

## Purchase Of Electric Commodity In Kentucky – Legal Opinion

### BACKGROUND:

According to Contracting, as stated in a request for a legal opinion:

Comments on the draft RFP [for Blue Grass Army Depot electrical system] were received from Kentucky Utility (KU) and Blue Grass Energy, Inc. (BGE) that have franchised territories bordering the BGAD installation. Comments from KU on the draft RFP state: “KU questions the legality of BGAD purchasing electricity from another supplier. Our rate department is investigating this issue.” Comments from BGE state: “Blue Grass Energy’s greatest concerns have to do with 1) the legality of the Government’s intentions to procure the electrical commodity on a competitive basis;”

BGAD’s intent was to allow offerors to propose on the commodity, make it “optional”, and by combining it with the privatization effort they would get the best value and deal with only one contractor....I am requesting a written legal opinion on the question of whether we can include the commodity as part of the solicitation in any fashion without violation of Section 2688 or other procurement statutes and regulations?

### I. THE RIGHT TO PRIVATIZE THE UTILITY SYSTEMS

The authority for the military to sell or privatize its utilities was granted by Congress through the passage of Public Law 105-85. Sec 2688 of that law reads as follows:

Utility systems: conveyance authority (a) Conveyance Authority.--The Secretary of a military department may convey a utility system, or part of a utility system, under the jurisdiction of the Secretary to a municipal, private, regional, district, or cooperative utility company or other entity. The conveyance may consist of all right, title, and interest of the United States in the utility system or such lesser estate as the Secretary considers appropriate to serve the interests of the United States.

The goal of the Department of Defense is to avoid the immediate expense of upgrading aging infrastructure by selling the systems to private entities. The costs of capital improvements will then be reimbursed to the utility company through utility rates over a period of time. The feasibility of privatization of each system is to be determined only after a full assessment of the system, evaluation of the market for all potential

purchasers, and a careful comparison of costs associated with each alternative, including the alternative of keeping the system where there are no cost benefits or no willing purchasers. See Policies And Procedures For Privatization Of Army Owned Utility Systems At Active Installations

In the initial legislation, Congress specifically mandated that if more than one entity expresses an interest in a system, the government must employ methods of full and open competition for the system. According to section 2688(b):

Selection of Conveyee.--If more than one utility or entity referred to in subsection (a) notifies the Secretary concerned of an interest in a conveyance under such subsection, the Secretary shall carry out the conveyance through the use of competitive procedures.

The National Defense Authorization Act For Fiscal Year 2001, P.L. 106-398, Sec. 2813, "Conveyance Authority Regarding Utility Systems Of Military Departments", added two new paragraphs, codified at 10 USC 2688 (b)2 & (b)3, bearing upon the issue of open competition in the sale of the systems. The first new paragraph reads:

(2) Notwithstanding paragraph (1), the Secretary concerned may use procedures other than competitive procedures, but only in accordance with subsections (c) through (f) of section 2304 of this title, to select the conveyee of a utility system (or part of a utility system) under subsection (a).

Title 10 USC 2304(c) contains the circumstances which are prerequisite to a limited competition:

(c) The head of an agency may use procedures other than competitive procedures only when--

(1) the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency;

(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order

(A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization,

(B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or

(C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to subsection (k), a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the agency--

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

The second new paragraph of the National Defense Authorization Act For Fiscal Year 2001, PI 106-398, Sec. 2813, "Conveyance Authority Regarding Utility Systems Of Military Departments" states:

(3) With respect to the solicitation process used in connection with the conveyance of a utility system (or part of a utility system) under subsection (a), the Secretary

concerned shall ensure that the process is conducted in a manner consistent with the laws and regulations of the State in which the utility system is located to the extent necessary to ensure that all interested regulated and unregulated utility companies and other interested entities receive an opportunity to acquire and operate the utility system to be conveyed.

In the Senate Committee Report, which accompanied the proposed legislation, a section entitled "Expansion of procedures for selection of conveyees under authority to convey utility systems" (sec. 2813) states:

The committee believes that maximizing competition in the privatization of utility systems within the Department of Defense is essential to ensuring that the military receives the most efficient and effective service and to ensuring taxpayers derive the maximum value from the government's previous investment in these systems.

The Senate Report also states:

...the committee believes that the Department's efforts to bundle systems or installations into a single solicitation for a large region may exclude entities that are only qualified to provide one type of service, or are limited to operating within a specific geographical area. The committee believes the Department should structure its solicitations in a way that allows interested entities to bid on parts of that which is being offered, as well as the entire package, thereby ensuring that all have a fair chance in the competition.

From all of the foregoing, it is clear that Congress favors full and open competition in the sale of the utility systems and procurement of utility services. Only in limited circumstances spelled out in Title 10 USC 2304(c), or at the discretion of the Secretary with 30 day Congressional notification, may a contracting officer proceed with less than a full and open competition.

## II. THE PURCHASE OF THE ELECTRIC COMMODITY IN COMPLIANCE WITH 8093.

### A. The Provisions of 8093

The purchase of the electric commodity is a separate matter for consideration. The Military Construction Appropriations Act for Fiscal Year 1988, Public Law 100-202, contained section 8093 which states as follows:

None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements:

Congress acted to provide that federal facilities must purchase the electric commodity in accord with State utility franchise laws. The action of Congress is a waiver of sovereign immunity subjecting federal facilities to state law.

This section continues with the following exceptions:

Provided, That nothing in this section shall preclude the head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287; nor shall it preclude the Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 or from purchasing electricity from any provider when the utility or utilities having applicable State-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense."

The first exception, Title 42 United States Code, section 8287 deals with energy saving performance contracts. It is a part of Chapter 91, "National Energy Conservation Policy." It allows heads of Federal agencies to "enter into contracts...solely for the purpose of achieving energy savings and benefits ancillary to that purpose." The contractor is supposed to "incur costs of implementing energy savings measures...in exchange for a share of any energy savings..."

The second exception, Title 10 U.S.C. 2394 is entitled "Contracts for energy or fuel for military installations. It provides that a Secretary of a military department may enter into contracts of up to 30 years for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.

#### B. The Department of Defense Legal Opinion.

Section 8093 has received various interpretations including my own suggestion that the 2394 exception be broadly construed as a general waiver for military facilities.<sup>1</sup>

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<sup>1</sup> Rather than limiting the application to the actual language "to purchase electricity", the Eighth Circuit Court of Appeals, in West River Electric Assoc, Inc. v. Black Hills Power And Light, 918 F2d

However, as a DOD agency, the Army must follow the interpretation of the Department of Defense. That interpretation has come from the Department of Defense Office of General Counsel. The opinion was issued on February 4, 2000 by Robert Taylor, Deputy General Counsel, Environment & Installations. A modified version was then adopted by the Acting General Counsel, Douglas Dworkin, and disseminated to the Services on February 24, 2000.

In the first opinion, after a general analysis of federal supremacy, Mr. Taylor confirmed that the use of competitive procedures is mandated by 10 USC 2688 in the privatization of the utility systems. He then presented both a narrow and a broad construction of Section 8093 and whether services or just commodities are governed by state law. He urged a narrow construction of Section 8093, limiting its provision to the purchase of the electric commodity rather than distribution and other services.

The amended version submitted to the Services omits the discussion of the broad construction and simply urges the narrow construction:

A plain reading of Section 8093's operative statutory language ('to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service...') necessarily leads to the conclusion that the waiver of sovereign immunity in that section is limited to purchase of the electric commodity (electric power) excluding distribution or transmission services. There is nothing in this section to indicate that 'purchase electricity' should be read in any way other than its plain language. Consequently, electricity does not include the provision of utility services other than the commodity. This reading of section 8093 is also buttressed by the rule of statutory construction that waivers of sovereign immunity should be narrowly construed. See,

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713, believed that this language governed the procurement of utility **service** for federal facilities. The court further believed that Federal enclaves were excepted.

We can only conclude that in enacting section 8093, Congress sought to submit federal installations and other federal agencies to state regulation in the procurement of utility service while refraining from subjecting a federal enclave, a constitutionally-created entity, to such state control."

The Court went on to state that the purpose of the legislation was to protect utility companies from abandonment by federal customers. The Court found it persuasive that there was no abandonment in that case.

The Federal Facilities Council (FFC), a continuing activity of the Board on Infrastructure and the Constructed Environment (BICE) of the National Research Council (NRC) made a distinction based on retail vs. wholesale. It stated in an article on the internet, "However, federal agencies, which are classified as retail, not wholesale, consumers of electricity, are currently barred from buying electricity competitively by section 8093 of the 1988 Defense Appropriations Act."

e.g., *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992).

Thus, the final legal opinion from General Counsel of the Department of Defense to the Armed Services states unequivocally that purchase of the electricity commodity alone is governed by State law.

### C. Rules Of Statutory Construction And Electric Utility Regulation.

The final conclusion in the Defense legal opinion, that distribution services are beyond the reach of 8093 may be in error because there is another fundamental rule of statutory construction. As summarized in *Brown & Williamson Tobacco Corp. V. FDA*, 153 F.3d 155, 162(4th Cir. 1998):

Although the task of statutory construction generally begins with the actual language of the provision in question...the inquiry does not end there. The Supreme Court has often emphasized the crucial role of context as a tool of statutory construction. For example, the Court has stated that when construing a statute, courts must not be guided by a single sentence or member of a sentence, but look to the provisions of the **whole law, and to its object and policy...**

Thus, the traditional rules of statutory construction to be used in ascertaining congressional intent include: **the overall statutory scheme...the history of evolving congressional regulation in the area...and a consideration of other relevant statutes**, (explaining that "all acts in pari materia are to be taken together as if they were one law")

Section 8093 consists of one sentence.:

to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

When the entire sentence is read rather than just the portion of the sentence cited by the Taylor opinion as "the operative statutory language", it is clear that Congress intended that the Federal Government abide by the franchised territories established under state law for the provision of the commodity to the end user. Section 8093 is directed to the Government as retail purchaser of the electric commodity. The retail purchase of electricity has historically been inextricably linked to a franchised distributor. Even in the states which have deregulated, and unbundled, the distribution to the final retail customer

is still regulated by franchised territories.<sup>2</sup> Only the source of the power is deregulated and subject to open competition.<sup>3</sup>

#### D. The Federal Regulatory Scheme

Section 8093 should be read in pari materia with the entire regulatory scheme. Prior to the enactment of 8093 in 1988, there was already a regulatory scheme in place concerning the generation, transmission, and sale of electricity. The Federal Government has regulated the wholesale sale of electricity since 1935. See Transmission Access Policy Study Group, Et Al. V. Federal Energy Regulatory Commission, Vermont Department Of Public Service, Et Al., Intervenors, 225 F.3d 667, (CA D.C. 2000). The Federal Government also regulates the transmission of power in interstate commerce. Pursuant to the provisions of Congress codified at 16 USC 824, the Federal Energy Regulatory Commission (FERC) has regulated wholesale power sales and interstate transmissions, and state agencies have retained jurisdiction over bundled retail sales, including service and the intrastate sale and distribution of electricity. Bundled retail sales are those sales where electricity is generated, transmitted and sold to the end user as an integrated process by one company. Accordingly, the franchised territories established under State laws are retail sales or distribution territories. Whole sale generation and sale has never been governed by state law.

When Sec. 8093 was enacted, the trend towards electric restructuring had just begun. As stated in Transmission Access Policy Study Group, 225 F.3d at 681.

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<sup>2</sup> See for example Pennsylvania. "The commission shall allow customers to choose among electric generation suppliers in a competitive generation market through direct access." 66 Pa.C.S. 2804(2) Generation supplier is defined as: "A person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators or any other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company."

<sup>3</sup> Under Pennsylvania law "It is in the public interest for the transmission and distribution of electricity to continue to be regulated as a natural monopoly subject to the jurisdiction and active supervision of the commission. Electric distribution companies should continue to be the provider of last resort in order to ensure the availability of universal electric service in this Commonwealth unless another provider of last resort is approved by the commission."66 Pa.C.S. 2801(16).

Also, "The commission shall establish rates for jurisdictional transmission and distribution services and shall continue to regulate distribution services for new and existing customers in accordance with this chapter and Chapter 13 (relating to rate making)."

66 Pa.C.S. 2804(10).

Historically, vertically integrated utilities owned generation, transmission, and distribution facilities. They sold generation, transmission, and distribution services as part of a "bundled" package. Due to technological limitations on the distance over which electricity could be transmitted, each utility served only customers in a limited geographic area. And because of their natural monopoly characteristics, utilities have been heavily regulated at both the federal and state levels.

Technological advances paved the way for electric utility restructuring. As explained by the Court in Transmission Access Policy Study Group, 225 F.3d at 681-682:

Technological improvements also made feasible the transmission of electric power over long distances at high voltages. Alternative power suppliers, such as cogenerators, small power producers, and independent power producers emerged in response to these developments. Constructing and operating generation capacity at prices lower than the embedded generation costs of traditional utilities, these alternative suppliers have created a wholesale market for low-cost power. [And] the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important... Yet the owners of transmission lines, the traditional utilities that had built the high-cost generation capacity, denied alternative producers access to their transmission lines on competitive terms and conditions. FERC therefore began requiring utilities<sup>[\*\*10]</sup> to file open access transmission tariffs that permitted other suppliers to transmit power over their lines under certain circumstances, such as when a utility sought authorization to merge with another utility or to sell power at market-based rather than cost-based rates.

Then, in 1992, Congress enacted the Energy Policy Act, which amended sections 211 and 212 of the FPA to authorize FERC to order utilities to "wheel" power--i.e., transmit power for wholesale sellers of power over the utilities' transmission lines--on a case-by-case basis... Invoking its authority under sections 205 and 206 of the FPA to remedy unduly discriminatory or preferential rules, regulations, practices, or contracts affecting public utility rates for transmission in interstate commerce, ...the Commission issued Orders 888 and 889 to prevent this discrimination by requiring all public utilities owning and/or controlling transmission facilities to offer non-discriminatory open access transmission service... "functional unbundling," i.e., separating utilities' wholesale transmission functions from their wholesale

electricity merchant functions. Specifically, the orders require utilities to (1) file open access nondiscriminatory tariffs that contain the minimum terms and conditions of nondiscriminatory services prescribed by FERC through its pro forma tariff; (2) take transmission service for their own new wholesale sales and purchases of electric energy under the same terms and conditions as they offer that service to others; (3) develop and maintain a same-time information system that will give potential and existing transmission users the same access to transmission information that the utility enjoys (called the "Open Access Same-Time Information System" or "OASIS"); and (4) state separate rates for wholesale generation, transmission, and ancillary services.

An article by The National Council For Science And The Environment, IB10006: Electricity: The Road Toward Restructuring, is included as Attachment A explaining some more of the history of regulation of electricity.

In 1996, as many states moved to unbundle sales, FERC asserted jurisdiction over all unbundled retail transmissions, leaving the states only the sales portion of unbundled retail transactions. FERC stated that FPA @ 201 gives it jurisdiction without qualification over all transmission by public utilities in interstate commerce, while acknowledging that FPA @ 201(b) explicitly places retail transmissions by 'facilities used in local distribution' beyond the Commission's jurisdiction. FERC then adopted a seven factor test for determining which facilities fall within which category. Transmission Access Policy Study Group, 225 F.3d at 691. The seven factors are listed in Attachment B. Thus for installations in states which have unbundled, the discussion of whether 8093 requires transmission services to be acquired in accord with state law has become moot. FERC has asserted jurisdiction.

A recent FERC order 2000 requires all public utilities that own, operate or control interstate electric transmission to file by October 15, 2000, a proposal for a Regional Transmission Organization (RTO), or, alternatively, a description of any efforts made by the utility to participate in an RTO, the reasons for not participating and any obstacles to participation, and any plans for further work toward participation. The RTOs will be operational by December 15, 2001.

#### E. Kentucky Electric Utility Regulation

Kentucky, the state in which BGAD is located, has not yet deregulated. The reauthorized Special Task Force on Electricity Restructuring is still holding meetings . In Kentucky retail electric services are governed by the Public Service Commission. Kentucky Revised Statute 278.020(5) states:

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect.

City owned utilities are exempt from regulation by the Public Service Commission. "As a result of our re-examination of Chapter 278, KRS, specifically the exemption from the regulatory control of the Public Service Commission granted to cities by the plain language of subsection (3) of KRS 278.010, we have reached the conclusion that our construction of this subsection is erroneous, and we hold that the exemption provided therein extends to all operations of a municipally owned utility whether within or without the territorial boundaries of the city." Carl McClellan et al. v. Louisville Water Company et al., 351 S.W.2d 197; 1961 Ky. Lexis 160.

The Kentucky laws that provides for the establishment of certified territories for retail sales of electricity are KRS 278.016-.018. KRS 278.016 states:

Commonwealth to be divided into geographical service areas. -- It is hereby declared to be in the public interest that, in order to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution [\*880] facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes[\*\*9] between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.

The formula used for boundaries is set forth at 278.017(1):

Except as otherwise provided in this section, the boundaries of the certified territory of each retail electric supplier are hereby set as a line or lines substantially equidistant between its existing distribution lines and the nearest existing distribution lines of any other retail

electric supplier in every direction, with the result that there is hereby certified to each retail electric supplier such area which in its entirety is located substantially in closer proximity to one of its existing distribution lines than to the nearest existing distribution line of any other retail electric supplier.

The third provision addresses the right to serve in a certified territory:

278.018. Right to serve certified territory. -- (1) Except as otherwise provided herein, each retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory, and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier; provided that any retail electric supplier may extend its facilities through the certified territory of another retail electric supplier, if such extension is necessary for such supplier to connect any of its facilities to serve its consumers within its own certified territory. In the event that a new electric-consuming facility should locate in two or more adjacent certified territories, the commission shall determine which retail electric supplier shall serve said facility based on criteria in KRS 278.017(3).

The Court in *City Of Florence, Kentucky; And The Union Light, Heat and Power Company v. Owen Electric Cooperative, Inc.*, wrote:

The constitutional sections do not grant a municipality the authority to franchise a right to sell electricity within the boundary of a city. The right to produce and sell electricity as a commercial product is not a prerogative of the government, but is a business which is open to all, and for that reason is not a franchise.

## CONCLUSIONS

Based on the direction from Office of Counsel and the plain language of the two Federal statutes, Public Law 105-85. Sec 2688 and P.L 106-398, Sec. 2813, there must be open competition for the sale of the system unless the facts justify an exemption under 2304. The Installation has offered no information which would lead one to conclude that circumstances warrant an exemption. Additionally it is clear that the commodity must be purchased in accordance with the State's utility laws. In Kentucky, this means a bundled sale from a franchised provider.

Therefore, I believe the contracting officer's position that "we solicit for proposals to privatize the electrical distribution under full and open competition without the commodity" would be the simplest.. However, I am unwilling to conclude that the commodity can not be included in the RFP under any circumstances.. Including the commodity as an optional bid item does not appear to be illegal. As long as the Government does not limit bidders for the system to those who can sell electricity under state law, it has not restricted competition for the system and services. Conversely, if procedures can be established to evaluate and accept bids on the commodity from only those entities eligible to sell the Commodity under state law, there is no violation of 8093

To what extent the RFP must be changed depends upon the answer to the question - what entities can lawfully sell the commodity to the Installation under State franchise laws?

[Further discussion of the RFP omitted for publication]

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## Attachment A:

<http://www.cnie.org/nle/eng-7.html>

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The Public Utility Holding Company Act of 1935 (PUHCA) and the Federal Power Act (FPA) were enacted to eliminate unfair practices and other abuses by electricity and gas holding companies by requiring federal control and regulation of interstate public utility holding companies. PUHCA remained virtually unchanged for 50 years until enactment of the Public Utility Regulatory Policies Act of 1978 (PURPA, P.L. 95-617). PURPA was, in part, intended to augment electric utility generation with more efficiently produced electricity and to provide equitable rates to electric consumers. Utilities are required to buy all power produced by qualifying facilities (QFs) at avoided cost (the amount it would cost the utility to produce that same amount of electricity; rates are set by state public utility commissions or through a bidding process). QFs are exempt from regulation under PUHCA and the FPA. Electricity regulation was changed again in 1992 with the passage of the Energy Policy Act (EPACT, P.L. 102-486). The intent of Title 7 of EPACT is to increase competition in the electric generating sector by creating new entities, called "exempt wholesale generators" (EWGs) that can generate and sell electricity at wholesale without being regulated as utilities under PUHCA. This title also provides EWGs with a way to assure transmission of their wholesale power to its purchaser. The effect of this Act on the electric supply system is potentially more far-reaching than PURPA.

On April 24, 1996, the Federal Energy Regulatory Commission (FERC) issued two final rules on transmission access (Orders 888 and 889). FERC believed these rules would remedy undue discrimination in transmission services in interstate commerce and provide an orderly and fair transition to competitive bulk power markets. Under Order 888, the Open Access Rule, transmission line owners are required to offer both point-to-point and network transmission services under comparable terms and conditions that they provide for themselves. The Rule provides a single tariff providing minimum conditions for both network and point-to-point services and the non-price terms and conditions for providing these services and ancillary services. This Rule also allows for full recovery of so-called stranded costs with those costs being paid by wholesale customers wishing to leave their current supply arrangements. The rule encourages but does not require creation of Independent System Operators (ISOs) to coordinate intercompany transmission of electricity.

Order 889, the Open Access Same-time Information System (OASIS) rule, establishes standards of conduct to ensure a level playing field. The Rule requires utilities to separate their wholesale power marketing and transmission operation functions, but does not require corporate unbundling or divestiture of assets. Utilities are still allowed to own transmission, distribution and generation facilities but must maintain separate books and records.

## Attachment B

The Commission's seven factor test involves evaluating on a case-by-case basis whether the activities of the facilities in question correspond with seven specific indicators of local distribution:

- (1) Local distribution facilities are normally in close proximity to retail customers.
- (2) Local distribution facilities are primarily radial in character.
- (3) Power flows into local distribution systems; it rarely, if ever, flows out.
- (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market.
- (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
- (7) Local distribution systems will be of reduced voltage.

Order 888, P 31,036 at 31,981.