S. HRG. 107–279

PUBLIC UTILITY HOLDING COMPANY ACT OF 2001—S. 206

HEARING

BEFORE THE

SUBCOMMITTEE ON SECURITIES AND INVESTMENT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

S. 206

TO REPEAL THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, TO ENACT THE PUBLIC UTILITY HOLDING COMPANY ACT OF 2001 AND FOR OTHER PURPOSES

MARCH 29, 2001

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

U.S. GOVERNMENT PRINTING OFFICE

77–694 PDF ★(STAR PRINT) WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
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Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

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C O N T E N T S

THURSDAY, MARCH 29, 2001

WITNESSES

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

THE PUBLIC UTILITY HOLDING COMPANY ACT OF 2001—S. 206

THURSDAY, MARCH 29, 2001

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON SECURITIES AND INVESTMENT,
Washington, DC.

The Subcommittee met at 10:10 a.m., in room SD–538 of the Dirksen Senate Office Building, Senator Michael B. Enzi (Chairman of the Subcommittee) presiding.

OPENING STATEMENT OF SENATOR MICHAEL B. ENZI

Senator ENZI. I will call this hearing to order.

I was asked by the Chairman of the Banking Committee to announce that this will be the first hearing since the first of the 50-State quarter plasters were installed. A new plaster will go up every 10 weeks. These are the new quarters. I can hardly wait until the Wyoming one goes up in 2007.

[Laughter.]

However, we are pushing for a space right here above the quarters, right in the center, for the Sacagawea dollar. We call that the Wyoming Dollar.

[Laughter.]

She may have been born in Idaho and shortly after that, kidnapped to North Dakota, and then went on the great expedition with Louis and Clarke through the whole west. But after she had seen the whole west, she chose to live out the rest of her life in Wyoming. We were so pleased to have her chosen for the coin. A bunch of Wyoming kids were involved in that process. We will be looking for that plaster to go up as well.

To get down to the more serious business of this hearing, I would like to welcome everyone to the Senate Banking Subcommittee on Securities and Investments. The hearing is on S. 206, the Public Utility Holding Company Act of 2001. The bill was sponsored by my colleague, Senator Shelby from Alabama.

This is my first hearing as Chairman of the Subcommittee on Securities and Investments. I look forward to addressing other issues of similar importance in the future.

I would also like to thank the witnesses for their willingness to be here today and to share their insights on the role of this Act in 21st Century energy markets.

I apologize for our slight delay in getting started. We are in the middle of a vote. Others will be joining me here shortly, as Senator Corzine has.

I would mention that my first involvement with PUHCA actually goes back about 12 years. It was as a result of my daughter, who was then in 4th grade, doing an experiment in buying stocks as a class activity. At the dinner table, I asked her what stock she had purchased. After she told me, I asked her why. And she said, well, it had a huge increase that day. I asked her what the trends had been. She had no idea.

So, she was willing to sit down at the computer with me and look it up on the Internet. We got a little explanation of the activity of the previous day and found out that Senator Wallop of Wyoming had sponsored a bill to repeal PUHCA. Of course, that led us to some other Internet activities, where we found out what PUHCA was.

I have to admit that as we finished up some 1 hour of being on the computer, my daughter said to me, so why did you look up CMS? I bought CML.

[Laughter.]

But it is been a tremendous advantage to me all of these years to have had some background in PUHCA and to follow the almost annual attempt to repeal it.

A lot of things have changed since the Public Utility Holding Company Act, PUHCA, was first passed into law in 1935, partly as a result of the 1929 stock market crash.

Our modern, high-tech economy has placed such demand on our aging energy grids, that we are now outpacing our ability to generate electricity.

As a result, much of our Nation is poised on a fine edge, where we can expect more and more brown-outs, like those recently experienced in California.

There is no other way to explain things, other than to say that we failed to plan for our future energy needs, and California's problems are only the beginning.

By failing to develop a national energy policy, we have allowed our dependence on foreign energy supplies to place our Nation at a great risk.

By placing short-term gains ahead of long-term stability, we have caused energy prices to jump dramatically across the United States. With the lines blurring between energy production, transportation, and consumption in the new high-tech economy, flexibility is going to become more and more important.

Without flexibility, we place incredible limits on our energy markets and limit our ability to adapt innovations that could revolutionize our children's futures.

The question before us today, therefore, is, given the need for flexibility, is there room for a statute like PUHCA?

There are considerable arguments that PUHCA has outlived its purpose. It was created in 1935, and was designed to fill a regulatory void that had allowed electricity and gas-holding companies to take advantage of the situation, and place layer upon layer of corporations between themselves and their customers.

Before PUHCA, holding companies could hide behind the corporate layers to avoid liability and to manipulate consumer rates by requiring operating companies to contract services with each other at exorbitant prices.

This self-dealing drove up consumer rates and threatened service when highly-leveraged holding companies were unable to pay their debts after the stock market crash in 1929.

PUHCA put an end to many of these unfair practices and abuses by stripping back the corporate shields and limiting holding companies to just two levels.

The statute then placed authority to monitor securities mergers and other activities within the companies with the Securities and Exchange Commission. Companies were then granted an exclusive service area in return for a requirement to provide reliable electricity service to all consumers at a regulated price.

As I said earlier, however, times have changed and the role played by the SEC and PUHCA in utility regulation has evolved.

The Federal Energy Regulatory Commission now has jurisdiction over all interstate wholesale electricity generation, and State public utility commissions are now controlling agencies that oversee State utility rates. Those are things that were missing in 1929 and 1935.

The Department of Justice and the Federal Trade Commission now have authority over holding companies and share in regulating their structure and functions. The void that existed before PUHCA no longer exists.

This oversight redundancy has created a situation where even the SEC has agreed that PUHCA is no longer necessary to protect investors or the rate-paying public. In fact, PUHCA has become a barrier to competition in the energy marketplace and it inhibits investment.

I have some very high hopes about the future of Wyoming. I see the need exists in the United States for reliable, affordable energy and recognize that Wyoming is in a prime position to fill those needs. But I am also concerned that without adequate flexibility, diversity, and planning, Wyoming's options for the future will be severely hamstrung.

PUHCA has a chilling effect on Wyoming investments because it limits the numbers of companies allowed to participate in investing in Wyoming's future. It also limits the kind of investments that are allowed. PUHCA repeal is an important step in the development of a comprehensive, real world energy policy.

I look forward to hearing from our witnesses and hope they will be able to shed some light on what should be done with PUHCA.

Senator do you have an opening statement that you would like to make?

STATEMENT OF SENATOR JON S. CORZINE

Senator CORZINE. Thank you, Mr. Chairman. I appreciate you holding this hearing.

I think I probably should have requested your daughter to come on staff to help me with what PUHCA was.

[Laughter.]

As you might recognize, it is not something that was at the front of my agenda in my previous life. But I do think that this is a particularly important review, given our current energy situation. And I, like others, will be open-minded about an appropriate policy in this area. I am looking forward to the hearing, and I thank the witnesses for participating.

I think it is pretty clear that anything put together in 1935 has reasons to be reviewed to see whether it is appropriate, whether it is overlapping or out of date and unreasonably costly. And I look forward to this hearing to help frame those issues in my own mind.

Thank you very much for being here.

Senator ENZI. This is one of those issues that kind of goes in the glaze-your-eyes-over category. But, fortunately, the energy crisis has brought it to a level where there is some interest in doing something now.

Senator CORZINE. Absolutely.

Senator ENZI. We have before us from the first panel, Mr. Isaac C. Hunt, Jr., who is the Commissioner of the Securities and Exchange Commission, and Ms. Cynthia Marlette, who is the Deputy General Counsel for the Federal Energy Regulatory Commission.

We look forward to your testimony.

Mr. Hunt.

STATEMENT OF ISAAC C. HUNT, JR.
COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION

Mr. HUNT. Thank you, Chairman Enzi, and other Members of the Subcommittee.

I am Commissioner Isaac C. Hunt of the U.S. Securities and Exchange Commission. I am pleased to have this opportunity to testify before you this morning on behalf of the SEC regarding the Public Utility Holding Company Act of 1935.

The Commission continues to support efforts to repeal the 1935 Act and replace it with legislation that preserves certain important consumer protections.

During the first quarter of the last century, misuse of the holding company structure led to serious problems in the electric and gas industries. Abuses arose, including inadequate disclosure of the financial position and earning power of holding companies, unsound accounting practices, excessive debt issuances and abusive affiliate transactions. The 1935 Act was enacted to address these problems.

In the years following the passage of the 1935 Act, the Securities and Exchange Commission worked to reorganize and simplify existing public utility holding companies in order to eliminate the problems that Congress identified.

By the early 1980's, the SEC concluded that the 1935 Act had accomplished its basic purpose. The SEC also concluded that many aspects of the 1935 Act regulation had become redundant: State regulation had expanded and strengthened since 1935, and the SEC had enhanced its regulation of all issuers of securities, including public utility holding companies.

In addition, changes in the accounting profession and the investment banking industry had provided investors and consumers with a range of protection unforeseen in 1935. Because of these changes, the SEC unanimously recommended that Congress repeal the 1935 Act based on its conclusion that it was no longer necessary to prevent the recurrence of abuses that led to the Act's enactment.

For a number of reasons, including the potential for abuse through the use of a multistate holding company structure, related concerns about consumer protection, the lack of a consensus for change, repeal legislation was not enacted during the early 1980's.

Because of continuing changes in the industry, however, the SEC continued to look at ways to administer the statute more flexibly.

In response to continuing changes in the utility industry during the early 1990's, then-Chairman Arthur Levitt directed the SEC staff in 1994 to undertake a study of the 1935 Act that culminated in a June 1995 report. The report again recommended repeal of the 1935 Act. The report also outlined and recommended that the Commission adopt a number of administrative initiatives to streamline regulation under the Act. The SEC has implemented many of the administrative initiatives that the report recommended.

The utility industry has continued to undergo rapid change since publication of that report. Congress facilitated some of these changes by creating a number of statutory exceptions to the regulatory framework of the 1935 Act.

Specifically, registered holding companies are now free to own exempt wholesale generators and foreign utilities, and to engage in a wide range of telecommunications activities.

The industry has also experienced regulatory initiatives, both at the State level, where the focus has been on fostering competition, and at the Federal level, where the FERC—Federal Energy Regulatory Commission—has focused on open transmission and related structural issues.

The internationalization of the industry has increased as well. In addition to foreign investments of U.S. utilities, three British utility companies have acquired American utilities within the past 2 years and subsequently registered under the Act. A Canadian utility has also announced its plans to acquire a utility in the United States.

At the same time that these changes have been taking place in the electric industry, some problems have arisen. The electricity shortages, price increases, and rolling black-outs in California represent some of the most severe problems.

Some industry experts, as well as a number of press reports, have speculated that other areas of the country may experience similar problems this summer. As a result of these issues, energy reform legislation is again being considered in this Congress. Repeal of PUHCA is a part of this discussion.

Based on the findings in the report, as well as the continuing pace of change in the utility industry, the SEC has recommended and continues to recommend that Congress repeal the 1935 Act.

As I will outline below, the SEC also recommends the enactment of legislation to provide necessary authority to the Federal Energy Regulatory Commission and the State public utility commissions relating to affiliate transactions and audits and access to books and records. Repealing the Act is not, however, a magical solution to the current problems facing the United States utility industry.

While PUHCA repeal can be viewed as part of a needed response to the current energy problems facing the country, repeal of the Act will not directly affect the supply of electricity in the United States.

The Energy Policy Act of 1992 amended the 1935 Act to remove most restrictions on the ability of registered and exempt holding companies, as well as nonutility companies, to build, acquire, and own generation facilities anywhere in the United States.

Repeal of the Act would, however, remove provisions that prohibit utility companies from owning utilities in different parts of the country, and that generally prevent nonutility businesses from acquiring regulated utilities in more than one State.

Repeal of the 1935 Act would thus likely have the greatest impact on both the continuing consolidation of the utility business, as well as the entry of new companies into the utility business.

As the SEC concluded in its report and testified before, there is potential for a regulated utility that is a monopoly, if left unguarded, to charge higher rates and use the additional funds to subsidize affiliated businesses in order to boost its competitive position in other markets.

The SEC believes that the best means of guarding against cross-subsidization is likely to be audits of books and records and Federal oversight of affiliated transactions.

As a result, the SEC continues to support a broader grant of authority to the FERC to audit books and records and believes that it is important that the FERC have the flexibility to engage in more extensive regulation if necessary. The SEC urges that S. 206 be amended to include this grant of authority.

The current situation in California illustrates this need. California's problems may have been caused by, among other things, the need to construct additional generating facilities to meet the supply needs of the State and perhaps additional transmission facilities. It is unclear whether repeal of the 1935 Act would have any real effect, positive or negative, on these problems.

However, another component of California's problems is the precarious financial condition of the State's utilities. While the cost of acquiring power has had a significant impact on the financial condition of California's utilities, there have been suggestions in the press and elsewhere that these utility financial problems were exacerbated by the holding companies' decision to use the profits of their regulated utilities' subsidiaries to finance investments in unregulated businesses.

Regardless of whether these suggestions are true, the holding companies that own California's utilities are currently exempt from most provisions of the 1935 Act and are thus, largely unregulated by the SEC. The potential for abuses of this type demonstrate the need to give utility regulators unfettered access to the books and records of holding companies so that they can develop a full understanding of the types of transactions occurring within a holding company system.

Questions have also arisen about how the Act, if not repealed, would impact the FERC's ability to implement its plans to restructure control of transmission facilities in the United States.

In particular, the status of new entities that control transmission systems, as well as the status of utility systems that own stakes in these new entities, raise a number of issues under the 1935 Act. Repeal of the Act would render this issue moot.

In the absence of repeal, although the SEC believes it has the necessary authority to deal with the restructuring issues, amending the Act to grant the SEC greater exemptive authority would allow the Commission to deal more efficiently with potential regulatory conflicts of this type. Also, granting the SEC broad exemp-

tive authority would aid in our administration of the Act as the electric and gas industries continue to evolve.

Senator Enzi and other Members of the Subcommittee, of course I would be pleased to answer any of your questions.

Thank you.

Senator ENZI. Thank you.

Ms. Marlette.

STATEMENT OF CYNTHIA A. MARLETTE
DEPUTY GENERAL COUNSEL
FEDERAL ENERGY REGULATORY COMMISSION

Ms. MARLETTE. Thank you, Senator Enzi, and Members of the Subcommittee.

My name is Cynthia Marlette and I am Deputy General Counsel of the Federal Energy Regulatory Commission.

I very much appreciate the opportunity to be here today to discuss the Public Utility Holding Company Act of 1935, and S. 206, which would repeal that Act and replace it with a more streamlined holding company act.

I appear before you today as a staff witness and I do not represent the Commission or any member of the Commission.

As discussed in my written testimony, S. 206 provides an important piece of the legislative reform that is needed to support the Nation's emerging competitive electric energy markets.

At this critical stage in the evolution of the industry, it is important to take all reasonable measures to support the development of competitive energy markets and to provide appropriate incentives for electric and natural gas infrastructure to meet our Nation's energy needs. However, such measures must ensure adequate protection of electric and natural gas rate-payers from abuse of market power and from inappropriate affiliate cross-subsidization.

Repeal or reform of PUHCA, such as that contained in S. 206, will help accomplish these objectives.

This is a time of enormous change for the electric utility industry. We are at a critical juncture in the development of competitive power markets and it is appropriate for the Congress to reexamine the framework for regulating electric utilities, including unnecessary restrictions that PUHCA places on the activities of certain participants in these power markets.

While one of the goals of PUHCA was to protect against corporate structures that could harm investors and rate-payers, today, some of PUHCA's restrictions may actually impede competition and appropriate competitive market structures, to the detriment of rate-payers and share-holders in the long run.

Since the Banking Committee's hearings on PUHCA reform were held in 1996 and 1997, the FERC and many State regulators and State legislatures have continued to move forward and to take regulatory actions to support and encourage the development of competitive markets at both the wholesale as well as the retail levels. Many areas of the country have been very successful. But there have been some very severe bumps in the road.

California's experience with only a partially deregulated electric generation market, and a severe lack of adequate generation supply and infrastructure, also transmission infrastructure in Cali-

fornia, have recently grabbed media attention nationwide and caused some regulators and industry observers to become wary of the promised virtues of competition in the electric industry. There is no doubt that California and the west face very serious, complex, electric power supply problems, particularly this coming summer.

Nevertheless, while regulators and industry participants may disagree on near-term remedies to address the dysfunctions in California and western power markets, the majority of industry observers continue to believe that competitive power markets, as opposed to traditional heavy-handed, cost-based regulation, will best serve consumers in the long run.

Enactment of S. 206 would help to remove unnecessary restrictions on market participants in competitive power markets.

Critically important, however, it would also ensure that the FERC and State regulatory authorities have adequate access to the books and records of all members of all public utility holding company systems when that information is necessary to meet their statutory rate-making responsibilities.

This is necessary to prevent affiliate abuse and subsidization by electricity rate-payers of the nonregulated activities of holding companies and their affiliates.

S. 206 addresses all of the concerns that were raised by FERC witnesses in previous hearings and is an appropriate vehicle for repealing PUHCA without impairing rate-payer protection.

Finally, I believe that the combination of the books and records provisions contained in S. 206, in conjunction with the FERC's additional Federal Power Act access to books and records, and its other FPA authorities over mergers, dispositions and acquisitions of jurisdictional facilities, and over the rate-making and accounting of public utilities, will provide adequate authority to protect rate-payers in newly emerging competitive markets.

Thank you, and I will be happy to answer any questions.

Senator ENZI. Well, I thank both of you for your testimony. We will now have a round of questions, with each Senator being allowed to ask questions for up to 5 minutes.

Ms. Marlette, you mentioned that FERC had had previous hearings on this. How many years has FERC been looking at hearings on repealing PUHCA?

Ms. MARLETTE. Well, we participated extensively back in the 1992 EPAct hearings with respect to the wholesale generator exemption provision. And I believe we have participated in hearings on every bill since that time and have advocated reform of PUHCA, assuming rate-payer protection remains intact.

Senator ENZI. Thank you. Mr. Hunt mentioned that the SEC recommended in 1980 that this statute be terminated. It took a while for the excitement to generate on it.

[Laughter.]

I appreciate your mentioning, and you mentioned it peripherally, the impacts that PUHCA has had on the California energy crisis. Could you elaborate a little bit on the relationship between PUHCA and the crisis in California?

Ms. MARLETTE. I think the California energy crisis has been a wake-up call for the entire country. While I do not think there is a direct nexus between PUHCA reform and the specific factors that

have affected California, I do think that, in the long run, repeal of PUHCA, to the extent that it removes restrictions on entities willing to invest in companies that can provide new infrastructure or expand existing infrastructure in transmission, electric generation and natural gas pipelines, can help to avoid similar problems in the future in the Nation.

Senator ENZI. Thank you. Mr. Hunt, one of the arguments raised by opponents of PUHCA repeal, is that PUHCA currently fills a void in regulating holding companies that would otherwise lead to increased market concentration and increase the risk of rapid consolidation, and that that would kill the developing market in its infancy. Do you feel that PUHCA repeal would allow utilities to gain substantial market power and inhibit that competition?

Mr. HUNT. I think, Mr. Chairman, the repeal of PUHCA might lead to continued consolidation in the utility industries. But, in terms of market power, I think that the restructuring that the FERC has gone through with the utilities and the restructuring that many of the States are going through, show that concerns about market power can be addressed.

Senator ENZI. You mentioned the SEC's support for S. 206, with some amendments. And that the bill contains adequate consumer protections to replace those that would be repealed with passage of this bill. Could you elaborate a little bit on what those consumer protections are?

Mr. HUNT. Well, I think that part of consumer protection is our ability to look at affiliate transactions to see that there is no improper cross-subsidization, no use of rate-payer money to invest in nonregulated activities of the other subsidiaries of the holding company. We continue to think that access to books and the ability to audit the books and records of the holding companies are necessary powers at the Federal level and should be vested in the FERC. And also that the State utility commissions, in keeping with consumer and rate-payer protection, should have access to the books and records so as to be able to examine the affiliate transactions within the holding company systems.

Senator ENZI. Thank you.

Senator Corzine.

STATEMENT OF SENATOR WAYNE ALLARD

Senator ALLARD. Senator Enzi, if I may interrupt you just one moment here.

I am going to have to preside at 11 a.m. I wonder if I might ask special permission from you and the Subcommittee to submit my written comments for the record now.

Senator ENZI. Without objection, so ordered. We appreciate it. And I would mention that Senator Shelby is here now. He is the sponsor of the bill.

Senator SHELBY. And Senator Enzi, I would ask that my opening statement be made part of the record and I will wait my turn.

Senator ENZI. Without objection.

Senator Corzine.

Senator CORZINE. Senator Enzi, presumably, the ability to check the books and records currently exists. It is just the overlap that is the problem with PUHCA.

Do you think that the tools of FERC are adequate to be able to check those books and records? You read now assertions, as opposed to factual reality, that there may be cross-subsidization, or at least tie-ins, among the utilities in the California issue.

And I am just curious whether you think the powers and the frequency of review is adequate enough to know if we were to repeal PUHCA and move to a less complicated regulatory structure, that that would be able to be challenged.

Ms. MARLETTE. I think that the access to books and records that is contained in S. 206, in conjunction with what the Commission already has under Section 301 of the Federal Power Act, which in and of itself is already fairly broad access to books and records, would give the Commission sufficient authority.

The Commission has long been very concerned about inappropriate cross-subsidization, particularly where you continue to have captive rate-payers, either at the wholesale or retail level. And there certainly are many areas of the country where we do not have captive rate-payers any more. But we have long been vigilant in looking at affiliate contracts involving any public utilities or any inappropriate cross-subsidization.

Senator CORZINE. What would be some of the warning signals you would look for in those cross-subsidizations?

Ms. MARLETTE. Well, in a traditional rate case, where you are having cost-based rates, and we are in a transition here because we are still doing some cost-based, but primarily moving to market-based rates, when we examine the costs submitted by the company, the Commission is going to be paying attention to what those are.

And a key example in the past has been affiliate coal or fuel contracts and paying more than what you might pay from a nonaffiliate for the same fuel.

And we have had some conflicts with PUHCA in the past that led to an Ohio Power court decision which caused some real problems for us. That is a primary example of what we would look at.

Senator CORZINE. I think making sure you have the adequate tools and resources to be able to do it. It is a complicated issue, looking at how holding companies fit together based on at least my own perspective in life, that it would be difficult, but not impossible, to do.

And I hope if we move in the direction of S. 206, that we make sure that there are adequate resources to be able to bring the checks and balances that I think the public would expect.

Thank you, Senator Enzi.

Senator ENZI. Senator Bunning.

STATEMENT OF SENATOR JIM BUNNING

Senator BUNNING. Senator Enzi, thank you for holding this hearing on S. 206, and I look forward to hearing from the remaining witnesses.

This question is for either witness, opponents of PUHCA repeal fear that repeal will lead to a greater concentration of power companies. How do you respond to those concerns?

Mr. HUNT. As I think I responded to Senator Enzi, Senator Bunning, we at the SEC think that there is the possibility that re-

peal of PUHCA would lead to increasing consolidation in the utility industry. But we also think that——

Senator BUNNING. You do believe that.

Mr. HUNT. Yes. We think it is possible. We think it is entirely possible.

Senator BUNNING. Okay.

Mr. HUNT. Because PUHCA does put some restrictions on the geographic location of utilities and what utility holding companies can own in various parts of the country and the utilities have to be in contiguous areas. Yes, we could say with the removal of those factors, there could be more consolidation in the utility industry.

But we think that, with the added powers that we hope the FERC will be given, there will not be either consumer or rate-payer abuse because they will have adequate authority to look at affiliate transactions and to look at cross-subsidizations.

Ms. MARLETTE. I think since the advent of open access transmission beginning around 1996, we have already seen tremendous increases in consolidations and mergers at the FERC.

Senator BUNNING. I would say that is an understatement.

Ms. MARLETTE. Correct. And it keeps us very busy. And I would expect we would see even more if PUHCA were repealed.

However, the Commission has, I believe, adequate authority over mergers, acquisitions, dispositions of jurisdictional transmission facilities and transfers of power sales contracts that often accompany generation transfers.

And the Commission takes a very hard look at increases in market power attributable to a merger. It looks at rate-payer impacts and effect on regulation and does not hesitate to impose conditions to mitigate market power as a condition of approving merger, if appropriate.

Senator BUNNING. Supporters say that PUHCA only affects a few companies. It gives companies not regulated under PUHCA an unfair competitive advantage. How do you respond to those assertions?

Mr. HUNT. There are very few regulated utility holding companies registered under PUHCA because so many of the utility companies in the country are intrastate and, therefore, exempted from most of the provisions of PUHCA.

But we have been trying to administer the Act to create a level playing field so that the regulated registered holding companies have as much flexibility as possible for investment in other activities as do the nonregulated utilities, which make up the majority of the holding companies in the country.

Senator BUNNING. Do you have a different answer, or the same?

Ms. MARLETTE. Same.

Senator BUNNING. Same answer. I yield back my time.

Senator ENZI. Continuing with the order of arrival, we will go to Senator Shelby.

STATEMENT OF SENATOR RICHARD C. SHELBY

Senator SHELBY. Thank you, Senator Enzi. I do want to take this time to thank you for holding this hearing. We think it is very important. I think dealing with the PUHCA problem is long past due.

And this is why I have been pushing this on a legislative plane for a long time.

Ms. Marlette, one of my biggest concerns with PUHCA is that it inhibits modernization of our national energy policy. What are your views regarding the effect that PUHCA will have on the implementation of FERC Order 2000?

Ms. MARLETTE. FERC Order 2000 is one of the biggest priorities of the Commission right now. Of course, California is also one of the biggest priorities.

But the creation of independent regional transmission organizations is, we think, the key to mitigating the major market power of vertically-integrated electric utilities, improving reliability of the transmission grid, and assuring more efficient use of our transmission facilities.

It will also facilitate transmission expansion and planning on a regional basis. And it will separate the transmission ownership and control from the generation entities.

PUHCA right now, I believe, is an impediment to entities being able to invest in independent transmission companies that would qualify as RTO's.

I believe there is a risk that investors would become holding companies and that they would have to register. It may be that the SEC has latitude under existing law to enact waivers or something similar. But I think it poses some real difficulties.

Senator SHELBY. Mr. Hunt, do you have any comment?

Mr. HUNT. Yes, sir. We also recognize the possible conflicts with the FERC if the RTO's come on line, and they may have to register as holding companies.

We think we have the power under existing law to exempt them, but that is not at all clear. We think that the repeal of the existing PUHCA would clear up that potential conflict between the SEC and the FERC.

Senator SHELBY. Ms. Marlette, is the Commission contemplating any action to ensure the implementation of the FERC Order 2000 that it would proceed efficiently?

Ms. MARLETTE. We are trying to proceed as rapidly as we can. All public utilities had to come in with either proposals to create RTO's or to join RTO's last October and last January. All of those filings are in.

The rule that we have in place is voluntary. We have asked the utilities to either, as I said, join or create an RTO or explain why they are not. We have said that those RTO's need to be operational by the end of this calendar year, which will be no small feat.

Senator SHELBY. Just this week, it was announced that the financial condition of the California utilities force them to raise rates by as much as 40 percent.

A few months ago, under California's restructuring plan, these same utilities put out for bid some of their generating assets in an effort to raise cash. It is my understanding that because of the restrictions imposed by PUHCA, only a limited number of entities bid on those assets.

Could it be argued that by limiting the number of bidders, PUHCA indirectly limited the amount of capital the utilities raised and that lack of capital in turn affected the size of the rate hike

that was ultimately put in place? In other words, PUHCA contributed to making a bad situation worse.

Ms. MARLETTE. I may defer to Commissioner Hunt on that. I would just say that the rate hike, I think, was the result of——

Senator SHELBY. As a sponsor of the legislation, that question came naturally.

Ms. MARLETTE. Right. Right.

[Laughter.]

But I think a combination of very complex factors led to that rate hike.

Mr. HUNT. Senator Shelby, I think there is certainly some possibility that PUHCA's restrictions on the possibility of people and entities who could invest in——

Senator SHELBY. Limited it, anyway, didn't it?

Mr. HUNT. It certainly is possible that PUCHA could have limited the number of investors willing to go into the California scene, yes, sir.

Senator SHELBY. S. 206 is intended to strengthen FERC and the State regulators' authority to obtain the books and records of the companies in the holding company system.

Ms. Marlette, I know you look at this from the other side of the issue. But how do you assess these provisions as a means to provide rate-payer protections?

Ms. MARLETTE. I think that they will help us to provide ratepayer protections, the provisions in S. 206, because they will allow us to look at a broader category of entities' books and records than we currently can look at.

Senator SHELBY. Okay. Thank you, Senator Enzi.

Senator ENZI. Senator Stabenow.

STATEMENT OF SENATOR DEBBIE STABENOW

Senator STABENOW. Thank you, Senator Enzi.

If I may just follow up as it relates to concerns that I know that have been raised about the States lacking authority or resources to provide adequate oversight of interstate public utility holding company activities. Could you speak more specifically to that, as to their ability, authority, to be able to do that and the resources? Do you feel confident that that will be available?

Either one of you.

Mr. HUNT. Well, we think the FERC is an essential element in the continuing regulatory scheme because, with the interstate operation of so many holding companies, there are many instances where no one State utility commission can regulate the entire holding company structure. And that is why we think a Federal presence continues to be necessary. But we want us taken out.

[Laughter.]

Senator STABENOW. Ms. Marlette, do you want to speak to that?

Ms. MARLETTE. I would just say that I would certainly defer to the States on their abilities. But I do think that S. 206, the provision that applies to States now, allows them to be able to reach out of State to other companies' books and records that they cannot previously reach at this time, which would help a lot.

Senator STABENOW. Thank you, Senator Enzi.

Senator ENZI. I want to thank this panel. It was very nice of you, Mr. Commissioner, to take the time to come and share this.

Mr. HUNT. Thank you, Senator Enzi.

Senator ENZI. And Ms. Marlette, we really appreciate the perspective that you provided from the Federal Energy Regulatory Commission.

Ms. MARLETTE. Thank you, Senator Enzi.

Senator ENZI. There may be additional questions that will be directed to you. We will leave the record open for that possibility.

Thank you very much.

Mr. HUNT. Thank you.

Ms. MARLETTE. Thank you.

Senator ENZI. Our next panel will be: Mr. David M. Sparby, Vice President for Government and Regulatory Affairs, Xcel Energy, Incorporated; Mr. David Sokol, Chairman and CEO of MidAmerican Energy Holdings Company; and Mr. Charles Acquard, who is the Executive Director of the National Association for State Utility Consumer Advocates. Is that NASUCA?

Mr. ACQUARD. Yes.

Senator ENZI. Okay. Mr. Sparby.

STATEMENT OF DAVID M. SPARBY
VICE PRESIDENT FOR GOVERNMENT AND REGULATORY AFFAIRS, XCEL ENERGY, INCORPORATED

Mr. SPARBY. Senator Enzi, Members of the Subcommittee, thank you for the opportunity to be here this morning.

I am Dave Sparby, Vice President of Government and Regulatory Affairs for Xcel Energy.

Xcel is a registered holding company that serves about 5 million customers at retail in 12 States, including Wisconsin, Wyoming, North and South Dakota, Colorado, New Mexico, Minnesota, Michigan and Texas.

We also own most of NRG, which is an independent power producer across the United States.

My purpose today is to recommend the passage of S. 206, to urge its passage as soon as possible, and to make this part of an ongoing effort to address this Nation's energy shortfall.

Many regions in which Xcel participates are in need of additional transmission and generation investment over the next few years.

The capital requirements associated with these projects are very significant. For many of these customers, the need for additional facilities will come much sooner.

Although the demand for electricity, the regionalization of the power industry, the insufficient utility investment over time has been seen in California, the combination of these events is affecting an increasing number of markets beyond California's borders.

Although I appreciate the hardships faced by Californians this past January during the periods of rolling black-outs, I can say that similar outages would have far more serious consequences when you serve climates like North Dakota's this past January, that registered temperatures well below zero on days they had electric curtailments in the southwest.

Now although we have not seen the black-outs that the southwest has experienced, we have seen the cost of procuring electricity reaching prices many times its historic peaks.

The sustained price hikes hit our communities hard and at a time during low agricultural prices, a difficult rural economy and an economic slowdown area also taking place.

A good example of what we are seeing is our experience in procuring power for Cheyenne, WY this past year. Cheyenne purchases and distributes electricity to the City of Cheyenne and much of Laramie County, WY.

Now although the western market in the past has allowed us to procure energy at prices less than 3 cents a kilowatt hour, this year, similar market prices were more than 4 times that earlier cost. When we were not able to purchase power on acceptable conditions, we responded by entering into arrangements to permit the construction of new facilities.

However, even the briefest exposure to prices of these magnitudes have severe adverse and long-lasting consequences on customers and communities. These problems are stretching well beyond Wyoming and affecting other communities as well.

There are some bitter ironies, however, for citizens of Wyoming to pay these kinds of prices, Wyoming sits on more than 400 billion tons of coal, huge reserves of natural gas and other resources.

Clearly, we need to repeal those policies that inhibit the development of this energy and incent companies to make investments necessary to develop these resources. The passage of S. 206, with its consumer safeguards, is an important element of this plan.

Today, PUHCA impedes the investment from nonutility companies who may choose to acquire regulated utilities. It limits investment in retail facilities at odds with the policies of other agencies working to develop a competitive market. It imposes a costly, unnecessary regulatory burden on companies. Legislative proposals considered today will benefit all the stakeholders in this industry.

In conclusion, let me say that I recognize the passage of this bill will not result in lower prices for customers immediately. We are a long lead-time industry. But the bill represents an important part of a long-term strategy to ensure that we not only have an adequate supply of energy, but that it be abundant.

Thank you.

Senator ENZI. Thank you. Mr. Sokol.

STATEMENT OF DAVID L. SOKOL
CHAIRMAN AND CEO
MIDAMERICAN ENERGY HOLDINGS COMPANY

Mr. SOKOL. Senator Enzi, Members of the Subcommittee, my name is Dave Sokol. I am the CEO of MidAmerican Energy Holdings Company, which is headquartered in Des Moines, IA, and with approximately $11 billion in assets.

We are here today representing both MidAmerican and other exempt utility holding companies that support S. 206.

Our company consists of four major subsidiaries—our CalEnergy division is a gas-fired generator of electricity and one of the largest geothermal and renewable energy providers in the United States.

MidAmerican Energy is a regulated electric and gas utility serving primarily Iowa, but also parts of South Dakota, Illinois, and small parts of Nebraska.

Our two other subsidiaries are Northern Electric, a large electric and gas utility in the United Kingdom, and our home services division, which is a real estate company which operates in nine States, including Maryland, Kentucky, and Indiana.

Last year, our largest investor, Warren Buffett, and I discussed PUHCA repeal with several congressional leaders. We warned that the electricity sector was headed for a train wreck in either California or the upper Midwest.

We do not take any pleasure in being correct in that prediction. We do hope that you will understand why we believe so strongly that Congress must act now. The numerous and complex causes of the California energy crisis can be tied to two core problems—the lack of adequate investment in infrastructure and regulatory policies that distort energy markets.

PUHCA did not stop the problems in California from occurring, but in certain respects, they actually have exacerbated them.

The law should be repealed and only Congress can do so. To do otherwise would leave a Federal statute on the books that will continue to inhibit investment and distort markets throughout this country. Let me give you two concrete examples of how PUHCA is limiting investment in the energy infrastructure of California.

Last summer, when we saw signs of severe problems in California's electricity market, we wanted to make several investments in existing utility infrastructure, but were blocked by the Public Utility Holding Company Act.

MidAmerican is exempt from the most intrusive regulatory restrictions of the Act because our regulated utility business is primarily in one State—Iowa. However, we cannot acquire more than 4.9 percent equity in any California utility without running afoul of certain PUHCA roadblocks.

For example, the physical integration requirements of PUHCA would have required us to demonstrate that we could physically interconnect our Iowa utility system with those of the California utilities. This is obviously an impossible standard for us and the other two-thirds of the American utilities operating east of the Rockies in the United States to meet. Moreover, the standard simply makes no sense today.

Second, even if we could have met the physical integration requirements, we would have been forced to become a registered holding company under the Act, which would have required us either to separate ourselves from Berkshire Hathaway, or to have Berkshire Hathaway divest all of its nonenergy assets. Obviously, neither option is acceptable.

Take a moment to reflect on the absurdity of this—a Federal law enacted nearly 65 years ago with the intent of protecting investors keeps Berkshire Hathaway, one of the only AAA entities in the world, from investing in California's utility markets when the State's own utilities cannot even pay their bills. Let me give you another example.

We wanted to double the size of our geothermal facilities in the Imperial Valley of California to provide desperately needed elec-

tricity to the California market. Again, PUHCA stands in the way. A new transmission line is needed which California's investor-owned utilities are in no financial condition to undertake. We cannot do it because of PUHCA.

California's utilities will have a difficult time raising capital for new infrastructure, yet PUHCA prevents most utilities and impedes most nonutility companies from meeting the extensive transmission needs in that State and limits opportunities for investment in new generation. Without S. 206, where will the needed capital come from?

The most likely scenario, we believe, is from foreign utility companies looking for a foothold in the United States. These companies are not restricted by the physical integration requirements of PUHCA on their first-bite entry into the American market. So they enjoy a substantial advantage over U.S. companies in the merger and acquisition market.

I am not making a case against international investment. In fact, we strongly support it. But outdated, unnecessary laws should not hamstring American companies in this competition.

Are there any good reasons not to repeal PUHCA? No. It made sense when it was enacted 66 years ago, when the SEC was in its infancy and there was no other statutory framework to control the misuse of the holding company structure. Today, however, that has changed. FERC and State commissions now closely regulate investor-owned utilities and will have more authority under S. 206.

As a result, PUHCA today is extraneous. It is an overlay of duplicative legislation that restricts healthy investment and creates no real value for consumers. That is why the SEC, the agency charged with enforcing PUHCA, has sought to repeal PUHCA for almost 20 years. PUHCA repeal will make it much easier for FERC to continue policies to promote efficient, competitive wholesale markets. For example, while PUHCA is premised on geographically limiting utility companies, FERC is working to reduce market concentration.

PUHCA repeal is clearly proconsumer. Repealing PUHCA will allow new investment, new ideas, and new efficiencies in the electric and gas industries at a time when they are needed most.

A study we commissioned last year by the highly respected econometrics firm of Analysis Group/Economics used very conservative estimates to show that PUHCA directly costs the American economy hundreds of millions of dollars annually. Other surveys put the lost opportunity costs in the industry in the many billions. Why then has PUHCA not been repealed?

Because it is being held hostage to the larger electricity debate. Other stake-holders in the industry use PUHCA repeal as leverage to achieve their goals in energy policy. We believe it is time to end this stalemate because the losers in this hard-played game over PUHCA repeal have been America's energy consumers.

The last point I would like to make is Mr. Sarby's company, Xcel Energy, is a registered holding company, subject to the most stringent restrictions of PUHCA.

In spite of the fact that our companies are regional competitors on the wholesale market, we fully support his company being re-

moved from PUHCA's onerous restrictions. He supports our company being able to expand beyond our limited geographical scope.

By removing both of our companies from PUHCA restraints, you will enable each of us to compete more aggressively, operate more efficiently, and serve customers better. We urge your support of S. 206. Thank you.

Senator ENZI. Mr. Acquard.

STATEMENT OF CHARLES A. ACQUARD
EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES (NASUCA)

Mr. ACQUARD. Thank you, Senator Enzi.

I do not know if we are going to solve anything here today, but one thing we have learned is that your 4th grader is the only child who knows anything about the Public Utility Holding Company Act, and I commend her for that.

[Laughter.]

Good morning, Senator Enzi, and Members of the Subcommittee.

I am Charlie Acquard, Executive Director of the National Association of State Utility Consumer Advocates, or NASUCA.

NASUCA is an association of 41 consumer advocate offices in 39 States and the District of Columbia. Our members are designated by the laws of their respective States to represent the interests of mostly residential consumers before State and Federal regulators and in the courts.

Some of my members are divisions of State attorneys general offices and some are independent State agencies. Many of the heads of the offices are appointed by governors of States and in many cases, confirmed by the State's legislative body.

On behalf of the members of NASUCA, I wish to thank you for the opportunity to testify before this Subcommittee on the Public Utility Holding Company Act.

The question before this Subcommittee today is on the future of PUHCA. Yet, this issue cannot be examined outside the context of the entire framework of the electric utility industry without considering the market implications for consumers and competitors alike. No one has to tell this Subcommittee that the electric utility industry is in the midst of substantial change, uncertainty, and, in some places, turmoil.

It is a front-page, 6 p.m., lead news story. Anybody involved with this industry cannot escape the over-the-backyard-fence or soccer-sidelines inquiries from concerned neighbors.

Up until recently, whenever I was asked at a gathering about what I do for a living, silence followed and the subject was then quickly changed. Now a crowd gathers and I get a lot of questions about the possibility of the crisis in California happening in Maryland, where I live. For the first time I can remember, people are worried about their lights coming on when the switch is flipped.

Examination or possible elimination of key industry underpinnings can no longer be done in a vacuum or viewed through a narrow jurisdictional prism that this is simply a securities regulation issue. Rather, any discussion of substantial alteration or repeal of PUHCA must be considered in the context of the potential impact on industry structure, market power, and ultimately, consumers.

PUHCA has been on the minds of consumer advocates since the origins of NASUCA as an organization. In a series of resolutions dating back almost 20 years, NASUCA has urged Congress to exercise the greatest caution in responding to efforts to dismantle the consumer protections contains in PUHCA.

We are not Luddites. We have negotiated many of the existing changes to PUHCA, including the gas-related activities act.

But NASUCA continues to oppose changes to PUHCA that would reduce consumer protections in the Act at this time. NASUCA urges Congress and the SEC not to take any action that would weaken the Act without first ensuring that public utility holding companies are either subject to effective competition or subject to effective regulation, where effective competition does not yet exist or competition would not induce efficiency, reduce cost, and advance consumer interest.

Our resolutions recognize that public utility holding companies and their subsidiaries are affected with the national public interest and that their activities extending over many States are not susceptible to effective control by any individual State. We also recognize that neither the electric industry, nor the natural gas industry, has a fully competitive market structure and that utility market power remains pervasive.

Therefore, we conclude if PUHCA were repealed today in the manner proposed in S. 206, neither the remaining regulatory scheme, nor the current state of competition would be sufficient to protect consumers.

Specifically, if PUHCA were repealed, consumers would face increased risk from diversification. PUHCA discourages diversification into nonutility business and regulates capital structure.

Without these consumer protection provisions, holding companies could diversify into risky ventures, pledging utility assets as collateral, and loaning funds from utility operations to nonutility affiliates. The last thing consumers need is the dot-comming of America's electric utilities. Consumers would also have last choice, as the SEC testified to.

If PUHCA is repealed on a stand-alone basis, the industry is likely to be dominated by a few large companies wielding incredible market power. If California has taught us anything, it is that a vibrant, competitive wholesale market is needed for retail competition to succeed. Competitive markets need a multiplicity of participants, not just a couple of two-ton utility gorillas.

Finally, in response to your question regarding how the repeal of PUHCA may help alleviate the current energy crisis, the short answer is that it would not. For the most part, the current energy crisis is caused by a shortage of supply. PUHCA is not an impediment to building power plants. In fact, the Energy Policy Act of 1992 specifically includes a PUHCA exempted for EWG's or exempts wholesale generators.

Proponents of stand-alone PUHCA repeal argue that the statute is no longer needed, that this is a Depression-era relic. They say, in 60 some odd years since its passage, securities regulation and State commissions have matured.

But NASUCA believes that, as John Dingell once said, times have changed, but human nature has not. Businesses will always

seek market dominance in an attempt to squash competition. Mid-managers to chairmen of the boards are handsomely rewarded when they do so.

But in an essential services industry, where monopoly power will continue to at least dominate the distribution and transmission functions, continued structural protections are needed to ensure that consumers are not left holding the bag.

Thank you for the opportunity to be here today and I look forward to any questions that you may have.

Senator ENZI. Thank you. I will defer to Senator Gramm Chairman of the Banking Committee who is with us now, for any statement or questions he wants to ask.

STATEMENT OF SENATOR PHIL GRAMM

Senator GRAMM. Well, Senator Enzi, let me thank you for this excellent hearing. I am sorry I missed the first panel. I was over working on the floor. I got to hear most of the second panel.

I want to thank everybody for participating. I want to thank you, Senator Enzi, for your leadership on this issue.

Senator Shelby and I first discussed PUHCA repeal when we were Democrats——

[Laughter.]

Members of the then-Energy and Commerce Committee in the House of Representatives. We were sitting next to each other when this subject was first discussed.

Senator SHELBY. 1979.

Senator GRAMM. And that was in 1979. Senator Shelby has been a leader on this effort ever since.

I believe the year has come to repeal PUHCA. I plan to hold a mark-up on this bill, perhaps as early as next week. We have reported it in the past, but other issues have ended up interfering with it.

There has been a belief that this was helpful, that this was a positive thing to do. But there was some other thing that was more important that might be used, that we might use PUHCA as a rider for.

And I am reminded of that old poem that went:

> Truth worth is in being, not seeming—
> In doing, each day that goes by,
> Some little good—
> Not in dreaming
> Of great things to do by and by.

I just want to say to those who have been a leader on this effort, that this is the year that we are going to repeal PUHCA. This is the year that—there is not any other issue bigger that we have any chance of getting a consensus on.

This is a thing that, it seems to me, needs to be done. And I want to pledge myself to an all-out effort this year to repeal this bill. Hopefully, PUHCA is in its last year of life, 2001. And I want to thank you, Senator Enzi.

Senator ENZI. Thank you.

Senator Corzine.

Senator CORZINE. I just want to thank Senator Enzi for giving me the opportunity to come after Senator Gramm with regard to this issue.

[Laughter.]

I do not have any poetry to recite. I do want to ask a question, however, of Mr. Acquard.

It was noted in your testimony that you would argue that there are places where affiliates' books and records would be exempted from review.

We heard in the first panel that we had security that FERC would have the ability to check the inter-affiliate transactions. Do you want to talk a little bit about where you think exclusions are and what the implications of those particular exclusions might be?

Mr. ACQUARD. Yes. I do not want to minimize the importance of the books and records provision. I want to praise Senators Shelby and Gramm for including those. There is a lot of good provisions in this bill and I think we have seen an improvement over the years of the holding company act.

I am also pleased to say that there is no doubt that you want to continue to protect consumers, although you want to repeal PUHCA. So there is that consensus that there needs to be some sort of action taken to protect consumers if the holding company act is repealed. Where we differ is that, once you do that, is that going to be effective?

Now books and records can be effective, and that is good. But that means that you are going to have to chase after a holding company that has done some wrong, and that is very difficult.

The question was raised earlier in the hearing whether or not the Commissions have the resources to do it, no matter what the statutory regulations that they have. I cannot speak for the Commissions, but I can speak for the consumer advocate offices.

About half of my members have 10 staffers or less and over half of my members have budgets of a million dollars or less. So we do not have a whole lot of resources to chase after. That is why we support continuing these structural protections, to prevent the harm from happening in the first place.

So, yes, books and records are important. We believe there would be some holes in that. But, even if there were not, it would be difficult to regulate multistate holding companies because of limited resources.

Senator CORZINE. What are some of those exemptions? Are there specifics that you were alluding to here?

Mr. ACQUARD. I would be happy to file that with you.

Senator CORZINE. It strikes me that the overlapping regulation may very well be part of the problem in the ability to actually get at the kinds of consumer protections you want because I am not clear who has responsibility here.

We need to make sure that the law has that ability, in my view, to get at books and records adequately. And I would be concerned that your argument is that it is not adequate.

Senator ENZI. Senator Bunning.

Senator BUNNING. Thank you, Senator Enzi.

Mr. Acquard, it is extremely rare that a Federal agency willingly concedes regulatory authority or oversight to another agency.

Why would the SEC willingly concede jurisdiction to FERC if there is such concerns about PUHCA repeal? Why do the SEC and FERC not share the same concerns that you have?

Mr. ACQUARD. Well, concerning the SEC willing to give up their authority to the FERC, I think the SEC has always been a bit uncomfortable regulating the Public Utility Holding Company Act because they are essentially a securities regulator.

So much more of the Act has to do with energy policy than just securities regulation. So I think they see it that FERC, because they have the knowledge to deal with the energy issues, that they would be a better regulator of that. And we would not disagree with that.

One of the positive things about the legislation is shifting some of the authority from the SEC to the FERC. The SEC has not done a very good job regulating the Act.

But the beauty of the Act is that it prevents these activities, these corporate structures, from taking place in the first place, so that the SEC never had to do anything and it still works. So as far as the FERC believing that they have adequate authority, you will have to ask them.

Senator BUNNING. We just did. And they just said that they had adequate authority.

Mr. ACQUARD. We would disagree.

Senator BUNNING. You disagree.

Mr. ACQUARD. And it is not just us. I think the letter that was sent to the Subcommittee to the commissioners, they say there are some limits of authority. And there is a list of a whole bunch of groups, from the AFL–CIO——

Senator BUNNING. I understand that. I can get you a list from the other side that says that we should repeal this and repeal it promptly. So we do not want to get into that debate. You are not going to win and I am not going to win on that debate because we will match the same list.

Let me also ask——

Senator SHELBY. Senator Bunning, I believe you would win.

[Laughter.]

Senator BUNNING. You think I would win? Because I would get the last word?

[Laughter.]

Let me ask a question to our other two witnesses. In your companies, what portion of your power production is in natural gas, nuclear, and coal-fired generation?

Either one.

Mr. SOKOL. Let me start. Roughly 15 percent of our generation is nuclear.

Senator BUNNING. Fifteen?

Mr. SOKOL. Yes. 45 percent is coal. Roughly 25 percent is gas. And the remainder is renewable energy.

Senator BUNNING. In other words, renewable energy being hydroelectric?

Mr. SOKOL. Geothermal and wind.

Senator BUNNING. Okay.

Mr. SPARBY. Sir, for Xcel energy, it is a little more than 50 percent by coal, about 30 percent of our megawatt hours are nuclear, the rest is purchases, as well as renewable energy.

Senator BUNNING. Let me ask, can we get back to the California debacle? We talked about some problems that PUHCA might have played in the exacerbation of the problem there.

But didn't the local jurisdiction, their local regulatory commission in California, cap retail rates and let wholesale rates go unfettered? In other words, to seek the level of competitive advantage or disadvantage?

Mr. ACQUARD. Yes.

Senator BUNNING. Wasn't that more of a problem than anything else that might have occurred in California?

Mr. ACQUARD. There were a number of problems that occurred. But that was one of the major ones, yes.

Senator BUNNING. And now, we are looking at approximately a 40-percent increase in retail rates to match those costs that the wholesale rates have created.

If in fact, California would not have reduced production of energy in California and made the decision to go outside of California to buy their power, don't you think that would have at least alleviated some of the problems that they are having there?

Mr. ACQUARD. That would have. But I do not think that is necessarily a holding company issue.

Senator BUNNING. No, no. It is not a holding company—I am trying to concentrate on California and the problem that they had by not being able to go in due to PUHCA and not compete for, because they were certainly based in a different area.

Mr. ACQUARD. Well, I would look at the California crisis, if you look at sort of the broad scope, is that it is an instance where there was deregulation or the consumer protections of regulation were removed before there was a vibrant competitive market, and that might have caused some of the problems.

And that is sort of what we are talking about here with the Public Utility Holding Company Act. We do not have a vibrant wholesale market and we are talking about removing some of the consumer protections found in PUHCA. We believe it is premature.

Senator BUNNING. We disagree that there is a vibrant wholesale market and by repealing, we will have a more vibrant one.

Thank you, Senator Enzi.

Senator ENZI. Senator Shelby.

Senator SHELBY. Mr. Sokol, Mr. Sparby, just for a minute hazard a guess, if you would, as to how much your industry has changed since PUHCA was enacted in 1935. I would hazard myself that neither one of you were born then.

Mr. SOKOL. I think you are correct for both of us.

Senator it has changed as much as the computer industry has changed in the last 20 or 30 years.

Senator SHELBY. Absolutely. I think it is important for you two to put this in a current context. Go ahead. I did not mean to interrupt you.

Mr. SOKOL. I think some simple examples would be that electricity is produced today with one half the amount of raw energy,

whether it is natural gas, coal or others, than it took just 30 years ago in modern technology.

Senator SHELBY. Yes.

Mr. SOKOL. The majority of that has been caused by, in fact, legislation passed in the late 1970's which created a level of generation competition in this country.

Senator SHELBY. You are talking about PURPA.

Mr. SOKOL. Correct. The other thing that has happened is, virtually every State—well, every State in the country today has a regulatory body that oversees regulated activity in that State of electric and gas. Now that did not exist in 1935. And there are a number of other examples.

If I might just take one moment and defend the SEC staff in their activities in handling PUHCA in the last 10 years during dramatic change.

That law, if it is read in its entirety, makes no sense today. It regulates an industry that ended in 1965, in our view. But the SEC has done a tremendous job of trying to find ways to work around it. But the reality is that those ways——

Senator SHELBY. Needs some legislation. And that is what they are saying here, is not it?

Mr. SOKOL. They absolutely do, yes, sir.

Senator SHELBY. Mr. Sparby.

Mr. SPARBY. Yes, Senators Enzi, and Shelby.

Senator SHELBY. I know you were not around in 1935.

[Laughter.]

Mr. SPARBY. Well, that is very kind for you to say that.

That Act contemplated very much an isolated, vertically integrated industry that looked very much unlike what we have today—an industry that is much more aggregated and organized in a horizontal fashion, as well as much more interconnected and regional than that Act's drafters could have ever imagined.

Senator SHELBY. In 1935, I am sure the people that enacted the legislation then could never imagine the production of electricity that you alluded to a minute ago, with half the raw materials, and so forth, could they?

Mr. SOKOL. The electricity industry was in its infancy in the late 1920's, early 1930's. And the reality is, the history of the 1935 Act was in response to some very devious steps that were taken after the beginnings of the Depression for people to try and use utility assets to offset losses in their holding companies elsewhere in their empires, if you will. And the Act was a direct response to that and it was an appropriate one at the time.

That cannot exist today. We fully support the books and records issues. Those elements of our business that are regulated must be available to public regulators to be absolutely certain that customers are protected because it is an essential service.

Our industry has no issue with that at all. In fact, our shareholder, Mr. Buffett, said it very well last year when he said the utility industry can never be a great business. It should only be a good business if it is run well because everybody depends upon it.

In the State of Iowa——

Senator SHELBY. But it is essential to our economy, isn't it?

Mr. SOKOL. It is absolutely essential. In the State of Iowa, all of our books and records, the holding company and their regulated utility, are available to that regulator. They should be and we have no opposition to every State having that. And I believe today virtually every State does have that requirement.

Senator SHELBY. Mr. Acquard, Ms. Marlette earlier, I think you were here, the FERC's witness today, felt that FERC would be able to protect rate-payers upon repeal of PUHCA.

Do you differ with that?

Mr. ACQUARD. Well, I think FERC has a role implanted. But I do not think they have the adequate authority that they need, nor do the States. And again, I would like to emphasize that I think you have a letter from the State regulators themselves saying that you need some additional things.

I was also interested to hear——

Senator SHELBY. I would have to agree with you. I think the State regulators do have a role.

Mr. ACQUARD. Right.

Senator SHELBY. And I think Mr. Sokol and Mr. Sparby alluded to that, didn't you?

Mr. SOKOL. Absolutely.

Mr. ACQUARD. I was interested in the testimony from the SEC, however, saying that maybe some additional authority is needed to check on cross-subsidies and other sort of market power abuse. And we would be delighted to work with the SEC and with this Committee to come up with some on this legislation.

Senator SHELBY. Isn't more capacity generally one of the keys, maybe not the only key, and adequate distribution, to bring the prices down?

It is in just about everything else. If you look at energy as a commodity, the more capacity you have, the better distribution you have, that brings competition in itself, in a way, doesn't it, Mr. Sparby?

Mr. SPARBY. Absolutely. We have seen markets, Senator Shelby, that have benefited significantly by not having just enough generation, but having enough generation that we have a truly robust and vibrant and competitive wholesale market. And that is the target we are shooting for.

Senator SHELBY. Thank you very much, Senator Enzi.

Senator ENZI. Thank you.

Senator SHELBY. For holding this hearing, too.

Senator ENZI. We appreciate you bringing the issue to the Committee so that we could have the hearing. And I want to congratulate you on your efforts.

Senator SHELBY. Thank you.

Senator ENZI. Senator Bayh

STATEMENT OF SENATOR EVAN BAYH

Senator BAYH. Thank you, Senator Enzi.

I would like to thank all three of our witnesses for coming here today to appear before this Committee. I apologize. I missed the first part of your testimony.

I had, as is usual in the Congress, a variety of issues trying to juggle at one time—education reform, campaign finance reform, as well as some others. So I do appreciate your time.

I have three very brief questions. First, Mr. Acquard, you have spoken with great passion about the importance of protecting the consumer interest, which of course is something that we would all be interested in.

We have also heard testimony from Mr. Sokol that in his company's case, this PUHCA actually prevented them from making some important investments in California that at least in part might have helped to alleviate some of the problems that exist there today. I assume that there are other companies similarly situated that might have made similar investments. Given that as a fact, how is such a restriction in the consumer interest?

Mr. ACQUARD. Well, again, it goes back to—in this specific case, it may have been a problem. It may have caused some problems in California. But if you look at the overall, as far as corporate structural restrictions, we believe that those restrictions are as important today as they were 65 years ago, when the Act was enacted during the Depression.

Those are the sort of—holding companies, by their very nature, are difficult to regulate. And once you form a holding company type system and you move from just an intrastate utility to an interstate utility, that becomes very difficult to regulate.

Will Rogers used to say that a holding company is where you stash the goods when the police frisk you down.

[Laughter.]

I think there is some truth to that. I would say that, while there are instances where perhaps there may be an impediment to doing some good things, overall, the structure is better for consumers.

Senator BAYH. My mother is from Oklahoma. I know a thing or two about Will Rogers. He also once said, if my colleagues will forgive me, that you can lead a man to Congress, but you cannot make him think.

[Laughter.]

So perhaps we should quote Will Rogers with some——

Senator SHELBY. Anything.

Senator BAYH. That is right. In any event, just a couple of other questions. I think Senators Bunning, and Shelby alluded to this. You have answered my question in part about the adequacy of current State and SEC regulation.

I gather the FERC and the SEC witnesses—previously, I know they have. I gather today they reiterated their belief that the current State structure is sufficient. And you suggested that there was a letter from the State regulators. I have not had a chance to read this letter.

If you have, Mr. Acquard, what about the current regulatory scheme, since the SEC and the FERC seem to believe it is adequate, what about the scheme is inadequate?

Mr. ACQUARD. The current scheme?

Senator BAYH. The current scheme of State regulations that has grown up over the years, the FERC's ability. I gather the State regulators believe it is inadequate.

Do you share their view that it is inadequate?

What about it is inadequate?

Mr. ACQUARD. Right. Well, I believe—and it is hard for me to speak for the State regulators. I was surprised not to see a representative from the State commissions up here today.

What the commissions are saying, I believe, is that if you do repeal the Holding Company Act and you do allow a growth of holding companies—and you will see that that is guaranteed—then their job is going to get more difficult. It is difficult as it is now. It is only going to get worse if the Act is repealed.

Senator BAYH. My final question would be to Mr. Sokol and Mr. Sparby. Could you respond to Mr. Acquard's comments about, if PUHCA is repealed, his belief that the consumers would be left on the hook here?

Could you give us your insights into why you think——

Mr. SOKOL. With all due respect, it is a complete red herring.

We are a holding company today. We hold a utility in the State of Iowa that services small territories in South Dakota, Illinois and Nebraska. The State has full access to books and records. The State completely ring-fences the utility assets in Iowa. We cannot, nor can any other utility in the United States that we are aware of, pledge utility-regulated assets to support any credit activity in any other part of the holding company.

The only thing we cannot do today is own another utility in another State. We can own any other type of company. We can do virtually anything else we want to do.

The States do very carefully oversee the fact that we cannot move assets out of Iowa, nor should we be allowed to. The consumers effectively own those assets through their rates. It is not an issue.

One issue, though, and you alluded to it earlier in your comments, that is very important, is that the conflict today between PUHCA, regional transmission operating companies, and FERC Order 2000, they are directly in conflict. They shouldn't be because we desperately need—one of California's problems, no question, they created the problem themselves.

But to help California get out of the problem, transmission corridors are absolutely essential. And virtually no one outside the State of California can invest and solve that problem under today's regulations. And that is a serious mistake.

Senator BAYH. Thank you very much. Mr. Sparby, briefly. I see my time is expired.

Mr. SPARBY. Yes, Senator Bayh. I agree that there are no holes here created by this bill.

The appropriate State or regulator has full authority here to take a look at what costs go into rates. They have done that in the past. They will continue to do that after the passage of this bill. And I agree that there is certainly nothing presented here, nor nothing suggested, to make us think otherwise.

Senator BAYH. Thank you, gentlemen.

I would just say in conclusion, so much has changed. I guess Senator Gramm has left. Not only was I not in existence in 1935, I am not sure my parents were in existence in 1935 when the rate was adopted.

So much has changed since then. We are going to have a national, in some cases, global, marketplace for energy. And I think that one of the lessons coming out of California is you believe in markets or you do not.

Mr. Acquard, I believe your point about the importance of efficient, robust markets is accurate. But they come in all sizes, shapes and descriptions, depending upon the particularities of the marketplace we are talking about.

More investment, more participants are going to provide, in the long run, better choices for consumers, better quality products at lower cost. And I have to say that, in many respects, it is my impression that this legislation is antiquated and is keeping us from achieving some of those objectives.

While I share your commitment to the consumer interest, I think in the long run, a robust, open free market is going to in most cases get us to that consumer interest, without being naive that in some circumstances, important protections need to be maintained.

Thank you, Senator Enzi.

Senator ENZI. Since I deferred to Senator Gramm, I still have my opportunity to ask questions here.

And I would like to welcome Mr. Sparby to Wyoming. You are a new owner of an old business—Cheyenne Light Fuel and Power has been one of the old companies.

Many people probably do not realize that Wyoming was the first State to have a town with incandescent street lights. That is right up there with the other firsts that Wyoming has that people also do not know about.

[Laughter.]

But one of the city's main points to attract businesses has been its low-cost power. Beginning in February, reports started coming in that Cheyenne electricity rates would possibly more than double overnight.

I know that your company just recently purchased Cheyenne Light Fuel and Power. But I am also aware that your company was involved in the negotiations when the contracts with PacifiCorp expired in December. And your company will be responsible for negotiating the rate increases with the Wyoming Public Service Commission. Would the repeal of PUHCA make any difference to the Cheyenne consumers?

Mr. SPARBY. Senator Enzi, I believe it would over the long run. The difficulty with the energy supply today is that it is hindered by numerous limitations, none of which you can point to and say, would the repeal or the amendment of that modification fix today's energy shortfall?

But looking at each one of these regulations, addressing them individually and doing it as soon as possible, I believe will result in lower costs and more generation over the long run.

Senator ENZI. Do you think that Wyoming will be able to adequately administer the regulation when PUHCA is repealed?

Mr. SPARBY. Yes, I do, Senator. I have found that the Wyoming commission has been very aggressive about its ability and inquiries into not only this proposed rate change, but all others, and have not been inhibited, nor found limitations that I am aware of, imposed by PUHCA.

Senator ENZI. Mr. Acquard, you mentioned Will Rogers. I do not think that Will Rogers ever had to work with FERC.

[Laughter.]

In your testimony, you first said that S. 206 does not have adequate regulation. And then you said that it increases the regulatory burden.

Do you want to explain that conflict?

Mr. ACQUARD. Well, I believe what I said is that S. 206, by repealing the Public Utility Holding Company Act, submits these companies to the regulations of each 50 States. And so, that would increase the burdens on the utilities.

Senator ENZI. One of the things that was mentioned both by FERC and the SEC earlier was the redundancy that there is in regulation by having this now.

Doesn't that redundancy cost consumers?

Mr. ACQUARD. There may be some redundancy in the Act. And again, we are not opposed to reform of the Act. However, we do believe that there continues to be a Federal role in the regulation of multistate holding companies. And that redundancy, we believe, does have consumer benefits, if there is any.

Senator ENZI. Mr. Sokol, one of the biggest fears that I hear from PUHCA repeal opponents is that PUHCA repeal will lead to the acquisition of utilities by nonutility companies and that that would lead to some abuses of transferring the costs of one company to rate-payers that PUHCA was initially created to avoid. If we repeal PUHCA, is that going to happen? Will my constituents in Wyoming end up paying more?

Mr. SOKOL. Senator, not to let my cohort here be outdone, I am a homeowner in the great State of Wyoming and we buy about $75 million of your fine coal each year, so as a constituent the answer is no. In fact, PUHCA has created the odd situation, again, unintended consequences of legislation being allowed to exist too long. But it has created the odd situation of really the only M&A or merger and acquisition activity going on in our industry is among the industry because investors like a Berkshire Hathaway are prohibited from owning more than a 10-percent piece in one utility. And so, I think you are actually seeing the opposite problem happen, which is a rather incestuous relationship without additional capital coming in.

And frankly, in the last 2 years, the greatest amount of capital coming into our sector is from foreign owners, not U.S. owners. So, no, I do not think there is any concern or real issue about cross-subsidization. And by the way, it should be completely prohibited. We have no interest in the consumer paying more than they should by that consolidation.

On the other hand, this is an industry that, as has been mentioned, has gone through phenomenal change, but with very few additional players in it. That is not very healthy, we do not think.

Senator ENZI. My daughter has even been following those changes just since the 12 years ago that she was introduced to it.

[Laughter.]

So I do appreciate the testimony of all of you today and the way that you have helped to build a record on this important issue.

Senator Shelby, did you want to make a concluding remark?

Senator SHELBY. No, thank you, Senator Enzi.

Senator ENZI. We will leave the record open in case anybody has additional questions for you, and we would appreciate any answers promptly from you when you get those.

Thank you, for your participation. The hearing is adjourned.

Mr. ACQUARD. Thank you.

Mr. SOKOL. Thank you.

Mr. SPARBY. Thank you, Senator Enzi.

[Whereupon, at 11:40 a.m., the hearing was adjourned.]

[Prepared statements, and additional material submitted for the record follow:]

PREPARED STATEMENT OF SENATOR WAYNE ALLARD

Senator Enzi, I would like to thank you for holding this important hearing on the conditional repeal of the Public Utilities Holding Company Act. As you know, this has been an issue that the Subcommittee has been working on for a number of years now.

I believe that this legislation accomplishes what should be our goal in many areas: it consolidates regulation and eliminates duplication while strengthening consumer protection. Currently, we are faced with increasingly difficult choices regarding energy. I support options to promote competition and increase innovation within the industry, and repeal of PUHCA is a good step in that direction.

The Securities and Exchange Commission, the agency charged with enforcing this Act, has recommended that the Act be repealed. I find this particularly telling, since it is so rare that a Federal agency actually recommends that its regulatory authority be curtailed!

I look forward to hearing from the SEC and other witnesses about their ideas on what can be done to improve the situation for the energy industry. I would like to especially welcome Mr. David Sparby, who is the Vice President for, Regulatory and Government Affairs at Xcel Energy. Xcel provides power for many of my constituents, and I look forward to working with David on this and other issues that are important to the people of Colorado.

Again, thank you all for being here. I look forward to your testimony.

PREPARED STATEMENT OF SENATOR JIM BUNNING

Senator Enzi, I would like to thank you for holding this hearing, and express my support for S. 206, The Public Utility Holding Company Act of 2001.

PUHCA was passed in 1935. Many feel that it is an outdated, duplicative, law. The original bill was designed to break up the high concentration of market power among a few holding companies. PUHCA has done that. But now there are only a few energy companies that are subject to PUHCA, while many others are not. Many believe PUHCA repeal will lower costs and allow the companies currently under, to grow and diversify. They believe it will eliminate burdensome regulations and it will allow the PUHCA holding companies to compete more effectively.

The Securities Exchange Commission (SEC) supports repealing PUHCA and shifting the regulatory oversight to the Federal Energy Regulatory Commission (FERC). If the SEC says FERC is the more appropriate regulatory agency, I think that is a pretty telling endorsement. I also believe that FERC, along with State public service commissions, can protect utility rate-payers and investors.

However, I do understand there are some concerns about repealing PUHCA and turning over the Securities Exchange Commission's regulatory powers to the Federal Energy Regulatory Commission. State regulators, consumer groups and Kentucky heating and electrical contractors have voiced their reservations about passing PUHCA as a stand-alone bill. I have heard their concerns and I will listen to the testimony today with great interest as I decide whether S. 206 is in the best interest of Kentucky.

Once again, thank you, Senator Enzi for holding this important hearing.

PREPARED STATEMENT OF SENATOR RICHARD C. SHELBY

Senator Enzi and Ranking Member Dodd, I want to thank you for holding this hearing today concerning S. 206, the Public Utility Holding Company Act of 2001.

This bill, which the Subcommittee has passed with bipartisan support in each of the last few Congresses, was developed in close consultation with the Securities and Exchange Commission, the Federal Energy Regulatory Commission and the State's Public Service Commissions.

S. 206 is designed to help America's energy consumers by repealing an antiquated law that is keeping the benefits of competition from reaching our citizens. Recent events across the country make it very clear that we are at a time in our Nation's history when we are going to have to make some critical choices regarding our national energy policy.

The fact is, future technological innovation and economic growth is contingent upon this country's ability to meet its ever increasing demand for energy. In order to do this, we need to modernize production systems, increase market competition,

and strip away unnecessary regulations. Achieving these goals is going to be a difficult and time consuming process.

However, repealing PUHCA would be the first step in the right direction. It has been a very long time since it first became clear that this outdated, Depression-era law had become a unnecessary constraint on the ability of American gas and electric utilities to compete. While the many bipartisan efforts to repeal PUHCA have not been successful, strong support still exists for its elimination. I believe that it is imperative that we achieve this goal in the 107th Congress. Thank you.

PREPARED STATEMENT OF ISAAC C. HUNT, JR.

COMMISSIONER, U.S. SECURITIES AND EXCHANGE COMMISSION

MARCH 29, 2001

Senator Enzi, Ranking Member Dodd, and Members of the Subcommittee: I am pleased to have this opportunity to testify before you on behalf of the Securities and Exchange Commission ("SEC") about S. 206, a bill that would repeal the Public Utility Holding Company Act of 1935 and establish a more limited regulatory framework covering public utility holding companies. The SEC continues to support repeal of the Public Utility Holding Company Act of 1935 ("1935 Act" or "PUHCA"). Repeal, however, should be accomplished in a manner that eliminates duplicative regulation while also preserving important protections for consumers of utility companies in multistate holding company systems.

Introduction

During the first quarter of the last century, misuse of the holding company structure led to serious problems in the electric and gas industry. These abuses included inadequate disclosure of the financial position and earning power of holding companies, unsound accounting practices, excessive debt issuances and abusive affiliate transactions. The 1935 Act was enacted to address these problems.[1] Because of its role in addressing issues involving securities and financings, the SEC was charged with administering the Act. In the years following the passage of the 1935 Act, the SEC worked to reorganize and simplify existing public utility holding companies in order to eliminate abuses.

By the early 1980's, however, many aspects of 1935 Act regulation had become redundant: State regulation had expanded and strengthened since 1935, and the SEC had enhanced its regulation of all issuers of securities, including public utility holding companies. Changes in the accounting profession and the investment banking industry also had provided investors and consumers with a range of protections unforeseen in 1935. The SEC therefore concluded that the 1935 Act had accomplished its basic purpose and that many of its remaining provisions were either duplicative or were no longer necessary to prevent the recurrence of the abuses that had led to the Act's enactment. The SEC thus unanimously recommended that Congress repeal the Act.[2]

The SEC's Study and the Current Environment

For a number of reasons—including the potential for abuse through the use of a multistate holding company structure, related concerns about consumer protection, and the lack of a consensus for change—repeal legislation was not enacted during the early 1980's. Because of continuing change in the industry, however, the SEC continued to look at ways to administer the statute more flexibly.

In response to continuing changes in the utility industry during the early 1990's, and the accelerated pace of those changes, in 1994, then-Chairman Arthur Levitt directed the SEC's Division of Investment Management to undertake a study, under the guidance of then-Commissioner Richard Y. Roberts, to examine the continued vitality of the 1935 Act. The study was undertaken as a result of the developments noted above and the SEC's continuing need to respond flexibly in the administration of the 1935 Act. The purpose of the study was to identify unnecessary and duplicative regulation, and at the same time to identify those features of the

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[1] *See* 1935 Act section 1(b), 15 U.S.C. § 79a(b).

[2] *See Public Utility Holding Company Act Amendments: Hearings on S. 1869, S. 1870 and S. 1871 Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing, and Urban Affairs,* 97th Cong., 2d Sess. 359–421 (statement of SEC).

statute that remain appropriate in the regulation of the contemporary electric and gas industries.[3]

The SEC staff worked with representatives of the utility industry, consumer groups, trade associations, investment banks, rating agencies, economists, State, local and Federal regulators, and other interested parties during the course of the study. In June 1995, a report of the findings made during the study ("Report") was issued. The staff's Report outlined the history of the 1935 Act, described the then-current state of the utility industry as well as the changes that were taking place in the industry, and again recommended repeal of the 1935 Act. The Report also outlined and recommended that the Commission adopt a number of administrative initiatives to streamline regulation under the Act.

The utility industry in the United States has continued to undergo rapid change since publication of the report. Some of these changes have been facilitated by Congress. Specifically, as a result of recently-created statutory exemptions, registered holding companies are now free to own exempt wholesale generators and foreign utilities and to engage in a wide range of telecommunication activities.[4] In addition, the SEC has implemented many of the administrative initiatives that were recommended in the Report.[5]

There has nonetheless been increased activity under the 1935 Act, especially in the area of mergers and acquisitions, corporate restructuring, diversification and affiliate transactions. The industry has also experienced an accelerating pace of initiatives at the State level to foster competition and the implementation of initiatives at the FERC to address open transmission and related structural issues. Finally, the internationalization of the industry has continued. In addition to the foreign investments of U.S. utilities, during the past 2 years, three British utility companies have acquired American utilities and subsequently registered under the Act.[6] A Canadian utility has also announced its plans to acquire a utility in the United

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[3] The study focused primarily on registered holding company systems, of which there were, at the time of the study, 19. The 1935 Act was enacted to address problems arising from multistate operations, and reflects a general presumption that intrastate holding companies and certain other types of holding companies which the 1935 Act exempts and which now number 119, are adequately regulated by local authorities. Despite their small number, registered holding companies account for a significant portion of the energy utility resources in this country. As of December 31, 2000, the 26 registered holding companies owned 214 electric and gas utility subsidiaries, with operations in 44 States, and in excess of 1,500 nonutility subsidiaries. In financial terms, as of December 31, 2000, the 30 registered holding companies owned more than $404 billion of investor-owned electric and gas utility assets and received in excess of $160 billion in operating revenues. The 30 registered holding companies represent over 40 percent of the assets and revenues of the U.S. investor-owned electric utility industry, and almost 50 percent of all electric utility customers in the United States.

[4] Sections 32 and 33 of the Act, which were added to it by the Energy Policy Act of 1992, permit, subject to certain conditions, the ownership of exempt wholesale generators and foreign utility companies. Section 34, which was added by the Telecommunications Act of 1996, permits holding companies to acquire and retain interests in companies engaged in a broad range of telecommunications activities.

[5] The Report recommended rule amendments to broaden exemptions for routine financings by subsidiaries of registered holding companies (*see* Holding Co. Act Release No. 26312 (June 20, 1995), 60 FR 33640 (June 28, 1995)) and to provide a new exemption for the acquisition of interests in companies that engage in energy-related and gas-related activities (*see* Holding Co. Act Release No. 26667 (Feb. 14, 1997), 62 FR 7900 (Feb. 20, 1997) (adopting Rule 58)). In addition, the Report recommended and the SEC has implemented changes in the administration of the Act that would permit a "shelf" approach for approval of financing transactions. For example, during calendar year 2000, all 11 of the new registered holding companies received multiyear financing authorizations that included a wide range of debt and equity securities. The Report also recommended a more liberal interpretation of the Act's integration requirements which have been carried out in our merger orders. The Report also recommended an increased focus upon auditing regulated companies and assisting State and local regulators in obtaining access to books, records and accounts. Six State public utility commissions participated in the last three audits of the books and records of registered holding companies.

[6] The three British companies that have made acquisitions in the United States and are currently registered under the Act are National Grid Group plc, Scottish Power plc and PowerGen plc. *See* Holding Co. Act Release No. 27154 (Mar. 15, 2000) (authorizing National Grid's acquisition of New England Electric System); Holding Co. Act Release No. 27166 (Apr. 14, 2000) (authorizing National Grid's acquisition of Eastern Utility Associates); Holding Co. Act Release No. 27290 (Dec. 6, 2000), corrected by Holding Co. Act Release No. 27292 (Dec. 7, 2000) (authorizing Scottish Power to engage in certain financing transactions following its acquisition of PacifiCorp and registration under the Act); Holding Co. Act Release No. 27291 (Dec. 6, 2000) (authorizing PowerGen's acquisition of LG&E Energy Group); Holding Co. Act Release No. 27312 (Dec. 21, 2000) (authorizing proxy solicitation in connection with National Grid's proposed acquisition of Niagara Mohawk).

States.[7] At the same time, problems have arisen in the electric industry. The electricity shortages, price increases and rolling blackouts experienced in California represent some of the most severe problems. Specifically, in California, acute supply shortages, opposition and legal impediments to new power plant construction and high natural gas prices have driven wholesale electricity prices to extraordinary levels. The two largest California utilities have not been allowed to pass wholesale price increases through to consumers and, as a result, are experiencing severe liquidity problems. They have stated publicly that they may file for bankruptcy. Some industry experts, as well as a number of press reports, have speculated that other areas of the country may experience similar problems this summer. With these issues further complicating already complex questions, energy reform legislation is again being considered in this Congress. Repeal of PUHCA is once again part of this discussion.

Current Proposals to Repeal the 1935 Act

Repeal of the 1935 Act may be accomplished either separately or as part of a more comprehensive package of energy reform legislation. S. 206 would repeal the Act on a stand-alone basis.

Based on the findings in the Report as well as the continuing pace of change in the utility industry, the SEC has recommended, and continues to recommend, that Congress repeal the 1935 Act. The SEC does not have a preference as to whether the Act is repealed on a stand-alone basis or as part of broader, energy-related legislation. However, the SEC does recommend the enactment of legislation to provide necessary authority to the Federal Energy Regulatory Commission ("FERC") and the State public utility commissions relating to affiliate transactions, audits and access to books and records, for the continued protection of utility consumers. As the Report stated, regulation under the 1935 Act that affects the ability of holding company systems to issue securities, acquire other utilities, and acquire nonutility businesses is largely redundant in view of other existing regulation and controls imposed by the market. There is, however, a continuing need to protect consumers.

Although deregulation is changing the way utilities operate in some States, electric and gas utilities have historically functioned as monopolies whose rates are regulated by State authorities. Some regulators subject these rates to greater scrutiny than others. There is a continuing risk that a monopoly, if left unguarded, could charge higher rates and use the additional funds to subsidize affiliated businesses in order to boost its competitive position in other markets. Thus, so long as electric and gas utilities continue to function as monopolies, the need to protect against this type of cross-subsidization will remain. In view of the sophistication of contemporary securities regulation, and analysis by the public and private sectors, the best means of guarding against cross-subsidization is likely to be audits of books and records and Federal oversight of affiliate transactions.

S. 206 represents a form of this type of conditional repeal—the type of conditional repeal that the SEC has endorsed. In particular, S. 206 would provide the FERC with the right to examine books and records of holding companies and their affiliates that are relevant to costs incurred by associate utility companies, in order to protect ratepayers. S. 206 would also provide an interested State commission with access to such books and records (subject to protection for confidential information), if they are relevant to costs incurred by utility companies subject to the State commission's jurisdiction and are needed for effective discharge of the State commission's responsibilities in connection with a pending proceeding. Finally, S. 206 would provide a transition period in which States, utilities and other parties affected by the change in the regulatory structure could prepare for the new framework. S. 206 thus accomplishes many of the goals of the conditional repeal advocated by the SEC.

Repealing the Act is not, however, a magic solution to the current problems facing the U.S. utility industry. While PUHCA repeal can be viewed as part of the needed response to the current energy problems facing the country, repeal of the Act will not directly affect the supply of electricity in the United States. Indeed, in 1992, as part of the Energy Policy Act, Congress amended the Act to remove most restrictions on the ability of registered and exempt holding companies as well as nonutility companies to build, acquire and own generating facilities anywhere in the United States. As a result, a number of registered holding companies now have large subsidiaries that own generating facilities nationwide. Repeal of the Act would instead remove provisions that prohibit utility holding companies from owning utilities in

[7] Emera Inc., the owner of Nova Scotia Power, has announced a deal to acquire Bangor Hydro-Electric Company and has applied for an order approving the transaction. *See* SEC File No. 70–9087 (application filed Nov. 6, 2000).

different parts of the country and that prevent nonutility businesses from acquiring regulated utilities.

Repeal of the Act would thus likely have the greatest impact on both the continuing consolidation of the utility business as well as the entry of new companies into the utility business. As outlined above, the SEC's primary concern with repeal is how consumers will be protected in this new environment. The SEC urges that S. 206 be amended to include provisions giving the FERC the authority it needs to oversee transactions among affiliates in holding company systems. Provisions granting access to books and records provide the FERC and the State commissions with the authority they need to identify affiliate transactions, review their terms and evaluate their effects on utility costs and rates. Nonetheless, the potential for cross-subsidization and consequent detriment to consumers remains, and the SEC believes it is important that the FERC have the flexibility to engage in more extensive regulation if necessary.

The current situation in California illustrates this need. California's problems have been caused by, among other things, the need to construct additional generating capacity and perhaps additional transmission facilities. It is unclear whether repeal of the 1935 Act would have any real effect, positive or negative, on these problems. However, another component of California's problems is the precarious financial condition of the State's utilities. While the cost of acquiring power has had a significant impact on the financial condition of California's utilities, there have been suggestions in the press and elsewhere that these utilities' financial problems were exacerbated by their holding companies' decisions to use the profits of their regulated utility subsidiaries to finance investments in unregulated businesses. Regardless of whether these suggestions are true—the holding companies that own California's utilities are currently exempt from most provisions of the 1935 Act and are thus largely unregulated by the SEC—the potential for abuses of this type demonstrates the need to give State and/or Federal regulators unfettered access to the books and records of holding companies so that they can develop a full understanding of the types of transactions occurring within the holding company. Moreover, because similar types of abuses can occur through affiliate transactions that cross-subsidize unregulated businesses with the profits of regulated utilities, regulators need the authority to review and analyze all transactions within a holding company system and prohibit those that pose unreasonable risks for utility ratepayers. The SEC therefore continues to support a broader grant of authority to the FERC to oversee these types of transactions including, if the FERC deems it appropriate, the authority to pre-review and pre-approve affiliate transactions.

Questions have also arisen about how the Act, if not repealed, will impact the FERC's ability to implement its plans to restructure the control of transmission facilities in the United States.[8] As a result of FERC's plans, many utilities will cede operating control—and in some cases, actual ownership—of their transmission facilities to newly created entities. The status of these entities as well as the status of utility systems that own stakes in them raise a number of issues under the Act.

While the SEC believes it has the necessary authority under the Act to deal with the issues created by the FERC's restructuring without impeding that restructuring, repeal of the Act would resolve the issues. In the absence of repeal, however, there are potential amendments to the Act that would permit the SEC more efficiently to deal with regulatory conflicts and other issues of this type. In both the Report and in prior testimony, the SEC has suggested that if Congress chooses not to repeal the Act, it could grant the agency broad exemptive authority similar to that we currently have under the other Acts that we administer.[9] Although an expansion of the SEC's exemptive authority under the Act would not achieve the economic benefits of simplifying the Federal regulatory structure and would continue to enmesh the SEC in difficult issues of energy policy, it would provide the SEC with a greater ability to respond quickly and appropriately to changes in the industry and the regulatory environment.

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[8] *See* FERC Order 2000, "Regional Transmission Organizations," 65 FR 810 (Jan. 6, 2000) (codified at 18 C.F.R. § 35.34).

[9] The SEC's current exemptive authority under the 1935 Act is considerably narrower than the exemptive authority under other securities laws. A model of broader exemptive authority is contained in section 6(c) of the Investment Company Act of 1940, 15 U.S.C. § 80a–6(c), which grants the SEC the authority by rule or order to exempt any person or transaction from any provision or rule if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors. *See also* section 206A of the Investment Adviser's Act of 1940, 15 U.S.C. § 80b–6a and section 36 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78mm. Section 28 of the Securities Act of 1933, 15 U.S.C. § 77z–3, grants the Commission similar exemptive authority, but permits it to exercise it only pursuant to a rulemaking.

The SEC takes seriously its duties to administer faithfully the letter and spirit of the 1935 Act, and is committed to promoting the fairness, liquidity, and efficiency of the U.S. securities markets. By supporting conditional repeal of the 1935 Act, the SEC hopes to reduce unnecessary regulatory burdens on America's energy industry while providing adequate protections for energy consumers.

PREPARED STATEMENT OF CYNTHIA A. MARLETTE

DEPUTY GENERAL COUNSEL
FEDERAL ENERGY REGULATORY COMMISSION

MARCH 29, 2001

Senator Enzi and Members of the Subcommittee: Good morning. My name is Cynthia A. Marlette, and I am Deputy General Counsel of the Federal Energy Regulatory Commission (FERC). Thank you for the opportunity to appear here today to discuss the Public Utility Holding Company Act of 1935 (PUHCA) and S. 206, which would repeal the 1935 Act and replace it with a streamlined Act. I appear today as a Commission staff witness, and do not speak on behalf of the Commission or any Commissioner.

As I will discuss further in my testimony, S. 206 provides an important piece of the legislative reform that is needed to support the Nation's emerging competitive electric energy markets. At this critical stage in the evolution of the electric industry, it is important to take all reasonable measures to support the development of competitive energy markets and to provide appropriate incentives for electric and natural gas infrastructure to meet our Nation's energy needs. Such measures must ensure adequate protection of electric and natural gas ratepayers from abuse of market power and inappropriate cross-subsidization. Repeal or reform of PUHCA, such as that contained in S. 206, will help accomplish these objectives, whether as part of a comprehensive energy legislative package or on a stand-alone basis.

This is a time of enormous change for the electric utility industry. We are at a critical juncture in the development of competitive power markets, and it is appropriate for the Congress to reexamine the framework for regulating electric utilities, including unnecessary restrictions that PUHCA places on the activities of certain participants in these power markets. While one of the goals of PUHCA was to protect against corporate structures that could harm investors and ratepayers, today some of PUHCA's restrictions may actually impede competitive markets and appropriate competitive market structures, to the detriment of ratepayers and shareholders in the long run.

Since the Banking Committee's hearings on an earlier version of PUHCA repeal legislation were held in 1996, the FERC and many State regulators and State legislatures have continued regulatory actions to support and encourage the development of competitive power markets at both the wholesale and retail levels. Many areas of the country, such as Pennsylvania, have been very successful. However, there have been some bumps in the road. In particular, California's experience with only a partially deregulated electric generation market and a severe lack of adequate generation supply and transmission infrastructure in that State have grabbed media attention nationwide. This has caused some regulators and industry observers to become wary of the promised virtues of competition in the electric industry. There is no doubt that California and the West face serious, complex electric power supply and pricing issues. Nevertheless, while regulators and industry participants may disagree on near-term remedies to address the dysfunctions in California and Western power markets, the majority of industry observers continue to believe that competitive power markets, as opposed to traditional cost-based regulation, will best serve consumers in the long run.

In past testimony, FERC witnesses have raised no objection to repeal or reform of PUHCA, so long as certain ratepayer issues are addressed. Today, we continue to take the position that PUHCA needs to be repealed or reformed, so long as the following matters are addressed:

- First, Congress should ensure that the FERC and State regulatory authorities have adequate access to the books and records of all members of all public utility holding company systems when that information is relevant to their statutory ratemaking responsibilities. This is necessary to prevent affiliate abuse and subsidization by electricity ratepayers of nonregulated activities of holding companies and their affiliates.
- Second, any exemptions from a new holding company act should be crafted narrowly. While it may be appropriate to grandfather previously authorized activities

or transactions, no holding company should be exempt from affiliate abuse oversight.

- Third, if Congress transfers any existing PUHCA functions to the FERC, instead of repealing PUHCA in its entirety, Congress needs to provide FERC with staff and administrative support necessary for us to carry out the additional responsibilities.

S. 206, as it was introduced on January 30, 2001, adequately addresses the above concerns.

Background

Under current law, the two major Federal statutes affecting electric utilities are PUHCA and the Federal Power Act (FPA). Both statutes were enacted as part of the same legislation in 1935 to curb widespread financial abuses that harmed electric utility investors and electricity consumers. While there is overlap in the matters addressed by these Acts, they each have different public interest objectives. The areas of overlap in the two statutes, and specific issues raised if PUHCA is repealed or amended, are described in detail in the Attachment to my testimony. As a general matter, however, the Securities and Exchange Commission (SEC) regulates registered public utility holding companies under PUHCA while FERC, under the FPA, regulates the operating electric utility and gas pipeline subsidiaries of the registered holding companies. The agencies often have responsibility to evaluate the same general matters, but from the perspective of different members of the holding company system and for different purposes. The FERC focuses primarily on a transaction's effect on utility ratepayers. The SEC focuses primarily on a transaction's effect on corporate structure and investors.

In June 1995, the SEC issued a report entitled "The Regulation of Public-Utility Holding Companies" and recommended that Congress conditionally repeal PUHCA and enact certain ratepayer safeguards in its place. We agree with a fundamental premise of the SEC's report that rate regulation at the Federal and State levels has become the primary means of ensuring ratepayer protection against potential abuse of monopoly power by utilities that are part of holding company systems.

Further, we believe that PUHCA, in its current form, may actually encourage market structures that impede competition. In particular, under PUHCA acquisitions by registered holding companies generally must tend toward the development of an "integrated public-utility system." To meet this requirement, the holding company's system must be "physically interconnected or capable of physical interconnection" and "confined in its operations to a single area or region." This requirement tends to result in geographic concentrations of generation ownership, which may enhance market power and diminish competition.

In addition, PUHCA may cause unnecessary regulatory burdens to utilities who, in compliance with Commission policy and regulations, seek to form or join regional transmission organizations (RTO's). It is RTO's that will provide the major structural reform needed in the electric industry to ensure mitigation of market power and an efficient, reliable transmission system. These institutions will operate, or both own and operate, the interstate transmission grid within their regions, provide transmission services on an open, nondiscriminatory basis, and provide the means for regional transmission planning. They may be nonprofit independent system operators (ISO's), or they may be for-profit transmission companies (transcos), or a combination of the two. The cornerstone requirement for the institutions, however, is that they be independent from power market participants, *i.e.,* independent from those that own, sell or broker generation. Under PUHCA, any entity that owns or controls facilities used for the transmission of electric energy—such as an RTO—falls within the definition of public utility company, and any owner of 10 percent or more of such a company would be a holding company and potentially could be required to become a registered holding company. This could serve as a significant disincentive for investments in independent for-profit transcos that qualify as RTO's.

Review of S. 206

S. 206 would repeal PUHCA and, in its place, enact the Public Utility Holding Company Act of 2001. The new Act would do five major things:

- provide the FERC with access to books and records of holding companies and their associate and subsidiary companies, and of any affiliates of holding companies or their subsidiaries (section 5);
- give State commissions that have jurisdiction over a public utility in a public utility holding company system access to books and records of a holding company, its associates or affiliates (section 6);

- require the FERC to promulgate a final rule, no later than 90 days after enactment, to exempt from the books and records access requirements of section 5 any person that is a holding company solely with respect to one or more: qualifying facilities under the Public Utility Regulatory Policies Act of 1978; exempt wholesale generators; or foreign utility companies (section 7);
- provide that nothing in the Act precludes the FERC or a State commission from exercising its jurisdiction under otherwise applicable law to determine whether a public utility may recover in rates any costs of an activity performed by an associate company, or any costs of goods or services acquired from an associate company (section 8); and
- grandfather activities in which a person is legally engaged or authorized to engage on the effective date of the new act (section 9).

With these protections in place, and with the Commission's other regulatory authorities under the FPA in place, we believe that S. 206 is an appropriate vehicle for repealing PUHCA without impairing ratepayer protection.

If PUHCA is not repealed, Congress should address the *Ohio Power* regulatory gap created by a 1992 court decision. In a decision by the United States Court of Appeals for the District of Columbia Circuit, *Ohio Power Company* v. *United States,* 954 F.2d 779 (D.C. Cir. 1992), the court held that if a public utility subsidiary of a registered holding company enters into a service, sales or construction contract with an affiliate company, the costs incurred under that affiliate contract cannot be reviewed by FERC. The court reasoned that because the SEC has to approve the contract before it is entered into, FERC cannot examine the reasonableness or prudence of the costs incurred under that contract. FERC must allow the costs to be recovered in wholesale electric rates, even if the utility could have obtained comparable goods or services at a lower price from a nonaffiliate.

The *Ohio Power* decision has left a gap in rate regulation of electric utilities. The result is that utility customers served by registered holding companies have less rate protection than customers served by nonregistered systems. If PUHCA is repealed, as in S. 206, this issue becomes moot. If the contract approval provisions of PUHCA are retained, however, this regulatory gap should be closed to restore FERC's ability to regulate the rates of utilities that are members of registered holding company systems.

In summary, S. 206 provides an appropriate means to help promote emerging competitive electric power markets while at the same time providing the FERC and States additional access to books and records in order to protect consumers against inappropriate cross-subsidization and market power abuse. Thank you again for the opportunity to be here today, and I would be happy to answer any questions you may have.

ATTACHMENT TO STATEMENT OF CYNTHIA A. MARLETTE

Existing Statutory Framework: FERC/SEC Jurisdiction

The FERC's primary function under the FPA is ratepayer protection. The FERC regulates public utilities as defined in the FPA. These include individuals and corporations that own or operate facilities used for wholesale sales of electric energy in interstate commerce, or for transmission of electric energy in interstate commerce. The FERC does not regulate all utilities. Publicly owned utilities and most cooperatives are exempt from our traditional rate regulatory authority.

The FERC ensures that rates, terms and conditions for wholesale sales of electric energy and transmission are just, reasonable and not unduly discriminatory or preferential. In addition, the FERC has responsibilities over corporate mergers and other acquisitions and dispositions of jurisdictional facilities, transmission access, certain issuances of securities, interlocking directorates, and accounting. In exercising its responsibilities, the Commission must take into account any anticompetitive effects of jurisdictional activities.

There is overlap in the jurisdiction of the FERC and the SEC. As a general matter, the SEC regulates registered utility holding companies whereas the FERC regulates the operating electric utility and gas pipeline subsidiaries of the registered holding companies. The agencies often have responsibility to evaluate the same general matter, but from the perspective of different members of the holding company system and for different purposes. The FERC primarily focuses on the impact of a transaction on utility ratepayers. The SEC, on the other hand, primarily focuses on the impact of a transaction on corporate structure and investors.

There are four major areas of overlap in the jurisdiction of the FERC and the SEC with respect to regulation of the electric industry:

(1) Accounting—The SEC has authority to establish accounting requirements for every registered holding company, and every affiliate and subsidiary of a registered holding company. Many of these companies are public utilities that are also under the FERC's jurisdiction and subject to its accounting requirements.

(2) Corporate regulation—The SEC must approve the acquisition of a public utility's securities by a registered holding company. The FERC must approve the disposition or acquisition of jurisdictional facilities by a public utility.

(3) Rates—The SEC must approve service, sales and construction contracts among members of a registered holding company system. The FERC must approve wholesale rates reflecting the reasonable costs incurred by a public utility under such contracts.

(4) PUHCA Exemptions—Under the PUHCA section 32 amendment contained in the Energy Policy Act of 1992, the FERC must determine whether an applicant meets the definition of exempt wholesale generator, and thus is exempt from the Holding Company Act. With minor exceptions, the SEC continues to make PUHCA exemption determinations under the pre-Energy Policy Act PUHCA provisions as well as under the new section 33 of PUHCA (concerning foreign companies).

Congress recognized the overlap in FERC–SEC jurisdiction when it simultaneously enacted PUHCA and the FPA in 1935. It included section 318 in the FPA, which provides that if any person is subject to both a requirement of the FPA and PUHCA with respect to certain subject matters, only the requirement of PUHCA will apply to such person, unless the SEC has exempted such person from the requirements of PUHCA. If the SEC has exempted the person from the PUHCA requirement, then the FPA will apply.

During the half-century following enactment of PUHCA and the FPA, there were no significant problems resulting from the overlap in FERC–SEC jurisdiction, until a series of court decisions involving the wholesale rates of the Ohio Power Company. Under the last of these court decisions, a 1992 decision by the United States Court of Appeals for the District of Columbia Circuit (*Ohio Power Company* v. *FERC*, 954 F.2d 779 (D.C. Cir. 1992) (*Ohio Power*)), the FERC does not have the extent of rate jurisdiction which it previously thought it had over public utility subsidiaries of registered electric utility holding companies.

Under the 1992 *Ohio Power* decision, if a public utility subsidiary of a registered holding company enters into a service, sales or construction contract with an affiliate company, the costs incurred under that affiliate contract cannot be reviewed by the FERC. The SEC has to approve the contract before it is entered into. However, the FERC cannot examine the reasonableness or prudence of the costs incurred under that contract. The FERC must allow those costs to be recovered in wholesale electric rates, even if the utility could have obtained comparable goods or services at a lower price from a nonaffiliate.

This decision has left a major gap in rate regulation of electric utilities. The result is that utility customers served by registered holding companies have less rate protection than customers served by nonregistered systems. If PUHCA is repealed, the *Ohio Power* problem goes away. This is a significant advantage of S. 206, introduced January 30, 2001. S. 206 would repeal PUHCA and enact a new, more limited law that does not give rise to an *Ohio Power* problem. Short of repeal of PUHCA, however, the existing regulatory gap needs to be addressed.

Issues Raised If PUHCA Is Repealed or Amended

There are several ratepayer protection issues on which Congress should focus in considering PUHCA legislation. S. 206 adequately addresses these issues.

An important aspect of ratepayer protection is preventing affiliate abuse and the subsidization by ratepayers of the nonregulated activities of nonutility affiliates. These issues can arise in virtually every area of the FERC's responsibilities. In the case of public utilities that are members of holding companies, there are increased opportunities for abuses. There are several reasons for this.

First, registered holding companies have centralized service companies that provide a variety of services (*e.g.,* accounting, legal, administrative and management services) to both the regulated public utility operating companies in the holding company system, and to the nonregulated companies in the holding company system. The FERC's concern in protecting ratepayers is that when the costs of these service companies are allocated among all members of the holding company system, the ratepayers of the public utility members bear their fair share of the costs and no more; ratepayers should not subsidize the nonregulated affiliates of the public utilities.

Thus far, FERC has had few, if any, problems with inappropriate allocations of service company costs. The services provided by the centralized service companies have been relatively limited. In recent years, however, there has been a substantial increase in the services being performed by these types of service company affiliates. In many registered company systems, the majority of the costs of operating and maintaining the operating utilities' systems, which previously were incurred directly by each individual utility, are now being incurred by the service company and billed to the public utility under SEC-approved allocation methods. These costs can be significant for ratepayers. This means that rate regulatory oversight of service company allocations is imperative.

A second concern involves special purposes subsidiaries. In addition to the centralized service companies, registered holding companies increasingly are forming special purpose subsidiaries that contract with their public utility affiliates to supply services, as well as goods and construction. This can include fuel procurement, services such as operation of power plants, telecommunications, and construction of transmission lines and generating plants.

The FERC's primary concern with affiliate contracts for goods and services is that utilities not be allowed to flow through to electric ratepayers the costs incurred under affiliate contracts if those costs are more than the utility would have incurred had it obtained goods or services from a nonaffiliate. As discussed earlier, under the 1935 PUHCA the FERC cannot provide adequate protection to ratepayers served by registered systems because of the 1992 *Ohio Power* court decision.

The Commission recently has made some progress in protecting customers served by registered holding companies by using its conditioning authority over registered holding company public utilities that seek approval to sell power at market-based rates. The Commission has said that if such utilities want to sell at market-based rates, they must agree not to purchase nonpower goods and services *from* an affiliate at an above-market price; they must agree that if they sell nonpower goods and services *to* an affiliate, they will do so at the higher of their cost or a market price. However, the Commission's market rate conditioning authority is not enough to protect all registered system ratepayers against abusive affiliate contracts. Short of repeal of PUHCA, legislation is needed to fully remedy the regulatory gap.

According to the SEC's 1995 report, service companies render over 100 different types of services to the operating utilities on their systems, with nonfuel transactions aggregating approximately $4 billion annually. This growth adds to the potential for ratepayer subsidies involving both the centralized and the special-purpose service companies.

Another reason for heightened concern regarding affiliate abuses in all holding company systems, both registered and exempt, is the large number of holding company subsidiaries that engage in nonutility businesses. According to the SEC report, since the early 1980's the number of nonutility subsidiaries of registered companies has quadrupled to over 200. The trend in exempt companies is also likely to be significant as well. The sheer number of nonutility business activities brings greater potential for improper allocation of centralized service company costs to the nonutility businesses (*i.e.,* electric ratepayers subsidizing the nonutilities' fair share of the costs). It also increases the opportunities for affiliate contracting abuses.

To protect against affiliate abuse and cross-subsidization, Federal and State regulators must have access to the books, records and accounts of public utilities and their affiliates. Under section 301 of the FPA (and section 8 of the Natural Gas Act), the FERC has substantial authority to obtain such access. It can obtain the books and records of any person who controls a public utility, and of any other company controlled by such person, insofar as they relate to transactions with or the business of the public utility. This, however, may not necessarily reach every member of the holding company. Thus far, there has been no significant problem in obtaining access to books and records and in monitoring and protecting against potential abuses. However, the SEC's regulatory role with respect to registered systems has been an added safeguard.

It is critical that both State and Federal regulators have access to books and records of *all* companies in a holding company system that are relevant to costs incurred by an affiliated utility. This is equally true with respect to both registered and exempted holding company systems. If Congress modifies or repeals PUHCA, it should clearly confirm the FERC's mandate and authority to ensure that ratepayers are protected from affiliate abuse. Similarly, we encourage Congress to be mindful of concerns expressed by State commissions and provide States with appropriate access to relevant books and records of *all* holding company systems.

In addition to the above ratepayer protection concerns, there are several other matters that should be considered in analyzing PUHCA reform. These include fu-

ture corporate structures in the electric industry, diversification activities, and the issuances of securities affecting public utilities.

As mentioned earlier, the FERC must approve public utility mergers, acquisitions, and dispositions of jurisdictional facilities. This is an area in which the Commission has overlapping jurisdiction with the SEC, but also an area in which in some instances there is no overlap. Jurisdictional facilities under the FPA are facilities used for transmission in interstate commerce, or for sales for resale in interstate commerce. FERC has claimed jurisdiction over transfers of jurisdictional sales contracts but has disclaimed jurisdiction over dispositions that solely involve physical generation facilities. It appears that State regulators have adequate authority to regulate dispositions of physical generation assets. Further, such dispositions or acquisitions would be subject to the antitrust laws.

The FERC does not have jurisdiction to approve or disapprove diversification activities of public utilities or holding companies. Thus, if PUHCA were repealed, there would be no Federal oversight of diversification activities of registered holding companies or their public utility members, other than through FERC auditing of books and records. The SEC does not directly review public utility diversification activities of other holding companies and public utilities, and this has not posed any significant problems in the FERC's protection of ratepayers. In addition, many State commissions regulate diversification by public utilities that sell at retail.

A final area involves issuances of securities. The FERC must approve issuances of securities by public utilities that are not members of registered holding company systems, unless their security issuances are regulated by a State commission. Because the majority of States regulate issuances by public utilities, the FERC does not regulate most public utilities' issuances. If PUHCA were repealed, it appears that there would be no Federal review and approval of issuances of securities by holding companies or their public utility members. The SEC can more appropriately address whether any Federal oversight is necessary in this area.

PREPARED STATEMENT OF DAVID M. SPARBY

VICE PRESIDENT, GOVERNMENT AND REGULATORY AFFAIRS

XCEL ENERGY, INC.

MARCH 29, 2001

Introduction

Senator Enzi, Members of the Subcommittee, my name is Dave Sparby, and I am the Vice President, of Government and Regulatory Affairs of Xcel Energy, Inc. Xcel Energy is a holding company registered under the Public Utility Holding Company Act of 1935 ("PUHCA"). Xcel Energy was created as the result of a merger between Minneapolis-based Northern States Power (NSP) and Denver-based New Century Energies (NCE). The merger of those two companies was completed on August 17 of last year, some 17 months after it was announced. Xcel Energy serves more than 3 million electricity and 1.5 million natural gas customers in 12 States, and 2 million electricity customers internationally.

While I am speaking here today on behalf of Xcel Energy, I would note that we are also members of the Repeal PUHCA Now! Coalition, an *ad hoc* group of electric and gas utility systems, with public utility operations (collectively, the "Coalition").[1] We at Xcel, and the other members of the Coalition, would like to thank you very much for inviting us to submit testimony in favor of legislation repealing PUHCA.

As Senator Enzi and other Members of the Subcommittee know, issues surrounding the relevance and efficacy of PUHCA, originally enacted in 1935, have been before the Congress almost continuously over the past 20 years. And while the statue has been amended in piecemeal fashion to respond to the changing dynamics of the energy industry, true reform has remained elusive. The legislation now before the Subcommittee, S. 206, offers the promise of such true reform and we support its speedy enactment. Indeed, legislation like S. 206 has been reported by the full Banking Committee, in identical or virtually identical form in each of the last two Congresses.

The Case for PUHCA Repeal

To be clear, we believe the case for enactment of S. 206 is strong. As articulated more eloquently in previous reports of the Subcommittee and elsewhere:

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[1] A complete list of the companies forming the Coalition is set forth in Attachment 1.

- The purposes underlying the original requirements and regulations under PUHCA no longer exist and other regulatory programs at the State and Federal level have arisen to address remaining concerns;
- PUHCA's restrictions and requirements deter and inhibit the otherwise orderly flow of capital into emerging competitive markets; and
- PUHCA requirements might well work at cross purposes with other important national energy initiatives.

The Need for PUHCA Regulation Has Passed

To provide some historical perspective, it must be remembered that when PUHCA was enacted nearly 67 years ago, it was designed primarily to eliminate the unsound financial structures that had been created by gas and electric holding companies during the 1920's. Abuses discovered at the time included the marketing of holding company securities based on unsound and fictitious values and without adequate disclosure to investors, and a practice by some companies of requiring their operating utility subsidiaries to pay excessive dividends or purchase services at excessive prices under non-arms-length service contracts.

Congress entrusted the administration of this statute to the new Securities and Exchange Commission ("SEC") because the SEC was the agency with the greatest expertise in financial matters and was already charged with the responsibility for overseeing investor protection under the Securities Act of 1933 and the Securities and Exchange Act of 1934. PUHCA is unique, however, in that it is the only securities statute designed to regulate a single non-financial industry.

The task of overseeing the financial restructuring of the electric and gas utility holding companies was largely completed by the mid-1950's. And, as the SEC's role in administering other Federal securities laws has evolved, it has become clear that PUHCA no longer serves any independent purpose in assuring investor protection. PUHCA is intended, after all, to regulate "the corporate structure and financing of public-utility holding companies and other affiliates." There is no question but that this authority is redundant of that which the SEC already has under the Securities Act of 1933 and Securities and Exchange Act of 1934. And in part for that reason, since 1982, the SEC has been on record favoring repeal of PUHCA.

Some have argued, however, that repeal of PUHCA would create a new "gap" in effective State/Federal regulation of utilities to the detriment of utility customers. But in this regard, it is important to remember what PUHCA does, and what it does not do. PUHCA does not, and was never intended to, address rate regulatory issues. Local distribution matters are exclusively within the province of State regulators, while the setting of wholesale rates and other transactions by utilities relating to the transmission of electricity or of natural gas in interstate commerce are regulated by the FERC. Repeal of PUHCA as proposed in the bill before you would not alter this allocation of jurisdiction and authority and indeed, the record keeping and report requirements of the legislation will facilitate the on-going work of FERC and State agencies to protect ratepayer interests.

Moreover, the "gap" in effective State regulation of electric and gas utilities that Congress found in 1935 no longer exists. Simply put, electric and gas utilities are among the most highly regulated businesses there are, and there is no longer any basis for believing that the States and the Federal Energy Regulatory Commission ("FERC") are unable to protect utility consumers.

The Effect of PUHCA on Necessary Investment

If PUHCA were merely an arcane law directed at problems that no longer exist, or simply duplicated other Federal and State regulatory laws, perhaps the case for PUHCA repeal would not be quite so compelling. But because of the structural inflexibility that is built into PUHCA, the statute has long been an obstacle to the implementation of significant competitive, economic and regulatory changes occurring in this country and throughout the world. PUHCA prevents registered holding companies from participating equally with all other energy companies in various activities that Congress and other Federal agencies are promoting, and, in addition, deters new investment in certain energy businesses by non-traditional investors by subjecting them to possible SEC regulation as statutory "holding companies."

In the past, Congress has addressed the "PUHCA Problem" in a piecemeal fashion. For example, Congress passed legislation in 1978 and again in the mid-1980's designed to promote the development of and investment in cogeneration and small power production facilities in the United States. Further amendments in 1990 were designed to allow the registered gas utility holding companies to participate fully in natural gas supply ventures. In 1992, the Energy Policy Act had somewhat lowered the PUHCA barrier to the development of an independent, competitive, whole-

sale generation market, and in 1996, Congress authorized registered holding companies, like all other companies, to invest in new telecommunications businesses.

Nonetheless, the "integration" standards under PUHCA remain an obstacle to economically desirable utility mergers. The FERC's review of electric utility mergers focuses on assuring that they are pro-competitive, that is, that a merger does not lead to a situation in which the resulting company has too much control over generation assets in a single geographic market. Under the FERC's merger guidelines, therefore, it is much easier to form a union between utilities that operate in different markets than between utilities that operate next door to each other. And yet the PUHCA integration standard stands in the way of geographically diverse utility systems by limiting a registered holding company to a single "integrated" electric system that's confined to a single area or region.

PUHCA also prevents registered holding companies from engaging in many desirable nonutility businesses, or, at a minimum, requires lengthy filings with the SEC and onerous ongoing reporting obligations that unregulated competitors in these businesses are not subjected to. This intrusion into the business judgment of holding company management is unprecedented under Federal law and positively harms the interest of investors by imposing costs in the form of lost business opportunities and regulatory compliance costs.

Under PUHCA, a company organized to construct and own new generation [except "exempt wholesale generators" (called an "EWG")] or transmission facilities would be an "electric utility company," and any 10 percent owner of its stock would be a "holding company." Every holding company must register under PUHCA, absent an available exemption. Registration would subject an investor to onerous financial and business regulation by the SEC. In addition, in many cases, an investor who acquires 5 percent or more of the stock of an electric utility company would require SEC approval, which necessitates a lengthy review process. Therefore, out-of-State utilities, as well as other types of nontraditional investors (*e.g.,* equipment suppliers, diversified energy companies, and financial investors) are effectively deterred from making innovative investments in new generation or transmission assets. The EWG exemption does not apply to an entity (called a "Transco") that is originated to build a new transmission line to transport new generation capacity.

Existing utilities and holding companies would find it difficult to obtain SEC approval under PUHCA to acquire 5 percent or more of the stock of a new generation or transmission company. This is because the "integration" standards under PUHCA prohibit investments in utilities in more than one State unless the facilities in each State are physically interconnected with each other.

A nontraditional investor (*e.g.,* an equipment manufacturer, a diversified energy concern, or a financial investor) may not qualify for any exemption under PUHCA if it became a "holding company" over a new generation or transmission company. Thus, PUHCA hinders nonutilities from making investments in new generation or transmission assets.

The only practical option for investing in new generation in California, for example, is through an "exempt wholesale generator," or an "EWG" for short. An EWG is exempt from all provisions of PUHCA and the owners of an EWG are not treated as "holding companies." But holding companies that are already registered under PUHCA, which now account for more than 40 percent of the entire electric utility industry, are limited by SEC regulations in the amount of investments that they may make in EWG's. This investment restriction has impacted the wholesale market in two ways:

- First, many registered holding companies have already reached their investment limit on other EWG projects and thus cannot enter new markets. Thus, even if these utilities wanted to enter the troubled California generation market, the PUHCA investment limit would prohibit them from doing so or, at a minimum, necessitate a lengthy and uncertain application review process at the SEC in order to obtain increased investment authority.

  Indeed, we believe that this restriction is one of the many factors that might well have contributed to the current California energy crisis and will stand in the way of any permanent solution is the structural and financial restraints imposed under PUHCA. Because PUHCA unnecessarily restricts the flow of capital it has a negative impact on places such as California that are in tremendous need of additional generation resources.

  I might add that the same can be said for other areas of the West as well. Xcel Energy is currently facing a tremendous problem in Cheyenne, Wyoming. The citizens of that part of Wyoming are served by Cheyenne Light, Fuel and Power Company (Cheyenne), a wholly owned subsidiary of Xcel. Cheyenne, which owns no generation assets of its own, has been serving local citizens through its purchase of wholesale power from another utility as a full requirements customer

since 1963. This past year that provider indicated that it would very significantly increase wholesale prices for future sales to Cheyenne. To the extent that PUCHA's capital inhibiting affects limited generation investment, this result as well as a number of other factors, have led to significant increases in the short-term costs to serve our customers.

- Second, the EWG exemption applies only to entities that generate electricity "exclusively" for sale *at wholesale.* Thus, the EWG exemption provides no relief for new investment in generation assets where the output will be sold *at retail,* even though such retail sales are permitted—and even encouraged—by State utility restructuring laws.

Passage of the bill before you will eliminate the artificial structural and financial barriers that now inhibit the flow of capital and would thus contribute to the resolution of California and broader Western regional energy problems. To be clear, we are not here claiming that PUHCA repeal, by itself, will solve the problems in Western markets, just as it is by no means the sole cause of those problems, but elimination of its outdated restrictions will certainly facilitate the development of new generation and transmission capacity in the West. All steps that can be taken to enhance investment in generation and transmission capacity should be made during this energy shortfall. Free flow capital is not merely a theoretical problem. Customers throughout the Western Region have been hurt by the lack of development of generation and transmission.

In short, with its mandate of a vertically integrated utility system confined to a single area or region, PUHCA is clearly a barrier to increasing competition in the electric and gas utility industries. It inhibits efficiency gains, limits new competitors in the marketplace, leads to differing regulatory rules for competitors that are holding companies, and contributes to inefficient investment decisions by utility management and shareholders. These costs are real, substantial and should not be continued.

Potential PUHCA Conflicts With Other National Energy Objective

The requirements of PUHCA are also posing a serious near-term obstacle to implementation of another national energy policy—the formation of regional transmission organizations (RTO's) pursuant to FERC Order No. 2000.

We see more and more that a preferred model for RTO structures is the so-called Transco or Independent Transmission Company (ITC). The ITC's are independent for-profit companies to which many utilities seek to transfer both ownership and operating control of their transmission assets. ITC treats transmission like a business, and has the most incentive to move power—from whatever generating source. Their for-profit status provides an efficient answer to reliably and competitively manage the system and—most importantly today—provide for its expansion. Yet, PUHCA would treat these new entities as "electric utility companies." Ownership of securities in ITC's would subject many now-exempt holding companies—and even utilities that are not holding companies of any kind—to burdensome PUHCA restrictions.

Moreover, the registered electric utility holding companies (which now account for more than 40 percent of the entire electric utility industry) will need to seek routine approvals from the SEC in order to transfer their transmission assets to RTO's and to provide other financial support. Thus, we have one Federal agency (the FERC) that is seeking to restructure the ownership and/or control of the Nation's transmission grid, while another Federal agency (the SEC) stands in the way.

Conclusion

PUHCA should be repealed at the earliest possible date. Therefore, Xcel Energy and the Coalition would support appropriate "stand alone" legislation or the inclusion of satisfactory legislative language repealing PUHCA in an acceptable "comprehensive" bill. And, we believe that PUHCA repeal should be clean, without lingering vestiges of this statue.

As the SEC has noted for almost 20 years now, PUHCA is an archaic law that has long since served its original intended purposes. The abuses that gave rise to the passage of PUHCA no longer exist and are unlikely to recur, due to the existence of other regulatory laws. At the same time, PUHCA has presented and will continue to present an obstacle to the realization of other Federal and State energy initiatives that favor competition and new investment. In short, as a regulatory law, PUHCA almost always pushes in the wrong direction.

Thank you again, Mr. Chairman, for the opportunity to submit this testimony to the Subcommittee.

ATTACHMENT 1

LIST OF COALITION

Allegheny Energy
American Electric Power
Cinergy Corporation
CMS Energy
Duke Energy
Entergy Corporation
Exelon Corporation
Florida Power & Light
GPU
MDU Resources
MidAmerican Energy
Pepco
NiSource
Northeast Utilities
Progress Energy
Reliant Energy
Southern Company
TXU
Xcel Energy

PREPARED STATEMENT OF DAVID L. SOKOL

CHAIRMAN AND CEO
MIDAMERICAN ENERGY HOLDINGS COMPANY

MARCH 29, 2001

Senator Enzi and Members of the Committee, I am David Sokol, Chairman and CEO of MidAmerican Energy Holdings Company, a diversified, international energy company headquartered in Des Moines, IA. I am here today representing MidAmerican and other "exempt" utility holding companies that support S. 206.

Thank you very much for the opportunity to testify this morning on an issue of great importance to my company, and I believe, the American energy consumer. I would like to thank Senator Hagel for that very kind introduction and I am pleased to say that I am also a constituent of Senator Enzi's. I would like to commend Senator Enzi and the Members of the Subcommittee for calling this timely and important hearing.

MidAmerican Energy Holdings Company consists of four major subsidiaries: CE Generation (CalEnergy), a global energy company that specializes in renewable energy development in California, New York, Utah, Texas, Arizona and Nevada, as well as the Philippines; MidAmerican Energy Company, an electric and gas utility serving the States of Iowa, South Dakota, Illinois and a small part of Nebraska; Northern Electric, a competitive electric and gas utility in the United Kingdom, and Home Services.com, a residential real estate company operating in, among other States, Maryland, Kentucky and Indiana. CalEnergy owns and operates geothermal power plants in the Imperial Valley of Southern California. The Company is the largest employer and taxpayer in Imperial County, one of the most economically disadvantaged counties in the State of California.

I would like to focus my remarks on providing the committee with some real-world examples of how the Public Utility Holding Company Act (PUHCA) is limiting investment in energy infrastructure and reducing the supply options for American consumers at the very time when the industry needs new investment most.

I have just returned from spending a week on the ground in California, observing first-hand the chaotic situation in that State. The causes of the California energy crisis are numerous and complex, but I believe they can be tied to two core problems—(1) lack of adequate investment and infrastructure in the energy sector and (2) regulatory policies that distort energy markets.

Concerning investment and infrastructure, California enters this summer approximately 5,000 megawatts short of expected peak demand. Even with heroic efforts to reduce demand, it will be difficult for the State to avoid blackouts this summer. Critical shortcomings in electric transmission such as the well-examined bottleneck along "Path 15" reduce the ability of the system to move power efficiently.

With regard to regulatory policies that distort energy markets, California took a number of steps which proved disastrous. In the name of reducing concerns about utility market power, the State either compelled or encouraged large-scale generation divestitures by the incumbent utilities and required those utilities purchase power in the volatile spot market. The State restructuring legislation also mandated significant rate reductions that discouraged new entrants from competing for retail customers. Combined with PUHCA's limitations on selling electricity generated by exempt wholesale generators (EWG's) at retail and the inadequacy of available transmission and generation, this helped smother retail competition at the residential level in its infancy. Also, almost all observers would agree with my view that the State's failure to preemptively address the excessive bureaucracy in its plant siting and environmental review procedures was a major shortcoming in California's restructuring plan.

In its review of the energy situation in California and the West last year under Chairman Hoecker, FERC found, "there is little doubt that the most crucial task ahead is to ensure that a robust supply enters this market, both now and in response to any future price signals." Nationwide, data from the North American Electric Reliability Council (NERC) project electric reserves of only 11.48 percent in 2001, with electric demands increasing by more than 2 percent per year. Typically, a 15 percent reserve is considered to be the minimum to ensure reliable service. Conservative estimates show that more than $76 billion will need to be invested in the sector by the end of the decade to assure reliable service.

As this Congress considers the actions it can take to ease the energy crisis in California and the West, I believe you will see that PUHCA contributes to both of these problems. The law can and should be repealed, and *only* Congress can do so. To do otherwise would leave a Federal statute on the books that will continue to inhibit investment and distort markets in the West and throughout the country. The re-

sults of California's failure to address these issues in advance of the onset of full retail competition should be a warning to Congress about the need to move quickly on removing barriers to investment and market entry. On a more specific level, I would like to provide the Subcommittee with two concrete examples of how the Act prevents actions that could help alleviate the California electricity crisis.

Last summer, we at MidAmerican began to see signs foreshadowing the severe problems that have afflicted the California electricity market. The investor-owned utilities in the State had already begun to suffer financially from the impacts of soaring wholesale electricity costs and capped retail rates. Since MidAmerican is a privately-held company whose largest shareholder is Berkshire Hathaway, we enjoy the benefit of substantial financial resources and the ability to take a long-term investment horizon. We gave serious consideration to a number of options that would have involved MidAmerican taking an equity position in the California utilities while working with the State to return the market to long-term viability.

Every scenario we reviewed ran into the same roadblock—the Public Utility Holding Company Act. MidAmerican is exempt from the most intrusive regulatory restrictions of the Act because its regulated utility business is primarily in one State, Iowa. However, MidAmerican could not acquire more than 4.99 percent of the equity in any of the California utilities without running afoul of PUHCA on several fronts. It also is my understanding that a number of other utilities considered taking similar actions either individually or as part of a consortium, but ran into the same PUHCA roadblock.

First, the physical integration requirements of PUHCA would have required MidAmerican to demonstrate that it could physically interconnect its utility systems in the Midwest with those of the California utilities. This is an impossible standard for MidAmerican to meet. Any other public utility, registered or exempt, operating within the eastern two-thirds of the United States would run into the same barrier.

Second, even if we could have solved the problem of the physical integration requirement, MidAmerican would have been forced to become a registered holding company under the Act. This probably would have required the Company to separate itself from Berkshire Hathaway or have Berkshire divest itself of all nonenergy related assets. I am sure I do not have to explain to the Members of the Senate Banking Committee why neither of those options was even momentarily considered.

In fact, the arrangement that allows Berkshire's interest in MidAmerican is probably the most extreme example of the so-called "PUHCA pretzel" where holding companies are forced to contort themselves organizationally to avoid violating the law or registration under the Act. Berkshire Hathaway owns approximately 90 percent of the equity in MidAmerican, yet controls less than 10 percent of the voting interest in the company. Mr. Walter Scott, also of Omaha, holds the majority of the control of the Company at the Board level. Only by such structuring could Berkshire Hathaway make an investment in a regulated utility and avoid having to divest itself of its diversified holdings. This arrangement works because of the extraordinary level of trust and respect among the small number of owners of MidAmerican, but it should not be necessary. The Company is structured this way for one reason and one reason only—the arbitrary requirements of PUHCA.

I hope you will take a moment to reflect on the absurdity of this. Berkshire Hathaway is one of the most financially stable private entities in the world, with a AAA bond rating. A Federal law enacted more than 65 years ago with the intent of protecting investors keeps MidAmerican and Berkshire out of California's utility market and almost prevented Berkshire from investing in MidAmerican. At the same time, the California utilities are unable to pay their dividends or even their bills, with cascading effects throughout the economy.

Another example pertains to our interest in expanding the Company's Imperial Valley geothermal plants. These plants currently provide the California electricity market with approximately 300 megawatts of baseload, emissions-free, renewable electricity. We would like to double the size and output of these facilities, providing desperately needed electricity to the California market.

In order to get this electricity to consumers in Southern California, additional transmission will need to be built. As you are well aware, the State's investor-owned utilities are in no financial condition to undertake this type of project. The obvious answer would be for CalEnergy to make the investment in the transmission lines necessary to connect these plants to electricity consumers. Unfortunately, PUHCA may stand in our way.

Being an owner of a transmission facility in California creates similar PUHCA problems to investing in a California utility. Once again, the Company would be faced with maneuvering around the physical integration standard and dealing with Berkshire Hathaway's diversified portfolio. There may be some way around these problems, and we will explore every option to find a way to complete this expansion.

Nonetheless, the existence of this unnecessary, outdated law makes it far more difficult to invest in this critical industry.

One final item the Subcommittee should consider related to California is what will happen to the utility companies in the State once stability is returned to the marketplace. These companies face a long climb back to fiscal health, and will have a difficult time raising capital for new infrastructure. Yet, PUHCA will prevent most if not all domestic utilities, and discourage nonutility companies, from making equity investments in these companies for the reasons already discussed.

Where will needed capital come from? I anticipate one of three sources. First nonutility companies could make these investments, but these companies will not have the benefit of prior experience in the industry and will be impeded by PUHCA just as Berkshire Hathaway. Federal or State governments are another possible source of capital. But, the political issues would seem to make that unlikely. The most likely scenario, I believe, is that foreign utility companies looking for a foothold in the U.S. market will take long looks at these companies.

Since these companies are not restricted by the physical integration requirement on their "first bite" entry into the American market, they will enjoy a substantial advantage in the mergers and acquisitions market. I am not making a case against international investment. In fact, I strongly support it. But outdated, unnecessary laws should not hamstring American companies in this competition. Are there any good reasons not to repeal PUHCA? I do not believe so.

(1) The SEC has consistently supported PUHCA repeal for almost 20 years. Speaking on behalf of the SEC at a hearing of the House Subcommittee on Finance and Hazardous Materials, Commissioner Isaac C. Hunt, Jr. testified, "by the early 1980's, the SEC had concluded that the 1935 Act had accomplished its basic purposes, and its remaining provisions, to a large extent, either duplicated State or Federal regulation or otherwise were no longer necessary to prevent the recurrence of the abuses that led to its enactment . . . Therefore, the SEC unanimously recommended that Congress repeal the statute."

Commissioner Hunt continued, "In the summer of 1994, the SEC staff, at the direction of Chairman Arthur Levitt, undertook a study of regulation of public utility companies which culminated in a June 1995 report. Based on the report, the SEC has recommended that Congress consider three legislative options for eliminating unnecessary burdens. The preferred option is repeal of the 1935 act, accompanied by the creation of additional authority to exercise jurisdiction over transactions among holding company affiliates. This course of action will achieve the economic benefits of unconditional repeal and also protect consumers." That is exactly the approach embodied in S. 206.

(2) The bipartisan leadership of this Subcommittee also has consistently supported repeal. It is a tribute to the ability of this Subcommittee to work on a bipartisan basis toward good policy goals that both the Senator and Ranking Democrats on the Banking, Finance and Urban Affairs Committee are cosponsors of this bill. I believe it is also a testimony to the strength of the arguments for PUHCA repeal that senior Members of the Subcommittee who have heard both sides for years, join in support of PUHCA repeal.

(3) Federal Energy Regulatory Commissioners have consistently supported repeal. On March 20, 1997 FERC Chair Elizabeth Moler, a Democratic appointee, testified, "as presently structured, the Public Utility Holding Company Act inhibits competition. Congress should eliminate these impediments. Utilities need the freedom to pursue structural changes without facing antiquated rules that do not easily accommodate current policies favoring competition." At the same time, Independent Commissioner, Donald Santa, Jr. testified, "this anachronistic Federal statute no longer serves any useful purpose and, in fact, is an impediment to greater competition in electricity markets." The current Chairman of FERC, Curt Hebert, is also a strong proponent of PUHCA repeal.

PUHCA repeal will make it easier for FERC to continue policies to promote efficient, competitive wholesale markets. PUHCA is premised on geographically limiting utility companies while at the same time FERC is working to reduce market concentration.

The limits PUHCA places on FERC's ability to promote competitive wholesale electricity markets are even more apparent today. PUHCA inhibits utilities' efforts to comply with FERC Order 2000 to establish independent regional transmission organizations (RTO's). Every nonutility participant in the electricity debate favors the establishment of RTO's to ensure the most efficient use of the electric transmission system and to guarantee that utilities do not use control of the transmission system to distort wholesale electricity markets. Every consumer group, every industrial user group, public power entities and rural coops all strongly support moving forward with RTO's.

Many utilities, including MidAmerican Energy, are working to establish independent transmission companies, or "transcos," that would provide for efficient management of transmission networks in large regional markets. As FERC strongly prefers that these organizations be large, multistate companies, they will be subject to PUHCA's restrictions. This discourages investment and delays the day we will see operational control of transmission fully separated from competitive market functions.

(4) PUHCA repeal is pro-consumer. Repealing PUHCA will allow new investment, new ideas and new efficiencies in the electric and gas industries at a time when these are needed most. Last year, MidAmerican commissioned an independent study by the highly respected econometrics firm Analysis Group/Economics. Using the most conservative possible estimates, the study demonstrated directs costs to the economy of hundreds of millions of dollars annually from PUHCA. Other surveys that have attempted to quantify lost opportunity costs in the industry have estimated a multibillion dollar annual drag on the economy from PUHCA. I am pleased to provide our study to Members of the Committee for your review.

Why then has PUHCA not been repealed yet?

Because PUHCA repeal is a hostage to other aspects of the larger electricity debate. Other stakeholders in the industry have sought to use PUHCA as leverage to achieve their goals in energy policy. I do not say that in an accusatory sense. That is the way the game is often played, and MidAmerican has taken a leadership role in trying to resolve policy differences on the full range of these issues.

Those efforts can and should continue, but I believe both Congress and the stakeholder community need to step forward and focus on what they support and are willing to help get passed. We need to end the politics of stalemate where interest groups have focused more on blocking progress on one another's priorities than on moving forward with good policy. Unfortunately, the losers in this hardplayed game have been America's energy consumers.

Mr. Brunetti's company, Xcel Energy, is a registered holding company subject to the most stringent restrictions of PUHCA. In spite of the fact that our companies are regional competitors on the wholesale market, I support his company being removed from PUHCA's onerous restrictions. He supports my company being able to expand beyond its limited geographical scope and become a larger competitor in the Midwest and Great Plains. By removing both our companies from PUHCA constraints, you will enable each of us to compete more aggressively, operate more efficiently and serve consumers better.

Last year, I joined Mr. Warren Buffett in discussing PUHCA repeal with House and Senate leaders. In those meetings, we warned that the energy sector was headed for a train wreck in either California or the Midwest. I don't take any pleasure in being right in that prediction, but I hope you will understand why I believe so strongly Congress must act now.

The political game that has held PUHCA repeal hostage has been well-played on all sides, but the big loser has been the American consumer. It's time to change the way the game is played. I thank you for the opportunity to testify this morning and ask you to support S. 206.

PREPARED STATEMENT OF CHARLES A. ACQUARD

EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES (NASUCA)

MARCH 29, 2001

Introduction

Good morning Senator Enzi and Members of the Subcommittee. I am Charlie Acquard, Executive Director of the National Association of State Utility Consumer Advocates (NASUCA). NASUCA is an association of 41 consumer advocate offices in 38 States and the District of Columbia. Our members are designated by laws of their respective States to represent the interests of utility consumers before State and Federal regulators and in the courts. On behalf of the members of NASUCA, I wish to thank you for the opportunity to testify before this Subcommittee on the Public Utility Holding Company Act of 1935.

First I would like to commend the Subcommittee for holding this hearing. As more States consider, implement (or reject), and reassess a move toward a more competitive electric generation industry, it is essential that Federal and State lawmakers continue to review those laws and regulatory actions that will either protect

or harm consumer interests in the context of the larger debate on the structure of the industry.

The question before this Subcommittee today is on the future of the Public Utility Holding Company Act. Yet, this issue cannot be examined outside the context of the entire framework of the electric utility industry without considering the market implications for consumers and competitors alike. No one has to tell this Subcommittee that the electric utility industry is in the midst of substantial change, uncertainty, and, in some places, turmoil. It is a front page, six o'clock lead news story. Anybody involved with this industry cannot escape the over-the-backyard-fence or soccer-sideline inquires from concerned neighbors about the possibility of what is going on out there happening here. So examination or possible elimination of key industry underpinnings cannot be done in a vacuum or viewed through the narrow prism of simply securities regulation. Rather, any discussion of substantial alteration of PUHCA must be considered in the context of the potential impact on industry structure, market power, and, ultimately, consumers.

NASUCA Resolutions

In a series of resolutions dating back almost 20 years, NASUCA has urged Congress to exercise the greatest caution in response to efforts to dismantle the consumer protections contained in PUHCA. Specifically, NASUCA continues to oppose changes to PUHCA that would reduce consumer protections in the Act at this time. NASUCA urges Congress and the SEC not to take any action that would weaken the Act without first ensuring that public utility holding companies are either subject to effective competition or subject to effective regulation, where effective competition does not yet exist or where competition would not induce efficiency, reduce costs and advance consumer interests.

Our resolutions recognize that public utility holding companies and their subsidiaries are affected with a national public interest and that their activities extending over many States are not susceptible to effective control by any individual State. We also recognize that neither the electric industry nor the natural gas industry has a fully competitive market structure and that utility market power remains pervasive. We conclude that, if PUHCA were repealed today in the manner proposed in S. 206, neither the remaining regulatory scheme nor the current State of competition would be sufficient to protect consumers. Until utility market power is eliminated, consumers must be protected by effective regulation, which includes the provisions of PUHCA.

In NASUCA's view, effective regulation of multistate public utility holding companies requires both rate reviews and structural reviews, with a rational allocation of responsibility between State and Federal decision-makers.

NASUCA recognizes that effective competition benefits consumers through greater efficiency and reduced costs. We also note, however, that deregulation under conditions of unfettered market power harms consumers. As such, our resolutions do not suggest that PUHCA must remain in its current form indefinitely. Rather, it cautions Congress and the SEC to take no action to weaken PUHCA without *first* ensuring that either effective competition or effective regulation is in place to protect consumers.

Our concerns are not held alone. In fact, every consumer group that I am aware of is opposed to repeal of the Act if not accompanied by effective provisions to promote sustainable, competitive markets. I have attached a list of groups who have been on record opposing PUHCA repeal.

S. 206

The legislation before us does not adequately address the concerns of consumer advocates across the Nation. Moreover, S. 206 would significantly worsen the problems associated with monopoly power. For example:

1. Repeal of PUHCA's integration requirement:

- Weakens the ability of State regulators to protect ratepayers (and State economies) from monopoly abuse. A State's ability to ensure least cost service is further confounded when the franchise owner is headquartered in another State or country.
- Opens the door to expanded opportunities for forum shopping and Federal preemption of State commissions in the assignment of generation or other costs which could be required by the FERC in light of the *Mississippi Power & Light Co.* v. *Mississippi Ex Rel. Moore, Atty,* 487 U.S. 354 (1988) court decision.
- Could increase the potential for nationwide or regional market concentration through unrestricted acquisitions of noncontiguous utilities by companies already holding substantial market power without competition for, or in their own service territories at the very time when we should be guarding against potentially anti-

competitive behavior. Elimination of competitors at the current pace has the potential to restrict competition and could artificially inflate prices paid by consumers if retail competition is implemented.

2. With repeal or easing of restrictions on utility diversification, the complexity of tracking and allocating costs and preventing cross-subsidization reaches a new level of difficulty. The goal of PUHCA modernization should be to reduce overly burdensome regulation. By repeal of PUHCA diversification provisions, S. 206 would have the opposite effect by increasing the regulatory burden.

3. There will be a significant increase in complex holding company structures. This would make it much more difficult to detect and deflect inappropriate interaffiliate transactions between competitive and monopoly business components, or to prevent conflicts of interest, anticompetitive behavior or other market power abuses.

4. As a result of their retail franchises and access to customers and information, electric utility holding companies retain an unmistakable advantage in many nonutility markets. Without addressing the fundamentals of this market power problem, S. 206 would permit utilities to harm competition in both utility and nonutility businesses. As a result, economic efficiency would be reduced, consumers harmed and small companies put out of business.

5. As evidenced in the SEC survey of State utility commissions complete a few years ago, many State regulators lack adequate authority to fill in regulatory gaps left by PUHCA repeal. Moreover, even if States have legal authority to fill the gaps, they may not have the resources, particularly as franchise owners become highly diversified and geographically distant, as S. 206 would permit.

While it is laudable that S. 206 includes a continued Federal presence in policing interaffiliate transactions, audits and access to books and records, it falls short in providing all of the necessary tools to the FERC with respect to policing interaffiliate transactions. It even exempts key affiliates from having to provide access to books and records. This legislation eliminates two provisions, the provisions addressing diversification and the integration limitations, which remain at the heart of the Act today despite the representations of some registered holding companies.

Proponents of repeal or major modification of PUHCA have incorrectly characterized the nature of the electricity industry today: It is not, as is claimed, a competitive industry. In fact, even in States that have restructured, little or no competition actually exists. Regulation, in the form of price caps and reductions, is the only tool that has resulted in lower prices for consumers. Furthermore, State regulation is not, contrary to repeal proponents, sufficient to protect consumers in the absence of a Federal statute regulating multistate public utility holding companies.

The factor motivating Sam Rayburn in 1935 to take on the power trusts and push for enactment of PUHCA—market power—still exists in the 2001. Since 1935, the structure of the industry has been greatly influenced by the Act. Changes in PUHCA, without ensuring effective competition and effective regulation in those sectors where each (or both) is appropriate, will harm consumers.

Market Power

Congress and Federal agencies must address the need to mitigate market power. The exercise of market power is likely in industry structures that include natural monopolies over essential facilities such as transmission and distribution systems, or in joint ownership of monopoly and potentially competitive businesses. In the electricity industry today, these conditions remain. These conditions are not present in other industries, where there is no exclusive franchise to sell at retail.

If Congress repeals PUHCA and its integration requirement without tying relief to a showing of effective competition or divestiture, then these very large utility companies can expand their monopoly customer, billing, transmission and distribution monopolies at will to ward off competitors. This places such utilities at a tremendously unfair advantage prior to the onset of competition and will allow the utility to acquire other utilities and their service territories without facing competition within their own service territory or realistically be subject to acquisition by even larger competitors.

And, contrary to claims you may hear, PUHCA does not in any manner prevent or limit the ability of utilities to build generation. Wholesale generators—or EWG's—are specifically exempted from the Act. So repeal of PUHCA will do nothing to alleviate the current energy crisis. In fact, repeal, as stated above, would only exacerbate monopoly power and manipulation of markets.

Where there are monopolies, especially with government-granted utility service franchises, the primary obligation is to core customers. No costs associated with an off-system investment, or with regulating such an investment to protect captive customers, should be borne by ratepayers. Unfortunately, effective means for denying the pass-through of unwarranted interaffiliate costs for multistate holding compa-

nies do not always exist at the State level. In fact, the Mississippi Power and Light court decision (Mississippi Power and Light Co. ex rel Moore) places consumers at continued and expanded risk from harm as a result of inappropriate costs potentially being allocated by a Federal agency even if the State has denied prudence of such costs. This may increasingly be the case as holding companies acquire disparate service territories. S. 206 does nothing to correct this regulatory gap. The very existence of such a regulatory gap will place consumers at risk.

Proponents of repeal argue that structural review is unnecessary because rate regulators can protect consumers. That is simply not the case. Rate review and structural review are complementary, and both are vital in ensuring fair rates and in preventing abuses. For example, PUHCA prevents holding companies from abusing corporate form to benefit their shareholders at the expense of consumers and competitors. They were designed as such when Congress enacted the twin Federal Power Act and PUHCA statutes. After-the-fact rate regulation alone cannot prevent or correct large investment errors, which may harm the ratepayers and the general public.

Second, State commissions do not have or may be prevented from using all the necessary tools to prevent harms to ratepayers and the public. For instance, the SEC/NARUC survey indicates that many States lack the legal authority to prevent certain out-of-State affiliations by a holding company located in another State, but owning the operating utility in the PUC's jurisdiction. In addition to the Mississippi Power and Light decision, other gaps include *Ohio Power* v. *FERC,* 954 F.2d 779 (D.C. Cir), *cert. denied,* 113 S.Ct. 483 (1992). While S. 206 appears to address the Ohio Power gap prospectively, it does nothing to address the regulatory gap created by MP&L.

Finally, States may not be the only appropriate jurisdictions to decide when a particular acquisition of a distant utility creates too much market power or concentration of control. So, structural regulation of multistate holding companies still requires a Federal role in addressing interaffiliate transactions, acquisitions of nonutility subsidiaries, acquisitions of distant utility companies, and mergers. Given current flaws in the structure of electricity markets, these changes are too substantial to adopt without ensuring the appropriate mix of effective regulation and effective competition.

After all, it is PUHCA itself, with its structural protections and outright bans of certain actions, transactions and behaviors that cannot be replaced or matched by S. 206 or other poor substitutes. Some parts of PUHCA still prevent anticompetitive and anticonsumer behavior.

The Committee should take a closer look at who is for and against stand-alone PUHCA repeal. The primary proponents of repeal are most of the registered holding companies and the SEC. Opponents include the Consumers for Fair Competition, all major consumer groups, representing residential, commercial and industrial customers, heating and air conditioning contractors, municipal electric and cooperative organizations, the National Association of Regulatory Utility Commissioners, and many other organizations.

Conclusion

I would like to conclude by urging this Subcommittee to consider any changes to the Public Utility Holding Company Act be done only in the context of the larger structure of the industry. As you have heard, the industry is evolving and that evolution has not been painless. We must first determine the appropriate market structure and nature of competition within the industry to evaluate the appropriate methods for balancing effective competition and effective regulation. If this is not achieved, consumers will not benefit, and will likely bear the brunt of any deregulatory actions.

NASUCA urges the Subcommittee not to repeal or weaken the consumer protections in PUHCA as embodied in S. 206 or other legislation without first ensuring that public utilities are subject to effective competition, or effective regulation, where competition would not induce efficiency, reduce costs and advance the interest of consumers. Legislation such as S. 206 does not meet such a standard.

Such legislation is inappropriate. At both the State and Federal levels throughout the Nation, the structure of the electric and gas utility industries are being debated. However, it is still unclear what will be the outcome in many States. If we have learned anything from California, it is that the world is evolving in ways which we cannot anticipate the results. To repeal the anti-empire building statute at such a time when structural abuses could become the order of the day would be dangerous.

Thank you again for the opportunity to speak on behalf of NASUCA.

PREPARED STATEMENT OF MARTY KANNER

COORDINATOR, ON BEHALF OF CONSUMERS FOR FAIR COMPETITION

MARCH 29, 2001

Consumers for Fair Competition (CFC)—an ad hoc coalition of residential and industrial consumer representatives, small business interests, local regulators, public interest groups, and public and private utilities—was formed to advance policies necessary to promote effective competition. The coalition believes meaningful competition will not take hold or survive if steps are not taken to address the market dominance of incumbent utilities.

You will hear assertions that the Public Utility Holding Company Act (PUHCA) is no more than an out-dated statute intended to protect investors from fraudulent securities practices. Do not be misled. Congress enacted PUHCA as a companion statute to the Federal Power Act. PUHCA establishes passive restraints on the structure of the electric utility industry in order to mitigate market power, preclude practices abusive to captive consumers, and facilitate effective regulation.

Stand-alone PUHCA repeal, as embodied in S. 206, eliminates these structural protections. Moreover, they do not include the policy prescriptions needed to promote meaningful competition. Such action will expose captive consumers to a myriad of potential risks. Rather than ushering in competition as repeal proponents would have you believe, stand-alone PUHCA repeal will have substantial anti-competitive repercussions and retard the development of a vibrantly competitive electricity market.

The current administration of PUHCA has clear limitations. However, its underlying purpose—the mitigation of market power and prevention of interaffiliate transactions and utility diversifications that threaten captive ratepayers—is the best policy option for a successful transition to a competitive marketplace. It is for that reason that every major consumer group—as well as numerous other interests—opposes stand-alone PUHCA repeal.

CFC has prepared provisions to provide the necessary checks on potential anti-competitive behavior. With adoption of these provisions, Congress could repeal PUHCA.

Underlying Purpose of PUHCA

As noted above, PUHCA establishes certain structural safeguards to protect consumers and facilitate effective rate regulation. Under the Act:

- Multistate utility holding companies must be physically and operationally integrated in order to ensure economic benefits and facilitate effective regulation;
- Holding company acquisitions are limited in order to promote economic and operational efficiencies and prevent undue concentration;
- Multistate utility holding company diversification activities are restricted in order to maintain a focus on the core business of utility service to captive consumers, limit financial risks to ratepayers, and protect businesses in unregulated industries from anticompetitive cross-subsidies;
- Inter-affiliate transactions are limited in order to prevent undue favoritism and self-dealing; and
- Capital structures and holding company investments are regulated in order to protect captive ratepayers from unwarranted financial risk.

Proponents of PUHCA repeal would have you believe that the Act only regulates the multistate holding companies that are "registered" under the Act. In fact, PUHCA's "passive restraints" effectively regulate the corporate behavior of the remaining investor-owned utilities that have structured their operations in a manner designed to avoid the restrictions applicable to registered holding companies.

In some cases, the benefits outlined above have been diluted by lax regulation by the Securities and Exchange Commission (SEC) or circumscribed by targeted amendments adopted by Congress. But such past actions do not justify wholesale repeal. Rather they require a careful consideration of the following questions:

- What structural protections are needed to facilitate and maintain a competitive market?
- What form, extend and duration of regulation is needed in a competitive market?
- Are further targeted amendments to PUHCA sufficient to redress a regulatory redundancy or changed circumstances?
- What—as noted economist Alfred Kahn put it—is the best possible mix of inevitably imperfect regulation and inevitably imperfect competition?

Consumer Protections Are Still Needed

Proponents of stand-alone PUHCA repeal argue that the statute is unneeded, a relic of a bygone day when all functions of the industry were monopolistic, State commissions were in their infancy, and securities regulation was undeveloped. As Congressman John Dingell once noted: "times have changed, but human nature has not."

It is not "evil" that businesses seek market dominance. It is the nature of business. The difference between the utility industry and other businesses, however, is the continued monopoly structure of distribution and transmission function (and the retail energy service business in many States). This straddling of monopoly and competitive markets warrants continued structural protections.

An office supply store might cross-subsidize staplers with paper clips, but a dissatisfied customer can always go elsewhere to buy paper clips. A company might diversify into another business line and face financial losses or even ruin—but there are no captive customers that suffer the consequences.

A dissatisfied utility customer cannot simply shop elsewhere; nor is that customer insulated from the bad business decisions of its supplier. Closer scrutiny reveals that consumers can face considerable risks under stand-alone PUHCA repeal.

1. Financial Repercussions of Poor Financial Practices

As noted above, PUHCA discourages diversification into nonutility businesses and regulates capital structure. In the absence of these protections, holding companies can diversify into risky ventures, pledge utility assets as collateral, and loan funds from utility operations to nonutility affiliates. Such actions can raise the cost of capital for the utility, siphon funds that should be invested in the core utility operations, and result in unnecessarily high rates.

None of the pending PUHCA-repeal proposals requires holding companies to exclusively use nonrecourse debt, preclude interaffiliate loans, or otherwise insulate captive consumers from risky financial transactions.

2. Cross-Subsidization Taxes Consumers

Holding companies can subsidize nonregulated ventures with captive ratepayer funds or resources.

For instance, a holding company could establish an affiliate to market surplus power from its generating facilities. The underlying costs of the facilities are paid by captive ratepayers. The affiliate marketer simply covers the variable cost of production and captures significant profits—for the holding company—from its power sales. The stand-alone PUHCA repeal proposals do not affirmatively prohibit cross-subsidization, and State regulation is inadequate to prevent siphoning of ratepayer dollars in a holding company structure.

3. Consumers Fail to Benefit From Successful Diversification

As noted above, consumers face potential risk from failed unregulated ventures. They also may benefit—through lower rates—if such ventures are successful.

A holding company could transfer a formerly rate-based, low-cost generating plant to an unregulated marketing affiliate—without pre-approval by all the relevant State commissions—for the embedded cost of the facility, thereby denying captive retail customers of the economic benefit of the facility and potentially exacerbating stranded cost exposure.

Alternately, a holding company could build a fiber optic system, with a small portion used for core utility operations (such as load control), and the remaining capacity operated as or leased to a competitive telecommunications provider. Given the economies of scale in fiber optic cable, captive utility customers could pay the majority of the underlying costs and not receive the economic benefits of the use of the remaining facilities.

The PUHCA repeal proposals limit State commission review of the transfer of assets and fail to require fair compensation to consumers for the transfer of ratepayer financed assets.

4. Captive Retail Service Becomes the Poor Stepsister

The provision of quality, affordable retail electric service to captive customers is likely to suffer. Holding companies will transfer the best and brightest personnel to those affiliates that hold the greatest potential for financial reward. Local utilities may become the corporate backwater.

One registered holding company established a subsidiary to manage and operate nuclear plants for other utilities. Despite assurances to local regulators, the top nuclear personnel of the utility spent most of their time on the subsidiaries activities, potentially degrading the operation and economic efficiency of the "core" utility's nuclear plants. Given the limited resources of regulatory agencies and the difficulty

of tracking personnel, neither State commission nor FERC rate regulation can remedy such actions.

Competitive Protections Are Still Needed

The structural restrictions of PUHCA not only protect consumers, they also encourage fair competition.

1. Competitors Protected From Unfair Cross-Subsidization

By limiting diversification into nonregulated businesses, PUCHA protects competitive industries from the entrance of players that can tap monopoly markets for unfair competitive advantage.

In the absence of PUCHA, a holding company could establish an affiliate, as outlined above, to market surplus power from rate-based facilities, with the affiliate simply covering the variable cost of production. In such a circumstance, a nonutility competitor would have to sell power at a rate that recovered both fixed and variable cost, while the holding company affiliate had its fixed costs subsidized by captive ratepayers. Holding companies could similarly use ratepayer-financed equipment, personnel and information to cross-subsidize entry into a host of energy services businesses. None of the PUHCA-repeal proposals protect competitors from unfair cross-subsidization.

2. Undue Favoritism to Affiliates

As a result of their monopoly status, utilities possess access to key customer information. For instance, a utility could have exclusive knowledge of the operational efficiency (and potential market for cost-effective upgrades) of the motors of an industrial customer. Such information would provide an affiliate energy services company with an unfair competitive advantage. Similarly, knowledge of customer consumption patterns, price sensitivity, and power quality requirements could provide advantages to affiliate equipment suppliers, equipment installers, and retail marketers. This information can be passed on directly to affiliates, or through the transfer or rotation of key personnel. None of the PUHCA repeal proposals require holding companies to provide competitors with comparable access to information obtained from monopoly affiliates.

3. Market Concentration

Registered holding companies are dominant market players. One even made light of this fact in its annual report—musing that it was an 800-pound gorilla.

Repeal of PUHCA facilitates increased growth and market concentration. While intermittently enforced, the Act requires acquisitions to advance the public interest, provide enhanced economic and operational efficiency, maintain physical integration and not result in undue concentration. Absent these requirements, the industry is likely to further consolidate. Holding company acquisitions of distant utilities are unlikely to be reviewed by the State regulators of the acquiring holding company—due to a lack of legal authority—and even FERC's revised merger guidelines do not appear to discourage such actions. Moreover, FERC lacks legal authority to review holding company to holding company mergers.

In addition, PUHCA precludes the acquisition of gas utilities by registered electric holding companies (or electric utilities by gas holding companies). The authority of FERC to review such "convergence" mergers is limited. If PUHCA is repealed on a stand-alone basis, the industry is likely to become dominated by a few large companies—the antithesis of a competitive market, which is characterized by a multiplicity of participants and the absence of barriers to market entry. The proposals before you fail to revise FERC's merger authority to screen the competitive implications of proposed mergers or establish clear authority to review gas and electric combinations or holding company to holding company mergers.

4. Selective Market Entry

Stand-alone PUHCA repeal will enable holding companies to participate in those retail markets that are open to competition—either as pilot projects or under State retail competition plans. As noted above, it is possible for these competitive ventures to be cross-subsidized by captive retail customers of the holding company. But while holding companies will receive the potential benefits of retail competition, they are not subject to the challenges of competition in their "home" market. Stand-alone PUHCA repeal enables holding companies to leverage government-sanctioned market power—their retail monopolies—to engage in competitive markets.

The Case for Stand-Alone PUHCA Repeal is Not Compelling

Proponents of stand-alone PUHCA repeal advance a variety of very unconvincing arguments.

- They argue that the Act was only intended to protect investors, ignoring the clear—and expressly intended—consumer benefits;
- They argue that it will advance competition, ignoring the potential anticompetitive consequences;
- They argue that PUHCA discourages domestic investment, while ignoring the myriad of legal, domestic investment opportunities and their own business decisions to invest abroad in search of higher returns;
- They argue that States will be the primary protectors of consumers, while ignoring—and not redressing—the legal limitations of State commissions.

To the extent that PUHCA poses legitimate restrictions—for instance duplicative securities regulation or an inability to purchase generating assets for direct sales in competitive retail markets—then Congress should consider targeted amendments; not wholesale repeal.

How to Advance Consumer and Competitive Interests

PUHCA repeal, in the absence of appropriate safeguards, will harm consumers. And the transition to competition will fail if a competitive structure is not established. CFC has drafted model legislation to guide Congress in moving toward a competitive market.

The coalition urges Congress to:

- Ensure that the transmission grid operates independent of electricity market participants;
- Alleviate overly-concentrated generation markets that will sustain high prices, entry barriers and inefficient markets;
- Scrutinize the competitive implications of all utility mergers;
- Provide enforceable standards to prevent utility cross-subsidization.

These authorities would be tied to the competitive condition of the marketplace. Regulatory action would trigger only when the likelihood of market failure was present.

Conclusion

Stand-alone PUHCA repeal should not be seen as the "appropriate first step" toward competition. True competition rewards efficiency and penalizes inefficiency. Stand-alone PUHCA repeal provides utility-holding companies with the benefits of competition, without the associated risks. The risks are borne by consumers and competitors.

Given these severe policy implications, PUCHA repeal must be considered only within the context of comprehensive legislation. In that way, Congress can determine the extent and form of regulation needed to supplement the discipline of a competitive market.

The members of Consumers for Fair Competition stand ready to assist this Subcommittee in crafting those policies needed to promote effective competition and consumer protection.

The undersigned organizations are opposed to stand-alone repeal of the Public Utility Holding Company Act (PUHCA). Oppose efforts to push stand-alone PUHCA repeal...

AFL-CIO
American Public Gas Association
American Public Power Association
A. Philip Randolph Institute
Chemical Manufacturers Association
Citizen Action Coalition of Indiana
Citizens' Utility Board of Wisconsin
City Council of New Orleans
Consolidated Natural Gas Company
Consumer Federation of America
Electricity Consumers Resource Council
ENRON
Environmental Defense Fund
Friends of the Earth
Industrial Energy Users-Ohio
International Association of Machinists
International Brotherhood of Boilermakers
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers
Izaak Walton League of America
Legal and Environmental Assistance Foundation
Madison Gas & Electric
Massachusetts Law Reform Institute
Missouri River Energy Services
National Association of Regulatory Utility Commissioners (NARUC)
National Association of State Utility Consumer Advocates (NASUCA)
National Consumers League
National Council of Senior Citizens
National Farmers Union
National Rural Electric Cooperative Association (NRECA)
Natural Resources Defense Council
Northern California Power Agency
Ohio Consumers' Counsel
Ohio Council of Retail Merchants
Ohio Environmental Council
Ohio Municipal Electric Association
Ohio Rural Electric Cooperatives, Inc.
Ohio Partners for Affordable Energy
Public Citizen
Public Utilities Commission of Ohio
Sierra Club
Transmission Access Policy Study Group (TAPS)
United Mineworkers of America
Union of Concerned Scientists
US Public Interest Research Group
UtiliCorp United Inc.
Utility Workers Union of America
Wisconsin Public Power Inc.
National Alliance for Fair Competition:
Air Conditioning Contractors of America
Air Conditioning & Refrigeration Wholesalers Association
Associated Builders and Contractors
Independent Electrical Contractors
Petroleum Marketers Association of America
National Association of Plumbing, Heating and Cooling Contractors
National Electrical Contractors Association
Sheet Metal and Air Conditioning Contractors National Association

Prepared & Distributed by:
Consumers for Fair Competition,
a coalition working to prevent market power abuse in the electric utility industry. All organizations listed have publicly opposed stand-alone PUHCA repeal—not all organizations above are members of Consumers for Fair Competition.
Contact: 202/347-6625

II

Calendar No. 36

107TH CONGRESS
1ST SESSION

S. 206

[Report No. 107–15]

To repeal the Public Utility Holding Company Act of 1935, to enact the Public Utility Holding Company Act of 2001, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 30, 2001

Mr. SHELBY (for himself, Mr. MURKOWSKI, Mr. SARBANES, Mr. GRAMM, Mr. DODD, Mr. LOTT, Mr. CRAIG, Mr. CRAPO, Mr. BROWNBACK, Mr. COCHRAN, Mr. GRAHAM, Mr. BUNNING, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

MAY 9, 2001

Reported by Mr. GRAMM, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To repeal the Public Utility Holding Company Act of 1935, to enact the Public Utility Holding Company Act of 2001, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Public Utility Holding Company Act of 2001''.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) the Public Utility Holding Company Act of 1935 was intended to facilitate the work of Federal and State regulators by placing certain constraints on the activities of holding company systems;

(2) developments since 1935, including changes in other regulation and in the electric and gas industries, have called into question the continued relevance of the model of regulation established by that Act;

(3) there is a continuing need for State regulation in order to ensure the rate protection of utility customers; and

(4) limited Federal regulation is necessary to supplement the work of State commissions for the continued rate protection of electric and gas utility customers.

(b) PURPOSES.—The purposes of this Act are—

(1) to eliminate unnecessary regulation, yet continue to provide for consumer protection by facilitating existing rate regulatory authority through improved Federal and State commission access to

books and records of all companies in a holding company system, to the extent that such information is relevant to rates paid by utility customers, while affording companies the flexibility required to compete in the energy markets; and

(2) to address protection of electric and gas utility customers by providing for Federal and State access to books and records of all companies in a holding company system that are relevant to utility rates.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(1) the term ''affiliate'' of a company means any company, 5 percent or more of the outstanding voting securities of which are owned, controlled, or held with power to vote, directly or indirectly, by such company;

(2) the term ''associate company'' of a company means any company in the same holding company system with such company;

(3) the term ''Commission'' means the Federal Energy Regulatory Commission;

(4) the term ''company'' means a corporation, partnership, association, joint stock company, business trust, or any organized group of persons,

whether incorporated or not, or a receiver, trustee, or other liquidating agent of any of the foregoing;

(5) the term ''electric utility company'' means any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale;

(6) the terms ''exempt wholesale generator'' and ''foreign utility company'' have the same meanings as in sections 32 and 33, respectively, of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z–5a, 79z–5b), as those sections existed on the day before the effective date of this Act;

(7) the term ''gas utility company'' means any company that owns or operates facilities used for distribution at retail (other than the distribution only in enclosed portable containers or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light, or power;

(8) the term ''holding company'' means—

(A) any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting secu-

rities of a public utility company or of a holding company of any public utility company; and

(B) any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the management or policies of any public utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this Act upon holding companies;

(9) the term ''holding company system'' means a holding company, together with its subsidiary companies;

(10) the term ''jurisdictional rates'' means rates established by the Commission for the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public con-

sumption for domestic, commercial, industrial, or any other use;

(11) the term ''natural gas company'' means a person engaged in the transportation of natural gas in interstate commerce or the sale of such gas in interstate commerce for resale;

(12) the term ''person'' means an individual or company;

(13) the term ''public utility'' means any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce;

(14) the term ''public utility company'' means an electric utility company or a gas utility company;

(15) the term ''State commission'' means any commission, board, agency, or officer, by whatever name designated, of a State, municipality, or other political subdivision of a State that, under the laws of such State, has jurisdiction to regulate public utility companies;

(16) the term ''subsidiary company'' of a holding company means—

(A) any company, 10 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held

with power to vote, by such holding company; and

(B) any person, the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this Act upon subsidiary companies of holding companies; and

(17) the term "voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.

SEC. 4. REPEAL OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The Public Utility Holding Company Act of 1935 (15 U.S.C. 79 et seq.) is repealed.

SEC. 5. FEDERAL ACCESS TO BOOKS AND RECORDS.

(a) IN GENERAL.—Each holding company and each associate company thereof shall maintain, and shall make

available to the Commission, such books, accounts, memoranda, and other records as the Commission deems to be relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(b) AFFILIATE COMPANIES.—Each affiliate of a holding company or of any subsidiary company of a holding company shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records with respect to any transaction with another affiliate, as the Commission deems to be relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(c) HOLDING COMPANY SYSTEMS.—The Commission may examine the books, accounts, memoranda, and other records of any company in a holding company system, or any affiliate thereof, as the Commission deems to be relevant to costs incurred by a public utility or natural gas company within such holding company system and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(d) CONFIDENTIALITY.—No member, officer, or employee of the Commission shall divulge any fact or information that may come to his or her knowledge during the course of examination of books, accounts, memoranda, or other records as provided in this section, except as may be directed by the Commission or by a court of competent jurisdiction.

SEC. 6. STATE ACCESS TO BOOKS AND RECORDS.

(a) IN GENERAL.—Upon the written request of a State commission having jurisdiction to regulate a public utility company in a holding company system, the holding company or any associate company or affiliate thereof, other than such public utility company, wherever located, shall produce for inspection books, accounts, memoranda, and other records that—

(1) have been identified in reasonable detail in a proceeding before the State commission;

(2) the State commission deems are relevant to costs incurred by such public utility company; and

(3) are necessary for the effective discharge of the responsibilities of the State commission with respect to such proceeding.

(b) LIMITATION.—Subsection (a) does not apply to any person that is a holding company solely by reason of

ownership of one or more qualifying facilities under the Public Utility Regulatory Policies Act of 1978.

(c) CONFIDENTIALITY OF INFORMATION.—The production of books, accounts, memoranda, and other records under subsection (a) shall be subject to such terms and conditions as may be necessary and appropriate to safeguard against unwarranted disclosure to the public of any trade secrets or sensitive commercial information.

(d) EFFECT ON STATE LAW.—Nothing in this section shall preempt applicable State law concerning the provision of books, records, or any other information, or in any way limit the rights of any State to obtain books, records, or any other information under any other Federal law, contract, or otherwise.

(e) COURT JURISDICTION.—Any United States district court located in the State in which the State commission referred to in subsection (a) is located shall have jurisdiction to enforce compliance with this section.

SEC. 7. EXEMPTION AUTHORITY.

(a) RULEMAKING.—Not later than 90 days after the effective date of this Act, the Commission shall promulgate a final rule to exempt from the requirements of section 5 any person that is a holding company, solely with respect to one or more—

~~(1) qualifying facilities under the Public Utility Regulatory Policies Act of 1978;~~

~~(2) exempt wholesale generators; or~~

~~(3) foreign utility companies.~~

~~(b) OTHER AUTHORITY.—The Commission shall exempt a person or transaction from the requirements of section 5, if, upon application or upon the motion of the Commission—~~

~~(1) the Commission finds that the books, records, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company; or~~

~~(2) the Commission finds that any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.~~

~~SEC. 8. AFFILIATE TRANSACTIONS.~~

~~Nothing in this Act shall preclude the Commission or a State commission from exercising its jurisdiction under otherwise applicable law to determine whether a public utility company, public utility, or natural gas company may recover in rates any costs of an activity performed by an associate company, or any costs of goods or services acquired by such public utility company from an associate company.~~

SEC. 9. APPLICABILITY.

No provision of this Act shall apply to, or be deemed to include—

(1) the United States;

(2) a State or any political subdivision of a State;

(3) any foreign governmental authority not operating in the United States;

(4) any agency, authority, or instrumentality of any entity referred to in paragraph (1), (2), or (3); or

(5) any officer, agent, or employee of any entity referred to in paragraph (1), (2), or (3) acting as such in the course of his or her official duty.

SEC. 10. EFFECT ON OTHER REGULATIONS.

Nothing in this Act precludes the Commission or a State commission from exercising its jurisdiction under otherwise applicable law to protect utility customers.

SEC. 11. ENFORCEMENT.

The Commission shall have the same powers as set forth in sections 306 through 317 of the Federal Power Act (16 U.S.C. 825e–825p) to enforce the provisions of this Act.

SEC. 12. SAVINGS PROVISIONS.

(a) IN GENERAL.—Nothing in this Act prohibits a person from engaging in or continuing to engage in activi-

ties or transactions in which it is legally engaged or authorized to engage on the effective date of this Act.

(b) EFFECT ON OTHER COMMISSION AUTHORITY.—Nothing in this Act limits the authority of the Commission under the Federal Power Act (16 U.S.C. 791a et seq.) (including section 301 of that Act) or the Natural Gas Act (15 U.S.C. 717 et seq.) (including section 8 of that Act).

SEC. 13. IMPLEMENTATION.

Not later than 18 months after the date of enactment of this Act, the Commission shall—

(1) promulgate such regulations as may be necessary or appropriate to implement this Act (other than section 6); and

(2) submit to the Congress detailed recommendations on technical and conforming amendments to Federal law necessary to carry out this Act and the amendments made by this Act.

SEC. 14. TRANSFER OF RESOURCES.

All books and records that relate primarily to the functions transferred to the Commission under this Act shall be transferred from the Securities and Exchange Commission to the Commission.

~~**SEC. 15. EFFECTIVE DATE.**~~

~~This Act shall take effect 18 months after the date of enactment of this Act.~~

~~**SEC. 16. AUTHORIZATION OF APPROPRIATIONS.**~~

~~There are authorized to be appropriated such funds as may be necessary to carry out this Act.~~

~~**SEC. 17. CONFORMING AMENDMENT TO THE FEDERAL POWER ACT.**~~

~~Section 318 of the Federal Power Act (16 U.S.C. 825q) is repealed.~~

SECTION 1. SHORT TITLE.

(a) SHORT TITLE; TABLE OF CONTENTS.—This Act may be cited as the "Public Utility Holding Company Act of 2001".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) the Public Utility Holding Company Act of 1935 was intended to facilitate the work of Federal and State regulators by placing certain constraints on the activities of holding company systems;

(2) developments since 1935, including changes in other regulation and in the electric and gas industries, have called into question the continued relevance of the model of regulation established by that Act;

(3) there is a continuing need for State regulation in order to ensure the rate protection of utility customers; and

(4) limited Federal regulation is necessary to supplement the work of State commissions for the continued rate protection of electric and gas utility customers.

(b) PURPOSES.—The purposes of this Act are—

(1) to eliminate unnecessary regulation, yet continue to provide for consumer protection by facilitating existing rate regulatory authority through improved Federal and State commission access to books and records of all companies in a holding company system, to the extent that such information is relevant to rates paid by utility customers, while affording

companies the flexibility required to compete in the energy markets; and

(2) to address protection of electric and gas utility customers by providing for Federal and State access to books and records of all companies in a holding company system that are relevant to utility rates.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(1) the term "affiliate" of a company means any company, 5 percent or more of the outstanding voting securities of which are owned, controlled, or held with power to vote, directly or indirectly, by such company;

(2) the term "associate company" of a company means any company in the same holding company system with such company;

(3) the term "Commission" means the Federal Energy Regulatory Commission;

(4) the term "company" means a corporation, partnership, association, joint stock company, business trust, or any organized group of persons, whether incorporated or not, or a receiver, trustee, or other liquidating agent of any of the foregoing;

(5) the term "electric utility company" means any company that owns or operates facilities used for

the generation, transmission, or distribution of electric energy for sale;

(6) the terms "exempt wholesale generator" and "foreign utility company" have the same meanings as in sections 32 and 33, respectively, of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z–5a, 79z–5b), as those sections existed on the day before the effective date of this Act;

(7) the term "gas utility company" means any company that owns or operates facilities used for distribution at retail (other than the distribution only in enclosed portable containers or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light, or power;

(8) the term "holding company" means—

(A) any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public utility company or of a holding company of any public utility company; and

(B) any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding

with one or more persons) such a controlling influence over the management or policies of any public utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this Act upon holding companies;

(9) the term "holding company system" means a holding company, together with its subsidiary companies;

(10) the term "jurisdictional rates" means rates established by the Commission for the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use;

(11) the term "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce or the sale of such gas in interstate commerce for resale;

(12) the term "person" means an individual or company;

(13) the term "public utility" means any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce;

(14) the term "public utility company" means an electric utility company or a gas utility company;

(15) the term "State commission" means any commission, board, agency, or officer, by whatever name designated, of a State, municipality, or other political subdivision of a State that, under the laws of such State, has jurisdiction to regulate public utility companies;

(16) the term "subsidiary company" of a holding company means—

(A) any company, 10 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company; and

(B) any person, the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or

more other persons) so as to make it necessary for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this Act upon subsidiary companies of holding companies; and

(17) the term "voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.

SEC. 4. REPEAL OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The Public Utility Holding Company Act of 1935 (15 U.S.C. 79 et seq.) is repealed.

SEC. 5. FEDERAL ACCESS TO BOOKS AND RECORDS.

(a) IN GENERAL.—Each holding company and each associate company thereof shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records as the Commission deems to be relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(b) AFFILIATE COMPANIES.—Each affiliate of a holding company or of any subsidiary company of a holding

company shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records with respect to any transaction with another affiliate, as the Commission deems to be relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(c) HOLDING COMPANY SYSTEMS.—The Commission may examine the books, accounts, memoranda, and other records of any company in a holding company system, or any affiliate thereof, as the Commission deems to be relevant to costs incurred by a public utility or natural gas company within such holding company system and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

(d) CONFIDENTIALITY.—No member, officer, or employee of the Commission shall divulge any fact or information that may come to his or her knowledge during the course of examination of books, accounts, memoranda, or other records as provided in this section, except as may be directed by the Commission or by a court of competent jurisdiction.

SEC. 6. STATE ACCESS TO BOOKS AND RECORDS.

(a) IN GENERAL.—Upon the written request of a State commission having jurisdiction to regulate a public utility company in a holding company system, the holding company or any associate company or affiliate thereof, other than such public utility company, wherever located, shall produce for inspection books, accounts, memoranda, and other records that—

(1) have been identified in reasonable detail in a proceeding before the State commission;

(2) the State commission deems are relevant to costs incurred by such public utility company; and

(3) are necessary for the effective discharge of the responsibilities of the State commission with respect to such proceeding.

(b) LIMITATION.—Subsection (a) does not apply to any person that is a holding company solely by reason of ownership of one or more qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601 et seq.).

(c) CONFIDENTIALITY OF INFORMATION.—The production of books, accounts, memoranda, and other records under subsection (a) shall be subject to such terms and conditions as may be necessary and appropriate to safeguard against unwarranted disclosure to the public of any trade secrets or sensitive commercial information.

(d) EFFECT ON STATE LAW.—Nothing in this section shall preempt applicable State law concerning the provision of books, records, or any other information, or in any way limit the rights of any State to obtain books, records, or any other information under any other Federal law, contract, or otherwise.

(e) COURT JURISDICTION.—Any United States district court located in the State in which the State commission referred to in subsection (a) is located shall have jurisdiction to enforce compliance with this section.

SEC. 7. EXEMPTION AUTHORITY.

(a) RULEMAKING.—Not later than 90 days after the effective date of this Act, the Commission shall promulgate a final rule to exempt from the requirements of section 5 any person that is a holding company, solely with respect to one or more—

(1) qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601 et seq.);

(2) exempt wholesale generators; or

(3) foreign utility companies.

(b) OTHER AUTHORITY.—The Commission shall exempt a person or transaction from the requirements of section 5, if, upon application or upon the motion of the Commission—

(1) the Commission finds that the books, records, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company; or

(2) the Commission finds that any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.

SEC. 8. AFFILIATE TRANSACTIONS.

(a) COMMISSION AUTHORITY UNAFFECTED.—Nothing in this Act shall limit the authority of the Commission under the Federal Power Act (16 U.S.C. 791a et seq.) to require that jurisdictional rates are just and reasonable, including the ability to deny or approve the pass through of costs, the prevention of cross-subsidization, and the promulgation of such rules and regulations as are necessary or appropriate for the protection of utility consumers.

(b) RECOVERY OF COSTS.—Nothing in this Act shall preclude the Commission or a State commission from exercising its jurisdiction under otherwise applicable law to determine whether a public utility company, public utility, or natural gas company may recover in rates any costs of an activity performed by an associate company, or any costs of goods or services acquired by such public utility company from an associate company.

SEC. 9. APPLICABILITY.

Except as otherwise specifically provided in this Act, no provision of this Act shall apply to, or be deemed to include—

(1) the United States;

(2) a State or any political subdivision of a State;

(3) any foreign governmental authority not operating in the United States;

(4) any agency, authority, or instrumentality of any entity referred to in paragraph (1), (2), or (3); or

(5) any officer, agent, or employee of any entity referred to in paragraph (1), (2), or (3) acting as such in the course of his or her official duty.

SEC. 10. EFFECT ON OTHER REGULATIONS.

Nothing in this Act precludes the Commission or a State commission from exercising its jurisdiction under otherwise applicable law to protect utility customers.

SEC. 11. ENFORCEMENT.

The Commission shall have the same powers as set forth in sections 306 through 317 of the Federal Power Act (16 U.S.C. 825e–825p) to enforce the provisions of this Act.

SEC. 12. SAVINGS PROVISIONS.

(a) IN GENERAL.—Nothing in this Act prohibits a person from engaging in or continuing to engage in activities

or transactions in which it is legally engaged or authorized to engage on the effective date of this Act.

(b) EFFECT ON OTHER COMMISSION AUTHORITY.—Nothing in this Act limits the authority of the Commission under the Federal Power Act (16 U.S.C. 791a et seq.) (including section 301 of that Act) or the Natural Gas Act (15 U.S.C. 717 et seq.) (including section 8 of that Act).

SEC. 13. IMPLEMENTATION.

Not later than 18 months after the date of enactment of this Act, the Commission shall—

(1) promulgate such regulations as may be necessary or appropriate to implement this Act (other than section 6); and

(2) submit to the Congress detailed recommendations on technical and conforming amendments to Federal law necessary to carry out this Act and the amendments made by this Act.

SEC. 14. TRANSFER OF RESOURCES.

All books and records that relate primarily to the functions transferred to the Commission under this Act shall be transferred from the Securities and Exchange Commission to the Commission.

SEC. 15. INTER-AGENCY REVIEW OF COMPETITION IN THE WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY.

(a) TASK FORCE.—There is established an inter-agency task force, to be known as the "Electric Energy Market Competition Task Force" (referred to in this section as the "task force"), which shall consist of—

(1) 1 member each from—

(A) the Department of Justice, to be appointed by the Attorney General of the United States;

(B) the Federal Energy Regulatory Commission, to be appointed by the chairman of that Commission; and

(C) the Federal Trade Commission, to be appointed by the chairman of that Commission; and

(2) 2 advisory members (who shall not vote), of whom—

(A) 1 shall be appointed by the Secretary of Agriculture to represent the Rural Utility Service; and

(B) 1 shall be appointed by the Chairman of the Securities and Exchange Commission to represent that Commission.

(b) STUDY AND REPORT.—

(1) STUDY.—The task force shall perform a study and analysis of the protection and promotion of competition within the wholesale and retail market for electric energy in the United States.

(2) REPORT.—

(A) FINAL REPORT.—Not later than 1 year after the effective date of this Act, the task force shall submit a final report of its findings under paragraph (1) to the Congress.

(B) PUBLIC COMMENT.—At least 60 days before submission of a final report to the Congress under subparagraph (A), the task force shall publish a draft report in the Federal Register to provide for public comment.

(c) FOCUS.—The study required by this section shall examine—

(1) the best means of protecting competition within the wholesale and retail electric market;

(2) activities within the wholesale and retail electric market that may allow unfair and unjustified discriminatory and deceptive practices;

(3) activities within the wholesale and retail electric market, including mergers and acquisitions, that deny market access or suppress competition;

(4) cross-subsidization that may occur between regulated and nonregulated activities; and

(5) the role of State public utility commissions in regulating competition in the wholesale and retail electric market.

(d) CONSULTATION.—In performing the study required by this section, the task force shall consult with and solicit comments from its advisory members, the States, representatives of the electric power industry, and the public.

SEC. 16. GAO STUDY ON IMPLEMENTATION.

(a) STUDY.—The Comptroller General shall conduct a study of the success of the Federal Government and the States during the 18-month period following the effective date of this Act in—

(1) the prevention of anticompetitive practices and other abuses by public utility holding companies, including cross-subsidization and other market power abuses; and

(2) the promotion of competition and efficient energy markets to the benefit of consumers.

(b) REPORT TO CONGRESS.—Not earlier than 18 months after the effective date of this Act or later than 24 months after that effective date, the Comptroller General shall submit a report to the Congress on the results of the study conducted under subsection (a), including probable

causes of its findings and recommendations to the Congress and the States for any necessary legislative changes.

SEC. 17. EFFECTIVE DATE.

This Act shall take effect 18 months after the date of enactment of this Act.

SEC. 18. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such funds as may be necessary to carry out this Act.

SEC. 19. CONFORMING AMENDMENT TO THE FEDERAL POWER ACT.

Section 318 of the Federal Power Act (16 U.S.C. 825q) is repealed.