

matter, consumers cannot verify for themselves the attributes of the electric power they purchase (e.g., they cannot

Although H.R. 2944 contains a provision (Section 104) that could mitigate possible generation market power by alleviating regional transmission constraints through regional transmission siting agencies, expansion of the transmission grid is likely to remain a difficult, time-consuming, and uncertain process. This difficulty stems from the many local environmental, health, and aesthetic considerations involved in the siting approval process for transmission expansion. Accordingly, Federal Trade Commission and Department of Justice expertise may prove even more valuable when addressing existing generation market power, which has the potential to remain a serious competitive concern.

II. Areas That Might Benefit from Substantial Modification

A. Retail Consumer Protection Issues

1. Section 302: Consumer Privacy

Section 302 of the Act requires the Federal Trade Commission to promulgate rules requiring any person who obtains "consumer information" in connection with the sale or delivery of electric energy to a retail electric consumer to obtain that consumer's prior written approval before using, disclosing, or permitting access to that information. This "opt-in" choice provides consumers with a high level of privacy protection by prohibiting (with exceptions) disclosure of certain

2. Section 303: Electric Supply Unfair Trade Practices

Subsections (a) and (b) of Section 303 require the Federal Trade Commission to promulgate rules addressing slamming (unauthorized supplier switching) and cramming (unauthorized billing). Although slamming and cramming are egregious practices meriting specific rules, the Commission suggests that its rulemaking authority here be permissive rather than mandatory. At this point, it is unclear what the extent of the problem will be -- as well as to what extent marketers will engage in self-regulation that obviates the need for federal rules. In addition, it is likely that states will craft legislation or promulgate rules as part of state restructuring of this industry. Therefore, Congress may wish to revise both subsections (a) and (b) to state that the FTC "may promulgate rules" to address slamming and cramming.

Subsections (a)(2) and (b)(2) prohibit changes in a retail electric consumer's supplier and charges to a consumer's bill except pursuant to FTC rules. This structure is problematic for two reasons. First, it does not account for the possibility that federal regulations may be unnecessary. Second, if federal regulations are necessary, these subsections do not account for the time period before any FTC rules can be issued. As a consequence, the statute might inadvertently prohibit even legitimate switches in suppliers or charges to electricity bills, simply because rules on permissible switches or charges would not yet exist. Competition would be enhanced and consumers would be better protected if the statute prohibited slamming and cramming independently of compliance with FTC rules.

Section 303(b), the cramming section, directs the Commission to promulgate rules for obtaining "the consent of a retail electric consumer for purchase of goods and services other than those expressly authorized by law or any agreement for the purchase of electric energy or related services entered into by the electric consumer and for the assessment of penalties for violation of these rules." The purpose of this section is to prevent firms from charging consumers for products or services that the customers have not authorized. This purpose could be more directly accomplished if the Act referred to consent for the "billing for," rather than for the "purchase of." In addition, the addition of commas around the phrase "other than ... electric consumer" and the insertion of the word "by" before "any agreement" would clarify the section's meaning.

B. Competition Issues

1. Section 401: Electric Company Mergers and Disposition of Property

Strong antitrust merger review is critical in guiding the evolution of the industry toward lower electric rates and higher quality services.⁽¹⁵⁾ Section 401 of the Act requires FERC to act on a merger within 180 days and if no action is taken by FERC within that time, the merger is deemed approved. So strict a deadline may restrict FERC's ability to review fully the effects on competition that complex utility mergers might have as well as provide incentives to the merging parties to delay the review process in the hope that FERC will not meet the deadline. In addition, we believe

electric generation markets in light of the regional nature of those markets. Giving FERC this authority is important because individual states often lack the legal authority or resources to examine the likely effects of a merger that are regional in scope and may require region-wide remedies. Thus, we believe that tying FERC's hands by imposing such a tight deadline on its merger review process may not promote and enhance competitive markets.

goals of the Act by broadening geographic markets, increasing consumer choices among suppliers and services, and diminishing discrimination in access to transmission services.

Congress may wish to clarify that FERC has authority to order the establishment of independent RTOs.⁽¹⁸⁾ Of course, FERC authority in this area will not foreclose its ability to encourage the development of flexible RTOs that are tailored to address specific market conditions and needs that exist in any geographic area or region. FERC authority in this area also would not preclude other marketplace developments from occurring that could enhance competition as well.

3. Section 101(b): Clarification of Federal and State Jurisdiction

Section 101(b) eliminates FERC's jurisdiction over "transmission of any bundled retail sale of electric energy" -- *i.e.*, the sale of both generation and transmission to an end user. This provision could discourage competitive markets by allowing utilities to structure retail sales as bundles of both generation and transmission services, and thereby escape FERC jurisdiction of the transmission component of the sale. Moreover, because states would have differing rules and regulations for transmission access, this provision might contribute to the balkanization of wholesale markets rather than encouraging broader markets.

C. Section 3: State Laws or Regulations Not Affected

Section 3 of the Act allows state laws or regulatory orders already in force, or those promulgated up to three years after the enactment of H.R. 2944, to supersede all of the consumer protection provisions (Title III) and the retail competition provisions (Section 531 (Aggregation), Section 532 (Interconnection), and Section 702 (Net Metering)) if the state law or regulatory order addresses any of the matters in these sections. Although we recognize that many states have taken the lead in encouraging retail competition in electric power and we appreciate the need to be sensitive to state activities in thi447TJ 5.8(t)(i)-119(e r)4

12. The intended scope of "related services" is uncertain. It might be read to cover such things as electric meters, energy efficiency devices, and energy appliance repair services, but also could arguably be interpreted to cover such things as home security services, Internet access, or telecommunications services.

13. If that is the rationale, however, it is unclear why the provision applies to companies other than a consumer's local distribution company. Section 302(a) is written broadly and covers not just local distribution companies but "any person who obtains consumer information in connection with the sale or delivery of electric energy to a retail electric consumer." The only reference to local distribution companies is found in Section 302(c), which permits the use and disclosure of *aggregate* consumer information and requires local distribution companies to make such information available to retail electric suppliers upon request.

14. The requ

