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National Policy Dialogue  
on  
State and Federal Regulation  
of the  
Electricity Industry

Staff Report  
on a  
Keystone Policy Dialogue

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**MASTER**

## PREFACE

This dialogue was convened by The Keystone Center, a neutral, non-profit organization that facilitates national and international consensus-building dialogues among individuals representing a diversity of interests. The Center conducts dialogues in seven main substantive areas: energy; environmental quality; health; biotechnology and genetic resources; natural resources; agriculture, food, and nutrition; and science and technology. The Center brings together people from the private sector, environmental and citizen organizations, academia, and government to address pressing questions, encourage scientific inquiry, enhance understanding and appreciation of the natural world, and develop consensus on public policy issues.

The policy dialogue process provides an opportunity for people to develop a common understanding of complex and controversial issues, explore respective interests, and negotiate recommendations that shape public policy. To reach consensus, participants must be willing to compromise. The resultant give-and-take creates a consensus document with a sum that is greater than the parts. In this sense, participants may not always agree on specific positions when viewed in isolation. Taken as a whole, however, they are willing to accept the full group's position as part of an entire package to create a comprehensive agreement and further the interests of sound public policy.

Participants followed three ground rules in this dialogue:

1. People participate in the discussions as individuals, not as formal representatives of an interest group or organization.
2. All conversations are off-the-record and not for attribution.
3. No documents produced in the course of the dialogue or the final report are made public until agreed upon by the group as a whole.

## **Introduction and Background**

For over two years, The Keystone Center facilitated a dialogue on State and Federal Regulation of the Electricity Industry. The intent of this report is to assist policy-makers faced with decisions about changes to traditional utility regulation and planning and provide an overview of a diverse group's deliberations on regulatory jurisdictional conflicts. This report is not a consensus document, rather it is a staff written summary of two years of discussion on the issues. The participants in the Keystone Dialogue believed that all affected interests could benefit from, if nothing else, a summary of their discussions of state/federal issues.

The electric utility industry is one of the last remaining, heavily regulated industries in the United States. Rate and corporate regulation is split between state and federal governments and there is distinct regulatory authority at each level. For example, retail rate regulation occurs at the state level, the Federal Energy Regulatory Commission is responsible for wholesale rate regulation under the Federal Power Act, and the Securities and Exchange Commission oversees registered utility holding companies as defined under the Public Utility Holding Company Act of 1935. This jurisdictional split between state and federal regulation has evolved over many years through legislation and litigation on such matters.

The creation of this allocation of regulatory responsibility was initiated in 1935 with the passage of the Public Utility Holding Company Act and the Federal Power Act when the economic and technological changes that are now occurring in the industry simply could not have been envisioned.

Changes in generation markets over the past twenty years have put pressure on both the industry and the current regulatory structure. One trend is the increased emphasis on regional power markets comprised of utilities seeking to sell excess capacity and purchase low cost supplies to meet system needs, the great increase in the number of non-utility generators, and the re-emergence of utilities in need of capacity. Another pattern is the increasing amount of joint-ownership of generation projects and power pooling. It is clear that such changes in the industry do not fit neatly into the existing state/federal balance and have disturbed the delicate

state/federal distribution of regulatory responsibility that has existed over the last several decades. As a result of these tensions and changes, Keystone initiated a Dialogue on State/Federal Regulatory Issues Affecting Electric Power Markets.

The goals of this Keystone Dialogue were to explore the current allocation of regulatory responsibility between federal, state, and other regulatory entities, how these entities regulate various transactions, the regulation's impact on the industry, and how future regulation can more effectively serve the public interest and provide greater certainty to the stakeholders in the industry. In short, the purpose of the dialogue is to ensure that regulation would be adequate to supervise the evolving marketplace.

### **Background**

This project originated with the idea of exploring the interplay of state and federal regulatory relationships as the electric power industry evolved. The premise of this Dialogue was that new regulatory relationships may be necessary to accommodate increased competition as the industry moves away from monopolistic structures towards greater reliance on competition in wholesale power markets to achieve power supply requirements. Many industry observers have concluded that regulatory gaps and conflicts between state and federal governments are hindering the efficient development of competition in bulk power supply to the detriment of all affected interests.

This friction is particularly evident in wholesale power markets where questions of jurisdiction and authority date back to problems identified by the Attleboro gap. Just as that problem led to passage of the Federal Power Act, current discussions focus on legislative solutions to today's problems. A small working group was asked to explore non-legislative approaches to addressing these jurisdictional issues in a way that would address the concerns of multiple stakeholders including state and federal regulators, utilities, independent power producers, consumers, and others.

Early on in this dialogue, participants agreed to focus on wholesale rate-making issues because of the problems that have arisen in this area. Some of the problems that are driving the discussion of state and federal relationships concern the regulation of wholesale power sales and purchases. The Federal Power Act provides the Federal Energy Regulatory Commission with authority to regulate certain wholesale sales, while state commissions claim the authority to supervise jurisdictional entities' wholesale purchases.

As more transactions occur in wholesale markets and as different entities enter those markets, the lack of regulatory specificity has resulted in changing delineation of authority created by precedent and the courts. Decisions to rely on third-party power supply through participation in bulk power markets are integrally related to the purchasing utility's strategic judgments concerning the need for power, technology choice, fuels dependency, facility location, and the availability or effectiveness of alternative direct investment in plant or demand side management. For the most part, regulatory supervision of the purchasing utility's judgments occurs at the state level. As reliance on third-party power supply increases and bulk power markets grow more competitive, the exercise of federal regulation of sellers is likely to: (1) become less and less relevant in determining what a seller may charge for power under specified terms, and (2) come into increasing conflict with state authority as states attempt to influence or set the terms and conditions upon which utilities subject to their direct regulatory supervision may participate in bulk power markets. In the case of multi-state operations, any attempt by a state to influence utility judgments or regulate outcomes is likely to come into increasing conflict with federal authority or with other states. To the extent they occur, jurisdictional conflicts between federal and state authorities or among the state will confound utility planning, impede bulk power market efficiencies, and impose additional costs on consumers.

### **Past Precedent and Recent Developments**

Several specific cases have defined the authority of state and federal regulators. Although a case related to transmission issues, Colton is often cited as the foundation upon which current state and federal authority is divided. The Pike County Doctrine has been characterized as ascribing broad authority to states for reviewing the power purchase decisions of utilities in light of

reasonable alternatives. The Supreme Court entered the fray with the Mississippi Power and Light decision that upheld FERC authority over certain cost allocations made to subsidiaries of registered holding companies.

State regulators are concerned with what they perceive to be an erosion of their authority as utilities purchase more power in interstate wholesale power markets and they become simply "rubber stamps" in passing through costs incurred by purchasing power at wholesale to retail ratepayers. As the industry continues to evolve and a greater proportion of transactions take place in wholesale power markets, it appears that utilities will build less capacity for retail rate base and instead rely more on purchased power. State commissioners have examined the Pike County Doctrine as it has been modified by the Mississippi Power & Light Supreme Court decision and found that they do not have authority over the power purchase decision of interstate holding company purchases because they are prohibited from examining the allocation between operating company subsidiaries of costs and energy of holding company purchases. Thus, states believe that utilities will structure themselves in such a way so as to avoid state regulation and engage in wholesale transactions resulting in federal pre-emption of state authority.

New mechanisms are sought to account for competition in wholesale markets. One of the primary mechanisms developed by state commissions has been competitive bidding program for the acquisition of bulk power resources. When FERC issued a Notice of Proposed Rulemaking in 1988 on bidding, states viewed it as an attempt by FERC to pre-empt the state's traditional role of selecting the generation mix. Several states have subsequently developed bidding programs to identify and select power supply resources although the subsequent wholesale rate filings were rejected by FERC. The most notable of these cases was the Tampa Electric decision in which FERC overruled the Florida Public Service Commission's decision that TECO had received a sufficient number of bids signifying adequate competition.

The Sun Peak decision exemplifies the conflict between state authority for assuring adequate supplies of electricity and federal authority for regulating wholesale rates. Under a modified integrated resource plan (IRP) approved by the Nevada Public Service Commission, Nevada

Power Company identified Sun Peak, an affiliate of the Southern California Edison Company, as the most efficient supplier of power. The Nevada IRP process is intended to review supply and demand side resource options and select the resource best suited to the needs of Nevada consumers. Sun Peak sought FERC approval of the power sale at market-based rates which FERC denied, citing inadequate competition. Upon rehearing, FERC approved the sale, but at cost-based rates. The state of Nevada viewed the FERC's original ruling as another example of federal pre-emption of a proper state function regarding the acquisition of power resources.

In the TECO, Sun Peak, and other cases such as the Western Systems Power Pool and Public Service of Indiana, FERC has prescribed rules and guidelines for approving wholesale sales in more competitive bulk power markets. While delineating the rules that they will use in approving transactions in competitive markets, state commissions have become concerned that these rules will pre-empt their authority over other aspects of such utility functions as planning and supply acquisition.

### **Proposal for a New Regulatory Regime**

During the initial phase of this project, a small group comprised of all affected interests developed a proposal for a new regulatory regime that would be presented to a larger group of participants at a plenary session held in February, 1991. The proposal focused on wholesale ratemaking issues and would change traditional seller regulation and move towards regulating buyers of electric power. The proposal would delegate most wholesale rate regulation to state commissions with jurisdiction over retail utilities. State regulators would be provided the authority to pre-empt the Federal Energy Regulatory Commission's rate-making authority under the Federal Power Act if the buyer of power was located in a single state. States could determine the need for power, including the term and conditions upon which the buyer may participate in bulk power markets, disallow recovery of purchased power costs, and require approval of individual contracts or specify terms and conditions of acceptable power purchase arrangements.

State regulation would be subject to federal guidelines which would be developed to preclude undue discrimination or to implement specific statutorily defined federal policy. If the buyer is

an operating company located in more than one state, a federal agency could regulate both the buyer and seller of power. However, state regulation could supplant federal regulation if states agreed to a joint form of regulation and agreed to be bound by joint decisions. States would have the authority to make decisions regarding supply acquisition and cost allocation.

This model was based on several organizing principles. (See Appendix A.) Such principles include that regulatory supervision of utility judgments should take place predominantly at the state level and that increasing reliance on third-party power supply increases the possibility that federal regulation of sellers will become less relevant and conflict with state authority as state commissions establish rules supervising utility involvement in bulk power markets. With respect to multi-state companies providing retail service in more than one state, states are likely to come into increasing conflict with each other and the federal government. If this occurs, jurisdictional conflict will confound utility planning and impose additional costs on consumers. This model was intended to minimize such conflicts.

Participants at the February, 1991 plenary session began discussion of the potential administrative changes that the Federal Energy Regulatory Commission could undertake to vest appropriate regulatory entities with sufficient authority to review and rule on wholesale power transactions under their purview. The proposal under discussion was presented in the nature of an exhaustion of administrative remedies for state and federal regulatory issues and was not predicated on the necessity for legislative action. Many questions remain about the legal and policy mechanisms that would enable such a regime to function. Further analysis of the proposal, it was agreed, should define criteria for comprehending and accommodating within FERC proceedings, state supervision of buyer participation in bulk power supply.

The group examined proposals designed to expedite FERC's treatment of rates that were not based on cost of service, but were established more by market forces. The group agreed that the FERC should defer to state decisions on such rate requests if the resource conforms to an integrated resource plan or was selected by competitive procurement. At about that time, speeches by FERC Chairman Allday communicated that the FERC would initiate a rulemaking



on market-based rates. In the case of interstate transactions, the proposal should encourage FERC to initiate experimentation in joint boards or other devices for better integration of the state role in the federal decision-making process. Proposal development should focus on defining the need and character of any federal legislation required to better structure regulatory supervision of bulk power markets and facilitate better coordination among commissions.

The proposal was limited to regulating the rates charged for different types of electric service, with a primary focus on wholesale rates. Environmental regulation and siting of power plants would not be addressed at that stage of the project. Transmission service and siting of facilities had been discussed by the working group and it was agreed that a companion proposal could be developed in the future to address jurisdictional questions that may arise in examination of these issues, if needed.

### **Introduction of Proposal**

Participants believed that the best method of fleshing out any proposal would be to first address a single, rather simple, transaction and determine the best method of regulation. For example, this approach would first look at a transaction involving two non-affiliated entities with retail operations located exclusively within a single state. The key to this approach is to essentially defer discussion of complex, multi-state transactions until the comparatively simplistic transactions can be worked out. (See Appendix B.)

The stated objective of the proposal is to "redefine the existing allocation of regulatory jurisdiction between FERC and state PUCs in relation to certain types of wholesale power sales, where both buyer and seller operate exclusively within the same state". Redefining the allocation of regulatory jurisdiction would shift regulatory oversight over strictly intrastate transactions back to the state level where many believe the most effective oversight can take place, thus reversing the effect of the Supreme Court decision in Colton. The proposal proponents believe that the authority for state-level review of utility transactions has gradually been eroded as a result of increased utility reliance on bulk power purchases and FERC rate-making decisions which conflict with states' integrated resource planning processes.

The proposal outlines a process by which FERC would issue minimum "safe-harbor" guidelines under which it would (1) defer rate review to state authority, and (2) certify the rate which results from the state proceeding as "just and reasonable", for purposes of Section 205 of the Federal Power Act (FPA). In order to reallocate jurisdictional authority, the transaction must meet the following guidelines:

1. Both parties must have all retail operations exclusively within a single state and can not be affiliated with any operating company serving at retail in another jurisdiction.
2. If the seller is a QF or IPP, it may be affiliated with an entity having generating facilities in other jurisdictions.
3. Except for QFs and IPPs, the state PUC must have jurisdiction over both parties to the transaction.
4. Parties would file a §205 rate proposal concurrently at the FERC and relevant state and, if the state did not assert jurisdiction over the transaction, the FERC would proceed with a traditional §205 rate proceeding.
5. The state must consider the following guidelines in a formal rate proceeding:
  - If parties seek a cost-based rate, the PUC would use the same cost-of-service approach used by the FERC in a §205 proceeding. In addition, the PUC, under its own rules, could examine the prudence of the transaction from the buyer's perspective.
  - If parties seek a market-based rate, the PUC would follow a set of FERC-promulgated "safe-harbor" guidelines which detail the evidentiary burden parties would have to meet and the findings that the PUC must make. In addition, the FERC would establish guidelines for affiliate transactions relating to affiliate abuse and self-dealing issues.
  - The "safe-harbor" guidelines would begin with the analytic framework and evidentiary burdens outlined in the Commission orders in Nevada Sun Peak and Edgar Electric, however they would grant some degree of deference to PUCs for

establishing specific evidentiary burdens to be sustained and assessments of market power and affiliate abuse.

- If PUCs follow the guidelines, approve rates, and certify such to the FERC, the FERC would then agree to accept the rate as "just and reasonable" under §205 of the FPA.

## **Discussion**

Following the introduction of the proposal, participants focused on what types of entities would be eligible to participate and the transactional scenarios permissible under the proposal. Participants explored the types of transactions that would allow entities from out of state to participate in transactions under the proposal. According to the proposal, the only out-of-state participants eligible under the guidelines are wholesale generators with no retail customers in another state, although they could be affiliated with generating units in another state. A significant issue of discussion was the role which IPPs and QFs would play under this new regulatory regime. For example, an IPP which is located out of state and is not affiliated with an operating company with retail customers would be considered eligible to participate. QF rates, on the other hand, are already subject to state review under PURPA avoided-cost determinations.

In reviewing the section on rate review, participants could not agree on how best to coordinate the actions of the state and FERC, if the FERC did defer jurisdiction over certain transactions to the state. According to the proposal, simultaneous rate filings would be made at both the FERC and relevant state. The state would be required to assert jurisdiction over the proposed transaction within a specified amount of time, and if it fails to do so, the FERC would proceed with a traditional §205 proceeding. Some participants state that, under existing law, the FERC has to act on a rate filing within 60 days or else the rate goes into effect. Therefore, the proposal would not only require the state to assert jurisdiction, but to actually act on the filing within 60 days. In discussing how to allot more time for review, it was stated that the FERC has no authority to suspend rates for new service and, of course, states can not suspend FPA filed rates.

Because the proposal is premised upon working within existing FERC authority, and not amending the FPA, it was widely believed that an alternative to this procedure is necessary.

Notwithstanding the discussion above, participants focused on a mechanism for state review of the rate filing and how the FERC would then rule on, or certify, that the rate was indeed just and reasonable. The essential element of this approach is to remove the FERC from state affairs on policy issues and afford the state as much latitude as possible because, ultimately, state decisions affect their ratepayers directly and the state is considered to be most sensitive to the needs of those ratepayers. Several variations were offered on how best to implement the proposal. Some believe that after the state implements a full rate proceeding (based on a FERC §205 proceeding), the decision and evidentiary record would then be forwarded to the FERC for a "one-step" review whereby the Director of Electric Power Regulation would review the case and certify it to the full Commission, while allowing for an appeal. Others foresee a process by which the state PUC would certify an ALJ decision (based on an evidentiary record), that decision would be sent directly to the full Commission for a final decision. It should be noted, that under any scenario, that judicial review is not precluded in any manner.

The issue of judicial review raises certain coordination problems. Problems may arise when a state decision is appealed to the relevant state court, and the decision is also sent to the FERC for review. Some believe that a "two-track" approach may unnecessarily delay timely review and may create certain legal and jurisdictional questions.

The discussion of market-based rates centered around determining the evidentiary burdens that must be met in order to justify a "just and reasonable" rate. The proposal states that for transactions involving non-affiliated entities, the main focus is a market power review, while affiliated transactions require a market power review, as well as affiliate abuse/self-dealing review. Some participants support the proposal requirements that the "safe-harbor" guidelines follow the Commission's analytical framework and evidentiary burdens set out in the Nevada Sun Peak and Edgar Electric orders. The proposal does acknowledge that the FERC should accept "a somewhat less rigorous and theoretically elegant analysis of the market power issue". -Some

participants, however, believe that states should not have to go through strict FERC-designated procedures to determine issues like market power. Instead, they contend that states should have the latitude to design their own market power test and affiliate abuse test because their ratepayers are the only ones to be potentially harmed.

Another option to ensure that a just and reasonable rate is achieved is for states to protect purchasers by determining an avoided cost cap. Some participants believe that such a mechanism would eliminate the need for a formal market power determination. Others assert that market pressures may cause prices to exceed a set avoided cost cap and, therefore, certain specific criteria may need to be detailed in order for states to implement such a mechanism.

Additional questions arise in discussing how mechanisms like state competitive bidding and integrated resource planning will be effected by the new regulatory framework. Some advocate a comprehensive approach in which the federal interest must first be determined and the specific burdens of proof which states must show to FERC in order to prove that the market is disciplined. Some participants are concerned that interstate participation in competitive bidding scenarios will be discouraged as a result of states asserting jurisdiction over as many transactions as possible.

### **Guidelines for States**

Participants focused on determining, in more specificity, guidelines which would set out the minimum acceptable standards that states would have to meet in order to act on a transaction (and for the FERC to grant deference). In ascending order of restrictiveness, are the following options:

1. State approved contract, from buyer perspective.
2. State issued decision, with reference to avoided cost, prudence review of purchasing decisions
3. Formal state regulatory process.
4. State IRP process, with no federal standards.
5. State IRP process, with competitive procurement procedures.
6. Competitive procurement, with a "sparseness test" by FERC.

## 7. Commission prescribed tests guiding all aspects.

During discussion of the state approved contract scenario, the main focus was on how a "workably competitive market" would be determined and whether the FERC would agree with a state's determination. In particular, the role of the avoided cost price cap was deliberated, and it was offered that states may not explore beyond whether a market was "workably competitive" if there was a price cap. In discussion, it was proposed that the FERC would deem a rate to be just and reasonable if the power sales contract was approved by the state, and was below the purchaser's avoided cost and self-build option, and was reached by either: (1) a bidding process; (2) a state supervised procurement process; (3) a state approved IRP process, or (4) a state determination that the seller lacks market power in the relevant geographic area.

Throughout the discussion, there were several factors raised that effect the competitiveness issue, the most influential being transmission access and pricing. Some participants assert that correct transmission pricing and access guidelines set by the Commission will ensure market power will be mitigated. These factors will play a significant role in future discussions of competitive forces affecting the locus of regulatory jurisdictional authority.

### **Principles for Action**

One participant presented a set of principles that could be implemented by states and which would allow FERC to rely on state determinations of rates for wholesale power transactions. The principles were categorized into three areas: avoided cost principles, market power determinations, and arms-length nature of a transaction. (Attached as Appendix C.) These principles articulate the bases for state action to review and approve purchases of electricity at wholesale from a variety of sources by utilities under their jurisdiction. To a great extent, the principles rely on the development of bidding programs or integrated resource planning processes as the means of identifying power suppliers to meet consumer needs. Avoided cost caps or more traditional prudence reviews of power purchase decisions are discussed in the principles. These principles include guidelines for determining the prudence of power purchase decisions. Finally, the principles include guidelines for determining if purchases by a utility from an affiliated entity or

from an entity with other types of contractual arrangements would be considered arms-length. Although the working group discussed these principles, they did not reach consensus on them.

### **Conclusions of the Group**

These discussions and proposals were presented to the full group in February 1992. The working group was comfortable with FERC issuing "safe harbor" guidelines that would provide states, utilities, IPP's, and consumer groups with the ability to predict the federal response to specific transactions. While there may be significant legal questions regarding the ability of FERC to completely accept the determinations of states, there are principles that FERC can adopt which would provide greater certainty as to the rate-making treatment of specific transactions.

The working group agreed to discontinue discussions primarily because events and planned actions at FERC began to overtake the working group's deliberations. The Notice of Proposed Rulemaking at FERC on market-based rates, as well as the series of discussions between federal and state regulators indicated significant attempts to resolve many of the same issues set out by the working group.

There are several fundamental issues that the working group would have further discussed if not for these events. The primary question was the ability of FERC to accept judgements from state commissions regarding approval of wholesale transactions and what procedures utilities would have to employ in order for FERC to give deference to their decision. Some believe that statutory responsibility under the FPA may severely limit FERC's ability to delegate authority to other regulatory entities without allowing for some type of appeal to FERC. Absent total delegation of authority, FERC could prescribe guidelines for other regulatory entities to follow although this could raise the issue of federal preemption of state authority if the guidelines were seen as prescriptive. Finally, there remain significant questions about expanding the market pricing guidelines discussed by the working group to other transactions in wholesale power markets.

## APPENDIX A



## Organizing Principles

- Decisions to rely on third-party power supply through participation in bulk power markets are integrally related to the purchasing utility's strategic judgments concerning the need for power, technology choice, fuels dependency, facility location, and the availability or effectiveness of alternative direct utility investment in plant or demand side management.
- For the most part, regulatory supervision of the purchasing utility's judgments in these matters occurs (and can best be exercised) at the state level.
- As reliance on third-party power supply increases and bulk power markets grow more competitive, the exercise of federal regulation of sellers is likely to (1) become less and less relevant in determining what a seller may charge for power under what terms, and (2) come into increasing conflict with state authority as states attempt to influence or set the terms and conditions upon which utilities subject to their direct regulatory supervision may participate in bulk power markets.
- In the case of multistate operations (utilities providing retail service in more than one state, participants in tight power pools, or members of multistate holding companies) any attempt by a state to influence utility judgments or regulate outcomes is likely to come into increasing conflict with federal authority or with other states.
- To the extent they occur, jurisdictional conflicts between federal and state authorities or among the states will confound utility planning, impede bulk power market efficiencies, and impose additional costs on consumers.
- The regulatory scheme outlined in the attached matrix is intended primarily to minimize the potential for jurisdictional conflict and provide a mechanism for the practical execution of regulatory judgment by:
  - consolidating the authority to adjudge the prudence of a utility's decision to purchase power with the regulatory authority to supervise the terms and conditions governing the power supply arrangement;
  - focusing regulatory supervision of bulk power markets on the buy side of the transaction rather than the sell side;

- providing a scheme which would allow states to displace federal jurisdiction of multistate operations provided states coordinate regulatory policies and decision making;
- providing for the exclusivity of federal jurisdiction of multistate operations in the absence of coordinated state action;
- (otherwise) restricting the federal role to matters which may be beyond the jurisdictional powers of states to deal with (e.g., interconnection and extension of service by sellers in another state) or, as necessary, to effect specific statutorily defined federal policies of general applicability or to preclude unreasonable burdens on interstate commerce or undue discrimination.

2/5/91

## APPENDIX B

**INVEST OF EMERGENCY  
FIVE YEARS - APPROXIMATE  
LOSSES TO BE AVOIDED**

**Location of**  
**Study Area**

**For purposes of this matrix:**

“Buyer regulation” would encompass pricing, advertising, and other matters.

- 11) determine the need for power, including the terms and conditions upon which the buyer may participate in bulk power sales (i.e., whether by bidding procedure, negotiated contract, or standard offer contract);
- 12) disallow recovery of purchased power costs determined to be imprudently incurred in relation to price of alternative sources of power;
- 13) require approval of individual contracts or specify terms and conditions of acceptable power purchase arrangements, including, but not limited to, pricing terms, reliability criteria, dispatchability, etc..
- "Seller regulation" would encompass authority to --
  - approve all terms and conditions of the power sale agreement including price.
- "Federal Guidelines" would be imposed by rules of general applicability by federal agency as determined to be necessary to preclude undue discrimination, unreasonable burden on interstate commerce, or other adverse effect to specific statutorily designated purposes. One Authority might be specifically authorized to promulgate such rules. Another Authority might be established by explicit statutory provision.
- In the case of matters reserved to state regulation, states would determine the scope, policies and procedures which they would govern the exercise of regulatory authority unless they are in direct conflict with Federal Guidelines.
- Joint agreement among states to specify voting power and circumstances upon which agreement may be terminated. Federal agency may specify acceptable terms sufficient to effect agreement, but may displacement and prescribe effect on pending proceedings.
- In the case of requirements services, an exceptions to the general rules:
  - 1) A municipality, a cooperative, or other electric utility may be exempted from the requirement that it exercise authority to be voluntarily entered into agreement to any purchase or sale of power by a seller which is a public utility located in a state in which the seller is located, and which is required to require such compulsory agency would determine whether, and on what conditions, including pricing, governing such service. Authority shall not be exercised to require service from a seller located in a state in which the seller is located, but may require reimbursement investment in interconnection capacity by seller, but may require reimbursement investment in interconnection capacity by seller located in the same state. [In the case of a seller located in the same state, if state provides for a seller to appropriate state authority if state provides forum and authority for such purpose.]
- The term "state" is intended to include a political subdivision of the state in the case of power sales to municipal systems.
- Increasingly resellers would be required. If at all, by rules of general applicability administered by federal agency with authority to delegate to states).
- Possible special rule exception to 1.b.i.
  - Federal agency would have authority to place into i.a. category those interstate operations are not subject to regulation. If company whose interstate operations are not subject to regulation

[illegible]

## APPENDIX C

## Principles for FERC Reliance on State Determinations

### Avoided Cost

1. Based on its authority to oversee the retail rates of an electric utility, a state regulatory commission may develop a variety of procedures for determining or reviewing the prudence of any wholesale power purchase contract entered into by that utility. The mere finding that a purchase was prudent does not always result from a broader determination that the purchase price was at or below the utility's incremental cost of alternative power. However, in some instances, such a determination is made by the state commission, or can be implied from the outcome of the commission's procedures. In evaluating a seller's wholesale power rates, FERC should rely on the outcome of a state proceeding in determining whether the rates are at or below the utility's avoided cost when:
  - a. A state-approved bidding process was conducted, and responses to the RFP were received from a certain number of bidders for a certain multiple of the amount of power needed (in which case the highest winning bid sets the utility's avoided cost)<sup>1/</sup>;
  - b. The state commission conducted an integrated resource planning review, made an express determination as to the utility's least-cost options (consistent with the utility's needs for reliability, diversity, etc.), and either approved the seller's contract in that process or established criteria to which the contract conforms;
  - c. The state commission reviewed the seller's specific power purchase contract and found it to be at or below the purchasing utility's avoided cost (as determined by the state); or
  - d. The state commission determined a currently effective ADFAC for the utility.

### Market Power

2. FERC should presume that a market is competitive in the circumstances set forth in 1.a. above.

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<sup>1/</sup> FERC would otherwise accept the state's design of a "suitable" bidding process.

3. In evaluating the prudence of a utility's wholesale purchase decisions, the state regulatory commission considers what options were available to the utility when it made its purchase decision. An express determination by the state commission that sufficient opportunities were available to the utility that the wholesale power market can be considered "competitive" should be relied upon by FERC when:
  - a. The commission reached its conclusion in the context of a state-approved bidding proceeding or an integrated resource planning review; or
  - b. The commission examined the purchase opportunities available to the utility in the course of reviewing the prudence of a specific contract.
4. As to whether the seller controls transmission assets that may give it an unfair advantage in competing with other suppliers in the market, FERC should give considerable weight to any express findings made by a state commission in this regard, in reaching its own conclusions.  
[Alternatively, FERC might accord any such state findings a rebuttable presumption of validity.]

#### Arms'-length Nature of Transaction

5. FERC should presume that a power purchase contract between an affiliated buyer and seller is arms' length if:
  - a. The contract was obtained pursuant to a state-approved bidding process and the outcome was approved by the state commission;
  - b. The state commission approved the transaction pursuant to an integrated resource planning review;
  - c. The state commission examined the transaction and specifically found it to be prudent despite the affiliation of the parties; or
  - d. The price is at or below the buyer's currently effective ADFAC and either the price was the lowest bid in response to a standard contract offer or the contract was specifically approved by the commission.
6. Similarly, FERC should presume that a power purchase contract between a buyer and seller with other contractual relations is arms' length if:
  - a. The contract was obtained pursuant to a state-approved bidding process [and the outcome was approved by the state commission];

- b. The state commission approved the transaction pursuant to an integrated resource planning review;
- c. The state commission examined the transaction and specifically found it to be prudent despite the previous relationship between the parties; or
- d. The price is at or below the buyer's currently effective ADFAC [and either the price was the lowest bid in response to a standard contract offer or the contract was specifically approved by the commission].