

A Presentation by:
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Electricity Consumers Resource Council (ELCON)
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Challenges and Opportunities of Federal Legislation (and Regulation)

The conventional wisdom is that there will be no significant new Federal energy legislation enacted and signed into law in 2010. That is probably true – and good for industrials that are suffering from the worst recession since the great depression.

The House-passed cap and trade bill is dead for this year – and maybe more than just this year. In the September to November legislative session – Senate Majority Leader Reid has said that any energy legislation must be small – perhaps including only Home Star and incentives for natural gas fleet vehicles. The Senate calendar is very full with “must pass” bills including: a continuing resolution to keep the government operating, appropriations, defense authorization, tax extensions, and small business assistance.

However, Senate Energy and Natural Resources Committee Chairman Bingaman, along with eight other Senators, introduced a federal renewable energy standards bill on September 21st that would require electricity suppliers selling more than 4 million mWh per year to meet 15% of their power from renewable sources by 2021 – The bill may be considered in the lame duck session – but there might not be the time or the commitment to actually do so.

Others are pushing for a large variety of other energy proposals including: energy efficiency requirements, conservation (from Senator Lugar’s bill S 3464), extensions of clean energy taxes, incentives for electric and natural gas vehicles, land and water development fund, oil spill liability, and perhaps even incentives for new nuclear plants – but none of these seem likely this year.

Senator Reid has promised a vote on Senator Rockefeller’s bill to remove EPA’s authority to regulate greenhouse gases from stationary sources. However, Senator Murkowski only got 47 votes on her similar proposal. Senator Rockefeller now has 53 supporters, however, his bill probably will not be considered on a stand alone basis. It might be tacked on as an amendment to another bill. But the chances for passage are very limited

That leaves the lame duck session – which more than likely will be needed as appropriations probably will not be finished. However, the numbers work against substantive energy legislation in the lame duck session. Especially if the Republicans gain substantial numbers of seats – and then are even less inclined to pass anything of real significance this year.

But, no new Federal legislation does not mean that Washington will not impact industrial electricity consumers. There are lots of issues with potentially very large impacts on utilities. Which, of course, means impacts on customers.

A few of these federal issues include:

- FERC is pushing very hard to make “green energy” policies friendly for lots more wind, storage, demand response, transmission, etc. Once FERC rules become final, utilities will

incur additional costs – perhaps substantial costs – which will, of course, be passed on to consumers.

- But by far the largest potential regulatory impact comes from the Environmental Protection Agency
 - First, following a Supreme Court decision of a few years ago, EPA has determined that greenhouse gases are a “detriment to human health” and that EPA has the authority, in fact the obligation, under Section 202a of the Clean Air Act to regulate GHGs. EPA is developing very broad and comprehensive rules to regulate GHGs that will have very significant cost implications to utilities and consumers taking effect perhaps as early as 2011. Unless, of course, Rockefeller is successful in overturning EPA’s authority.
 - Second, New Source Review. Any new or substantially modified power plants must undergo extensive review for environmental impacts. Any such changes must use “best available control technologies” – or BACT. EPA is applying NSR to many smaller projects than in the past.
 - Third, EPA proposed in August 2010 that state implementation plans for “prevention of significant deterioration” permits – or PSD permits – should consider GHG emitted from large, newly-constructed or modified facilities starting on January 2, 2011. These facilities would be subject to BACT. And BACT is not well understood or defined – for GHGs. Several groups have challenged EPA’s authorities in courts. Only time will tell the outcome.
 - Fourth, and perhaps even of more concern to many consumers is the Clean Air Interstate Rule (or CAIR). EPA issued CAIR in 2005 to cap SO₂ and NO_x in 28 states and DC. While the courts have remanded the rule, it is not vacated. EPA proposed a new transport rule in July 2010 – that could become effective in 2011.
 - Fifth, and related to CAIR – is the Clean Air Mercury Rule. EPA issued a final rule in 2005 requiring a cap and trade approach under Section 111 of the CAA for coal-based power plants. Courts vacated the rule and it is back in EPA for reconsideration.
 - Finally, Coal Ash. EPA proposed a rule in July 2010 following a coal ash spill from TVA. Utilities estimate that up to 18% of coal generation in the US could be closed due to the rules and compliance costs could be \$20 billion annually. The bottom line, at least to me, is that state regulators may be required to pass along to consumers billions of dollars in additional costs. At a time that the economy is still reeling from the great recession.

- EPA Administrator Lisa Jackson just last week went on what one report described as a “charm offensive” to try to calm industry fears that EPA’s new regulations will have devastating negative impacts on the economy. Jackson rebutted what she described as “wild projections of economic collapse” being circulated by lobbyists. She set forth five principles that she says will guide EPA regulation including:
 - (1) promoting investment in energy efficiency and updated technologies
 - (2) addressing multiple pollutants at once
 - (3) setting clear and achievable standards while allowing flexibility
 - (4) seeking input from citizens, industry and other affected stakeholders, and
 - (5) focusing on the most cost-effective strategies

However, the Business Roundtable and 24 other industry associations responded by sending letters to Congress strongly requesting a two-year delay in EPA’s authority to regulate GHGs and all of the

activities relating to this regulation. Such actions do not seem consistent with Administrator Jackson's calming assertions.

So what are the challenges and opportunities facing state commissions?

I assume that utilities in each of your states operate under a "regulatory compact." Key features of a regulatory compact include (or at least to me should include):

- Recognition that the electric industry is a natural monopoly
- Utilities operate in the public interest and provide an essential service
- The state provides an exclusive service territory
- In exchange, the utilities are given an obligation to serve consumers at least cost along with an opportunity to recover prudently incurred costs that are just and reasonable and earn a rate of return that is equal to the risk that they actually incur

Without specific changes to the regulatory compact, we feel that commissions should:

- Require utilities to minimize their long-run revenue requirements necessary to supply an adequate, reliable and efficient electricity supply complying with existing laws at least cost
- Such a process should begin with a determination of need
- This need determination should be based on actual legal requirements currently in existence
- The determination should NOT be based on laws some folks think might be enacted in the future and should NOT even attempt to consider any so-called environmental externalities or societal costs
- Rates for all consumers should be "just and reasonable" and based on only those prudently-incurred costs that are required to provide an adequate, reliable and efficient electricity supply

It is not feasible, therefore neither prudent nor appropriate, to try to anticipate future legal requirements. We may think that the U.S. Congress (and state legislatures for that matter) MAY take action in the future. But no one can predict what will actually come out of Federal legislation – or regulation – until the legislation and/or rules are finalized. And it is completely improper to require consumers to pay for costs that may never be actually required.

Before closing, I thank Ralph Cavanagh for doing me a favor by including in the meeting package an Energy Dialogue report on an exchange he and I had at a NARUC conference held in Santa Fe in 1991 – nearly 20 years ago. I urge you to carefully read that dialogue -- it is quite clear from that exchange that my positions have not changed. I specifically direct your attention to Ralph's last sentence – and I quote: "I dare to **predict** that when you next convene, in a forum like this, my place will be taken by John Anderson, who will be debating an unrepentant, but increasingly unheeded, John Sununu."

I only point out that Ralph's prediction was about as accurate as any of us would be in predicting future environmental laws or regulations – that is, not accurate at all. I thus urge the regulators in this room to follow the laws that are actually in place – You certainly must do so. But don't make customers pay costs associated with guesses about the future laws that might, or might not, ever be enacted. That is the only way to be prudent, especially in these turbulent and difficult economic times.