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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE OHIO

In The Matter of The Application,)
Testimony, Part A, unbundling plan,)
Parts B through Part H, and Part F,)
Supplemental information of Ohio)
Power Company for approval of electric)
Transition plan and application for)
Receipt of transition revenues)

PUCO

Case No. 99-1730-EL-ETP

**MOTION OF NATIONAL ENERGY MARKETERS ASSOCIATION
FOR LEAVE TO INTERVENE**

This Motion for Leave to Intervene is filed by National Energy Marketers Association (NEM) pursuant to the Ohio Public Utilities Commission's (Commission) Rules and Regulations Section 4901-1-11. NEM requests that this Motion be granted for the reasons set forth in the attached memorandum.

Respectfully Submitted,

Craig G. Goodman Intr

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Dated: January 10, 2000.

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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF THE OHIO**

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PUCO

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Power Company for approval of electric)	
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**MEMORANDUM IN SUPPORT OF
MOTION OF NATIONAL ENERGY MARKETERS ASSOCIATION
FOR LEAVE TO INTERVENE**

In support of its Motion to Intervene, the National Energy Marketers Association (NEM) files this Memorandum pursuant to the Ohio Public Utilities Commission's (Commission) Rules and Regulations Section 4901-01-11. NEM requests that the Motion be granted for the reasons set forth below:

I.

Communications and correspondence concerning this Motion should be directed to the following:

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II.

NEM is a national, non-profit trade association representing producers, generators, transporters, and marketers of energy and energy-related services and technologies throughout the United States. NEM's membership includes: small regional marketers; large international wholesale and retail energy suppliers; energy consumers; energy-related software, equipment, machinery, tools, efficiency services, and information technology providers; and energy-related products, services, information and technology marketers, including affiliated and unaffiliated companies.

III.

In accordance with Amended Substitute Senate Bill 3, on January 1, 2001, customer choice will be implemented for all electric consumers in Ohio. As part of implementing customer choice, the electric utilities were required to file transition plans no later than early January 2000. The Commission issued its final transition plan rules on November 30, 1999. On December 30, 1999, Ohio Power Company (Ohio Power) filed its transition plan in the above-reference proceeding.

IV.

NEM, as a representative of a diverse group of providers of energy and energy-related services, has an interest to advocate the implementation of rates, tariffs, operating procedures, standards of conduct, rules, and policies that will ensure the development and maintenance of an efficient and reliable competitive electricity market on the systems of the Ohio Power Company (Ohio Power) and in Ohio generally. As electricity marketers and providers of energy-related services and technologies, various NEM members intend to serve customers in the Ohio electricity market, including the

residential, commercial, and industrial customer segments in all of the utilities' service territories. The ability of NEM's members to fairly compete in the restructured electricity industry and thus bring the benefits of additional competition to Ohio electricity consumers will be subsequently and specifically affected by the outcome of this proceeding.

The National Energy Marketers Association, as a national trade organization, will be able to bring a wide range of experiences, as well as a broad perspective, to the deliberative process, and its participation in this proceeding will aid the Commission by enhancing the quality of the record to be developed here. NEM can lend a unique perspective to this proceeding because its membership represents a diverse cross-section of market participants.

NEM's issue development team includes not only energy information, billing and metering technology firms, but also a regionally-diverse cross-section of small regional marketers, large international energy suppliers, wholesalers, retailers, and both affiliated and unaffiliated marketers of electricity and natural gas. NEM recently has developed National Guidelines for Restructuring the Electric Generation, Transmission and Distribution Industries. NEM also recently developed a National Uniform Code of Conduct (NUCC) to govern transactions between utilities and both affiliated and non-affiliated entities (both documents are attached and incorporated herein).

Even if other trade associations or individual marketers seek to intervene in this matter, NEM's interests and position are significant and unique given its industry diversity, its interest in serving Ohio's commercial, industrial, and residential customers, its current and past participation in restructuring in multiple jurisdictions on

similar issues, and the substantial business interests of its members in the development of a viable electric market in Ohio. NEM's participation in these proceedings will not cause undue delay, will not unjustly prejudice any existing party, and will contribute to the just and quick resolution of the issues and concerns raised in these proceedings.

As such, the interests of NEM and its members in this proceeding cannot be adequately represented or protected by any other party hereto. Under all these circumstances, then, NEM submits that good cause exists to grant it leave to intervene in this proceeding.

V.

WHEREFORE, for the reasons explained above, NEM respectfully requests that the Commission permit it to intervene in the above-captioned proceedings and be made a party for all purposes.

Respectfully Submitted,

Craig G. Goodman /MTR

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Counsel for
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Dated: January 10, 2000.

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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF THE STATE OF OHIO**

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**MOTION FOR ADMISSION
PRO HAC VICE**

I, Steven M. Sherman, an attorney in good standing of the State of Ohio and authorized to practice in this state hereby move pursuant to the Ohio Public Utilities Commission's (Commission) Rules and Regulations Section 4901-1-08 to permit the appearance of Craig G. Goodman, member of the bars of the states of Florida, Texas, and the District of Columbia and President and Counsel for The National Energy Marketers Association, to appear *pro hac vice* in the above-captioned matters.

I hereby certify that copies of this motion have been served upon all parties in the above-captioned matters.

Steven M. Sherman

Steven M. Sherman
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Dated: January 10, 2000.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Motion to Intervene and Memorandum in Support via first class mail, postage prepaid, upon each person listed below.

Washington, D.C.: Dated January 10, 2000.

Craig Goodman /MTR

Craig Goodman

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**UNIFORM CODE OF
CONDUCT
FOR
REGULATED AND UNREGULATED
SUPPLIERS OF ENERGY AND
RELATED SERVICES AND
TECHNOLOGIES**



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This document reflects the views of the National Energy Marketers Association and does not necessarily reflect the views of any specific member of the Association.

I

Introduction

The National Energy Marketers Association (NEMA) is a national, non-profit trade association representing a regionally diverse cross-section of both wholesale and retail marketers of natural gas and electricity. NEMA also represents producers, generators, transporters, and marketers of energy-related information, services and technology throughout the United States.

NEMA is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement restructuring of natural gas and electricity markets. NEMA and its members appear before state Public Utility Commissions, the Federal Energy Regulatory Commission and legislative bodies throughout the nation. NEMA members urge lawmakers and regulators to implement:

- Laws and regulations that open markets for natural gas and electricity;
- Rates, tariffs and operating procedures that lower the cost of energy;
- Standards of conduct that protect consumers;
- Rules to permit competition on the basis of price and quality of service; and
- Policies that encourage new technologies, including the integration of energy, telecommunications and Internet services.

II

Background

Decades-old regulations governing the supply, generation, transmission, storage, distribution, marketing, and delivery of energy are being rethought and rewritten, nation-wide. After years of experience in numerous industries, lawmakers, policymakers, and regulators throughout the country are increasingly coming to recognize that true price competition and meaningful customer choice provide greater public benefits than traditional utility-style regulation.

This document sets forth NEMA's recommendations for a set of principles to ensure competitive neutrality between utilities, affiliates and non-affiliated energy providers. These guidelines include recommendations for a Uniform Code of Conduct that should govern commercial transactions between regulated and unregulated energy service providers as well as recommendations for specific functions, products and services that should be competitively priced by unregulated companies. Recommendations for national

guidelines for unbundling the natural gas and electric transmission and distribution functions will be set forth in separate documents.

All Classes of Customers Should Have Meaningful Choices Among Competitive Suppliers at the Earliest Possible Date

The right to switch suppliers is the ultimate consumer protection. Choice must exist in order to serve the public interest and it should not be complicated or expensive. A true measure of a competitive market is the number of customers that have choice. A true measure of the quality of choice is the number of customers that, in fact, exercise choice. NEMA urges that all customers be given meaningful choice at the earliest possible date.

Competitively Priced Energy Products and Services Should be Offered Separately from Regulated Utility Services

Competitively priced energy and related services can serve the public interest, save consumers, governments and taxpayers billion of dollars and can continue significant efficiency, innovation and productivity gains, nationwide. However, to bring the benefits of competition to the American public, historically regulated utility services should be offered separately ("unbundled") from products and services that may be offered by competitive suppliers and subjected to the rigors of the marketplace.

It is generally acknowledged that utilities should continue to provide certain services and perform certain functions that are truly "natural monopoly" functions. For now, "natural monopoly" functions and services include long-distance transmission and local distribution of natural gas and electricity. Specifically, regulations should continue to ensure the maintenance, scheduling and reliable operation of the pipes and wires needed to deliver natural gas and electricity through interstate commerce into a local franchise territory to end users. However, there are numerous, services and functions which can be offered separately from regulated utility services and priced competitively by non-regulated energy suppliers.

It is imperative to establish rules that fairly allocate, value and competitively price utility services that are needed to support robust, competitive markets in energy and related services. Additionally, a competitively neutral code of conduct to govern commerce between the regulated and unregulated providers of energy services is crucial. Competitive advantages must be a matter for the marketplace to determine.

To the extent that the following functions, products and services are currently offered by utilities, the National Energy Marketers Association urges legislators and regulators to pass and implement rules to require that they be separately priced and offered on a non-discriminatory basis. Unregulated energy service providers should be authorized to offer these same services on a competitive basis. At a minimum, these functions, products and services are:

Natural Gas Services That Can be Opened to Competition

- Supplying natural gas,
- Providing customer billing and metering,
- Providing upstream natural gas transportation capacity consistent with existing law,
- Providing natural gas storage services,
- Providing natural gas balancing services, and
- Providing natural gas peaking services.

Electric Services That Can be Opened to Competition

- Supplying electric generation,
- Providing customer billing and metering,
- Energy imbalance services,
- Demand side management and efficiency services, and
- Providing ancillary services such as operating reserve: spinning reserve service, operating reserve: supplemental reserve service, reactive supply and voltage control from generating sources, regulation and frequency response services, load following, backup supply services, real power loss services, restoration services, and system black start capability.

III

Principles That Should Govern Transactions Between Regulated and Unregulated Energy Service Providers

A. Codes of conduct should incorporate state privacy and consumer protection laws.

In the marketplace, there are numerous laws and regulations that are designed to protect consumers from invasion of privacy, fraud and all manner of improper commercial practices. These laws provide reasonable protection. Wherever and whenever applicable, these laws should act as valuable complements to NEMA's recommended standards for industry

conduct and its recommended guidelines for commerce between regulated and unregulated energy providers.

Reference to the Uniform Commercial Code (UCC), state privacy laws and local laws against unfair trade practices imbues the marketplace with meaningful and enforceable guidelines to implement the final unbundling of the natural gas industry and the regulatory and corporate restructuring of the electricity industry. Incorporating these laws and years of court cases interpreting these laws protects all purchasers of energy without imposing new and costly regulations, licensing requirements, paperwork and administrative burdens. In addition, the National Energy Marketers Association strongly endorses standards of conduct and self-policing rules to protect our customers against unwanted sales tactics.

B. As regulated utilities fully unbundle functions, products and services, they should be relieved of the associated "obligation to serve."

Historically, regulated utilities have offered a "bundle" of energy related services. However, after years of experience, it has become clear that alternative suppliers can offer many of the services traditionally offered by regulated utilities on a competitive basis. This includes the responsibility to be the energy supplier of last resort. When regulated utilities fully unbundle energy supply and service functions, the provider-of-last-resort functions can be provided by qualified suppliers and the obligation to serve can be modified into an obligation to deliver.

C. Choice must exist in order to serve the public interest and it should not be complicated or expensive.

All consumers should have a right to choose, and regulators should encourage choice. Excessive, non-cost based fees, filing requirements, complicated forms, processes, formal contracts with signatures and multiple monthly bills, effectively inhibit competition and the ability of customers to choose alternative energy suppliers. The National Energy Marketers Association urges establishment of alternative methods of protecting customers from slamming and other improper business practices. NEMA supports rules, rates, tariffs and operating procedures that provide the maximum ease, flexibility and a minimum of paperwork, licensing and administrative burdens in permitting customers to switch energy suppliers. Indeed, the ability for a customer to quickly and painlessly choose an alternate supplier is the ultimate consumer protection and the maximum assurance of quality control.

D. No functions, products or services shall be subsidized by regulated rates. All regulated utility services must be offered on a non-discriminatory and comparable basis.

It is vital to protect a competitive market from the leverage of a utility's control over regulated transmission and distribution facilities.

Historically, regulated utilities have been given few if any incentives to provide truly competitive energy services. Regulations based on performance may sufficiently ameliorate this problem. The nature of cost-of-service ratemaking generally and after-the fact commodity-cost adjustments, in particular, are not suited to markets that can otherwise be competitive. Competitors take market and price risks that may not be compensated by the marketplace. Historically, regulators mitigate or eliminate risks for regulated utilities by guaranteeing returns on all "prudently incurred" costs and investments. In competitive markets, there are no such guarantees.

Given the many decades during which regulated utilities have been the only provider of energy services, it is important that consumers understand both the existence and implications of the new choices available to them. For these reasons, many states are formulating affiliate guidelines and codes of conduct to govern the relationship between regulated and unregulated energy providers. Set forth below are principles that are incorporated into NEMA's recommended Uniform Code of Conduct to govern commerce between utilities and affiliated and non affiliated energy providers.

1. **Subsidies of non-regulated activities by regulated entities should be prohibited.** No costs or overhead related to competitive, non-regulated activities should be included in the rates of regulated utility services.
2. **Regulated utility services must not preferentially be tied to products or services provided by non-regulated market participants (affiliated or nonaffiliated).** A regulated utility should not represent to any customer that it might receive preferential treatment concerning regulated services if it deals with a specific unregulated market participant (affiliated or non-affiliated).
3. **All tariff provisions must be applied in an equal, non-discriminatory manner to all market participants (affiliated and non-affiliated).** Tariff and rate designs should ensure that every term and condition of service offered by a regulated utility is offered at comparable prices and on comparable terms and conditions to all competing companies. Offers of rebates, discounts, waivers of contracts, fees or tariff provisions by regulated utilities must be applied in an equal, non discriminatory manner to all market participants. Where application of a tariff is discretionary, any exercise of such discretion must be documented.
4. **Information that is available should be available and disseminated on a non-discriminatory, competitively neutral basis.** NEMA urges all jurisdictions

to require that customer energy usage and billing data be provided at a reasonable fee, in a timely manner, without preference to all competitors. Specific customer information requested by one non-regulated party must be confidential to all other parties unless similarly requested by such parties. Utilities should keep written records of such information requests and stand ready to demonstrate that information requested by one competitor has not been shared improperly with other competing suppliers.

5. **Communications within an exclusive franchise territory by a regulated utility should be competitively neutral.** A regulated utility should not speak or appear to speak on behalf of any non-regulated entity (affiliated or non-affiliated). A regulated utility should not supply leads or assign customers to non-regulated market participants unless it is in a competitively neutral fashion.
 - **Regulated utilities should not provide advice on picking alternate suppliers, or provide qualitative information on suppliers.** The state public service commission should maintain a list of qualified providers. Customers should be advised of the availability of such lists from their utility or Public Service Commission.
 - **Marketing activities of non-regulated entities must not be subsidized by regulated rates.**
6. **If regulators permit regulated utilities to engage in unregulated activities (either through affiliated or non-affiliated entities) a number of safeguards must be implemented to protect against disclosure of proprietary or competitive information.** Firewalls and separation of functions, information, operations and personnel must be effective and enforceable. Enforceable standards of conduct must ensure that proprietary and confidential competitor information is scrupulously safeguarded. Ironclad operational firewalls must be erected, and a complete separation of functions and operations must occur. Under no circumstances may the supplies of natural gas or electricity of an unregulated entity be subsidized by regulated rates.
7. **Under no circumstances may a regulated entity sell, release or otherwise transfer assets, services or commodities that have been included in regulated rates at less than market value.**
8. **Under no circumstances, may a regulated company directly or indirectly subsidize the costs associated with employees, officers or in-house services, or expenses associated with these employees that are shared with affiliated, non-regulated entities.**

Uniform Code of Conduct for Regulated and Unregulated Suppliers of Energy and Related Services and Technologies

1. Cross subsidies between a utility and its marketing affiliates are prohibited. A utility's operating employees and those of its unregulated affiliates shall function independently of each other.
2. Under no circumstances may a regulated entity sell, release or otherwise transfer assets, services or commodities, that have been included in regulated rates, at less than market value.
3. A utility shall not preferentially disclose, condition, withhold or tie any agreement for the release, use or transfer of interstate pipeline or electric transmission capacity or related assets or services to, or on behalf of, any non-regulated market participants (affiliated or nonaffiliated).
4. Under no circumstances may the supplies of natural gas or electricity of an unregulated entity be subsidized by regulated rates.
5. Offers of rebates, discounts, waivers of contracts or fees in connection with tariff provisions of regulated utilities should be made by utilities in an equal, non-discriminatory manner to all market participants (affiliated and non-affiliated). Any discount, rebate or fee waiver of utility service offered by a utility directly or indirectly to its unregulated affiliate or to a customer of its unregulated affiliate, including but not limited to transportation, transmission, generation, dispatch, redispatch, wheeling, balancing, meters, meter installation, storage, or standby or interruptible services or any other tariffed service offered to shippers, shall be simultaneously offered on a non-discriminatory basis to all non-affiliated marketers, suppliers and customers. All such offerings should be made available upon request.ⁱ
6. In the event, market information acquired through the provision of tariffed service related to on-system retail markets is made available by a utility to on system suppliers, it will at the same time be made available to all competing suppliers, under the same terms and conditions. Such information should be available on-line.
7. A utility shall not speak on behalf of its unregulated affiliate or give the appearance that it is speaking on behalf of its unregulated affiliate.
8. A utility and its unregulated affiliate shall not trade upon, promote, or suggest to any customer, supplier or third-party that they may receive preferential treatment as a result of the affiliation. Utilities may not provide negative information about affiliated or non-affiliated competitors.
9. Marketing activities of non-regulated entities must not be subsidized by regulated rates.
10. Books and records of the utility shall be available, for good cause shown that these Guidelines have been violated, for review and audit by a Commission on a confidential basis.
11. Each utility will establish enforceable complaint procedures to detect alleged abuse of the relationship with its unregulated affiliates and made available to all that allege violations of these Guidelines. Resort to these procedures should be voluntary on the part of complainants and shall not preclude the filing of complaints directly with the jurisdictional regulatory commission.
12. A utility may contract with its unregulated affiliates only if the services to be provided under the terms of that contract are consistent with the public interest.ⁱⁱ
13. Procedures for implementing compliance with these rules must be neutral and swift, and the penalties for non compliance should adequately discourage repeated violations.
14. Nothing in these Guidelines shall be construed to modify, impair, or supersede federal, state or local laws, rules or regulations.

ⁱ Personnel of a utility's unregulated affiliate shall not be involved in the utility's regulated management decisions concerning the day-to-day operation of its transmission, generation and/or distribution systems (including but not limited to, decisions relating to available capacity, nomination, dispatch, redispatch, curtailment and declaration of system emergencies or critical periods).

ⁱⁱ A utility must apply all rates and tariff provisions on a nondiscriminatory basis to all marketers, shippers, and customers including all customers served under the same or comparable tariff services or non-tariff offerings. Further, a utility may not, through a tariff provision or otherwise, give its unregulated affiliate or customers of such affiliate preferences (or "last-looks" and rights-to-match) over non-affiliated suppliers or customers with respect to transmission or distribution services, including but not limited to service priorities, scheduling, capacity reservations, processing of requests for service, balancing, metering, storage, standby service or curtailment policies.

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**NATIONAL GUIDELINES
FOR
RESTRUCTURING
THE
ELECTRIC GENERATION,
TRANSMISSION AND DISTRIBUTION
INDUSTRIES**



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Executive Summary

Since the invention of the light bulb in 1882, the US electricity industry has grown into one of the largest, most important industries in the world. As a result of spectacular growth in both the demand for electricity as well as the technology to generate and deliver it, the period between 1880 and 1970 was characterized by ever expanding generation capacity and declining average costs. By 1950, virtually every American household had electrical service. These factors were the underpinning of the regulatory compact upon which cost-of-service based regulations were implemented throughout the United States.

Beginning with the oil price shocks in the 1970s, however, the economics of the US electric industry started to change radically. The cost of electric generating capacity skyrocketed from an average of \$161/kW in 1970 to a high of \$5,810 by the early 1980s. Many of the economic assumptions upon which electricity regulations were based became obsolete. Economies of scale disappeared at the same time lower-cost providers emerged. As a result, the historic regulation of electric utilities ceased to protect consumers from monopoly pricing and, instead, ironically, started to protect monopolies from competitive pricing.

These circumstances have created the impetus for revolutionary changes in the laws and regulations governing how electricity is generated and delivered. Bold leadership at both the state and federal levels has set the stage for one of the largest industrial restructurings in the history of the United States.

The National Energy Marketers Association (NEMA) was created specifically to work with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement restructuring of both the natural gas and electricity markets. NEMA is committed to the implementation of laws, regulations, standards of conduct, rates, tariffs and operating procedures that (a) provide all customers meaningful choice, (b) implement open, efficient, liquid and price-competitive energy markets, and (c) that encourage the development of new and innovative energy services and technologies, at the earliest possible date. This document sets forth the legislative and regulatory framework necessary to implement these goals at both the federal and state levels within two years.

In summary, the federal government has significant constitutional, national security and budgetary interests in restructuring the US electricity industry. To further these interests, Congress should resolve outstanding jurisdictional issues and require FERC to promulgate uniform, non-discriminatory, open access transmission tariffs, clarify current tax laws to expand existing stranded cost recoveries and mandate a date certain by which the states must complete the transition to a competitive energy market.

In turn, FERC should expand and clarify Orders 888 and 889. FERC should require that all jurisdictional transmission services be unbundled and that all service providers reserve, purchase, schedule and curtail transmission services under the same uniform, non-discriminatory, open-access transmission tariff and mandate compliance with and strictly enforce Order 889. Additionally, FERC should make transmission services sufficiently uniform to be transferable and tradable, and should regionalize the US electric grid under truly independent management and operational control with incentives to optimize service, accountability and throughput.

State Governments also have significant legal, economic and consumer protection interests in electricity restructuring. State legislatures should clarify existing laws and empower state Public Utility Commissions (PUCs) to implement customer choice and retail access to all classes of customers, at the earliest possible time. State legislators should also require government to purchase power from competitive providers, thereby implementing tax and budget reductions immediately.

In turn, state PUCs should act promptly to remove the numerous operational, behavioral and tariff barriers to competition and should establish a date certain by which to complete the transition to a competitive market. Regulatory commissions should immediately separate regulated and unregulated services so that consumers may choose, on a line-item basis, both the price and amount of each competitive service that they wish to purchase. Regulatory commissions should also implement NEMA's *Uniform Code of Conduct* for competitive suppliers of energy services and technologies. Lastly, government should stop acting as the risk manager for the new energy marketplace.

The right to switch energy suppliers is the ultimate consumer protection. Choice must exist in order to serve the public interest and it should not be complicated or expensive. A true measure of a competitive market is the number of customers that have choice and the number of providers ready to serve those customers. One measure of the quality of choice is the number of customers that, in fact, exercise choice. NEMA urges that all customers be given meaningful, competitive choices at the earliest possible date.

Competitively priced energy and related services will serve the public interest, save consumers, governments and taxpayers billions of dollars and will promote significant efficiency, innovation and productivity gains, nationwide. Experts from NEMA's policy writing committees are available to meet with policymakers around the country to help structure new laws, regulations, tariffs and operating procedures that permit competition on the basis of price and quality of service, encourage new technologies and that bring meaningful savings to US consumers of energy.

Table of Contents

I	Introduction	2
II	Historical Background of US Electric Utility Regulation	2
	1880 to 1970— <i>Light Bulbs to Price Shocks</i> — A Period of Invention, Growth and Declining Average Costs	2
	1970 to Present— <i>Price Shocks to Order 888</i> — A New Economic and Regulatory Paradigm	3
III	Role of the Federal Government in Electricity Restructuring —	
	<i>Significant Constitutional, National Security and Budgetary Interests</i>	2
	A. Congress should resolve outstanding jurisdictional issues, require FERC to promulgate uniform, non-discriminatory, open-access transmission tariffs and clarify current tax laws to expand existing stranded cost recoveries	4
	B. FERC should expand and clarify Orders 888 and 889, and take specific actions to eliminate current burdens on and discrimination against interstate commerce	4
	1. FERC should require that all jurisdictional transmission services be unbundled and that all service providers reserve, purchase, schedule and curtail transmission services under the same uniform, non-discriminatory, open-access transmission tariff	5
	2. FERC should mandate compliance with and strictly enforce Order 889	5
	3. FERC should make transmission services sufficiently uniform to be transferable and tradable	5
	4. FERC should expand Order 888 to require separation between a utility's regulated functions and its energy sales (marketing/merchant) functions	5
	5. FERC should regionalize the US electric grid under truly independent management and operational control with incentives to optimize accountability, service and throughput	5
IV	The Role of State Governments in Electricity Restructuring	6
	A. State legislatures should clarify existing laws and mandate utility commissions to restructure promptly and fairly	6
	1. State legislators should clarify and empower state PUCs to implement customer choice and retail access to all classes of customers at the earliest possible time	6
	2. State legislators should require government to purchase power from competitive providers, thereby, implementing tax and budget reductions immediately	6
	3. State legislators should adopt NEMA's <i>Uniform Code of Conduct</i> and competitively neutral standards to implement retail access	6
	B. State PUCs must act promptly to remove the numerous operational, behavioral and tariff barriers to competition	6
	1. Regulatory commissions must establish a date certain by which to complete the transition to a competitive market	7
	2. Regulatory commissions should immediately separate regulated and unregulated services so that consumers may choose, on a line-item basis, both the price and quantity of each competitive service	7
	3. Regulatory commissions must establish uniform, competitively-neutral codes of conduct to govern relationships between competitive suppliers of energy services and technologies	7
	4. Restructuring will fail if government remains the risk manager for the new energy marketplace	7
	5. Customer choice must be easy to execute	7
V	Conclusion	8
	Endnotes	8

I

Introduction

The National Energy Marketers Association (NEMA) is a national, non-profit trade association representing a regionally diverse cross-section of both wholesale and retail marketers of natural gas and electricity. NEMA also represents producers, generators, transporters, and marketers of energy-related information, services and technology throughout the United States.

NEMA is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement restructuring of natural gas and electricity markets. NEMA and its members appear before state Public Utility Commissions, the Federal Energy Regulatory Commission and legislative bodies throughout the nation. NEMA members urge lawmakers and regulators to implement:

- Laws and regulations that open markets for natural gas and electricity;
- Rates, tariffs and operating procedures that lower the cost of energy;
- Standards of conduct that protect consumers;
- Rules to permit competition on the basis of price and quality of service; and
- Policies that encourage new technologies, including the integration of energy, telecommunications and Internet services.

II

Historical Background of US Electric Utility Regulation

Reliable electricity is the lifeblood of economic growth and technological progress. Indeed, the availability of reliable, reasonably-priced electricity often defines the limits of growth and prosperity for both developed and developing countries around the world. Over the last 100 years, changes in the economics and technology of generating and delivering electrical power have precipitated one of the largest industrial restructurings in the history of the United States.'

1880 to 1970

Light Bulbs to Price Shocks

A Period of Invention, Growth and Declining Average Costs

In 1882, Thomas Edison applied the use of electricity to power his invention of the light bulb. Thereafter, he established a number of small "light companies" that by the 1930s evolved into what is now known as "electric utilities." By 1925, virtually every home in Chicago was connected to a central station and more than 30 million electrical lamps had been installed."

Samuel Insull, former secretary to Thomas Edison and first president of Commonwealth Edison of Chicago argued that, like the railroads, the production, transmission and distribution of electrical power was a natural monopoly. He premised his arguments on declining average costs and the notion that one firm can more economically provide electrical power because of the "economies of scale."ⁱⁱⁱ

These economic principles became the theoretical basis for defining "natural monopolies" and for justifying a government grant of exclusive rights to supply electrical power within "franchise monopolies." Within a government-approved, exclusive franchise territory, one company is permitted to provide power without competition, subject to state regulation of rates and profits. Between 1907 and 1922, new state government agencies known as "Public Utility Commissions" (PUCs) were established in virtually every state to implement this form of electricity regulation.

By the 1930s, the federal government's involvement with electricity" plus significant advances made in both generation and transmission technology reinforced the theory upon which electric regulation was premised, namely that larger units could produce electricity for decreasing costs. During the "Roaring Twenties," a flurry of mergers created seven large, multi-state utility holding companies that controlled 60 percent of America's power sources. After the stock market crash of 1929, great financial and social concern about these holding companies became the impetus for significant New Deal legislation. In 1935, Congress passed the Public Utility Holding Company Act and the Federal Power Act. These two statutes continue to govern utility regulation to this day.

Between the Great Depression and the Oil Price Shocks of the 1970s, electricity use, both in the aggregate and per capita, grew exponentially. By mid-century, virtually the entire country received reliable service at reasonable prices.' During this time, generating units grew increas-

ingly larger, high-voltage transmission lines, switching and control technology were developed and computers capable of coordinating the network were invented and installed. All of these factors contributed to the realization of decreasing average costs and supported the decisions to prohibit competition, to grant exclusive franchise monopolies to local utilities and to promote the commercial integration of the generation, transmission and distribution functions.

By the end of the 1970s, however, the regulatory paradigm of decreasing average costs, ever increasing plant sizes and regulated rates that rarely increased, was coming to an end. From the inception of the electric industry until the oil price shocks of the 1970s, the "regulatory compact" protected society against monopoly pricing in exchange for reliable service and regulated rates that permitted utilities to recover the cost of capital invested in plant and equipment. As long as underlying economic and technological factors kept average costs declining, this compact served the public interest well. However, by the end of the 1970s, this regulatory paradigm had changed radically.

1970 to Present

Price Shocks to Order 888

A New Economic and Regulatory Paradigm

The decade of the 1970s gave rise to cost factors that were largely outside of the control of utilities to manage. Specifically, oil prices increased ten-fold, natural gas prices increased seven-fold and the price of coal quadrupled. At the same time, interest rates soared to historical levels.^{vii} Construction costs for new plants that were within the control of utilities to manage also skyrocketed. This combination of factors undermined the economic principles on which US electric utility regulation was based and on which the government's grant of an exclusive franchise monopoly was justified.

In response to the skyrocketing costs of fuel, interest rates and large plant construction, the Public Utility Regulatory Policy Act of 1978 (PURPA) was passed.^{viii} This bill introduced a limited form of competition and encouraged a new industry comprised of co-generators and independent power producers (IPPs) to emerge.^{ix} Co-generation, IPPs and a new class of Exempt Wholesale Generators (EWGs) permitted by the Energy Policy Act of 1992^x established competitive, non-regulated generation which, in turn, demonstrated that significant efficiencies and cost savings were available to serve the public interest.

The era of declining average utility costs had ended. As larger, centrally dispatched generation unit costs skyrocketed and average costs increased, cost-of-service based rate-making still had the effect of encouraging utilities to undertake expensive new plant additions despite the availability of lesser expensive options. At the same time, a new economic theory of "subadditive costs" was advanced by a group of economists working at Bell Laboratories.^x Under this new theory, researchers were able to demonstrate that the existence of "subadditive costs" could make monopoly supply difficult to preserve in a competitive marketplace.

Simply stated, subadditive costs occur when customers have access to below average cost supplies or a supplier that can sell additional product at a price slightly below the average (but still at a profit) and thereby undercut utility prices.^{xi} The existence of non-regulated plants generating electricity more economically than average utility costs have rendered government mandated exclusive monopoly franchises economically unstable because it tends to become the higher-cost supply option. Under these circumstances, electric regulation ceases to protect the public from monopoly pricing and, instead, ironically, protects monopolies from competitive generation pricing.

In response to these major shifts in the underlying economics, equities and efficiencies of US electric utility regulation, the Federal Energy Regulatory Commission (FERC) issued Orders 888^{xii} and 889.^{xiii} These Orders together with actions taken by numerous states throughout the country have initiated the first significant steps necessary to implement the largest industrial restructuring in the history of the United States and possibly the world.^{xiv}

III

The Role of the Federal Government in Electricity Restructuring

Significant Constitutional,

National Security and Budgetary Interests

Beginning in World War I, the federal government has had significant social and national security interests related to the production and transmission of electrical power. Reliable management of interstate transmission service is the backbone of interstate commerce and is vital to national security. Rural electrification programs brought universal service to areas of the country that were historically uneconomic for private power investments. Special tax-free financing status also exists for certain federal, state, municipal and cooperative authorities and projects.^{xv}

The consolidated US market for energy and related services and technologies is one of the largest industries in the world. Estimates range as high as \$830 billion per year. In addition, federal and state governments are among the nation's largest consumers of energy. Consequently, even modest cost savings or gains in efficiency can result in tens of billions of dollars in savings to US consumers and billions more in federal and state tax and budget relief. It is important to note that every year of energy cost savings has the economic effect of a major tax reduction.

Given the constitutional, national security and significant economic interests inherent in a competitively-structured electric power market, it is vital that federal legislation resolve outstanding legal, economic and social policy issues as soon as possible. This document does not attempt to address each such issue. Instead, the following guidelines are what are minimally necessary to restructure the US generation, transmission and distribution industries in a manner that promotes maximum price competition, reliability and quality of service to all classes of customers in the shortest period of time.

A. Congress should resolve outstanding jurisdictional issues, require FERC to promulgate uniform, non-discriminatory, open access transmission tariffs and clarify current tax laws to expand existing stranded cost recoveries.

Congress should resolve that competition in the sale of electricity is in the best interests of consumers, and direct FERC to take significant steps toward encouraging such competition. FERC's actions should be taken in a timely fashion so that the benefits of fully functioning, efficient electricity markets emerge as soon as possible. Toward that end, Congress needs to ensure that FERC has the requisite authority to require all owners of transmission facilities to provide all transmission services on a comparable, non-discriminatory basis. This authority should include the ability to mandate participation in regional transmission organizations. FERC's actions should also provide owners and/or operators of transmission facilities with a heightened sense of accountability through a meaningful and balanced system of incentives and penalties that are aggressively administered by FERC.

An issue raised by the current ownership of generation assets is the ability of a generation owner to exercise

market power, either vertically, in conjunction with transmission and/or distribution assets, or horizontally, due to a concentration of assets in a particular region. Regulators should assure against the exercise of such market power. NEMA supports the divestiture of generation assets to non-affiliated entities to the extent necessary to fully mitigate residual horizontal and vertical market power. In accomplishing this objective, valid stranded costs associated with generation assets should be collected to the extent that market values for such assets have been determined by reference to legitimate arm's-length sales offerings. Further, such stranded costs should be measured on an aggregated basis (i.e. market values that are greater than net book values should be netted against negative market values). In addition, to the extent any company is, or becomes an owner of generation and transmission and/or distribution facilities, these functions should operate independently consistent with NEMA's *Uniform Code of Conduct*.

To further facilitate the transition to fully competitive electrical services, the federal government should also make minor revisions in existing tax laws to permit traditional capital cost recoveries for so-called "stranded assets" that are found, after good-faith and diligent sales efforts, not to be saleable at any price. A low-cost provision could be added to permit a special, one-time write-down of assets "as if divestiture occurred" if a PUC determines that divestiture is impossible due to a lack of buyers. This could include items such as nuclear power plants or purchase power agreements that have a diminished economic value but cannot be sold due to a lack of buyers. The legislation should also request the Internal Revenue Service (IRS) to clarify the treatment of "stranded costs" that are divested or "marked-to-market" under existing tax laws.

B. FERC should expand and clarify Orders 888 and 889, and take specific actions to eliminate current burdens on and discrimination against interstate commerce.

FERC has exhibited bold leadership by promulgating Orders Nos. 888 and 889. However, as was necessary to restructure the natural gas industry, the time has come to expand, clarify and enforce specific provisions that will enhance the competitive viability of the wholesale electricity market and provide the foundation for meaningful retail access and customer choice for all classes of customers at the earliest possible date.

As a basic principle of the expansion and clarification of Orders 888 and 889, it is vital that FERC should take actions to ensure that all customers have equal, non-discriminatory access. A competitive market with true customer choice is not characterized by captive customers. Indeed, captive customers do not exist in a competitive market. Current rules that discriminate with regard to reservations, scheduling, and future plant expansions are serious roadblocks to the stated goals of Orders 888 and 889.

Specifically, to achieve a workably competitive market for electricity, FERC should revise Orders 888 and 889 in the following ways:

1. **FERC should require that all jurisdictional transmission services be unbundled and that all electricity providers reserve, purchase, schedule and curtail transmission services under the same uniform, non-discriminatory, open-access transmission tariff.** This tariff would be applicable on a uniform, non-discriminatory basis to all transactions, including those currently designated as "native load." Existing regulatory preferences that foster discrimination in favor of native load are inhibiting the growth of an efficient, liquid and workably competitive market. Competitive energy suppliers are experiencing significant difficulties in obtaining transmission access and scheduling power deliveries, particularly when the operating entity responsible for transmission scheduling owns and or dispatches either or both generation assets and transmission service.^{xvi} Providing all transmission service on comparable, uniform, non-discriminatory terms and conditions regardless of corporate affiliation or destination of load is a prerequisite to a competitive electrical power market. Future load growth and plant additions should also rely on competitive market forces.
2. **FERC should mandate compliance with and strictly enforce Order 889.** "Real time" information on which to rely when entering commercial transactions is vital to the operation of a competitive marketplace, and is the linchpin of Order 888. In many instances, transmission providers are not posting "Available Transmission Capacity" (ATC) accurately (or at all). Transmission operators tend to overestimate native load and reserve "margins," thereby underestimating the level of transmission service that is available for use by competing suppliers. Specifically, FERC should require, under strict and enforceable penalties for non-compliance, that all transactions (including those involving captive, preexisting or "grand-fathered" transmission customers) be reported and available to the marketplace in "real time" on the Open Access Same Time Information System ("OASIS").
3. **FERC should make transmission services sufficiently uniform to be transferable and tradable.** Liquidity of transactions in the wholesale electric market is the linchpin of an efficient competitive retail marketplace. Non-discriminatory, uniform, comparable and transferable rights to transmission services are vital to accomplish these competitive goals. FERC should remove any potential barriers to the creation of voluntary power exchanges, "trading hubs" or "market centers."
4. **FERC should expand Order 888 and 889 to require separation between a utility's regulated functions and its energy sales (marketing/merchant) functions.** Currently, a lack of formal separation between functions that justify an exclusive franchise monopoly and those functions that are competitive have created both the opportunity to use market power as well as significant financial conflicts of interest that often inure to the detriment of competitors attempting to do business within a utility's franchise territory. In this respect, the FERC should promulgate a national *Uniform Code of Conduct* similar to the one developed by the NEMA.^{xvii} Indeed, many competitive energy suppliers assert that market power abuses have become so endemic by virtue of the market structure permitted by Orders 888 and 889 that FERC and state commissions should seriously consider revisiting the issue of divestiture.^{xviii}
5. **FERC should regionalize the US electric grid under truly independent management and operational control with incentives to optimize throughput.** A key element in linking geographically separate electricity markets is the integrity of the transmission network. This network facilitates the movement of bulk power transactions to ensure reliability, economic efficiency and market liquidity. Unlike generation, transmission remains a "natural monopoly" function.^{xix} Given the current commercial bottlenecks (constraints) in transmission service, the owners of such service must be scrupulously monitored to avoid use of these constraints unfairly as market power to its own financial advantage or to the disadvantage of competitors.

The FERC has recently endorsed the independent control of transmission access as a means of achieving regional operation of transmission grids with some measure of separation from generation ownership. Unfortunately, the current management structure of ISOs is neither sufficiently independent nor free of conflicts of interest to implement Orders 888 and 889. Nor is it sufficiently accountable to transmission customers. There are no incentives to optimize transmission, nor are there meaningful penalties for failure to comply with rules established for fair and non-discriminatory operations. Independent grid managers should have incentives to optimize transmission throughput and service reliability and be held accountable for their operational decisions.

Sound public policy mandates that control of the transmission network must be operated regionally under truly independent management with no financial conflicts of interest between the owners of affected transmission, distribution and generation assets. Independence means that operational decisions will be made solely upon operational considerations and that commercial protocols are uniformly applied in a non-discriminatory fashion regardless of corporate affiliation. Additionally, in emergencies, no direct or indirect financial benefit should be derived by the operator of the transmission network.

FERC should fully utilize its current authority to order regionalization of the nation's power grid under truly independent and accountable management. The FERC should (1) take the bold steps necessary to create larger regional transmission organizations (RTOs) and to force maximum participation into these organizations under truly independent operational control with appropriate incentives and accountability, (2) financially structure regional grid management and operations to optimize throughput and operational integrity, (3) require all ATC calculations to be made on a regional basis, (4) prohibit pancaking of rates within any region, and (5) prohibit financial conflicts of interest between the owners of generation, transmission and distribution assets within the region.

IV The Role of State Governments in Electricity Restructuring

A. State legislatures should clarify existing laws and mandate utility commissions to restructure promptly and fairly.

1. **State legislators should clarify and empower state PUCs to implement customer choice and retail access to all classes of customers at the earliest possible time.** In some states, utilities have challenged the authority of regulatory commissions to implement retail restructuring. Legislatures should authorize and mandate PUCs to implement retail access and customer choice to all classes of customers at the earliest possible date.
2. **State legislators should require government to purchase power from competitive suppliers, thereby implementing tax and budget reductions immediately.** All classes of customers should be permitted to receive the benefits of price competition at the earliest possible date. However, it is likely that imposing competitive purchasing rules for the purchase of electricity onto federal, state and local governments will speed the advent of retail competition for all other purchasers faster than it otherwise would. Government already has competitive procurement rules that should apply equally to electricity purchases. This measure would significantly lower energy costs to society and provide immediate tax and budget relief.
3. **State legislators should require specific codes of conduct and standards to implement retail access.** Independent marketers have complained of undue advantage provided by utilities to their marketing affiliates. Conversely, affiliated marketers have complained of too-strict standards of separation or other limitations on their ability to compete. NEMA represents both affiliated and unaffiliated marketers of energy and related services and technologies. NEMA has developed competitively neutral standards of conduct to govern transactions among all market participants regardless of corporate affiliation. State PUCs should adopt standards consistent with NEMA's *Uniform Code of Conduct*. Copies are available at www.energymarketers.com.

B. States should act promptly to implement open access and competition without operational, behavioral and tariff barriers.

Restructuring fails without system integrity and reliability. Regulated utilities have a vital commercial role to play in the new energy marketplace. NEMA submits that maintenance and construction of transmission and distribution wires continue to exhibit scale economies that merit society sanctioning a single provider. NEMA also

recognizes that significant investments have been made in systems and personnel that require equitable cost recoveries during the transition of these services to a competitive market. Indeed, NEMA members aspire to be the utilities' best customers, suppliers and partners to help them profitably expand their systems to meet the needs of the Twenty-first Century.

Reliability can, however, be achieved without ownership of generation assets. Indeed, when a vertically integrated utility owns both generation and wires, it can use generation to restrict availability of wires service for competition. Regulatory commissions should establish procedures to encourage divestiture of generation assets by transmission-owning utilities. Divestiture by sales of assets in the open market will quantify and aggressively mitigate stranded costs. Divestiture will assure that generation is run efficiently by those at financial risk if it does not run. In addition, divestiture will assure that there are no stranded costs associated with the divested assets in the future. To the extent there are unrecovered stranded costs, PUCs should maximize the use of existing tax laws and minimize the use of competitive transition charges.

1. **States should establish a date certain by which to complete the transition to a competitive market.** The maximum consumer benefits of open access and competition take place when markets make a complete transition to competition. All classes of consumers must be free to purchase as many or as few competitive services as they wish as soon as possible without fear of losing quality or reliability. Each PUC should apply cost-of-service regulation only to those specific functions that remain natural monopoly services on the basis of true "economies of scale" and declining average costs. These functions do not include competitive commodity supply functions. Additionally, as regulated utilities unbundle energy supply and service functions, the provider-of-last-resort functions can be provided by qualified competitive suppliers, and the obligation-to-serve can be modified into an obligation to connect and deliver. NEMA believes that all of the issues that allow for complete open access can be resolved within two years.
2. **Regulatory Commissions should order unbundling of services so that consumers may choose competitive services on a line-item basis.** Regulations, tariff structures and operational protocols should promptly be designed to permit competitive, non-utility suppliers to provide each of the functions and services that are not natural monopoly functions. All other functions should be opened to competition.

At a minimum, the following services can be opened to competition:

- Supplying electric generation,
- Qualified suppliers of last resort,
- Providing customer billing and metering,
- Energy imbalance services,
- Demand side management and efficiency services, and
- Providing ancillary services.²²

3. **Regulatory commissions should institute rule-making procedures to establish uniform codes of conduct to govern relationships between affiliated and non-affiliated suppliers of competitive energy services and technologies.** As noted above, NEMA urges adoption of standards of conduct consistent with its *Uniform Code of Conduct*. Restructuring fails if financial conflicts of interest are not eliminated among owners of generation, transmission and distribution assets. In this process, direct and indirect subsidies and tying arrangements must be prohibited. Penalties for violation of these rules must be swift, effective and designed to ensure that repeated violations do not become merely a cost of doing business for violators.
4. **Restructuring will fail if Government remains the risk manager for the new energy marketplace.** Market prices and downside risk shape competitive markets. By law, regulators minimize or eliminate many forms of utility business risk. However, in a competitive market, unregulated entities must take all forms of risk in order to succeed and profit. Regulators must permit competitive suppliers to take risks and design regulations, rates, tariffs and operational protocols to separate the regulated and unregulated business functions so that unregulated entities are not indirectly subsidized by a utility's rate structure, lack of risk or guaranteed returns.
5. **Customer choice must be easy to execute.** The right to switch energy suppliers is the ultimate consumer protection. Choice must exist in order to serve the public interest and it should not be complicated or expensive. A true measure of a competitive market is the number of customers that have choice, and the number of customers that, in fact, exercise choice. All customers should be given meaningful, competitive choices at the earliest possible date.

V Conclusion

Major shifts in the economics and social costs of traditional electric utility regulation clearly support restructuring this industry into a more competitive one. Restructuring will not work well if competitive suppliers and regulated utilities do not find win-win solutions to the issues that must be resolved to permit competition on the basis of price and quality of service. The actions outlined above need to be implemented promptly to permit a robust and liquid wholesale market for electricity and to lay the foundation for an efficient retail market.

Competitively priced energy and related services will serve the public interest, save consumers, governments and taxpayers billions of dollars and will promote significant efficiency, innovation and productivity gains, nationwide. Experts from NEMA's policy writing committees are available to meet with policymakers throughout the country to help structure the new laws, regulations, tariffs and operating procedures that permit competition on the basis of price and quality of service, encourage new technologies and that bring meaningful savings to US consumers of energy.

ENDNOTES

i. For a discussion of the regulatory and economic history of the US electrical power industry, see generally Fox-P. 1997, *Electric Utility Restructuring, A Guide to the Competitive Era*, Public Utility Reports.

ii. Platt, H. 1991. *The Electric City*, Chicago, University of Chicago Press.

iii. The economic theory of "economies of scale" posits that costs of certain products such as electrical power decline as output increases. Advocates argue that competitive forces would result in price wars that would eventually reduce competition to a single firm, which in turn, would become a monopoly. Therefore, granting one firm a monopoly in the first instance would reduce the social costs of failed businesses in exchange for prices that were regulated to avoid monopoly profits. This concept was first applied to the railroad industry after the Civil War and later to the regulation of the natural gas industry. As the use of electrical power grew, Insulls predictions of lowering costs by integrating the electrical network into a single power network proved correct until the price shocks of the 1970s.

iv. Electrical use during World War I grew substantially. The Federal Water Power Act was passed in 1920 and granted exclusive rights to the federal government to develop hydroelectric facilities. The Tennessee Valley Authority and the Bonneville Power Administration were created in 1933.

v. By 1956, the US Census Bureau reported that 98.8 percent of all American households had electrical service. See US Census Bureau, *Historical Statistics of the United States from Colonial Times to the Present* (1974).

vi. Several other factors also contributed to the high cost of power in the U.S. The Fuel Use Act of 1978 essentially prohibited the use of natural gas in new electric generation facilities. Environmental laws and regulations limited the use of coal and fuel oil as fuels for new generation plants. Projected economic development and utility forecasts indicated the need for significant amounts of new generation capacity. Utilities believed that they had little choice but to construct nuclear electric generation plants to meet the projected demand. At the same time, safety concerns following the incident at the Three Mile Island nuclear plant in Pennsylvania led to significant regulatory scrutiny and oversight of nuclear facilities. Extensive permitting processes and local opposition to nuclear plant development created long delays in completing nuclear plants. These delays significantly increased the overall cost of building nuclear plants. This build up in nuclear generation capacity was followed by lower than expected economic growth in the U.S. during the early 1980s. The economic slow down virtually eliminated the need for new generation and resulted in a substantial surplus of generation capacity. These various factors combined to increase the electric rates on a per unit basis to extremely high levels in certain parts of the United States.

The costs of new nuclear power plants on which construction was completed between 1968 and 1971 averaged \$161/kW of installed capacity. The Three Mile Island incident occurred in 1979. Between 1979 and 1984, average costs rose nearly ten-fold to \$1,373/kW. Costs of the most expensive plants built during this time ranged from \$1,607/kW to \$5,810/kW. See Joskow, P.L. "Regulatory Failure, Regulatory Reform and Structural Change in the Electric Power Industry", In *Brookings Papers on Microeconomic Activity* 125-200 (1989) at 151, and Charles River Associates, et al (1986)

vii. PURPA permitted "Qualified Facilities" (QFs) to use waste heat and steam to "co-generate" electricity for use by end-users without being subject to state utility regulation. QFs were granted special status if they were designed more efficiently than existing or proposed utility units and, in turn,

utilities were required to purchase this power at "avoided costs." In theory, society would be better off because cogenerated power had to meet higher efficiency standards and use waste heat energy. Theoretically, utilities were indifferent to the transaction if the price was truly reflective of "avoided costs," particularly if construction overruns are disallowed by regulators. Over time, however, government-mandated avoided costs were established on the basis of forecasts that proved inaccurate. Resulting avoided cost payments created economic incentives that encouraged the development of smaller, more efficient, lower-cost, distributed generation units that were designed to serve very localized loads.

viii. Advancements in the development of combined-cycle natural gas-fired generation technology significantly increased the efficiency of gas-fired generation. This, in turn, dramatically lowered the overall cost of electricity produced from gas-fired generation facilities, especially when compared to the high cost of power generated from nuclear plants. Industrial companies that consumed large volumes of electricity in manufacturing processes soon noticed the disparity between the rates of the incumbent utility and the rates of utilities in other parts of the country as well as the cost of new combined cycle gas-fired generation. The industrial community actively sought access to lower cost electricity due to the enormous potential cost savings and an increasingly competitive global economy.

ix. H.R. 776, 1992 U.S.C.C.A.N. 2534-2.

x. See Zajac, E.E. 1978. *Fairness or Efficiency: An Introduction to Public Utility Pricing*. Cambridge, MA., Ballinger Publishing; see also Faulhaber, G.R. 1987. *The FCC's Path to Deregulation: Turnpike or Quagmire?*, Public Utilities Fortnightly 120 at page 5.

xi. This phenomenon contributed to the drastic reduction in the economic component of the New York Power Pool (NYPP). Prior to the late 1980s, utilities in NYPP traded large volumes of electricity on a "split savings" formula. This then created a situation in which any two members could agree on a trade slightly below the average cost result of the NYPP formula. Although some NYPP members challenged this practice at FERC, individual, two-party transactions were allowed outside the pool structure. The ability of any two parties to price below the multi-party average created a need to restructure the NYPP and eventually led to the development of what has become the New York ISO.

The example given by Faulhaber, *supra* at pages 22-26, is the situation in which three towns can supply water jointly for \$660, whereas, any single town can supply its own water for \$300 and two towns could join together and supply water from one facility for \$400. While it may be cheaper to force

all three towns to join together to supply the water at \$660, there is no fixed price at which a single firm can keep the market because it is always cheaper for two towns to split off and supply themselves at a lower average cost (i.e. $\$660/3$ vs. $\$400/2$)

xii. Order No. 888, Promoting Wholesale Competition Through Open Access Non Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May 10, 1996), 1991-1996 FERC STATS. & REGS. PREAMBLES ¶ 31,036 (Apr. 24, 1996), order on reh'g, 62 Fed. Reg. 12,274 (March 14, 1997), 78 FERC ¶ 61,220 (March 4, 1997), order on reh'g, 62 Fed. Reg. 64,688 (December 9, 1997), 81 FERC ¶ 61,248 (November 25, 1997), order on reh'g, 82 FERC ¶ 61,046 (January 20, 1998).

xiii. Order No. 889, Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, 61 Fed. Reg. 21,737 (May 10, 1996), 1991-1996 FERC STATS. & REGS. PREAMBLES ¶ 31,035 (April 24, 1996); Order No. 889-A, order on reh'g, 62 Fed. Reg. 12,484 (March 14, 1997), III FERC STATS. & REGS. ¶ 31,049 (March 4, 1997); Order No. 889-B, reh'g denied, 62 Fed. Reg. 64,715 (December 9, 1997); III FERC STATS. & REGS. ¶ 31,253 (November 25, 1997).

xiv. Responding to the same shifts in economics and technology, state legislators and PUCs are considering or in the process of restructuring the electricity industry in virtually every state except Florida, Alaska and South Dakota. As noted *infra*, the consolidated US wholesale and retail markets for energy-related commodities, services and technologies is one of the largest industries in the world. Estimates range as high as \$830 billion per year. Cost savings in other deregulated industries have averaged 30-40 percent. See Crandall and Ellig (1997). Given the experience with deregulating other industries, costs saving attributable to restructuring the US energy markets could exceed \$100 billion per year.

xv. The federal and state power authorities, in particular have a unique position in that they possess many of the characteristics of traditional utilities. They own generation and transmission and sell electricity to both retail and wholesale customers, but are not subject to the same regulatory oversight. In order to effect a consistent competitive framework these entities should implement open access to their systems by applying the principles similar to those developed for traditional utilities. Because of their unique status, these authorities must remain competitively neutral and operate in fashion that is consistent with their originating charter.

With their special, tax free financing status, government initiatives, such as federal and state authorities and municipal systems and cooperatives have played an important role in the development of the electric utility industry. For example, rural electrification programs brought universal service to areas of the country that were historically uneconomic for investor owned utilities. Government entities should provide comparable access to their transmission systems and to the extent they offer electric supplies or related services that marketers can offer, such supply and service should be offered on competitively neutral terms.

xvi. See Petition for Proposed Rulemaking on Electric Industry Structure, Incentives of Market Participants and Improvement of Open-Access Commercial Practices in FERC Docket No. RM95-8-000 & RM98-5-000, filed March 25, 1998.

xvii. Copies of NEMA's *Uniform Code of Conduct for Regulated and Unregulated Suppliers of Energy and Related Services and Technologies* (UCC) and its *National Guidelines for Unbundling and Restructuring the Natural Gas Distribution Function* are available at www.energymarketers.com.

xviii. See Endnote xviii, supra.

xix. Electrical physics suggests that line losses decrease exponentially with the increase in transfer capability and it currently appears that there may be efficiencies gained in the operation of larger transmission facilities. Consequently, at this writing, NEMA believes that economies of scale continue to apply to the construction of transmission facilities and justify cost-of-service or performance-based regulation of transmission facilities as natural monopolies with due consideration to all of the market power issues inherent therein.

xx. At this writing, ancillary services include operating reserve: spinning reserve service, operating reserve: supplemental reserve service, reactive supply and voltage control from generating sources, regulation and frequency response services, load following, backup supply services, real power loss services, restoration services, and system black start capability.