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April 3, 2001

**Hand-Delivered**

Mr. Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 159
Washington, DC 20580

Re: V010003 - Comments Regarding Retail Electricity Competition

Dear Mr. Clark:

Enclosed are the original and six copies of Comments of The New Power Company in the referenced proceeding, together with a disk containing the Comments in Word format. Also enclosed are two receipt copies to be returned to our courier after filing.

Thank you for your assistance.

Very truly yours,

Bracewell & Patterson, L.L.P.

Randall S Rich

Randall S. Rich

Counsel for
The New Power Company

Enclosures
/cjb

DC.140404.01

**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL TRADE COMMISSION**

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| **V010003-Comments Regarding** | ) |
| **Retail Electricity Competition** | ) |
| | ) |

## COMMENTS OF THE NEW POWER COMPANY

These are the comments of The New Power Company ("NewPower") to the March 6, 2001 Notice Requesting Comments on Retail Electricity Competition Plans issued by the Federal Trade Commission. NewPower is a retail provider of electricity and natural gas in nine states. As such, it has struggled to understand and comply with the many plans which effect retail electric competition in the United States. It is from that perspective that these comments are written.

NewPower has confidence that competitive retail electric markets will, in time, provide the many benefits that have been touted as arising from the plans adopted to achieve competition: innovation, reliability, better price signals, better service, to name a few. Unfortunately, most states' plans are suffering the growing pains of the transition from an entrenched monopoly service to an open market. NewPower believes that despite these growing pains, the states should stay the course and complete the transition to competition. That will take commitment and assistance from a number of parties: state regulators, incumbent utilities, other market participants, the Federal Energy Regulatory Commission ("FERC"), and perhaps Congress. In short, NewPower does not believe that California is the harbinger of things to come in the rest of the country.

**Impediments to Market Entry**

It should be no surprise that marketers will come to a market where there is margin and that they will avoid markets where there is no margin to be found. There are very few open electric markets today where there is adequate margin to attract alternative providers of electricity to serve all customer classes. (Margin can be defined in a variety of ways, but for the purposes of these comments, it should be defined as the difference between the standard offer price made available by the utility and the bundled cost of the alternative provider to deliver a comparable product. It includes both profit for the marketer and savings for the customer.) The reasons are many: stranded cost recovery, inadequate unbundling of utility rates or "shopping credits" that are too small, mandated rate reductions, burdensome regulatory requirements, burdensome qualification procedures with the investor owned utility ("IOU") and/or the regional transmission organization ("RTO"), lack of uniform business practices across the states or even the IOUs within a state, to name a few. We will examine each of these separately.

**Stranded costs** – In virtually every market open to competition today, customers are paying "stranded costs" to the utilities in addition to paying for the cost of the delivered electricity they use. That extra charge, coupled with mandated rate reductions, limits the margin available to new market entrants. Stranded costs are a transition cost that will distort the face of competition in early years but they should not deter policy makers or customers from pursuing competitive markets. They will be paid off in time, either by virtue of collection of the appropriate amount of money or by passage of a specified period of time.

The states have taken varied approaches to dealing with stranded costs. California, for example, had a short time period in which all stranded costs were to be collected. Pennsylvania and Texas, by contrast, had recovery periods of up to 15 years. In any event, collection of those costs on top of the delivered cost of the commodity when paired with a mandated rate reduction squeezes the margin available for customers and suppliers alike. The end of the collection of stranded costs will eliminate that squeeze and should promote the entry of more competitors into the market.[1]

**Inadequate unbundling** – In virtually every open market, state regulators have failed to unbundle utility rates adequately.[2] They continue to permit utilities to recover costs for services which are competitive in nature with the effect that customers pay twice for many services. If, for example, a marketer provides its own billing services which are included in its charge to a customer, that customer will often pay the utility's billing services charges which continue to be embedded in their distribution rates. The same is true for customer call centers, the utility's cost of procuring power, and certain transmission costs – none of which are used by the customer participating in the competitive market.

"Shopping credits" are one manifestation of unbundling. They are generally a reduction to the bundled utility offering for a comparable service or the price against which a marketer must compete. Ideally, they should reflect the commodity cost (including the cost to procure the power and schedule it), all transmission costs (including, but not limited to congestion costs, losses, capacity charges, and ancillary services) incurred by the utility to bring the power to the appropriate market, and all costs associated with the competitive services offered by the utility which are provided by competitors (billing, call centers, other customer care functions, metering). It is rare, however, that shopping credits truly reflect those costs. As a result,

[1] One of the ironies of the California situation is that customers have paid the price for competition – they have paid all the utilities' stranded costs. Many are now calling for re-regulation after consumers have footed the bill for competition.

[2] Texas appears to be a notable exception.

customers will pay twice for services, many of which they no longer take from the utility in a competitive world.

**Mandated rate reductions** – Many state legislatures imposed a mandated rate reduction for customers when they enacted restructuring laws.[3] By reducing the rate which could be charged by the regulated utility for power while also imposing a surcharge for stranded costs (which had to fit under the cap) most states effectively prevented any meaningful competition for small customers. In other words, there was no opportunity to offer customers savings below the mandated reduced rate. The problem was exacerbated by the fact of rising fuel costs for generation which today have generally put the wholesale price above the capped rate. Connecticut and California are two such examples.

If one of the rationales for implementing a competitive market is to send accurate price signals to customers, mandated rate reductions undermine that rationale. Without understanding the true cost of the commodity consumed, customers will make irrational economic choices about its use. California's situation has made clear that customers will not conserve if they receive inaccurate price signals. Capped rates have done nothing to encourage demand management in a state where supply and demand are out of balance.

**Burdensome regulatory requirements** – Every additional regulatory requirement imposed on a marketer adds costs to that marketer's services that will either be passed on to customers or will keep the marketer out of the market. Licensing is one such example.

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[3] In many instances, these rate reductions were for residential and small commercial customers only. The rationale offered was that those customers would not otherwise benefit from competition.

NewPower agrees that states have an interest in ensuring that qualified suppliers provide dependable supply to customers and that customers receive expected services (such as bills) in a timely, accurate fashion. Many states have created elaborate licensing procedures using the rubric of "protecting consumers from bankruptcies and fly by night marketers." Having a licensing process that requires the hiring of attorneys, appearances at hearings, and the generation of data which is largely meaningless has done nothing to prevent marketers from going out of business and has, in fact, increased their cost structure.

For example, many states require a listing of supply contracts and marketing budgets in order to obtain a license. Often, a marketer will have neither as it prepares to obtain a license. Supply contracts are often entered into after one obtains customers; one cannot obtain customers without a license. Likewise, a marketer may attempt to obtain a license with no immediate plans to enter a state. As a result, no marketing budget will exist. In each case, commission insistence on production of those items creates unneeded costs and constitutes a barrier to entry.

Likewise, many states impose burdensome reporting requirements on marketers once they begin to sell in the state – fuel source mix, environmental impact, number of customers by zip code, etc. Insult is added to injury when the competing utilities are not forced to meet the same requirements. At some point, a marketer may decide to forgo such a marketing "opportunity" especially when margins are small or non-existent.

**IOU/RTO Qualifications** – In addition to obtaining a license from a state, marketers must also qualify with the IOU on whose system they propose to operate. Such qualification also demands qualification with the appropriate ISO/RTO. [4] In both cases, marketers are required to execute adhesion contracts – contracts over which they have absolutely no input or

[4] In some instances, the state also requires qualification with the appropriate ISO/RTO.

bargaining power. If the marketer refuses to accept the contract as presented, he will not be doing business on that system.

Marketers are required to test their computer systems to determine whether they are compatible with the IOUs' systems. Some utilities are most accommodating in scheduling and completing such testing. Many are not. They offer testing only during very limited windows and are inflexible in the way in which they pursue the testing. As a result, marketers can lose a market opportunity by virtue of the IOUs' intransigence. Add to that the fact that very few IOUs have the same testing protocols and this becomes another unnecessary area of cost for marketers to bear.

Perhaps the most costly part of the IOU/RTO qualification process is the security or bonding process. IOUs and RTOs demand the posting of a bond or a letter of credit to ensure payment of certain charges. The amount is generally non-negotiable and can be quite sizeable if the marketer is moving a significant amount of commodity on the system. The size of the security is often calculated in a "black box" so that it is impossible to determine whether one marketer is treated the same as the next. These requirements should be uniform and should be capable of being met by demonstration of a marketer's sufficient cash on hand or net worth to protect the utility.

**Uniform Business Practices/Rules** – One of the most frustrating issues for marketers is the absence of uniformity across states, or even within states, of the rules and business practices for each utility. In one state, for example, each of three utilities has a different protocol for rendering a bill. One requires that the marketer be "bill ready." Another requires that the marketer be "rate ready." The third has yet a different requirement. Each time a marketer has to build a new system to serve its customers, its costs increase and, thus, the customers' costs increase.

The effort on uniform business rules sponsored by EEI last summer is a decent starting point to begin to discuss uniformity. It does not go far enough, in NewPower's estimation, however, to solve the practical problems faced by marketers who operate behind multiple utility systems. A commodity which moves in interstate commerce should not be subjected to so many different rules affecting its sales and distribution.

**What We Like**

NewPower has evaluated the electric markets in all states that have passed legislation and has several observations on matters which enhance competition:

- Full divestiture of generating assets by utilities promotes competition.
- Fuel adjustment clauses for the standard offer product help to reveal the true cost of the product sold. This mitigates some of the harm wrought by mandated rate reductions.
- Structural separation of the marketing function from the regulated utility services facilitates rate unbundling and creates a more level playing field for other entrants – all competitors are unregulated.
- Competitive default service jump starts competition by moving large blocks of customers to a competitive supplier without the need to shop.
- Strong affiliate rules and a commission willing to enforce them ensure that all marketers start from the same place and that no one participant has a distinct advantage.

**What Marketers Need**

The two main requirements of marketers entering new electric markets are adequate margin and uniform business rules, as discussed above. Adoption of the items mentioned above which further competition would also be highly advantageous to competition. Other items which would improve the marketer's lot in life include:

- Regulatory processes which recognize that marketers do not have the same regulatory resources as utilities will permit more marketer input and better rules. Working groups that meet several days each week for weeks on end are bound to disadvantage marketers. Marketers generally do not have the staff to devote to all the working groups that convene to implement restructuring laws. By contrast, utility companies rarely have fewer than two representatives (and often as many as seven representatives) in each meeting.[5] While marketers applaud the use of informal working groups, commissions should seek processes which recognize the limited resources of marketers and ensure that their voice is heard.
- A single point of contact (an account manager) at the utility for each marketer goes a long way to help facilitate the entry into that utility's market. Commissions should require such support for competitive providers.
- Metering and billing should be made competitive, *i. e.* removed from the bundle of regulated utility services as soon as possible. Only when the marketer owns the key interfaces to the customer will the optimal benefits of competition be realized. Competitive metering will permit the innovative, creative products which have been

[5] Large regulatory staffs continue to be included in utility rates with the result being that customers pay for the people who fight to keep their rates high and stymie competition.

predicted by proponents of competition to be developed. Permitting billing to be offered by the marketer will lower cost structure and cement the relationship between the customer and the marketer.[6]

- FERC should quickly see that RTOs are formed and operational. It should make each RTO as large as operationally feasible in an effort to achieve more uniformity in transmission transactions.[7] It should find a way to avoid pancaked rates. Most importantly, it should remove the native load exception which permits incumbent utilities to favor their own load and hinder the development of competitive markets.

**Conclusion**

NewPower thanks the Commission for the opportunity to share these observations on the state of competition in the retail electric industry. While we are admittedly in the midst of some disarray in competitive electric markets, NewPower is optimistic that states will find a way to bring all the benefits of competition to all customers. States must recognize as they implement their legislation, however, that marketers will not come unless they can offer benefits to customers and profits to their shareholders. If they create a system where no one can compete with the utility, they should not be disappointed that competition does not develop. Meanwhile, the FERC must look at the development of the wholesale electric market and take steps to ensure that it does not hinder the further development of retail markets.

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[6] Where the utility renders a consolidate bill, it is not unusual for the utility to permit the marketer no more than 2 lines on its bill and to refuse to let the marketer include any promotional or other material in the billing envelope. Customers have little or no clue who their electric provider actually is.

[7] For example, it should consider consolidating PJM, the NY ISO, and NEPOOL.

We look forward to competing in all states when their markets are appropriately open and we look forward to working with decision makers to achieve that result.

Respectfully submitted,

Kathleen E. Magruder by RSR

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