



Electricity Legislation In The 108th Congress: A Mid-Congress Assessment From The Perspective Of Large Industrial Users

When the 108th Congress convened in January 2003, a comprehensive energy bill was a priority item for the leadership in both houses as well the Administration. While many industrial energy users strongly supported such legislation – especially increased oil and gas exploration – those manufacturers that are electricity-dependent realized that there was a potential downside to such legislation in its approach to electricity issues.



ELCON, as the national association representing large industrial electricity users, has long sought open and reliable wholesale and retail electricity markets. Accordingly ELCON has supported legislation to accomplish that objective and opposed legislation that would make achieving that objective more difficult. Specifically, large users have supported: larger markets rather than smaller ones; an open, non-discriminatory transmission system; and consistent market rules throughout the nation so that buyers have a maximum number of potential sources from which to purchase power for multiple locations.

Well-funded electric utilities had long sought – and many times almost achieved – legislation to protect their monopoly status to the disadvantage of consumers, including industrial consumers. Specifically, utilities sought legislation allowing them to exercise increased market power (through repeal of the Public Utility Holding Company Act), to keep competitively priced

non-utility generators from having equal access to the transmission grid, and to restrict the Federal Energy Regulatory Commission (FERC) as it attempted to establish consistent national standards for wholesale electricity markets.

Many electric utilities saw 2003 and the 108th Congress as the perfect opportunity to effect the changes that they were seeking. And many consumers – including ELCON and industrial consumers – recognized the financial and political resources available to those utilities and were fearful that the utilities could prevail. In the short run, utilities did succeed. Both houses passed different versions of a comprehensive energy bill, and the House and/or Senate approved several utility-backed provisions that would likely work to the detriment of consumers in terms of higher prices, limited opportunities or even decreased reliability. Utilities' objectives included:

- **Prohibiting FERC from Issuing a Standard Market Design**
Utilities sought a legislative ban on any FERC action that would result in consistent rules and standards for wholesale electricity markets. This ban would allow different regional markets to have different rules, making broad-based purchasing more difficult for industrial users with multiple locations.
- **Repeal of the Public Utility Holding Company Act (PUHCA)**
Utilities have tried to repeal PUHCA for over twenty years; repeal would allow utilities to merge more easily (resulting in fewer potential competitors) and engage in new, unregulated, activities, without maintaining consumer protections currently in statute.
- **Mandatory "Participant Funding" for Transmission**
Utilities pushed for language that would direct FERC to use an inflexible formula for the funding of new transmission and transmission upgrades which would result in less transmission being built and

reduce the ability of lower cost non-utility generators to gain access to the grid.

- **“Incentives” for New Transmission**

Claiming that the need for new transmission was paramount (true in some areas, not in others) transmission owning utilities sought language directing FERC to provide incentives – on top of a guaranteed rate of return – for the construction of new transmission or transmission upgrades in all areas, regardless of (1) whether new transmission was needed or (2) whether such transmission would be fully subscribed (meaning low risk, normally resulting in a lower, not higher, rate of return). Higher transmission construction costs would, of course, be passed on to consumers resulting in higher rates.

- **Repeal of the Public Utility Regulatory Policies Act (PURPA)**

Since PURPA's enactment in 1978, utilities have tried to repeal the sections of that Act which guaranteed cogenerators the right to sell power to utilities and to purchase back-up and stand-by power from utilities. Having smaller quantities of efficiently produced cogenerated power available can lower costs for consumers and increase reliability by removing demand pressure on the grid.

- **Native Load Protection**

Claiming that they were protecting their local (captive) customers, utilities have tried to statutorily protect their “native load,” allowing them to reserve capacity on their transmission systems, allegedly for local customers. These local customers certainly did not seek such protection, since the end result is to keep lower cost power from non-utility generators off the transmission system.

- **Prohibiting Utility Bypass**

Many large gas users have saved money by bypassing their local distribution company and connecting directly with a pipeline. Some electricity customers have explored the possibility of direct hook-ups with the transmission system, bypassing the local electric utility (as well as charges from that utility). Utilities sought statutory language prohibiting such bypass.

As the comprehensive energy bill progressed and the conference committee produced a final bill, some of these were included, some were modified to be slightly less harmful to consumers, and some were either omitted or changed to be beneficial to large users (e.g., PURPA, where language proposed by cogenerators was adopted, and the anti-bypass proposal, which the conference committee did not approve). But by and

large, as expected, for industrial consumers the electricity title of the bill provided no benefit and potentially could increase costs.

However, as is now well known, the energy bill did not pass the Senate, in part because of objections to many non-electricity provisions (MTBE liability waiver, ethanol subsidies, and approximately \$26 billion in tax breaks) and in part because of the anti-consumer electricity title. **Thus none of the damaging provisions was enacted in 2003.**

That bill is now stalled and, although efforts continue, most observers believe a comprehensive bill is unlikely to be enacted this Congress.

However utility continue to support additional legislative action, and all of the sub-issues listed above continue to enjoy support within the utility community. A new “stripped down” energy bill, including some of the damaging electricity provisions, has been introduced. And the possibility of an “electricity only” bill being considered at some point in 2004 is real, and some utility lobbyists are pushing Congress in that direction.

The year 2003 was particularly active for advocates of electricity consumers, especially large industrial end users, as many important policy issues were debated, though no legislation was passed. Debate on those issues continues, and 2004 may prove to be more important than 2003. ELCON will “be at the table,” but without the support of the industrial community utilities may well be able to finally succeed.

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