analogous to the Administration's Bill in the Commission's ability to order abandonment of transmission facilities to an independent entity and to oversee the formation of regional transmission planning agencies.<sup>61</sup> The Commission could direct the

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58. *Id.* § 112(f).

59. S. 2287, 105th Cong. § 204 (1998).

60. *Id.* § 202. Other aspects of the proposal include the ability of a state regulatory authority to prevent a distribution utility over which it has no jurisdiction from selling to customers of a distribution utility in its state that is covered by a notice of retail competition. *Id.* § 102. Non-regulated distribution utilities also would be able to prevent the sale by a distribution utility without a notice of retail competition to customers of a distribution utility that is covered by a notice of retail competition. *Id.* Through the use of this power, a state regulatory authority may impose reciprocity requirements on out-of-state distribution utilities. Furthermore, PURPA would be amended to require the disclosure of information to an electric customer regarding the nature of the service, price of energy, additional charges and the type of resource used to generate the energy. *Id.* § 103. Wholesale providers must divulge information regarding the type of resource used to produce energy and the environmental attributes of the generation. A state may bring a civil action in district court on behalf of its residents for violations of the consumer information disclosure rule.

61. Electric Consumers' Power To Choose Act of 1997, H.R. 655, 105th Cong. § 118 (1997). House Bill 655, as amended in section 413, would modify the FPA, preventing suppliers from using transmission and distribution facilities of another person if the supplier or its affiliate, or any person generating, selling or providing electricity, does not provide open access. *Id.* § 101. If a supplier seeks to sell to consumers in an open access state, but the supplier or its affiliates own, control or operate local distribution facilities in a closed state, the supplier must voluntarily open these facilities in order to provide any retail electric supply. The FPA would require the Federal Trade Commission (FTC), after consultation with the Commission, the Secretary of Energy and the Environmental Protection Agency, to issue rules regarding electric supplier information disclosure. The disclosure requirements, similar to those in the Administration's Bill, would apply to any supplier that sells or offers to sell electricity to consumers, or urges consumers to purchase electricity. The statement must include information regarding: (1) the nature of the service; (2) the price of electricity; (3) a description of charges; (4) information regarding the amount of electricity generated from renewable resources; and (5) other information as prescribed by the FTC. *Id.* A wholesale seller must provide its customers with information on generation source and emissions characteristics, as required by the information disclosure rules. *Id.*

abandonment of control if (1) the action will promote competitive markets and "efficient economical and reliable operation" of the grid; (2) the ISO will operate the transmission facilities so that ownership provides no advantage; and (3) the transmitting utility will receive just and reasonable compensation.<sup>62</sup>

Under the DeLay-Markey Bill, if "after notice and opportunity for a hearing" the Commission finds (1) "action is appropriate to promote competitive electricity markets and efficient, economical and reliable operation of the interstate transmission grid;" (2) the independent system operator "will operate the transmission facilities in a manner that assures that ownership of transmission facilities provides no advantage in competitive electricity markets;" and (3) "just and reasonable compensation" will be provided to the transmitting utility for use of its facilities, the Commission would be permitted to order the establishment of "an entity for the purpose of independent operation and control of interconnected transmission facilities for the broadest feasible geographic region."<sup>63</sup> Furthermore, the Commission also would be empowered to direct transmitting utilities to turn over control of the operation of their transmission facilities to an independent system operator.<sup>64</sup>

Under the Bingaman Bill, if "the Commission finds such action necessary or desirable in the public interest to ensure the fair and non-discriminatory access to transmission services," the FERC would be empowered (1) to compel the formation of a regional transmission system, and (2) to compel any transmitting utility operating within such region to participate in the system.<sup>65</sup> Under this proposal, the FERC must appoint a regional oversight board to assign an ISO, which would guarantee that the ISO develops policies, operates the system and solves disputes "in a fair and non-discriminatory manner."<sup>66</sup> The oversight board would be

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62. *Id.* § 115. Sections 212(j) and 212(k) of the FPA, special provisions relating to Bonneville Power Administration (BPA), TVA and Electric Reliability Council of Texas (ERCOT) wheeling provisions, would be repealed. *Id.* § 116.

63. *Electric System Reliability Act of 1998*, H.R. 4432, 105th Cong. § 201(a) (1998).

64. *Id.* The ISO may be either a nonprofit or for-profit entity and must not establish or operate a market for the sale, purchase or exchange of electric energy. *Id.* § 201(a). Under the Delay-Markey Bill, each state would be permitted to develop a single siting authority. House Bill 4432 defines single siting authority as:

[a] State governmental agency that has the authority, staffing and funding to issue, on a timely basis, all permits, licenses, and authorizations required under any State, county, municipal, or local law or regulation or pursuant to any federally delegated or approved permit program for the construction and operation of facilities used for the generation of electric energy (other than hydroelectric projects and nuclear generating facilities) or transmission of electric energy (including facilities used to increase or reduce voltage between the local distribution level and the transmission level).

*Id.* § 202. However, until the ISO has been notified of the formation of a single siting authority, the ISO would have the authority "to issue certificates of public convenience and necessity for the construction and operation of facilities used for the generation or transmission of electric energy." *Id.*

65. S. 1276, 105th Cong. § 8 (1997).

66. *Id.* The Bingham Bill does not specifically explain how this process of ISO formation would occur.

composed of a "fair representation" of transmitting utilities involved in the regional transmission system, electric utilities, consumers and state regulatory authorities in the region.<sup>67</sup> Although the Commission would establish the rules to implement this section, an ISO must not (1) own generating facilities or sell energy, or (2) "be subject to the control of, or have a financial interest in," a transmitting utility or electric utility served by the ISO.<sup>68</sup>

### *B. Proposals Promoting Regional Tariffs and Requiring Reciprocity*

The Markey Bill would amend section 211 of the FPA and direct the FERC to promulgate rules establishing tariffs applicable in "the largest region or regions feasible" to (1) ensure the development of competitive markets; (2) ensure full recovery of prudently incurred transmission costs by owners of transmission facilities; (3) "prevent multiple charges for transmission service;" and (4) prevent a seller from gaining a competitive advantage due to such person's ownership or control of transmission or distribution facilities.<sup>69</sup> An order under section 212(h) of the FPA directing a transmitting utility to provide wholesale transmission service also would apply to retail transmission service provided by the entity.<sup>70</sup>

Under their proposals, Senators Johnston,<sup>71</sup> Bumpers,<sup>72</sup> Thomas<sup>73</sup> and Nickles<sup>74</sup> would prohibit a retail utility, or its affiliates, from selling energy to ultimate customers through unbundled local distribution service unless the utility provides reciprocity.

### *C. Proposals Related to Ensuring Reliability*

In addition to requiring reciprocity, several proposals would attempt to guarantee system reliability. The Administration's Bill would amend the FPA to empower the FERC to register, approve and oversee the formation and ongoing functioning of an electric reliability organization.<sup>75</sup>

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67. *Id.*

68. S. 1276, 105th Cong. § 8 (1997).

69. H.R. 1960, 105th Cong. § 121(a) (1997). Although House Bill 1960 does not contain provisions regarding the establishment of an ISO, the Bill would require the development of tariffs for use in the largest region/regions possible. *Id.* Some proposals would not mandate the formation of an ISO. For example, the Stearns Draft would encourage the formation of ISOs, but would not grant the Commission the authority to order the development of an ISO. Rep. Stearns discussion draft, 4.

70. H.R. 1960, 105th Cong. § 121(B) (1997). The FERC's open access rules would apply to nonjurisdictional utilities one year after the date of enactment of the proposal. *Id.* § 122.

71. S. 1526, 104th Cong. § 11(b) (1996).

72. S. 1401, 105th Cong. § 103(c) (1997).

73. The term "utility" includes a non-regulated electric utility, a state regulated electric utility or a cooperative utility. S. 722, 105th Cong. § 3(a) (1997).

74. S. 2187, 105th Cong. § 6 (1998). If the utility owns or controls transmission or local distribution facilities and does not provide unbundled local distribution service for its generation station, a state may prohibit the utility from selling to an ultimate consumer. *Id.* The Administration's Bill and the Amendment to H.R. 655 also contain reciprocity provisions. *See supra* notes 60 and 61.

75. S. 2287, 105th Cong. § 205 (1998). Other proposals contain less detailed reliability provisions. Under the Bumpers Bill, the FERC would establish reliability guidelines for ISOs. Section 104 would

Initially, all bulk power participants would have to abide by the standards that are in effect on the date of enactment and were established by the North American Electric Reliability Council (NERC) and other regional reliability councils. These standards would remain in effect until modified by the reliability organization and approved by the Commission. The Commission would approve one reliability organization for the entire United States, which must apply for registration and file reliability standards with the Commission.<sup>76</sup> The amendment to the FPA sets forth several conditions that must be met before the Commission would register a reliability organization.<sup>77</sup> Moreover, every system operator, as well as other entities essential to reliability, would be obligated to become members of the reliability organization.

For purposes of ensuring reliability, the Commission would have jurisdiction over the electric reliability organization, all system operators and all users of the bulk power system. Furthermore, the Commission would have the ongoing authority to review and approve reliability standards; it would also require the development and/or immediate implementation of a new or revised standard to avoid any disruption of reliability that would affect public safety or welfare.<sup>78</sup> The electric reliability organization would be required to file for Commission approval any proposed change in procedures, governance or funding. The proposal would establish two rebuttable presumptions. First, actions taken to comply with a reliability standard would be just and reasonable for the purpose of the FPA. Second, activities of the reliability organization or of a member of the organization in pursuit of organizational goals would be in compliance with the antitrust laws of the United States.<sup>79</sup>

allow a state or state regulatory authority to impose generation reliability requirements on persons seeking to sell retail electric energy to consumers. S. 1401, 105th Cong. § 104(a) (1997). According to the DeLay Bill, the provision of necessary information to the system operator would be a key component for the successful operation of the transmission and distribution systems. The system operator must receive (1) adequate and timely information on transmission system flows; (2) access to resources to maintain system balance in emergency situations; and (3) the ability to penalize service providers who fail to abide by the tariffs governing access to the transmission system. H.R. 1230, 105th Cong. § 5 (1997). Aside from the objective set forth in section 5, the DeLay Bill does not contain a reliability provision. The Thomas Bill does not contain a nationwide reliability provision; however, states would be empowered to develop and enforce performance standards to enhance system reliability and protect customers. S. 722 § 3.

76. S. 2287, 105th Cong. § 501 (1998).

77. These conditions include (1) the organization's capacity to provide "an adequate level of reliability;" (2) its permission of voluntary membership to any bulk power system users; and (3) fair procedures for enforcement of standards. The Administration's Bill and the Amendment to H.R. 655 also list the following requirements of an electric reliability organization's procedures: (1) fair representation of members in selection of management; (2) assessment of reasonable dues, fees and charges; (3) procedures that include notice and opportunity for public comment on development of standards; (4) fair and impartial procedures for enforcement of standards; (5) notice and opportunity for public observance of meetings; and (6) other matters the Commission deems appropriate. See S. 2287 § 501; Amendment to H.R. 655, 105th Cong. § 101 (1997).

78. S. 2287, 105th Cong. § 501 (1998).

79. *Id.* § 502.

The Amendment to H.R. 655 and the DeLay-Markey Bill<sup>80</sup> duplicate the major provisions of the Administration's proposed formation and regulation of an electric reliability organization. Similar to the Administration's Bill, the Amendment to H.R. 655 and the DeLay-Markey Bill would permit the electric reliability organization to impose a penalty, seek injunctive relief, or take other disciplinary action against a user of the bulk power system that violates an organization procedure or standard.<sup>81</sup>

Under the Markey Bill, the FERC would have the authority to oversee the operations of an electric reliability council composed of every electric utility and transmitting utility.<sup>82</sup> The FERC would be required to establish procedures for the registration of an electric reliability council; and to approve any proposed rule or change in a rule of an electric reliability council.<sup>83</sup> To protect system reliability, the Commission would be empowered to revoke the registration of an electric reliability council and operate the council until the revocation is reversed or another council is in place.

The Bingaman Bill would support the establishment of reliability councils and authorize the FERC to: (1) designate a national council and regional councils to promote reliability; (2) incorporate the operational standards adopted by such councils into the national electric reliability standards to be adopted by the Commission; and (3) enforce compliance with such standards on the part of any public utility or transmitting utility.<sup>84</sup> The Commission also would be empowered to order a transmitting utility to expand its interstate transmission facilities.<sup>85</sup> The formation and operation of an electric reliability council to advise the Commission on the reliability of wholesale sales and transmission in interstate commerce is also part of the Stearns Draft.<sup>86</sup>

#### IV. PROPOSALS PROMOTING A COMPETITIVE MARKETPLACE AND THE MITIGATION OF MARKET POWER

##### A. *Proposals Revising Section 203 of the FPA*

The Amendment to H.R. 655 would revise section 203(a) of the FPA by replacing "public utility" with "electric utility company" as defined by

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80. H.R. 4432, 105th Cong. §§ 101-102 (1998).

81. Amendment to H.R. 655, 105th Cong. § 101 (1997); S. 2287, 105th Cong. § 501 (1997).

82. H.R. 1960, 105th Cong. § 201 (1997).

83. A proposed rule or a proposed rule change related to (1) "a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule;" (2) a change in dues; or (3) a solely administrative council matter would not require Commission approval. *Id.* § 201. These changes would become effective upon filing with the Commission. *Id.*

84. S. 1276, 105th Cong. § 6 (1997).

85. *Id.* § 7. The Commission may not order such an extension if it would "unreasonably impair the ability of the transmitting utility to render adequate service to its customers." *Id.*

86. Rep. Stearns Draft, 8. All electricity suppliers, transmitting utilities and local distribution companies must be members of the council. *Id.*



the Public Utility Holding Company Act of 1935 (PUHCA).<sup>87</sup> This change would subject a company that owns or operates generation, transmission or distribution facilities and qualifies an “electric utility company” to the Commission’s control over the sale, lease or disposition of jurisdictional facilities worth over \$50,000. A holding company in a system that includes an electric utility company would be required to seek Commission approval for the acquisition of any security of an electric utility company, or of a holding company in a system that includes an electric utility.<sup>88</sup> The submittal of an “oral or written presentation of views” would replace the traditional merger review “hearing” process.

The bills proposed by the Administration, Senator Bumpers and Representatives Markey and DeLay would grant the FERC the explicit authority to order divestiture to remedy market power when providing authorization under the FPA section 203. Similar to the Amendment to H.R. 655,<sup>89</sup> under the Administration’s Bill, once the Commission determines that market power exists, the Commission must order the utility to submit a plan to remedy the market power.<sup>90</sup> Following submittal of a plan, the Commission must review, then approve or modify the plan as appropriate.<sup>91</sup> The Commission could order the utility to submit a plan to mitigate its market power, where a state regulatory authority has filed a notice of retail competition and applies for an order under this section while lacking authority to remedy the market power of a utility making sales at retail, r.

The Bumpers Bill would direct the Commission to mitigate market power under section 203(a) of the FPA by conditioning the Commission’s approval of a merger upon a finding that the merger promotes

87. Amendment to H.R. 655, § 117(1). PUHCA of 1935 defines electric utility company as “any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale, other than sale to tenants or employees of the company operating such facilities for their own use and not for resale.” 15 U.S.C. § 79b(a)(3) (1994). Antitrust laws would apply as they did before the implementation of the proposals and a new FPA section would prohibit the cross-subsidization of services subject to competition by transmission and local distribution services that are not subject to competition. Amendment to H.R. 655 § 101. This provision includes, but is not limited to, the prohibition of cross-subsidization through the use of vehicles, tools, employees, or the use of name, logo, service mark, trademark or tradename of a subsidiary or affiliate to resemble the name of a utility. *Id.* The Amendment to H.R. 655 also would add a section to the FPA requiring the Energy Information Administration to study and publish information on the development of wholesale and retail competition on the electric industry including market power issues. *Id.*

88. *Id.* § 117(2).

89. The Administration’s Bill defines “electric utility company,” “holding company” and “holding company-system” based on the definitions in PUHCA (1998), whereas the Amendment to H.R. 655 defines these terms based on the definitions in PUHCA (1935). *Id.*; S. 2287, 105th Cong. § 402(4) (1998).

90. The proposal defines market power as “the ability of an electric utility profitably to maintain prices above competitive levels for a significant period of time.” S. 2287 105th Cong. § 403 (1998).

91. The Commission’s remedial actions include, but are not limited to, imposing conditions regarding: “[1] operation or dispatch of generation; [2] independent operation of the transmission facilities; or [3] divestiture of ownership of one or more generation facilities.” *Id.*

“competitive wholesale and retail electric generation markets.”<sup>92</sup> Public utilities would be prohibited from acquiring the facilities or securities of a natural gas utility company unless the FERC finds the transaction to be in the public interest.<sup>93</sup> Furthermore, the FERC could: (1) order a physical connection of generation or transmission facilities; (2) order the provision of transmission services by a transmitting utility; or (3) require the divestiture of generation or transmission facilities to prevent a wholesale or retail supplier from utilizing “its ownership or control of resources to maintain a situation inconsistent with effective competition” among suppliers.<sup>94</sup>

The Markey Bill proposes to eliminate undue market concentration<sup>95</sup> and empower the FERC with the ability to order remedial actions, including the power to order divestiture.<sup>96</sup> The acquisition of an interest in a public utility, resulting in effective control or ownership of a substantial interest,<sup>97</sup> would be conditioned upon certain FERC findings regarding effective competition, and cost reductions in the area of energy and arm’s length bargaining.<sup>98</sup> A public utility would be prohibited from creating a situation “inconsistent with effective competition” through the use of its resource ownership or control in any market where the company has a designated service territory for retail distribution.<sup>99</sup> The Bill would empower the FERC to order the sale or transfer of assets if a public utility is found to have violated the prohibition.<sup>100</sup> The Commission could order a

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92. S. 1401, 105th Cong. § 113(a)(1) (1997). Senator Bumpers’ earlier proposal, S. 237, 105th Cong. (1997), would expand the public interest standard of section 203(a) of the FPA to require any proposed disposition, consolidation, acquisition or control to be consistent with “the promotion of competitive wholesale and retail electric generation markets.” S. 237 105th Cong. § 113(a)(1) (1997). The Commission also would be empowered to take any necessary actions to prevent retail suppliers from using their ownership or control of resources to decrease competition among market participants. *Id.* § 113(b).

93. S. 1401, 105th Cong. § 113(a)(2) (1997). A natural gas utility company is defined as “any company that owns or operates facilities used for the transportation at wholesale, or the distribution at retail (other than the distribution only in enclosed portable containers) of natural or manufactured gas for heat, light, or power.” *Id.*

94. *Id.* § 113(b)(1)-(3).

95. H.R. 1960, 105th Cong. § § 111-112 (1997).

96. *Id.* § 112(b).

97. Substantial interest is defined as any interest where the value of the interest equals 10% or more of the book value of the public utility. *Id.* § 111(e)(2).

98. *Id.* § 111(b)(1)-(3). Additionally, the acquisition would be conditioned upon state commission authorizations and the submission of a certification restricting the recovery of the acquisition premium. *Id.* § 111(c)(1)-(2). The FERC would establish the rules regarding transactions between a public utility and the person acquiring a substantial interest in such a company. *Id.* § 111(d).

99. 1960, 105th Cong. § 112(a) (1997).

100. Under section 113, the FERC would promulgate regulations to guarantee that any diversification by a public utility: (1) would have no adverse impact on customers; (2) arm’s length relationships would exist between the transmission activities and other business activities of the company; and (3) the FERC and the relevant state commission would have access to the books and records of the public utility and its affiliates. *Id.* § 113(a)(1)-(2). Furthermore, the FERC would determine the necessary components of a state certification program for compliance with competition standards and requirements, including the retail competition and public benefit standard. Section 103

public utility or affiliate to sell or transfer assets to a non-affiliated company or an affiliated company on an arm's length basis.<sup>101</sup> Furthermore, the Commission could order that business activities involving a specific resource be conducted on an arm's length basis and/or access to assets be shared on a nondiscriminatory basis at "just and reasonable, and not unduly discriminatory or preferential" rates.<sup>102</sup>

*B. Proposals Imposing Market Restraints Without Specifically Revising Section 203 of the FPA*

Some proposals would attempt to prevent undue discrimination and abuses of market power by establishing standards for retail utilities. The DeLay Bill would demand the Commission guarantee that "existing electric utilities are not permitted to exercise market power in the sale of electric service."<sup>103</sup> The FERC would be required to determine the extent of existing market power and devise methods for mitigating such power. Also, authority to lessen market power by restricting the sale of services at market-based rates along with ordering divestiture of assets and functions.<sup>104</sup>

After notice and opportunity for hearing, the DeLay-Markey Bill provides that if certain conditions are found to exist, the Commission must order the "divestiture or transfer of control of such generation or transmission facilities" of an electric utility that result in market power.<sup>105</sup> Upon making the same finding, the Commission may require the owner of securities of an electric utility to sell or dispose of the securities in return for just and reasonable compensation.<sup>106</sup>

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would grant the President the power to promulgate rules to guarantee that generators and providers of electric energy for sale or ultimate consumption cannot obtain any competitive advantage from the ownership, control, use or purchase of electric energy from facilities that are not subject to enforceable emission limitations as strict as performance requirements for new electric generating facilities under the Clean Air Act. *Id.* § 103.

101. *Id.* § 112(b)(1)-(2).

102. *Id.* § 112(b)(3)-(4).

103. H.R. 1230, 105th Cong. § 6(b) (1997). Additionally, the DeLay Bill sets forth objectives for the operation of the nation's transmission and distribution systems which include: (1) the organizational separation between those who provide electric service and those who operate the transmission and distribution systems; (2) nondiscriminatory access to the transmission and distribution system; (3) the prevention of preferential treatment towards affiliated service providers; and (4) nondiscriminatory access to information. *Id.* § 5(a)(1)-(4).

104. *Id.* § 6(b).

105. *Id.* § 201(a). The Commission must find: (1) the "electric utility that owns or controls generation or transmission facilities has market power in wholesale or retail markets for electric energy;" (2) the market power "can result in prices for electric energy that exceed the prices that would be charged in a competitive market;" (3) divestiture or transfer of control is necessary to diminish or abolish market power; (4) the continued reliability of the affected electric systems "would not [be] unreasonably impair[ed];" and (5) there is "no reasonable probability" that the utility's market power can be contained "by less intrusive means." *Id.*

106. H.R. 1230, 105th Cong. § 6(b) (1997).

## V. PROPOSALS MANDATING RETAIL COMPETITION OR PERMITTING STATES TO ELECT TO DEVELOP THEIR OWN PROGRAMS

### A. *Proposals Mandating Retail Competition*

The Bumpers Bill would mandate customer choice by January 1, 2002;<sup>107</sup> however, state authorities would be allowed to institute a program prior to this date.<sup>108</sup> The Bill would provide for the limited grand-fathering of state restructuring actions taken prior to January 1, 2002.<sup>109</sup> Any state legislation or regulation providing customers with the choice of purchasing electric energy from any retail supplier, and providing electric utility companies the option to recover retail stranded costs,<sup>110</sup> would be deemed to comply with the proposal's retail access mandate and the retail stranded cost provision.<sup>111</sup>

Several proposals would direct states to impose retail competition, but would provide the Commission with backup authority to institute retail competition if a state fails to implement a plan. The Johnston Bill would mandate retail access by January 1, 2010.<sup>112</sup> The FPA would be amended to grant state regulatory authorities the right to require electric utilities to provide local distribution services to any electric consumer.<sup>113</sup> States would be required to begin proceedings to consider (1) establishing standards for competitive electric procurement markets to meet the requirements of section 5;<sup>114</sup> (2) a retail access plan covering all state regulated retail

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107. S. 1401, 105th Cong. § 101(1997). S. 237 would set December 15, 2003 as the date at which (1) every consumer shall have the right to purchase retail electric energy from any seller; and (2) all sellers shall have reasonable and nondiscriminatory, unbundled access to local distribution and retail transmission of retail electric energy and all ancillary services. S. 237, 105th Cong. § 102(a)-(b) (1997). Under S. 237, any legislation or regulation issued by a state or a state regulatory authority that requires retail electric competition on or before December 15, 2003, would be considered to be in compliance with S. 237's provisions mandating retail access, stranded cost recovery and the recovery of multi-state utility company stranded costs. *Id.* § 104(c).

108. S. 1401, 105th Cong. § 103 (1997).

109. *Id.* § 103(b).

110. Section 3(y) defines retail stranded costs as "[a]ll legitimate, prudent, verifiable and non-mitigatable costs incurred by an electric utility company in all of its generation assets which would have been recoverable in retail rates but for the implementation of retail electric competition, less the total market value of these assets after retail electric competition is implemented. Binding power purchase contracts and regulatory assets, the costs of which would have been recovered but for the implementation of retail electric competition, shall be considered generation assets for purposes of this subsection." *Id.* § 3(y).

111. *Id.* § 103(b).

112. S. 1526, 105th Cong. § 8(a) (1997). The DeLay Bill would mandate retail choice by January 1, 1999, but does not contain a provision to grandfather state restructuring actions.

113. *Id.* § 11(b).

114. Section 8 states that the minimum requirements for the establishment of procurement markets including, or which include: (1) application of the standards to all or part of new contract electricity or new generating sources to be procured; (2) public notice of every offer to purchase; (3)

electric utilities; and (3) any alternative plan.<sup>115</sup> States not exempt under section 7 of the proposal must elect one of these three options.<sup>116</sup> Within eighteen months after the date of enactment of the Johnston Bill, each state regulatory authority would be required to adopt a competitive option and begin implementation of the plan not later than sixty days after rendering a decision adopting the competitive option.<sup>117</sup> A state regulatory authority's choice of a competitive option that meets the requirements of sections 4, 5 and 6 may not be reviewed by the Commission or any court of the United States,<sup>118</sup> however, any person aggrieved by the final order instituting a retail program or failing to make a final decision may petition the Commission to enforce sections 4, 5 and 6 of the Johnston Bill.<sup>119</sup>

Under the Schaefer Bill, December 15, 2000 would be the date by which all electric utility retail customers would have the right to buy retail electric energy services from any person offering such services.<sup>120</sup> If a State regulatory authority makes such an election, the regulatory authority must institute "flexible pricing procedures and incentive-based rate regulation for each retail . . . service provided."<sup>121</sup> Furthermore, with regard to any entity that is not providing local distribution services, a state regulatory authority electing to establish retail choice must end: (1) any regulation of prices for retail services; (2) any requirement that such entity file a schedule of charges for retail services; (3) any requirement that such entity file cost or revenue projections; and (4) any regulation of depreciation charges for facilities used to provide retail services.<sup>122</sup> If a State regulatory authority does not make such an election, the FERC would be required to

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reasonable time to respond to the offer; (4) no exclusion of suppliers; (5) purchasers must not be excluded from supplying to themselves; (6) selection of the lowest cost supplier; and (7) purchasers may rescind or modify offers prior to execution of the contract. *Id.* § 5. New contract capacity is defined as "electric energy or capacity which is sought to be produced from a party other than the purchaser for a period exceeding 60 days." *Id.* § 2(6).

115. *Id.* § 4(a)(1).

116. If prior to the date of enactment of the act, a State regulatory authority had adopted requirements for competitive electric markets or a retail access plan providing for choice by January 1, 2004, the authority would be exempt under section 7 from the requirements of the proposal. *Id.* § 7(a). Non-regulated retail electric utilities would be exempt if they met the requirements of section 5 (procurement markets) or adopted a retail plan providing for choice by January 1, 2004, prior to the date of enactment of the act. *Id.* § 7(b).

117. *Id.* § 4(a)(3). Non-regulated retail electric utilities must abide by the same requirements, except rather than establishing standards for competitive procurement markets, non-regulated utilities must develop procedures for "the acquisition of a new contract electricity and new generating sources" in conformance with section 5 standards. *Id.* § 4(b)(1)(A).

118. *Id.* § 9(a).

119. *Id.* § 9(b).

120. H.R. 655, 105th Cong. § 102 (1997). The proposal would prohibit the subsidization of services subject to competition by non-competitive services. *See* H.R. 655, 105th Cong. § 103(b)(3) (1997). Under section 104, a non-regulated electric utility may elect to establish retail electric service choice no later than December 15, 2000. If the non-regulated electric utility does not elect to establish choice, it would be subject to the election made by the state regulatory authority under section 103. *Id.* § 104(a).

121. *Id.* § 103(c).

122. *Id.* § 103(d).

implement a retail choice program.<sup>123</sup> In reference to state actions taken prior to the enactment, preemption would be precluded on the condition that such actions satisfy the requirements of the act.

The Amendment to H.R. 655 would alter the FPA by mandating open and nondiscriminatory or preferential access for all state-regulated and non-regulated electric utilities.<sup>124</sup> The FPA would allow every state and non-regulated electric utility until January 1, 2001, the option of electing the requirement of open access to all distribution utilities. The state regulatory authority would establish the terms and conditions necessary to guarantee consumer choice and comparable access to local distribution facilities.<sup>125</sup> If a state fails to make an election requiring open access within one year after the enactment, the Commission would exercise authority which the state would have, had the election been made.<sup>126</sup> Under this scenario, the Commission would have jurisdiction to "fix rates, charges, terms, and conditions of local distribution service, including the imposition of separate nonbypassable charges."<sup>127</sup>

Unlike previous proposals mandating date-certain retail competition, the Administration's Bill would impose a flexible mandate allowing entities to opt-out of the retail competition mandate. Under H.R. 655, notice of retail competition indicating the implementation or the planned implementation of retail competition must be filed with the Commission by a state regulatory authority with respect to a jurisdictional distribution utility or non-regulated distribution utility.<sup>128</sup> If the implementation of retail competition would have a "negative impact on a class of customers . . . that cannot be mitigated reasonably," a state regulatory authority, after notice and opportunity for hearing, could permit a distribution utility to opt out of the retail competition requirement.<sup>129</sup> Section 201(b) of the FPA would be amended to clarify that states have

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123. *Id.* § 106(a).

124. A state regulated electric utility is defined as "any electric utility or local distribution company with respect to which a State regulatory authority has rate-making jurisdiction, but does not include the Tennessee Valley Authority." Amendment to H.R. 655 § 101. A non-regulated electric utility is defined as "any electric utility or local distribution company other than any State regulated electric utility or local distribution company, but does not include the Tennessee Valley Authority . . . or any federal power marketing administration." *Id.*

125. A notice that the state will demand open access must be submitted to the Commission by the above-mentioned date. A non-regulated electric utility must submit its notice to the appropriate state regulatory authority.

126. If a non-regulated electric utility fails to make an election, it would be subject to the election made by the state under this section. If the state did not make such an election during the required period, the Commission would exercise all of the power the non-regulated utility would have exercised. The proposal contains provisions grand-fathering prior adoption of customer choice programs and prior prudence determinations made by the Commission or a state regulatory authority.

127. *Id.* § 101.

128. PURPA would be amended to mandate retail competition by January 1, 2003 for any distribution utility that has the capability to deliver energy to consumers over its facilities. S. 2287, 105th Cong. § 101(a) (1998).

129. *Id.* § 101(a). Based on the same finding, non-regulated distribution utilities could also opt out of retail competition.

the authority to unbundle transmission and local distribution services; however, if the unbundled transmission is in interstate commerce, the Commission would have exclusive jurisdiction over the rates, terms and conditions of such service.<sup>130</sup> States also would have the power to levy a delivery charge on the receipt of energy by an ultimate consumer.

### *B. Proposals Promoting But Not Mandating Retail Competition*

Rather than mandate retail wheeling, the Thomas Bill would encourage states to take action independently.<sup>131</sup> States could require suppliers to provide wholesale and retail reciprocity for open, nondiscriminatory transmission access and local distribution access. The proposal does not contain a mandate for retail wheeling; instead, the proposal would remove federal law barriers to state action. States that elect to require electric utilities to provide unbundled local distribution service would be encouraged to formulate a policy and report to the FERC on any adoption of such policy.<sup>132</sup> An electric utility's provision of unbundled local distribution service must not be unjust, unreasonable, unduly discriminatory or preferential.<sup>133</sup>

As in the Bingaman Bill, the Stearns Draft would guarantee states the authority to order jurisdictional electric utilities to provide nondiscriminatory, open access transmission and distribution service.<sup>134</sup> If a state has not established jurisdiction over a non-regulated utility by the date of enactment of the act, the state may not prevent the utility from selling energy at retail in interstate commerce or "establish any disincentives" to the formation of competitive retail markets.<sup>135</sup> The Markey Bill would establish a voluntary program for the certification of competition by state regulatory authorities and would encourage states and public power entities to consider retail competition.<sup>136</sup>

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130. *Id.* § 201(a).

131. S. 722, 105th Cong. § 3 (1997).

132. S. 1276, 105th Cong. § 5 (1997).

133. *Id.* § 4. Any law or regulation resulting in such unjust and unreasonable local distribution service would be preempted. If an electric utility or any of its affiliates owns or controls local distribution facilities and does not provide unbundled local distribution service, a state or state regulatory authority would have the right to bar the utility from selling to an ultimate consumer. *Id.*

134. A reciprocity condition would prevent electric utilities and non-regulated utilities that fail to offer open access transmission service from competing outside their boundaries. Rep. Stearns Draft, at 2(b)(1).

135. *Id.* The Johnston Bill would offer state regulatory authorities the option to institute an "alternative plan" for retail choice. Alternative plans, those not prescribed by the proposal, must guarantee that a retail electric utility, state regulated or non-regulated, would not "unduly discriminate" in favor of its own generation supply or its affiliate's supply. S. 1526, 105th Cong. § 6(a-b) (1997). Moreover, an alternative plan must ensure that the retail utility would not employ any form of self-dealing that might result in above-market consumer prices.

136. H.R. 1960, 105th Cong. § 102(b) (1997).

## VI. RETAIL STRANDED COSTS AND THE CONTINUATION OF SERVICE TO RURAL, RESIDENTIAL AND LOW-INCOME CONSUMERS

### A. Retail Stranded Costs

Several proposals would specifically allow states to provide for the recovery of costs caused by the transition to retail competition.<sup>137</sup> Under S. 237, a retail energy provider may request recovery of stranded costs<sup>138</sup> if (1) a state or state regulatory authority provided for retail electric competition after January 30, 1997, but the requirement did not allow for full recovery of stranded costs; or (2) the customers of the retail energy provider have access to retail competition due to section 102 of S. 237.<sup>139</sup> Distribution and retail customers would be required to pay a non-bypassable stranded cost charge in order to permit retail energy providers to fully recover their stranded costs. Customers of a retail energy provider affiliated with another provider, or serves customers in more than one state, would be responsible for only those stranded costs associated with retail competition

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137. Section 3 of the Thomas Bill would permit states to impose a charge to recover transition costs and provide for electric industry workers adversely affected by restructuring. S. 722, 105th Cong. § 3 (1997). The Amendment to H.R. 655 also would allow states to impose a charge to recover transition costs including costs related to utility workers. Amendment to H.R. 655, 105th Cong. § 113 (1997). States could impose a charge (1) to ensure the availability of adequate service to all customers; (2) to enhance reliability of the retail electric system; (3) to fund low-income assistance programs; (4) to encourage renewable energy programs; and (5) to encourage research and development as a condition to the purchase or receipt of energy. *Id.* A non-regulated electric utility or local distribution company also may require such a charge for any of the above-mentioned purposes. The charge must be assessed in a nondiscriminatory manner. *Id.* The Bingaman Bill would permit states to assess stranded costs (or other nondiscriminatory charges) on local distribution service. *See* S. 1276, 105th Cong. § 4 (1997). The Administration's Bill would amend PURPA and direct states to consider mechanisms under state law to address the recovery of retail stranded costs that are "legitimate, prudent, and verifiable, if the utility has taken all reasonable steps to mitigate the costs." S. 2287, 105th Cong. § 101(a) (1997). Under the Stearns Draft, a state or a state regulatory authority would be able to impose a charge to (1) recover "costs incurred by an electric utility that become unrecoverable due to the availability of retail electric service choice;" (2) ensure the availability of adequate service; (3) enhance reliability; (4) fund low-income assistance programs; (5) encourage renewable energy programs; (6) retrain displaced electric employees; and (7) pay "reasonable" nuclear decommissioning costs. Rep. Stearns Draft, § 2(c)(1) (1998).

Some Bills would permit states to determine how to provide for the recovery of retail stranded costs. Under section 114(b) of the Schaefer Bill, the imposition of a stranded cost charge would be left to the states and individual non-regulated electric utilities. The Markey Bill also would leave the stranded cost recovery issue to the states, but require that recovery be nondiscriminatory. The DeLay Bill would impose a ban on exit fees and other charges for terminating retail service. H.R. 1230, 105th Cong. § 3(b) (1997).

138. Section 106(f) defines "stranded costs" as "either (1) all legitimate, prudently incurred and verifiable investments made by a retail electric energy provider in generation assets, including binding power purchase contracts, and related regulatory assets which would have been recoverable but for the implementation of retail electric competition following the date of enactment of this Act, and which cannot be reasonably mitigated or (2) if a retail electric energy provider sells all of its generating facilities, the difference between the book value of such facilities less the amount received from their sale." S. 237, 105th Cong. § 106(f) (1997).

139. *Id.* § 106(a). Section 102 of the proposal would mandate retail competition.



in the state or area where the customers are located.<sup>140</sup> Senator Bumpers' follow-up proposal to S. 237, S. 1401, would provide for the full recovery of retail and wholesale stranded costs.<sup>141</sup> If the state regulatory authority fails to determine the utility's retail stranded costs within eighteen months, the Commission would determine the costs.<sup>142</sup>

The Johnston Bill would provide backup authority to the Commission similar to that provided under the Bumpers Bill. To the extent a state or state regulatory authority requiring unbundled local distribution service fails to permit the recovery of all stranded costs or lacks the authority to do so, the Commission would be required to allow the recovery of all such stranded costs "when determining or fixing rates subject to its jurisdiction" under sections 205 and 206 of the FPA.<sup>143</sup> The Commission's section 205 and 206 authority to determine rates for unbundled local distribution service would be strictly limited to providing stranded cost recovery under the proposed FPA section dealing with such cost recovery.<sup>144</sup>

### *B. Universal Service-The Continuation of Service to Rural, Residential and Low-Income Customers*

Some proposals tackle the issue of providing for the continuation of service to rural, residential and low-income customers.<sup>145</sup> Under S. 237, if a

140. *Id.* § 107(a).

141. S. 1401, 105th Cong. §§ 105-106 (1997). Retail stranded costs are defined as "all legitimate prudent, verifiable and non-mitigatable costs incurred by an electric utility company in all of its generation assets which would have been recoverable in retail rates but for the implementation of retail electric competition, less the total market value of these assets after electric competition is implemented." *Id.* § 3(y).

142. The electric utility must have been subject to the jurisdiction of a state regulatory authority prior to the date of enactment of the act. *Id.* § 105(a)(1). The electric utility may apply to the state regulatory authority if the state has a retail competition program that does not permit full recovery of stranded costs or the utility's distribution customers would have access to retail competition as the result of section 101 of the act. *Id.* § 105(a)(1)-(2). Both electric utilities and non-regulated utilities would have a right to full recovery of retail stranded costs through a non-bypassable charge imposed on customers. *Id.* § 105(c)(1)-(2). Section 114 would provide for the recovery of reasonable nuclear decommissioning costs through a non-bypassable charge. *Id.* § 114.

143. S. 1526, 105th Cong. § 11(b) (1997).

144. *Id.*

145. Some proposals set forth general principles regarding the universal provision of service. H.R. 655 would enact a provision stating Congress' sense that (1) every electric energy consumer should have access to energy at reasonable and affordable rates; and (2) the Commission and the states "should ensure that competition in the electric energy business does not result in the loss of service to rural, residential, or low-income customers." Amendment to H.R. 655, § 119. Overall, the Bingaman Bill would support the principle of universal service; section 5 of the proposal mirrors the above-mentioned provision in the Amendment to H.R. 655. S. 1276, § 5. The Bingaman Bill also would direct that states requiring the unbundling of local distribution services consider developing means to provide universal service.

Some proposals would encourage states to develop their own universal service programs. Under the DeLay proposal, states have the authority to guarantee and establish local distribution access charges for the continuation of service to residential customers unable to afford such service. H.R. 1230, 105th Cong. § 4(b) (1997). States would be required to assign any retail customer who failed to select an energy service provider. *Id.* § 4(d). The proposals of Senator Thomas and

state regulatory authority determines a customer does not have reasonable access to competing retail suppliers, and the customer has not chosen an alternative supplier, every retail provider would be obligated to sell to, or purchase on behalf of, any consumer served by the retail provider.<sup>146</sup> The Bumpers Bill, S. 1401, would permit a state to develop a program to guarantee customers access to at least one supplier at a "just and reasonable rate."<sup>147</sup> Customers in states without retail choice who have not chosen a retail supplier would default to their existing supplier.<sup>148</sup> Furthermore, states would be empowered to create charges to fund the costs of universal service programs<sup>149</sup> and public benefits programs.<sup>150</sup>

Under the Markey Bill, the FERC would establish a federal-state joint board for the purpose of recommending uniform universal service support mechanisms.<sup>151</sup> The universal service principles, which should be considered by the joint board and states, include the following: (1) "[q]uality services should be available at just, reasonable, and affordable rates;" (2) all regions of the United States should have access to advanced electric services; (3) low-income customers, rural customers and those in high cost areas should have access to services that are "reasonably comparable" to services provided in urban areas; (4) "[a]ll providers of electric services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;" (5) sufficient mechanisms to advance universal service should exist; and (6) any additional principles deemed necessary to protect the public interest should be considered.<sup>152</sup>

Similar to the Markey Bill, the Administration's Bill would set up a joint federal-state board to oversee the funding of public purpose programs providing affordable electricity to low-income customers, implement conservation measures and develop generation technology. The board would establish a public benefits fund and determine which state programs warrant funding.<sup>153</sup>

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Representative Schaefer would allow states to decide whether to require electricity suppliers to assist in providing universal service. S. 722, 105th Cong. § 3(1997); H.R. 655, 105th Cong. § 111(b) (1997).

146. S. 237, 105th Cong. § 108(a) (1997).

147. S. 1401, 105th Cong. § 108(a) (1997).

148. *Id.* § 108(b)(1).

149. *Id.* § 108(b)-(c).

150. *Id.* § 109.

151. H.R. 1960, 105th Cong. § 127(a)(1) (1997).

152. *Id.* § 127(b)(1-6).

153. Programs would be funded through a mandatory public benefits charge imposed on every owner of an electric generating facility with capacity exceeding one megawatt. S. 2287, 105th Cong. § 301 (1997).

## VII. REPEAL OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (PUHCA)

### A. *Repeal of PUHCA and Replacement with the Public Utility Holding Company Act of 1998*

The Administration's Bill would repeal PUHCA and replace it with the "Public Utility Holding Company Act of 1998." These revisions to PUHCA closely resemble the proposal in the Amendment to H.R. 655,<sup>154</sup> and the proposals by Representative Tauzin<sup>155</sup> and Representative Stearns.<sup>156</sup> Under the new act, the Commission would have access to the books and records of every holding company, associate company, affiliate company and subsidiary company if "relevant to the costs incurred by a public utility or natural gas company" and "necessary or appropriate for the protection of utility customers with respect to jurisdictional rates."<sup>157</sup> Confidentiality requirements would be placed upon members, officers and employees of the Commission who examine the books and records.

State regulatory authorities with jurisdiction to regulate a public utility company in a holding company system also would have access to books and records; however, state commissions must make a written request for such documents. The records must be produced if: (1) they have been "identified in reasonable detail" in a state regulatory authority proceeding; (2) the state regulatory authority deems them relevant to costs incurred by the public utility company; and (3) the records are necessary

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154. Amendment to H.R., 105th Cong. 655 § 201 (1997).

155. Representative W.J. Tauzin's (R-LA) proposal, H.R. 3976, 105th Cong. (1988), The Public Utility Holding Company Act of 1998 would repeal PUHCA. However, it would provide federal and state access to the books and records of all companies in a holding company system. Under section 5, the Commission would have access to those books and records of each holding company, associate company, affiliate of a holding company or any subsidiary company that are (1) deemed "relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and (2) necessary or appropriate for the protection of utility customers with respect to jurisdictional rates." H.R. 3976, 105th Cong. § 5(a)-(b) (1998). The Commission also could examine the books and records of any company in a holding company system or any affiliate. *Id.* § 5(c). Any person that is a holding company only with respect to one or more of the following (1) qualifying facilities under PURPA; (2) exempt wholesale generators; or (3) foreign utility companies would be exempt from section 5. *Id.* § 7. Under section 14, all books and records primarily related to Commission functions would be transferred from the Securities and Exchange Commission (SEC) to the Commission. *Id.* § 14.

156. Rep. Stearns Draft, §§ 6-7. Section 7(d)(1) of the Stearns Draft would require every holding company and subsidiary company to make their books and records available to the Commission. *Id.* at § 7(d)(1). However, section 205(a) of the Amendment of H.R. 655, section 5(a) of the Tauzin Bill and section 401 of the Administration's Bill would require every holding company and associate company to make their books and records available to the Commission. Amendment to H.R. 655, 105th Cong. § 205(a) (1997); H.R. 3976, 105th Cong. § 5(a) (1998); S. 2287, 105th Cong. § 401 (1997).

157. S. 2287, 105th Cong. § 401(3)(a) (1997).

for the state commission to effectively carry out its responsibilities.<sup>158</sup> The Commission would be required to promulgate regulations to implement the Public Utility Holding Company Act of 1998 and submit recommendations to Congress on the conforming changes to federal law necessary to carry out the act.

### B. Repeal of PUHCA

Under several restructuring proposals, PUHCA would no longer apply to electric utilities or holding companies subject to retail competition.<sup>159</sup> Under the Bumpers Bill, PUHCA would be repealed one year after the date of enactment of the restructuring proposal.<sup>160</sup> Title II of the proposal would provide both the FERC and the states with access to the books and records of every holding company and associate company<sup>161</sup> as pertinent to the costs incurred by a public utility in the holding company system.<sup>162</sup> On the wholesale level, the Commission would have the authority to approve the recovery of the costs of goods and services that a

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158. S. 2287, 105th Cong. § 401(4)(a)(1) (1997). Any person that is a holding company solely with respect to one or more qualifying facilities under PURPA, exempt wholesale generators or foreign utility companies would be exempt from the section dealing with federal access to books and records.

159. Under H.R. 655, once each applicable state notifies the FERC and the SEC that the relevant retail customers of each company of the holding company providing retail distribution service are able to buy services at retail from any seller on a "competitively neutral and nondiscriminatory basis," PUHCA would no longer apply to a gas utility company or an electric utility company. H.R. 655, 105th Cong. § 201(b)(1). Under section 203 of the Schaefer Bill, the FERC could examine the books and records of any company in a holding company system or any affiliate as relevant to the costs incurred by the entity or for the protection of customers. H.R. 655, 105th Cong. § 203 (1997).

Under the DeLay Bill, PUHCA would no longer apply to electric utilities or to holding companies subject to retail competition. H.R. 1230, 105th Cong. § 5 (1997). Moreover, the Markey Bill would add a section to PUHCA entitled "Utilities with Certification of Competition." This section would provide that if an electric utility company and its affiliated electric utility companies receive the appropriate state certificates declaring compliance with the requirements of competition under PURPA, PUHCA would not apply to the particular holding company system. H.R. 1960, 105th Cong. § 101 (1997). The SEC would no longer have the authority to exempt from prior SEC approval the acquisition of an interest in an energy-related company by a registered holding company, or any subsidiary. *Id.* § 103. The SEC would not be permitted to approve registered holding company investments in foreign utility operations in excess of fifty percent of consolidated retained earnings without a certificate of competition. *Id.*

160. S. 1401, 105th Cong. § 201 (1997). S. 237 also would repeal PUHCA. Sections 204 and 205 of S. 237 would guarantee federal and state access to books and records of public utility holding companies and their associate companies. S. 237 defines an associate company as any company in the same holding company system with the subject company. S. 237, 105th Cong. § 202(9) (1997). Section 206 would authorize the FERC and state regulatory bodies to determine the recoverability of goods and services acquired by a public utility company from an associate company. The Commission (for wholesale rates) and state regulatory authorities (for retail rates) could examine the prudence of inter-affiliate power transactions among public utilities.

161. Associate company is defined as "any company in the same holding company system with such company." S. 1401, 105th Cong. § 3(d) (1997).

162. *Id.* §§ 203(a), 204(a). The Commission, by rule or order, could exempt any person or transaction from the requirements of Title II. *Id.* at § 202(b). Additionally, the Commission would be required to promulgate regulations to implement the title within six months after the date of enactment. *Id.* § 210.

public utility company acquires from an associate company.<sup>163</sup> State regulatory authorities would have the same authority with regard to retail rates.<sup>164</sup> The recovery of costs unrelated to the provision of electric service could not be recovered by a public utility which is an associated company of a holding company unless approved by the Commission (for wholesale rates) or a state regulatory authority (for retail rates).<sup>165</sup>

The Thomas Bill also would repeal PUHCA. However, it would provide the FERC and state regulatory authority access to the books and records of a holding company, associate company or affiliate company.<sup>166</sup> The FERC would be required to exempt any person or transaction from the record access requirements, if regulation of the person or transaction is irrelevant to the jurisdictional rates of a public utility.<sup>167</sup> The FERC and state regulatory authorities would retain the power to determine whether costs of affiliate transactions could be recovered in rates of a public utility.<sup>168</sup>

The DeLay-Markey Bill would amend PUHCA to establish a new category composed of exempt transmitting utilities, which would be defined as “any person determined by the Federal Energy Regulatory Commission to be engaged directly or indirectly through one or more affiliates as defined in section 2(a)(11)(B), and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible transmission facilities.”<sup>169</sup> Exempt transmitting utilities would be exempt from all provisions of PUHCA of 1935.<sup>170</sup>

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163. *Id.* § 205(a). The Commission and state regulatory authorities would determine the recoverability of costs associated with the activities of an associate company. *Id.* § 205(b).

164. S. 1401, 105th Cong. § 205(a) (1997).

165. *Id.* § 206.

166. S. 722, 105th Cong. § 7(d)-(e) (1997).

167. *Id.* § 7(f)(2).

168. Senator Alfonse M. D’Amato (R-NY) has proposed revisions to PUHCA similar to the provisions in the Thomas Bill. The purpose of Senator D’Amato’s proposal, S. 621, Public Utility Holding Company Act of 1997, is to eliminate “unnecessary regulation” and improve federal and state commission access to the books and records of all companies in a holding company system if relevant to the rates paid by utility customers. S. 621, 105th Cong. § 2(b)(1) (1997). Under this proposal, PUHCA would be repealed, effective eighteen months after the date of enactment of S. 621. *Id.* § 4. The FERC would have access to the books and records of holding companies and associate companies “as the Commission deems to be relevant to costs incurred . . . and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.” *Id.* § 5(a). Furthermore, subject to certain requirements, state commissions also would have access to these books and records. *Id.* § 6.

169. H.R. 4432, 105th Cong. § 401(a) (1998).

170. Senate Bill 2381, entitled the Transition to Competition in the Electric Industry Act, would prospectively repeal section 210 of PURPA, but not alter existing rights and remedies. Transition to Competition in the Electric Industry Act, S. 2381, 105th Cong. § 4(a)-(b) (1998). Electric utilities purchasing electricity or capacity under a “legally enforceable obligation” pursuant to section 210 of PURPA before the date of enactment of the act would not “be required directly or indirectly to absorb the costs associated with the purchases.” *Id.* § 5(a).

### VIII. REPEAL OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 (PURPA)

Numerous proposals would provide for the prospective repeal of section 210 of PURPA, the "must take" provision requiring electric utilities to offer to purchase electric energy from qualifying co-generation facilities and qualifying small power production facilities.<sup>171</sup> For instance, under the Johnston Bill, section 210 of PURPA would no longer apply to facilities beginning commercial operation after the effective date of the act. However, the section would continue to apply to facilities operating under a contract pursuant to section 210 on the effective date of the act.<sup>172</sup>

The Johnston Bill would prohibit the reopening or forced renegotiation of power purchase contracts or arrangements in effect on the effective date of the act.<sup>173</sup> Senator Thomas also proposes that electric utilities beginning operation after the date of enactment of the proposal would be exempt from PURPA requirements.<sup>174</sup> After enactment, an electric utility would not be required to enter into a new contract to purchase or sell energy under section 210 of PURPA. Under the Administration's Bill, the mandatory purchase requirement of PURPA would be repealed after the enactment of the Comprehensive Electricity Competition Act.<sup>175</sup> The Amendment to H.R. 655 and the Stearns Draft both would provide for the prospective repeal of section 210 of PURPA;<sup>176</sup>

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171. The Stearns Draft and Representative Gerald B. H. Solomon's (R-NY) proposal, H.R. 4183, are exclusively related to the repeal of PURPA. The Stearns Draft concludes that section 210 of PURPA would no longer be necessary due to the enactment of the Energy Policy Act of 1992 and the resultant "competitive wholesale electric marketplace." Ratepayer Protection Act, H.R. 338, 105th Cong. § 2 (1997). H.R. 338 would prospectively repeal PURPA so that after January 7, 1997, no electric utility would be required to enter into a new contract or commitment to buy or sell electric energy or capacity pursuant to section 210. *Id.* § 3. Section 4 would direct the FERC to promulgate and enforce regulations to guarantee that no utility would be required to absorb the costs associated with purchases made pursuant to an obligation entered into under section 210 prior to January 7, 1997. *Id.* § 4.

Representative Solomon's proposal would amend section 210 of PURPA so that each state regulatory authority would be empowered to guarantee that qualifying small power producers and qualifying co-generators charge rates that are: (1) just and reasonable; (2) in the public interest; and (3) capped at the incremental cost, at the time of delivery, of purchasing alternative energy and capacity. State Electric and Consumer Empowerment Act of 1998, H.R. 4183, 105th Cong. § 3. Section 3 of the proposal would permit states to develop monitoring programs to determine whether in-state facilities meet the FERC's standards for qualifying facilities. States also would be empowered to require contract amendments for any contract entered into before the date of enactment. *Id.* Furthermore, PURPA would be amended to ensure that purchasers of energy from qualifying facilities would recover all costs associated with their purchase. *Id.* § 4.

172. S. 1526, 105th Cong. § 3 (1997).

173. *Id.* § 3(d)(1).

174. S. 722, 105th Cong. § 7 (1997).

175. S. 2287, 105th Cong. § 304 (1997).

176. Amendment to H.R. 655, § 303(a); Rep. Stearns Draft, § 6(a)(1)-(2). Under the Schaefer Bill, once each applicable state notifies the FERC of its determination that the relevant retail customers of a particular utility are able to buy services at retail from any seller on a "nondiscriminatory and competitively neutral basis," PURPA's requirement that the electric utility offer to purchase from qualifying co-generation and small power production facilities at specified costs

however, existing rights and remedies related to the purchase or sale of electric energy or capacity would not be affected by this repeal. Moreover, the Commission must promulgate regulations to assure that electric utilities purchasing energy or capacity under a section 210 obligation would recover all costs associated with such purchases.<sup>177</sup> Similarly, under Senator James M. Jeffords' (R-VT) proposal, on January 1, 2000, section 210 of PURPA would be repealed with no impact on existing rights and remedies.<sup>178</sup> The Commission would retain authority to ensure the status of qualifying small power production facilities under section 210 and continue the exemption granted under that section.<sup>179</sup>

Under the Markey Bill, an electric utility with an effective certificate of competition from a state regulatory authority would be exempt from the requirement that electric utilities offer to purchase electric energy from qualifying co-generation and qualifying small power production facilities.<sup>180</sup> State regulatory authorities would be authorized to require the compliance of electric energy distributors and sellers with PURPA competition standards and requirements. The amendments to PURPA would set forth a voluntary program where states could choose to require sellers or distributors, subject to the jurisdiction of the state regulatory authority, to comply with "the standards and requirements of competition" under subtitle F of PURPA.<sup>181</sup> If a state elects to develop such a program and a seller or distributor complies with competition requirements, the state must issue a certificate of compliance.<sup>182</sup>

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would no longer apply. H.R. 655, 105th Cong. § 103 (1997). Thus, the Schaefer Bill would provide a prospective waiver of purchase requirements for utilities subject to retail competition.

The Bumpers Bill also would prospectively waive purchase requirements for utilities subject to retail competition. Section 210 of PURPA would not apply to generation facilities beginning operation after January 1, 2002, unless the facility had entered into a contract under section 210 as of the effective date of the Act. S. 1401, 105th Cong. § 302 (1997). Senator Bumpers' earlier proposal, S. 237, would render PURPA inapplicable to public utility facilities starting commercial operation after the enactment of the Act. Public utilities would not be required to purchase or sell electric energy pursuant to section 210 of PURPA after the effective date of the title or after the date on which retail electric competition is implemented in all of its service territories, whichever date is earlier. S. 237, 105th Cong. § 303 (1997).

177. Amendment to H.R. 655, 105th Cong. § 304 (1997); Rep. Stearns Draft § 6(b).

178. Electric System Public Benefits Protection Act of 1997, S. 687, 105th Cong. § 6(f)(1) (1997).

179. *Id.* § 6(f)(3).

180. H.R. 1960, 105th Cong. § 102 (1997).

181. *Id.*

182. The FERC would establish the criteria for issuance of a certificate of compliance. At a minimum, the person must meet: (1) the federal retail competition standard; (2) the public benefit certification requirements of section 152(b); and (3) other Commission-prescribed requirements consistent with the public interest. To satisfy the retail competition standard, a person selling or distributing electric energy must meet the following conditions: (1) all retail electric energy services must be sold and billed separately; (2) these sales must be open to competition; (3) the option to build, own or operate new generating capacity must be open to competition in the state in which the person sells or distributes energy; (4) no undue advantage over other competitors exists due to ownership of a monopoly franchise or status in a designated service territory; (5) the person has effective tariffs for transmission through local distribution facilities; and (6) such person allows "reasonable and nondiscriminatory access" to its local distribution facilities. *Id.* The public benefit certification

Both the DeLay and Markey Bills would tie the repeal of PURPA to the implementation of retail competition.<sup>183</sup> Under the DeLay Bill, PURPA would no longer apply to electric utilities “if each State in which such utility is providing electric services: (1) determines that the retail customers served by such utility have the ability to purchase electric energy services in accordance with the provisions of section 3 of this Act; and (2) notifies the Commission [and the Securities and Exchange Commission] of such determination.”<sup>184</sup> The Bingaman Bill does not contain a provision on PURPA repeal, but would protect the recovery of costs under outstanding PURPA contracts.<sup>185</sup>

## IX. PROPOSALS FOR EXPANDING THE USE OF RENEWABLE ENERGY

### A. *Proposals Directing the Commission to Establish a Renewable Energy Trading Program*

Several proposals specifically would direct the Commission to establish and oversee a program for the trading of renewable energy credits. The Bumpers Bill would require every retail supplier to submit renewable energy credits to the Commission equal to a percentage of the total energy sold in a year.<sup>186</sup> The FERC would: (1) establish a “National Renewable Energy Trading Program;” (2) issue credits; (3) collect a fee for administrative costs; (4) promulgate rules or regulations regarding the submission of information to confirm the amount of renewable energy generation; and (5) issue annual reports on the program.<sup>187</sup> A schedule of the required annual percentages provided in section 110, would permit the sale or exchange of credits “by the person issued or the person who

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requirement is met if: (1) all of the suppliers of energy services “have both the incentive and opportunity to provide energy efficiency and renewable energy resources;” (2) non-bypassable charges on the use and access to electric energy services and facilities have been imposed by the state; (3) each customer class must pay its share of any state imposed stranded costs; (4) recovery of stranded costs is not contingent on continued operation of generating assets; (5) reliability protections are in place; (6) customers have the opportunity to aggregate their purchases; and (7) net metering for renewable energy must take place. *Id.* Furthermore, section 124 would amend PURPA to encourage certain generation technologies by permitting a state regulatory authority to set incremental costs “at levels which reflect avoided environmental costs that are not included in market rates.” *Id.* § 124.

183. *See also supra* note 160.

184. H.R. 1230, 105th Cong. § 7(b)(1)-(2) (1997).

185. S. 1276, 105th Cong. § 10 (1997).

186. Section 110 of S. 237 sets forth a framework for retail suppliers to comply with renewable energy credit requirements. As of January 1, 2004, every retail supplier would be required to submit renewable energy credits to the Commission equal to the required annual percentage of the total energy sold by the supplier in the preceding calendar year. Renewable energy credits are defined as “a tradable certificate of proof that one unit (as determined by the Commission) of renewable energy was generated by any person.” S. 237, 105th Cong. § 101(12) (1997). The required annual percentage for 2004 would be five percent. Thereafter, the percentage would be nine percent beginning in 2008 and twelve percent beginning in 2013. *Id.* § 110(c).

187. S. 1401, 105th Cong. § 110 (1997).



acquires the credit.”<sup>188</sup> The renewable energy requirements would not apply after December 31, 2019.<sup>189</sup>

The renewable energy provisions under the Amendment to H.R. 655 are similar to the provisions of the Bumpers Bill. Both bills would direct the FERC to establish a program to issue renewable energy credits and require each electric generator selling electric energy to submit credits equal to the required annual percentage of the total electric energy generated in the preceding calendar year.<sup>190</sup> Under the Amendment to H.R. 655, the renewable energy program would not apply any earlier than: (1) December 31, 2015; or (2) after Commission certification that the market value of credits or the number traded is so minimal as to render the Commission’s expenditures on such a program unnecessary.

The Jeffords Bill would set forth a renewable energy program for each covered generation facility, defined as “a non-hydroelectric facility that generates electric energy for sale.”<sup>191</sup> The Commission would be responsible for developing standards and procedures for the issuance, sale or transfer, and submission of renewable energy credits. Under this program, a covered generation facility must certify the amount of electricity generated by a renewable resource and the amount generated by a source other than a renewable source.<sup>192</sup>

### *B. Proposals Directing the Secretary of Energy to Establish a Renewable Energy Trading Program*

Under the Markey Bill, every generator and seller would be required to “submit to the Secretary of Energy renewable energy credits . . . in an amount equal to a specified percentage of its total . . . sales in the preceding calendar year.”<sup>193</sup> The Secretary of Energy would develop a

188. *Id.* § 110(f).

189. *Id.* § 110(j).

190. Amendment to H.R. 655, 105th Cong. § 101 (1997). For both proposals, the required annual percentage for 2001-2004 would be two percent. For 2005, the minimum percentage would be three percent and for 2010, the minimum percentage would be four percent. *Id.* § 492(b). The Amendment to H.R. 655 defines renewable energy as “electricity generated from organic waste, biomass, dedicated energy crops, landfill gas, geothermal, solar, tidal or wind resources.” *Id.*

191. S. 687, 105th Cong. § 6(a) (1997).

192. *Id.* § 6(c)(1). Senator Jeffords’ proposal also establishes a “cap and trade” program for nitrogen oxide, sulfur dioxide, carbon dioxide and mercury. *Id.* § 7. Representative Frank Pallone’s (D-NJ) proposal to amend part III of the FPA focuses on establishing an allowance program to control air pollutants emitted from electric generating units. H.R. 2909, 105th Cong. (1997). The proposal would direct the Commission to develop programs to: (1) impose generation performance standards and tonnage caps; (2) provide for the allocation and trading of allowances; and (3) estimate the total electric generation by generating units in applicable regions. *Id.*

193. H.R. 1960, 105th Cong. § 126(a) (1997). The Jeffords Bill directs the Secretary of Energy to establish a National Electric System Public Benefits Board (Board) composed of representatives from the Commission, state regulatory agencies, state utility consumer advocates, state energy offices, energy assistance directors and the Environmental Protection Agency (EPA). S. 687, 105th Cong. § 4(b) (1997). A national charge imposed on “the operator of the wire on electricity carried through the wire” would be paid directly into the National Electric System Public Benefits Fund (Fund). *Id.* § 5(c)(2). The Commission could impose a civil penalty against a wire operator that fails to pay a wires

program for the issuance and trading of renewable energy credits and the collection of administrative fees.<sup>194</sup> The FERC would have the authority to establish safety and power quality standards for the net metering<sup>195</sup> of renewable energy under PURPA.<sup>196</sup>

The Administration's Bill would add a new section to PURPA requiring retail electric suppliers to submit to the Secretary of Energy renewable energy credits equal to a required percentage of their total sales. Both the Administration's Bill and the Markey Bill would direct the Secretary to establish a program for the issuance and tracking of credits, as well as for the monitoring of the sale or exchange of credits.<sup>197</sup> In addition to the federal program, states could elect to require renewable energy generation.

Under the Administration's Bill, every retail electric supplier would be required to make net metering available to any retail electric customer. In addition, every distribution utility would be required to permit interconnection of an eligible on-site generating facility<sup>198</sup> to its distribution facilities, if the facility meets certain safety standards established by the Commission. Net metering would permit an electric consumer to receive a credit for electricity generated from an eligible on-site generating facility against the total electricity provided to the retail customer from its retail supplier.

### *C. Proposals Specifically Allowing States to Decide Whether to Establish a Renewable Energy Trading Program*

A few proposals would permit states to determine whether to implement a renewable energy program. Under the Johnston Bill, states would not be prevented from promoting the production of renewable energy or the voluntary purchase of such energy.<sup>199</sup> The DeLay Bill does not contain a federal requirement related to renewable energy; however, states would have authority over customer choice for renewable energy

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charge. *Id.* § 5(c)(4).

The Fund would be used by the Board to provide matching funds to states in support of programs related to renewable energy, universal electric service, affordable electric service, energy conservation, and research and development programs. *Id.* § 5(b)(1)(A)-(E). The Board would suggest eligibility criteria for public benefits programs and direct the manager of the Fund to distribute all funds except for those funds necessary to cover operating costs. *Id.* § 5(b)(2)(A).

194. H.R. 1960, 105th Cong. § 126(c)-(d) (1997).

195. The consumer who owns and uses an eligible on-site generating facility would be billed only for the net electricity consumed during the Billing period.

196. *Id.* § 103. Additionally, section 125 would amend the Fair Packaging and Labeling Act to require the disclosure of generation source information and emissions data to electric consumers. *Id.* § 125.

197. S. 2287, 105th Cong. § 302 (1997).

198. An eligible on-site generating facility is defined as "a facility on the site of an electric consumer with a peak generating capacity of 20 kilowatts or less that is fueled solely by a renewable energy source." *Id.* § 303.

199. S. 1526, 105th Cong. § 10 (1997).

options.<sup>200</sup> Additionally, the Thomas Bill would permit each individual state to determine the use of renewable energy.<sup>201</sup>

#### X. PROPOSALS PROMOTING COMPETITION FOR FEDERAL POWER MARKETING ADMINISTRATIONS (PMAS)

Since federal power marketed by PMAs is sold at cost to preference customers, such customers will receive a substantial competitive advantage from these purchases in a deregulated world. Therefore, some proposals would require federal power marketed by PMAs to be sold competitively on the open market.<sup>202</sup>

The Bumpers Bill would permit wholesale and retail suppliers to sell energy to persons currently purchasing energy from the TVA.<sup>203</sup> In turn, TVA, would be allowed to sell wholesale energy to any person, subject to restrictions in section 104(a) of the proposal.<sup>204</sup> The Bill also contains provisions that would allow entities to terminate contracts with TVA upon one year's notice.<sup>205</sup>

The Amendment to H.R. 655 would also introduce competition to the TVA. The proposal would permit the TVA to sell power at market-based rates outside of its traditional service area. The transmission systems of federal PMAs would be subject to Commission jurisdiction under parts II and III of the FPA (except sections 204, 207, 209, 214, and 305).<sup>206</sup> Although the federal PMAs would still be restricted to selling power at cost, the Commission could change a PMA's proposed rates and "establish terms and conditions that are necessary and appropriate."<sup>207</sup> In addition, sections 212(f) and 212(j) of the FPA would be repealed to permit

200. H.R. 1230, 105th Cong. § 4(f)(3) (1997).

201. S. 722, 105th Cong. § 3 (1997).

202. *But see* H.R. 655, 105th Cong. § 104(d) (1997) (prohibiting any purchaser under a long-term firm contract with any federal PMA from reselling energy purchased under the contract "to any other person not directly served by retail distribution facilities owned or operated by such person").

203. S. 1401, 105th Cong. § 601 (1997). Section 503 of the Bumpers Bill also would subject the BPA to the Commission's rules on nondiscriminatory, open access transmission and its rules on standards of conduct. *Id.* § 503. The BPA may participate in a Commission regulated ISO, but, except as permitted in section 5(c) of the Northwest Power Act (16 U.S.C. § 839(c), (d) (1994)), must "not market, sell or dispose of electric power to any end user or retail customers that did not have a contract for the purchase of electric power with the Administrator for services to specific facilities as of October 1, 1997." *Id.* § 507.

Section 504 of the Bumpers Bill would allow the BPA to recover transition costs resulting from the act, the Energy Policy Act or Order No. 888; any proposal for a charge to recover transition costs must be "developed and adopted by the Commission within 180 days of the filing." *Id.* § 504. S. 237 would grant all retail and wholesale suppliers the right to sell to customers of the TVA. S. 237, 105th Cong. § 115 (1997). This article analyzes proposals related to federal PMAs, the TVA and the BPA only when in the context of a broader restructuring proposal, any additional proposals are not included.

204. *Id.* § 602.

205. *Id.* § 603.

206. Amendment to H.R. 655, 105th Cong. § 433 (1997).

207. *Id.* § 432(a)(2).

wholesale competition in the Tennessee Valley region.<sup>208</sup> The TVA would be barred from making retail sales to end users or retail customers that did not have a purchase contract with the TVA on the date of enactment of the Act.<sup>209</sup> The proposal would subject (1) wholesale sales of electric energy by the TVA for use outside of the TVA region, and (2) the transmission and local distribution of electric energy by TVA to Commission jurisdiction under parts II and III of the FPA (except sections 204, 207, 209, 214, and 305).<sup>210</sup> Furthermore, the Commission would be required to promulgate regulations for the recovery of stranded costs by the TVA.<sup>211</sup>

The Markey Bill would establish a federal comparability requirement making it unlawful for the TVA or any federal power marketing administration to provide retail service to any person outside the designated power marketing area (or for the TVA, the area mentioned in section 15d(a) of the Tennessee Valley Authority Act of 1933) unless such service is available "on a competitive basis to all retail electric energy customers within such area."<sup>212</sup> This requirement would not apply to sales to persons receiving retail service from the TVA or a federal power marketing administration before the enactment of the Act.<sup>213</sup> The Commission's rules adopted under section 201, 205 or 206 of the FPA applicable to wholesale or retail open access transmission services, would apply to any federal power marketing administration. However, the Commission may exempt the application of such rules if such action is in the public interest.<sup>214</sup>

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208. *Id.* § 402(a).

209. *Id.* § 403.

210. *Id.* §§ 403(c), 406(a).

211. *Id.* § 408.

212. H.R. 1960, 105th Cong. § 102 (1997).

213. *Id.*

214. *Id.* § 122.

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