PART ONE

AN ANALYSIS OF RESIDENTIAL ENERGY MARKETS IN GEORGIA, MASSACHUSETTS, OHIO, NEW YORK AND TEXAS

Barbara R. Alexander

Executive Summary

The five state programs examined in Part One include: Georgia's natural gas competition program at Atlanta Gas Light Co., New York's Consolidated Edison's electric restructuring program, Massachusetts' electric competition program (statewide), Ohio's electric competition program (statewide), and Texas' electric competition program (statewide). Part One analyzes the terms of service provided to residential customers through both Default Service and the offers made by competitive suppliers; the consumer protection programs and policies adopted by each state; the extent of the development of the retail market; and the scope and type of competitive suppliers who have sought to obtain residential customers. The status to date of these five state energy competition programs suggests the following important conclusions and recommendations:

1. In those states that have relied on market-based prices for Default Service, residential customers appear to be worse off, compared to pre-restructuring rate policies, and are certainly worse off compared to customers in states that have adopted rate caps and rate freezes that insulated customers from price volatility, rate shocks and market uncertainty during the transition period.

Four of the states in this study adopted a transition plan that exposed some residential customers to market-based prices without any regulated option in the form of a price cap or rate freeze during the transition period: Massachusetts, New York (Consolidated Edison territory), Georgia (Atlanta Gas Light territory), and the Texas Provider of Last Resort (POLR) program for customers who are dropped by their incumbent provider. In each of these states, the experience with market-based rates has persuaded legislators and regulators to consider significant changes in restructuring policies to stabilize residential rates and shift from short-term to longer term pricing policies. For example, the Texas PUC just adopted a change in its POLR rule that will shift defaulting residential customers to the incumbent's regulated rates instead of the higher priced POLR.

Ohio was the only state of those studied that adopted a transition period with capped rates or rate reductions for Default Service, which shielded residential customers in general, and low-income customers in particular, from price volatility and the effects of an immature wholesale market. While the Ohio model exists in most other restructured states, including Pennsylvania, New Jersey, Illinois, Connecticut, Michigan, Maryland, and the District of Columbia, the end of the transition period will require new decisions in all of these states about the structure and pricing of Default Service. Many observers have proposed reliance on short-term market based prices in those states. The analysis of the five states clearly demonstrates that residential customers are likely to be worse off with any price plan that exposes them to short-term volatile rates in an immature wholesale market.

2. As states move to the end of the transition period, it is clear that the method of pricing and delivery of Default Service will be crucial to residential customers.

When a competitive market has not yet developed at either the retail or wholesale market level, residential customers are likely to be exposed to short-term price volatility and unreasonable prices unless regulators focus on how to provide stable prices to residential customers. Default Service should be designed to assure stable, predictable, and affordable prices for customers who do not shop, who are unable to obtain reasonably priced service from alternative providers, or who are not the subject of offers by mass market retail providers. No state has yet confronted the long-term policy implications of the failure of a competitive market to develop for residential customers or adopted policies and programs that will govern the provision of Default Service after the end of the transition period.

Default Service has been required in most restructured states (the only exception was Georgia, which did not adopt a Default Service provider until recent legislative reform adopted in 2002) in order to provide continued service for consumers who "choose not to choose" a new provider and customers whose alternative provider terminates service or goes out of business. Typically, the Default Service provider is the regulated distribution utility company. Even in situations where elements of Default Service may be bid out to other providers, the distribution company generally retains metering, billing, and customer service functions for Default Service customers. If Default Service is properly designed, the competitive market will win customers by offering either a service or product not otherwise available ("green" energy; time-of-use meters; bundled products) or a more efficiently provided basic service that is priced lower than the more traditionally priced default electric service.

3. With the exception of Georgia at the onset of its market opening, the five states studied have adopted consumer education, licensing and consumer protection rules designed to foster price and fuel mix comparisons among competitive offers and have sought to prevent the most obvious abuses of a competitive market.

The other four states have adopted comprehensive consumer protection programs and policies: consumer education programs, supplier licensing, mandatory price and fuel mix disclosures, enrollment and switching protocols designed to prevent slamming, contract and bill disclosures, prohibitions on redlining and anti-discriminatory conduct, and beefed-up Commission enforcement tools, particularly the ability to assess civil fines and penalties for noncompliance. Texas and Ohio, in particular, are models for well-designed consumer education and protection programs.

Georgia's natural gas program is the model for what can go wrong when well-designed consumer protection measures are either not adopted or not enforced at the onset of the retail competition program. As detailed in the paper, Georgia's Governor and legislature took corrective actions during 2002.

4. Competitive market abuses, particularly door-to-door marketing, point to the need for additional regulatory oversight.

The number of customer complaints about marketer activity in the other states studied has been relatively low due to the lack of marketing to residential customers. Door-to-door marketing by some energy providers in Georgia, Texas, New York and elsewhere has resulted in the highest number of customer complaints. According to reports, these door-to-door marketing representatives have sought to appear as representatives of the customers' former utility or have implied that electric service would be terminated if a customer did not choose an alternative supplier. These practices suggest that door-to-door marketing may require closer regulatory supervision and the adoption of additional disclosures and educational materials.

Furthermore, the abrupt failure or departure of some natural gas marketers in Georgia and New York, as well as electricity marketers in Pennsylvania and elsewhere, suggests that consumers will bear the risk of losing any prepayments or security deposits paid to marketers. This is a significant deterioration in consumer protection compared to regulated electric or natural gas service. In order to allow consumers to leave their incumbent providers without fear of such losses, states should require marketers to post a security bond to provide a source of funds for consumer payments in the event of supplier failure. This would be similar to the deposit that many marketers require customers to pay in the event of customer default.

5. None of these states has yet been able to create and sustain a vibrant and robust market for electricity or natural gas services aimed at residential customers.

The lack of development of a competitive electricity market for residential customers is true not only in those states that have adopted price caps or rate freezes for Default Service customers, but it is true even in states that have passed through wholesale market prices changes to residential customers (Massachusetts and Consolidated Edison in New York).

In Ohio, Massachusetts, and New York, there are either no marketers or only one or two marketers offering competitive electric service to residential customers in most utility service territories. Texas has a larger number of marketers and has reported over 300,000 customer enrollments, but the data have been clouded by delays in switching and billing as a result of its statewide switching system problems. Furthermore, several marketers (e.g., Shell Energy and New Power) have either folded or abandoned the residential market. Nonetheless, the rate of Texas switching to date suggests the highest level of marketing to residential customers of any state.

The Georgia natural gas market is unique due to its requirement that all customers switch natural gas providers or be assigned to a competitive provider. No other state has adopted such an approach to electric or natural gas competition. However, the Georgia model has suffered from lack of new entrants and a rash of supplier failures and bankruptcies, resulting in a high concentration of customers with only a few suppliers.

Even the Pennsylvania market, which initially appeared to stimulate a relatively large number of marketers aimed at residential customers and where choice participation levels exceeded 30 percent in some territories, has experienced a steady decline in marketer offers and customer participation in the competitive market.

6. It is clear that the transition period is going to last longer than initially contemplated in all of the states.

The lack of development of a competitive market for residential customers in most states, the turmoil that has accompanied the development of wholesale market prices, the delays in the development of a Standard Market Design by the Federal Energy Regulatory Commission (now scheduled for implementation over a multi-year period starting in 2003), and the failure of competitive suppliers to “beat” the Default Service price in each state have combined to create significant uncertainty and, at the least, a longer transition period. This uncertainty, combined with the large-scale failure or sharp reduction in activity by many energy trading firms and an uncertain economic situation, suggests that states must rethink the time scale and structure of energy markets for residential and small commercial customers for the post-transition period.

At a minimum, the experiences documented by this project suggest that legislators and regulators should develop policies that protect such customers from uncertainty and short-term price volatility. Any attempt to expose such customers to short-term “real time” prices, as proposed by some observers, is likely to harm the customers who are least able to take alternative actions or to afford costly mistakes in public policy.

GEORGIA

Background

Georgia has taken the most unique approach of any state in its move to retail competition for natural gas service. This market model has not been adopted elsewhere for either electric or natural competition.

First, under the Georgia approach, all customers must choose a competitive natural gas supplier: Those who do not choose are "given" to a competitive marketer. Second, the retail customers have no relationship with the natural gas distribution company. Rather, customers are billed directly by the marketer for both unregulated natural gas commodity charges and regulated distribution charges. Third, Georgia natural gas marketers can disconnect service for nonpayment of any portion of the bill, thus preventing the customer from obtaining natural gas service from any default provider or competitive supplier until the bill is paid or the marketer has agreed to payment terms. Fourth, until recently, there was no "provider of last resort" in the Georgia model similar to the provision of this service in other states. As a result, for several years, there was no regulated provider with regulated rates available to customers unable to obtain service in the competitive market, such as those disconnected for nonpayment by a marketer and who cannot afford to pay the overdue amount, security deposit and reconnection fees required by the marketer.

Retail competition for natural gas suppliers and customers at Atlanta Gas Light (AGL), the state's largest investor-owned natural gas utility, began November 1, 1998 under the 1997 Natural Gas Competition and Deregulation Act.[i] The law and the Georgia Public Service Commission (PSC) have implemented a competition model (sometimes referred to as the Single Retailer Model), in which the retail customer receives natural gas service and bills from the gas marketer and has no interaction with the local distribution utility. The act required that when certain market conditions were met, all customers who had not yet chosen a competitive supplier would be assigned to a competitive supplier based on the market share obtained by the suppliers in the first several years of the program.

In late 1998 and early 1999, there was not much activity by customers to choose a natural gas supplier, so AGL pushed for legislation designed to speed up the competitive process. Customers were told in early 1999, that if they did not choose a marketer by a certain deadline, they would be assigned to a marketer. As a result, many customers had signed up for competitive providers by the fall of 1999. Only 280,000 had to be assigned, because 1.1 million had already chosen a marketer. This astounding migration during the first year of the program was due in part to the massive marketing campaigns by various marketers (coupled with upfront prizes and giveaways, such as the $50 promised by SCANA, and a "free" month of natural gas by Peachtree) and in part due to the controversy and outrage expressed by customers against Atlanta Gas Light (the distribution utility), which initiated a new rate design approach for charging for natural gas distribution service that shifted costs to lower-use customers. By the fall of 1999, AGL was completed removed from the retail natural gas business, and every retail customer had chosen or been assigned to a competitive marketer.

Prices and Supplier Activity

There were 24 licensed suppliers seeking retail customers at the time of the most intense marketer activity during 1999. This number has steadily declined. Several marketers conducted massive outreach and marketing campaigns, particularly SCANA (an affiliate of a South Carolina utility), Peachtree (an upstart), the Atlanta Gas Light affiliate, Georgia Natural Gas[ii], and Shell Energy Services. The market share as of October 1, 1999:

Georgia Natural Gas	31.3%
SCANA Energy	30.1%
Peachtree Natural Gas	11.1%
Shell Energy	10.6%
Columbia Energy	5.8%
United Gas Management	4.6%
Energy America	3.9%

In October 1999, after it had been assigned its share of non-choosing customers, Peachtree Natural Gas filed for bankruptcy. The bankruptcy judge "sold" its customers and assets to other certified marketers. The publicly stated cause for this bankruptcy was the marketer's obligation to pay the local gas utility for its distribution charges upfront, before the marketer had obtained customer payments. It also experienced significant billing difficulties and complaints. Another marketer, Gas Key, obtained about three percent market share, but then sold its assets to Georgia Natural Gas after claiming that it was "overwhelmed" by the volume of customers who signed up and that it could not handle the billing.

Most importantly, only three marketers now control 94 percent of the residential market, according to press accounts.[iii] AGL's affiliate, Georgia Natural Gas, reportedly has 50 percent of the residential customers.

The PSC maintains a "Certified Gas Marketer Price List" on its website, published monthly since July 2000.[iv] In July 2000, 11 marketers were offering both fixed and variable prices for natural gas supply. These prices were presented on a per therm basis, along with the following categories of other charges: "interstate capacity charge," "customer service charge," and "other charges." In all cases, the prices presented do not include the "base charges" from Atlanta Gas Light. The price chart did not originally calculate an average customer bill, and it was not possible to easily compare marketer prices because of the variety of charges and their method of presentation on the chart. However, as of early 2001, the price chart includes a calculation of an average customer bill for each marketer's product, and this bill calculation include all charges and the AGL base charge as well.

As of March 2001, there was a wide variation in monthly customer bills among 14 products offered by 11 marketers, ranging from the Georgia Natural Gas "senior/low income" rate ($118.98) to the highest priced rate offered by Shell ($161.11). Most marketers offered rates that resulted in a monthly bill of about $140. By October 2001, there were only seven marketers, offering 11 products, and the average monthly bill ranged from $54.72 (Georgia Natural Gas senior/low income rate) to $70.42 (SCANA-variable rate). The average bill was about $68/month, and the range between the marketers was far less than the prior winter season.

Another feature of the early PSC price comparison chart was the listing of the "Southeastern States" average price for residential natural gas service, presumably derived from regulated natural gas utility rates in nearby states. However, this listing disappeared from the price chart in November 2000.

According to a study by a consultant to AGL Resources (Atlanta Gas Light's parent company), published in the Public Utilities Fortnightly[v], some of Georgia's natural gas customers fared well in the winter of 2000-2001, particularly those who signed up for fixed rate contracts. These included most customers who selected Georgia Natural Gas service. Those who selected variable rate products did not fare well compared to regulated rates in nearby states. For example, customers of Shell and Energy America (marketers with relatively small market shares) with variable rate contracts paid 13-24 percent more than the weighted average bill of representative customers in the five neighboring states.

Prices being offered by marketers in the summer and fall of 2001 were very high compared to market-based rates elsewhere. By the time the Governor's Natural Gas Deregulation Task Force was formed in October 2001, natural gas prices in Georgia were the highest in the country.[vi] Based on the October and November 2001 price charts published by the PSC, it is certainly clear that marketers in Georgia are offering relatively high prices compared to other utilities. The Commission opened a formal investigation of this phenomenon and is seeking pricing data from marketers, many of whom have publicly alleged that the reason for their higher prices is the extremely high bad debt and collection costs they incurred in 2001.[vii]

Billing and Collection

Under the Georgia natural gas competition model, all marketers must bill for both the unregulated natural gas supply charges and the regulated distribution charges provided by AGL. AGL does not issue any retail bills. Therefore, marketers have had to obtain significant billing and collection services in order to serve their customers. This has resulted in a significant level of billing failure, billing error and various other glitches that have sparked letters to the editor, articles in the newspaper, and high rates of billing complaints to the PSC.[viii]

The Commission received 15,281 complaints against marketers in the late 1999 and early 2000 period: 2,039 about billing, 179 about service, and 13,063 alleging deceptive marketing, mainly slamming. According to the PSC's Consumer Affairs Director, Phil Nowicki, natural gas complaints went from a pre-deregulation low of 208 for the first six months of 1998, to a post-deregulation high of 8,596 for the first six months of 2001, a 40-fold increase in customer complaints.[ix]

The billing errors and complaints led to several initiatives. First, the PSC issues a monthly Georgia Gas Marketer Scorecard that lists the number of complaints received by the PSC for each marketer for three key areas: Billing; Service; and Deceptive Marketing. This scorecard is also available on the Commission's website.[x] The scorecard does not calculate complaint ratios (which would allow comparisons among marketer complaint activity).

Second, the Commission enacted billing regulations[xi], effective January 1, 2001. Contrary to the proposals of consumer advocates, the PSC did not impose any uniform billing disclosures (that would allow comparison of prices), but did provide consumers with the following "rights":

1. To receive a timely bill. The marketer must mail the bill within 45 days from the date it receives the meter reading and other billing information from Atlanta Gas Light.
2. To receive a bill that is substantially correct, that includes charges that are clear and unambiguous and that contains the marketer's toll-free number to report a complaint.
3. To receive notice at least 25 days in advance of any customer service charge increases or additions or any changes in the method by which commodity and interstate capacity charges are calculated.
4. To have the same period of time to pay a late bill, without penalty, as it took for the bill to be mailed, including, upon request, the choice to make payments in equal installments.
5. To have 90 days from the date any corrected bill is mailed to pay it, without penalty.
6. To have the marketer make a good faith effort to promptly resolve a billing complaint.

Exceptions to the Rule

1. Bills that are late, incorrect or ambiguous as a result of acts beyond the marketer's control.
2. Bills that contain different terms set forth in a contract signed by the consumer prior to January 25, 2001.

These rules are modest at best, and the exceptions create major loopholes that are the subject of dispute between the customer and the marketer and have been difficult for the PSC to enforce.

Third, the Legislature enacted an amendment to the Natural Gas Deregulation Act in May 2001 to addresses customer billing and access to service. Senate Bill 217[xii] requires several new initiatives by the Commission. This recent legislation is summarized below in further detail, but there is no evidence on the PSC website that the Commission has implemented these legislative directives.

Consumer Protection Programs and Policies

The PSC has done very little with respect to proactive consumer protection regulation. The Commission licensed natural gas suppliers without any investigation into their ability to conduct large-scale billing and customer service programs and did not require security bonds or other financial security as a hedge against marketer failure or loss of customer deposits and prepayments. Nor did the Commission establish basic contractual disclosure requirements, so marketers were not required to inform new customers in writing of the material terms of their agreement or give them or a copy of any contractual agreement. As a result, customers were often confused about the price they had agreed to pay and had to rely on advertisements or telephone conversations to pursue a complaint about deceptive pricing or other important terms of the service agreement.

Both Energy America and United Gas Management (no longer operating in Georgia) garnered publicity for slamming and door-to-door sales practices. The PSC initiated formal investigations of the marketers and entered into consent decrees with both, with provisions that required payments to the state and retraining of their work force. Subsequent to these events, Energy America stopped marketing in Georgia.

The PSC's rules did not require the marketer to offer a payment arrangement to any customer, and, until recently, marketers were not required to put any negotiated payment arrangement in writing. While there is no requirement that marketers offer budget payment plans, most do so. However, there have been disputes about how marketers handle the "true-up" when a customer's usage deviates significantly from the estimated usage used to set the monthly payment at the beginning of the payment plan.

The PSC did not regulate marketers' deposit and credit practices, although there appears to be an unwritten rule that marketers have an "obligation to serve," since they cannot deny an individual natural gas service, but can, based on unregulated credit evaluation criteria, demand a deposit. Most importantly, the natural gas marketers can disconnect service for nonpayment of the bill. The marketer must issue a notice, and only AGL can actually physically disconnect (and reconnect) the service. The disconnection activity was very slow in the early days of this program due to the massive billing failures and billing errors. Once marketers began to more routinely issue timely bills in early 2001, the pace of disconnections increased markedly. This occurred at the same time that customers were seeing the true effects of the large bills from the 2000-2001 winter, one of the coldest on record in the Atlanta area. The impact of the cold weather on customers who had variable rate contracts that winter exacerbated the higher bills due to increased usage.

The PSC halted disconnection of service during the latter part of the winter of 2000-01, but when the moratorium was lifted in April, record numbers of disconnections occurred. As a result, over 125,000 disconnections occurred in the summer and fall of 2001.[xiii]

While only AGL can physically disconnect a customer, the prior AGL practice of attempting to contact the customer at the premises and potentially negotiating a payment plan or accepting payment has ended. AGL field personnel act merely as agents of the marketers, none of whom are required to contact the customer and seek to avoid disconnection of service. Furthermore, once disconnected, only AGL can reconnect the customer, and the backlog of those currently disconnected has taken as long as eight weeks.

One of the most controversial policies allowed by the PSC has been the “hold” on reconnection that marketers insist upon so that customers cannot get reconnected with a new marketer until the old marketer has released the account — that is, the customer has paid the overdue bill. This practice was in effect until late in 2001, when the Commission finally ordered marketers to halt this practice. It is not clear whether all marketers have done so.[xiv]

The Legislature has frequently enacted “reforms” for the natural gas program. With SB 217, enacted in May 2001, the Legislature directed that (1) customers could change marketers once a year without switching fees; (2) marketers can require a deposit prior to initiating service, but the amount cannot exceed one month’s service; (3) marketers must refund deposits after a customer has paid monthly bills on time for six months, when a customer has changed marketers or discontinue service (after applying the deposit to any amount owed by the customer to the marketer); (4) authorized and required the PSC to adopt rules applicable to marketer billing that require certain minimum disclosures and performance standards; (5) requires the Commission to publish a chart of comparative pricing information quarterly in the local newspapers; (6) enacts certain restrictions and prohibitions on how marketers can collect a disputed bill; (7) increases the penalties that the PSC may impose on marketers for violation of law or rule; (8) expands the purpose of the Universal Service Fund to statutorily include assisting low-income customers in times of emergency as determined by the Commission, allowing up to 10 percent of the Fund to be used for low-income energy conservation programs, and requires the PSC to consider the needs of low-income customers subject to price increases when setting the amounts required to be paid into the Fund on an annual basis; and (9) allows the Commission to establish a provider of last resort using an expedited hearing procedure. The PSC did not change its rules or implement these procedures in a formal docket or other rulemaking.[xv]

Universal Service Programs

The Georgia Natural Gas legislation authorizes a Universal Service Fund. The PSC implemented this fund in 1999.[xvi] The fund is specific to a natural gas distribution utility (in this case, AGL) and is administered by the PSC. The fund was seeded by: (1) rate refunds due the distribution company from interstate pipeline suppliers; (2) excess earnings under the utility’s performance-based rate plan; and (3) a surcharge on rates for distribution services paid by marketers. The primary purpose of this fund was to aid expansion of the natural gas distribution system. A secondary purpose was to reimburse gas marketers for uncollectible retail accounts.

Since the fund’s creation, the PSC has used almost the entire amount for low-income assistance. The Commission has not in fact disbursed the fund to any marketer, although several have filed petitions to seek reimbursement for excess uncollectible expenses. Rather, the PSC has disbursed funds to the state’s LIHEAP program and to provide additional funding to low-income (annual income less than $12,000) elderly customers (age 65 or older), who are eligible for a rate discount — approximately $10 per month — on the monthly customer service portion of their bill. The funding for this rate discount is through AGL’s rates, and it appears on all customers’ bills as a line item for distribution services. Approximately 31,000 customers receive this bill credit.[xvii]

On October 16, 2001, the PSC announced that $10 million would be released from the Universal Service Fund[xviii] to help low-income elderly customers pay for natural gas. The Commission ordered that $8 million be allocated to low-income elderly customers who were already receiving the rate discount, and that $2 million be distributed to low-income elderly households via LIHEAP, which starts November 1 in Georgia. It was estimated that the $8 million would result in a $50 bill credit for those already participating in the rate discount program. The PSC directed that the $2 million be distributed through the state and local agencies that implement LIHEAP in Georgia and supplement a $14 million federal LIHEAP grant for the upcoming winter season.

Governor's Natural Gas Task Force and Recent Legislation

In the face of mounting criticism and public complaints about the natural gas program, Governor Roy Barnes announced the formation of a Natural Gas Consumer Protection Task Force in the fall of 2001 and stated that he is "strongly persuaded that the state needs to take steps to protect the individual consumer of natural gas." He cited the high prices currently charged by natural gas marketers and the record number of disconnections. The appointments to this Task Force, formally announced on November 13, included state human service agency representatives[xix], a CAP agency director[xx], all five PSC Commissioners, legislators[xxi], and the Office of Consumer Affairs and consumer utility counsel. There are no marketers or utility representatives on the panel, but the Governor's Executive Order asked the Task Force to appoint an Advisory Committee to represent these interests.

While the Task Force was getting underway, the PSC was considering a petition to establish a Provider of Last Resort to serve customers who are disconnected and facing the potential of no natural gas heating service. Under the Georgia deregulation model, all marketers have a theoretical obligation to serve, but these same marketers can disconnect service for nonpayment and impose deposit, fees, and onerous payment terms as a condition of reconnection. As a result, there is no real "provider of last resort" as that obligation exists in other states, because there is no regulated service with regulated rates that customers can turn to if they are unable to be served in the competitive market. Both AGL and several competitive marketers filed proposals to serve as the Provider of Last Resort, under a variety of pricing and reimbursement schemes. In late December 2001, the Commission appointed Infinite Energy, a natural gas marketer, to act as the Provider of Last Resort. This marketer had the obligation to offer service to any customer dropped or disconnected by other marketers at a regulated price. However, the price that the PSC approved for this service was significantly higher than that offered by other marketers: $150 security deposit, $11.95 per month customer charge, monthly variable rate prices, plus a 10 cent per therm "adder" beyond the prices charged other customers.[xxii]

After the Task Force made its final recommendations in January 2002, the Governor proposed legislation to correct some of the defects in the natural gas program. During the following legislative session, an attempt to completely "re-regulate" natural gas was defeated. However a significant package of reforms was adopted in the Natural Gas Consumers' Relief Act (HB 1568). The final version of the legislation adopted a "Consumer Bill of Rights" and required the PSC to appoint a Provider of Last Resort.

The Consumer Bill of Rights requires enhanced regulation of marketer billing and contract procedures and requires marketers to handle customer complaints in a prompt manner. The legislation also requires the PSC to supervise AGL's quality of service to the marketers in the form of timely meter readings and switching procedures.

The Provider of Last Resort program requires Scana, the chosen marketer (selected by a bidding process), to serve two groups of customers: consumers who meet the definition of low-income as established by the Georgia Department of Human Resources and consumers who are unable to obtain service from another marketer. Under the rates approved by the Commission[xxiii], low-income customers will pay about $0.22 per therm over the wholesale price of natural gas, with a $4.95 monthly charge, low-income seniors will pay $0.20 over wholesale (not required by the legislation, but offered by the winning bidder), with a $4.95 monthly charge, and other high-risk customers (those unable to obtain service from another marketer, but who are not certified as low-income) will pay $0.36 over wholesale, with a $11.95 monthly charge. Pursuant to the provisions of the new legislation, the Universal Service Fund (collected from all market participants) will subsidize the POLR's uncollectible expenses for at least the low-income customers.

As a result, the Georgia program does not directly subsidize low-income customers. Rather, the POLR is reimbursed from the Universal Service Fund for higher than normal uncollectible expenses associated with service to low-income customers. While it is not clear whether the POLR price will always be lower than market prices charged by unregulated marketers, the recent prices for this service announced by SCANA are about 20 percent lower (in cents per therm) than prices in effect for other marketers. Of course, this lower price is accompanied by a per-customer subsidy provided to SCANA and approved by the PSC from the universal service fund.

Finally, customers must affirmatively sign up for this service: They are not automatically transferred to the POLR service. This sign-up procedure has already resulted in significant delay in serving low-income customers: As of early September 2002, only 200 customers had signed up for this service.

Preliminary Conclusions and Recommendations

The Georgia natural gas model has not been replicated in any other state, either for electric or natural gas competition. In fact, the significant public dissatisfaction with the natural gas competition program has led to a widespread consensus in Georgia that electric competition should not be explored further.

Several aspects of the Georgia program can be identified as models that should not be emulated elsewhere:

* Default Service or Provider of Last Resort policies and prices should be identified up front and built into any retail energy competition program. The lack of any POLR in the Georgia model resulted in a crisis-oriented atmosphere and contributed to the public dissatisfaction with the overall program.
* Customers were "driven" from the utility by a combination of price changes in the regulated gas service and the policy decision that required customers to leave the utility by a certain date. This approach may have worked in the sense that customers did leave the incumbent utility over a very short period of time, but in the long run it contributed to public dissatisfaction and confusion.
* Consumer protections in the form of required disclosures, effective supplier licensing and oversight of supplier conduct are vital to assure public confidence and willing participation in retail energy competition programs.
* The concept of requiring competitive suppliers to bill and collect for the entire retail customer bill and allowing such entities to disconnect service for nonpayment of unregulated charges resulted in widespread billing errors and complaints. Suppliers did not have reliable systems in place to replicate the utility billing system and were dependent on the utility for meter readings and transmission of customer-specific data that often did not "work" efficiently. Furthermore, the consumer protection implications of allowing competitive suppliers (who were not subject to strong consumer protection oversight in the Georgia program) to disconnect service for nonpayment of regulated and unregulated charges when there was no POLR required to serve such customers were not widely understood until very late in the program's implementation.
* Finally, the Georgia experience demonstrates clearly that a legislature will attempt "corrections" when the public is dissatisfied with a retail competition program that goes awry, when complaints soar, and prices increase beyond expectations.

End Notes

i http://www.psc.state.ga.us/gas/sb215.htm

ii The Commission prohibited AGL from allowing its affiliate to use a similar name, but allowed the affiliate to use AGL's logo. As a result, most customers quickly associated the Georgia Natural Gas offers with the former public utility.

iii Quinn, Matthew, "Governor to Appoint Natural Gas Task Force", The Atlanta Journal and Constitution, October 10, 2001.

iv http://www.psc.state.ga.us/gas

v Bartman, Emily and Hall, George, "After the Shakeout: Another Look at the Georgia Gas Market," Public Utilities Fortnightly, September 15, 2001, pp. 38-46. The authors argue that there is no evidence of price gouging by marketers in the winter of 2000-2001 or that Georgia customers paid more compared to nearby states. However, the most recent allegations of price gouging have occurred since this study was done.

vi See fn. 3.

vii Quinn, Matthew, "Gas Marketers Pressured for Data," The Atlanta Journal-Consitution, October 17, 2001.

viii Greene, Kelly and Brooks, Rick, "Georgia's Gas Deregulation is Messy, but Offers a Lesson to Other States," The Wall Street Journal, January 15, 2001. This extensive article described a number of customers who had not received a natural gas bill for over a year and others who suffered "mistaken" disconnections of service due to billing errors and computer snafus.

ix Interview with Phil Nowicki, November 28, 2001.

x http://www.psc.state.ga.us/consumer_corner/scorecard.html

xi http://www.psc.state.ga.us/consumer_corner/faq.htm

xii http://www.ganet.org/services/newleg/legsearch.cgi?year=2001&bill=SB217

xiii Quinn, "Funding Elusive for Natural Gas Safety Net," The Atlanta Journal-Constitution, November 21, 2001. Note: The PSC obtains monthly reports on disconnection activity from AGL, but does not publish this information on a regular basis.

xiv Interview with Phil Nowicki, November 28, 2001.

xv One of the authors of this legislation is on the Natural Gas Task Force and has already asked the Commission for a report on the implementation of this legislation to be presented to the Task Force.

xvi http://www.psc.state.ga.us/gas/USF%20Rules.htm

xvii Quinn, Matthew, "$25 Million to Help Georgians in need pay heating bills," The Atlanta Journal-Constitution, October 18, 2001.

xviii The Fund currently totals approximately $20 million.

xix Commissioner Brenda Cornelius, Gov. Office of Human Relations; Commissioner Jim Martin, Dept. of Human Resources.

xx Janice Riley, Director, Ninth District Opportunity Inc., Gainsville, GA

xxi Rep. Newt Hudson, District 156; Rep. Jimmy Skipper, District 137; Rep. Mark Burkhalter, District 41; Senator Nathan Dean, District 31; Senator Regina Thomas, District 2; Senator Jeff Mullis, District 53.

xxii "Georgia PSC reverses vote on last-resort provider", Gas Daily, Wednesday, December 19, 2001.

xxiii Georgia PSC selects SCANA to Be the Regulated Natural Gas Provider Established by the Natural Gas Consumers' Relief Act (HB 1568) and Takes Other Actions, June 18, 2002, available at www.psc.state.ga.us .

MASSACHUSETTS

Background.
The Massachusetts restructuring statute,[i] which mandated retail competition as of March 1, 1998, was one of the first state electric restructuring statutes. The model used by Massachusetts is typical is most respects, in that the utilities are obligated to continue serving customers who do not choose a competitive provider, customers who seek to return to regulated service, and customers whose provider defaults. Under the state Department of Telecommunications and Energy (DTE) restructuring decisions, most utilities voluntarily agreed to divest generation resources, and they were allowed to recoup stranded costs in rates for a period of time. The Massachusetts restructuring law required utilities to offer service with a 10 percent rate reduction followed by an additional 5 percent reduction over several years.

The law also increased funding for low-income energy efficiency, an endorsement of the low-income discount rates that had been adopted at some utilities in the past, and increased spending for renewable energy projects and initiatives. All of these programs were funded by utility ratepayers through targeted funds or included in distribution service rates.

Massachusetts did adopt one unique provision for its restructuring program. While most states adopted a Default Service or Provider of Last Resort rate that utilities must provide to non-shopping customers, Massachusetts adopted a two-tier system: "Standard Offer Service" (SOS) and "Default Service."[ii] Standard Offer service is provided by existing utilities to all customers who choose not to choose. The statutory mandate for rate reductions (10 percent in 1998 and 15 percent beginning on September 1, 1999) was implemented through Standard Offer Service.

Standard Offer service is available only for the transition period of seven years (until March 1, 2005). The restructuring law provides a limited set of circumstances under which a customer may enter the competitive market and then return to this service, but basically new customers who move into a distribution utility's service territory after competition begins cannot receive SOS. Customers who were being served by utilities in March 1998 may enter the competitive market and return once within 120 days, but any other customers who enter the competitive market and seek to return to utility service are not eligible for Standard Offer Service. However, the law allows low-income customers (defined as those receiving the low-income rate discounts available at each utility) to return to Standard Offer service at any time.

Default Service is available for customers who move into the service territory after the onset of competition and those who wish to return to regulated service after entering the competitive market. Unlike SOS, however, Default Service must reflect "market-based rates" and is not subject to the rate caps or rate reductions associated with SOS. Because it was not clear how this statutory pricing directive should be implemented, the Massachusetts DTE decided early on that utilities should provide those eligible for Default Service with the Standard Offer price until the mechanisms for procuring and pricing Default Service could be fully implemented.[iii] The DTE initiated a proceeding to implement the market price requirement for Default Service in June 1999.[iv] The Department noted that " . . . Default Service pricing and procurement will affect the types and number of bids to supply Default Service and could have implications for the competitiveness of the retail market."[v] As of June 2002, more than 590,000 residential customers were "qualified" for Default Service pricing, primarily because they had moved to a new location after March 1, 1998.

A citizen referendum attempting to repeal retail electric restructuring made the ballot in the fall of 1998, but

Massachusetts voters rejected it by a relatively wide margin. At that point, the issue from the general public's perspective was whether to adopt the 10-15 percent rate reduction and allow competition or reject it in favor of what was perceived as very high electricity rates. Although not as high as Maine's (12 cents per kWh at Central Maine Power Co. due to rate increases associated with non-utility generation contracts) or New Hampshire (15 cents per kWh for Public Service of NH due to the bankruptcy settlement of cost overruns associated with Seabrook Nuclear Plant), the typical Massachusetts residential electricity rate was about 9.5 cents per kWh (total bill) in 1998.

Supplier Activity

The Massachusetts DTE unbundled the customers' utility bills so that they could compare the price for generation (determined in restructuring proceedings) with those available from competing marketers. The gap between the negotiations and enactment of the legislation and the actual onset of formal competition proved to be significant: By early 1998, providers claimed they were unable to beat the SOS rates. When rates were unbundled, wholesale market prices were about 2.5 cents/kWh, and the SOS rates were initially fixed at 2.8-3.2 cents/kWh.

Full retail competition was initiated in March 1998, but very few customers switched then or since, and few alternative suppliers have entered the retail market in a significant way. Marketers allege that this is because the SOS generation charge on unbundled customer bills has always been below wholesale market prices and does not reflect the costs of acquiring and retaining mass market customers. This situation was exacerbated by rising prices in the wholesale market through 2000. As of November 2000, only 2,848 residential customers had switched.

Even so, several dot com electricity suppliers (Utility.com and Essential.com) sought customers in Massachusetts in 2000, but went out of business in 2001. There is currently only one provider licensed in the to provide electricity to residential customers that is actually marketing to residential customers. This supplier, Dominion Retail (an affiliate of Dominion Power, based in Virginia), has only recently initiated marketing efforts after rates for Default Service increased and is offering fixed rate service for a minimum two- to three-year term.

There are many suppliers licensed to market to commercial and industrial customers, and there was a significant amount of marketing activity to such customers in 1998 and 1999. Since then, however, even nonresidential customers have not seen significant competitive activity. During 2000, the number of competitive supply customers fells from 9,471 to 5,682.[vi]

There was slightly more activity in all customer classes during 2001, due to the higher rates charged for utility generation service (discussed in more detail below). As of December 2001, 5,451 residential customers, 5,112 small commercial, 3.202 medium commercial, and 1,215 large industrial customers were taking generation service from competitive providers. Of course, the vast majority of kWh of competitive generation sales was to industrial customers.[vii]

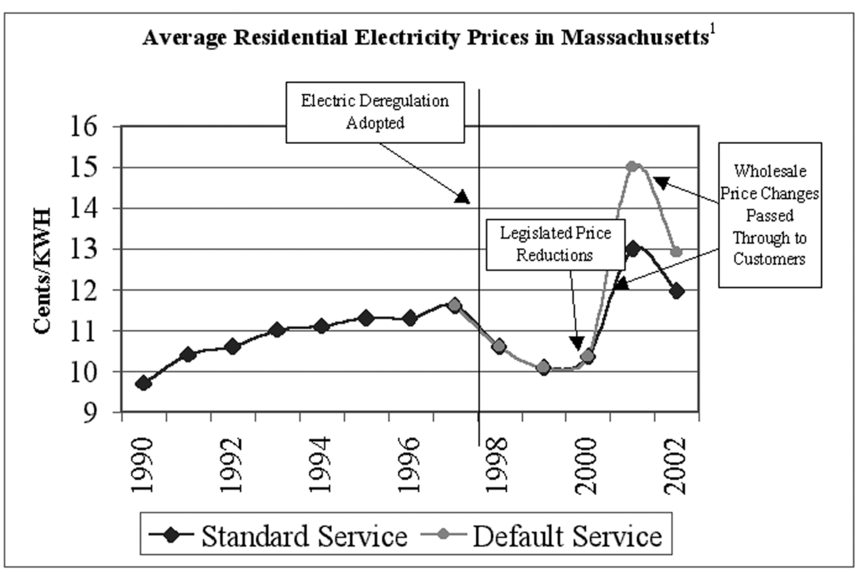
Standard Offer Service and Default Service

In mid-2000, the DTE decoupled Default Service rates from SOS rates.[viii] The Department ordered utilities to offer both a variable price and a fixed-price, six-month Default Service rate. Residential customers who had to obtain Default Service were automatically placed on the six-month fixed price rate, but offered a month-to-month variable price as well. Commercial and industrial customers were put on the variable price option. Utilities were ordered to obtain bid prices by customer class, but some stated that they were not able to implement multiple Default Service prices with the current billing systems. The DTE rejected a suggestion that the Default Service prices include any administrative costs associated with the procurement of Default Service or other costs, such as bad debt expense. In a later Order[ix], the Department clarified that the utility should reconcile the cost for this service annually and that the over- or under-recovery would be passed to all customers. The declared objective in decisions about Default Service was to "send an efficient price signal."[x]

The new Default Service rates went into effect on January 1, 2001. These rates were substantially higher than SOS rates, namely 7.032 cents per kWh at Boston Edison (residential) and more than 8 cents at Fitchburg Gas and Electric and Western Massachusetts Electric Co. While affected customers were issued bill notices to explain the forthcoming rates, bills containing the higher rates were not issued until February 2001.

At the same time that the Department moved to market-based rates for Default Service in late 2000, electric utilities asked for significant increases in Standard Offer Service as well. The basis for these requests was the rising fuel prices in the wholesale market. In effect, the utilities sought a fuel clause adjustment to their rates and alleged that the Restructuring Act did not intend to prevent such fuel clause adjustments in mandating the 10-15 percent rate reductions. In a Letter Order issued on December 4, 2000[xi], the DTE agreed with the utilities and confirmed that the utilities had been accruing deferred fuel costs and should not continue to do so. As of August 2000, the utilities had accrued Standard Offer service deferrals of $10 million for Fitchburg, $60 million for Massachusetts Electric, and $144.8 million for NSTAR companies (Boston Edison and two other electric utilities). These accruals were projected to increase substantially throughout 2001. The DTE ordered an annual change in SOS to reflect actual fuel costs incurred by utilities, subject to reconciliation of actual costs incurred to provide this service. Utilities were also ordered to inform customers of these price changes.

In June 2001, the DTE approved a new round of rate increases for the generation supply portion of SOS, applicable to the July-December 2001 time period. Residential customers of Boston Edison eligible for SOS pay 7.445 cents per kWh, compared to 6.215 cents during January-June, 2001 or 4.5 cents in 2000. Massachusetts Electric Co. customers (a subsidiary of National Grid) pay 6.631 cents per kWh, compared to 5.401 in January-June, 2001 or 3.8 cents in 2000. The monthly variable rate for the generation or supply portion of the bill for a Default Service residential customer for the period July-December, 2001 varied among utilities, but was typically 10-11 cents per kWh in the summer and 7-9 cents in the winter. The fixed rate option was generally in the 8-9 cents per kWh range. For example, Massachusetts Electric's fixed residential Default Service rate is 9.213 cents per kWh for the period May-October, 2001.[xii]



Another way to evaluate or compare the pre-restructuring prices to those in effect in 2001 would be to compare the total bill price for residential customers. The following graph[xiii] shows the average statewide prices charged for the total bill for SOS and Default Service at each electric utility in comparison to pre-restructuring prices. The average total bill for a residential Default Service customer has increased over 30% since 1998, the onset of retail electric competition in Massachusetts.

These prices were substantially higher than those forecast by utilities or regulators or that could be explained by higher energy prices generally. According to a filing by Western Massachusetts Electric Co. seeking approval for an energy efficiency plan, actual electricity prices were 77 percent higher than price projections used in earlier plans to calculate program benefits for 2000 and 2001. These higher prices for the generation portion of the electricity bill were almost double the price increases for heating oil and natural gas.[xiv]

In 2002, prices for SOS have remained in the 5-6 cents per kWh range for the winter months (Jan.-March) and have dropped to 4-5 cents per kWh for the April-December period. In short, SOS prices have generally doubled since 1998. Default Service prices vary by utility[xv], ranging from 7.57 cents per kWh for the fixed price option (Western Mass Electric) to 4.996 cents per kWh (Fitchburg Electric) for the July-December 2002 period.[xvi]

Even in the face of such significant increases in the generation portion of the customer's bill, only one marketer has entered Massachusetts to seek residential customers. As of June 2002, 49,721 residential customers were served by competitive suppliers.

Consumer Protection Programs and Policies

The Massachusetts restructuring statute contained specific directives to continue strong consumer protection policies and programs. Competitive providers must comply with the same billing and collection rules that are applicable to utilities and which remain in place for the distribution utilities. The DTE adopted consumer protection regulations applicable to competitive providers, including mandatory price and environmental disclosures, terms of service statements, customer switching and authorization provisions with mandatory penalties for slamming violation, and customer complaint procedures.[xvii] Competitive suppliers cannot disconnect service for nonpayment. The Department has jurisdiction over competitive providers for licensing and enforcement of regulations, including resolution of customer complaints, assessment of penalties, and the issuance of cease and desist orders. All competitive providers must be licensed by the DTE.

The Legislature did not authorize the DTE to allow competitive metering and billing, so all competitive providers must offer stand-alone billing for generation services or arrange to bill through the utility's regulated bill.

Under the original rules, competitive suppliers did not have access to lists of residential customers or usage information about customers unless each customer specifically authorized the release of such information. In the face of higher prices and lack of both supplier and customer participation in retail electric choice, the DTE opened an investigation into the status of the competitive market, with the avowed intent of "taking all appropriate steps to bring the benefits of industry restructuring to electricity consumers."[xviii] The focus of the early steps explored by the Department was to stimulate supplier interest in Default Service customers and, based on comments from suppliers gathered at technical meetings in early 2001, increase supplier access to information about Default Service customers. The DTE ordered that utilities to make lists of customer names, addresses, and rate classes available to all licensed suppliers that were prepared to serve customers immediately. It then sought comment on whether or how suppliers should obtain access to further customer-specific information, such as credit history and load/usage data, and whether consumers should be able to electronically enroll with suppliers.

Comments from suppliers[xix] indicated that the customer list information would be valuable, along with customer-specific usage and load shape information. The suppliers showed little interest in credit history information, but did indicate that the customer lists provided by utilities should exclude customers who were 30 days or more in arrears. Suppliers also strongly urged the DTE to reflect the provisions of the Electronic Signatures in Global and National Commerce Act[xx] ["E-Sign"] so that customers could electronically "sign" enrollment agreements with suppliers over the Internet.

Consumer groups[xxi] and the Attorney General[xxii] raised concerns about the manner and method of the release of customer-specific information and pointed to the DTE's obligation to consider customer "privacy" concerns in its efforts to jump-start a competitive market for electricity. Specifically, these comments pointed out that the DTE had not come up with a way to notify customers that information was being released or a way for customers to "opt out" of such lists before their release. Consumer groups raised concerns about the potential for "redlining" by suppliers if the rate code information reflected customers' participation in the electric rate discount programs (reflected in most utility tariffs with a specific rate code). They pointed to the suppliers' proposal that customer lists not contain customers with an arrears balance as evidence of the potential for redlining. The consumer groups pointed to the statutory and regulatory requirement in Massachusetts for a written confirmation of a customer's enrollment with a supplier, and they proposed methods to reconcile access to the Internet and the need to prevent slamming.

It appears that customer lists with name, address, and some sort of rate designation have, in fact, been released to suppliers in Massachusetts, pursuant to the Department's June 29th Order, without a formal program of customer notification and opportunity to "opt out." This is contrary to the process adopted in other states that have released customer lists, namely, Ohio, Pennsylvania, and Texas, in which customers were provided prior notice and offered the option to opt out of a supplier list by postcard, phone, or Internet (e-mail). Furthermore, no state has allowed suppliers access to customer payment information without specific prior authorization, including the payment status of the customer (such as the request by the suppliers in Massachusetts that customers in arrears not appear on the list).

On October 15, 2001, the DTE issued its final order in its competitive market investigation,[xxiii] stating that, "Access to a customer's historic usage is critical for suppliers to project what their wholesale costs would be as that customer's retail supplier" and that the current system requiring specific customer authorization by the supplier is "cumbersome and inefficient." The DTE also stated that it was "convinced that, with proper education efforts, the vast majority of customers will appreciate the value of having their historic usage information included on the Customer Information Lists" and adopted an "opt-out" system that allows customers to prevent the release of their usage information by contacting the local utility. This opt-out process requires utilities to provide two consecutive bill messages and bill inserts to customers, informing them of the release of this information and how to prevent its release (by telephone or letter). The first generic release of the Customer List information was done in February 2002.

Responding to the general tenor of most comments, the DTE ruled that utilities should not provide suppliers with customers' credit or payment history and that the customer list should not be filtered by removing customers with late payment histories. With respect to concern that the use of tariffed rate classifications would identify customers on low-income discount rates, the Department required utilities to use rate classifications that do not reveal this information to suppliers.

When considering application of the "E-sign" law, the DTE interpreted various Massachusetts laws to mean that customers could "sign" a customer authorization form (and select a supplier) electronically, thus avoiding any determination of preemption. The Department deferred the development of procedures and protections to allow Internet enrollment for electricity sales to Phase II of the proceeding.

In Phase II, the Department announced that it would explore several important issues designed to further restructuring. First would be how and whether distribution utilities should act as "brokers" for Default Service customers, that is, in assisting or acting as a middle man to stimulate customer enrollment with competitive suppliers. Second, the DTE will explore how municipal aggregators can aggregate Default Service customers within their municipal boundaries. The pending proposal by the Cape Light Compact proposal to provide such a service as a pilot project[xxiv] will be used to issue generic guidance on this matter. Finally, the DTE will explore the details concerning Internet-based enrollment.

Consumer Education

The restructuring statute authorized and directed consumer education activities to help consumers realize savings. The consumer education program was to provide "a consistent and reliable basis for comparing products and services offered in the electric market" and "assist in the detection and avoidance of unfair or deceptive marketing practices." [xxv]

Unlike most other states, Massachusetts assigned responsibility and funding for consumer education to agencies other than the utility regulatory agency. The Regulated Industries Division of the Attorney General's Office (official public advocate) and the Division of Energy Resources (DOER) jointly implemented the consumer education program. This program was modest, primarily because of its small budget. Again, unlike other restructuring states, Massachusetts did not assess consumer education funds from utilities. Rather, the Division of Energy Resources dedicated specific fiscal resources for educational activities in 1998 ($2 million) and 1999 ($1 million). No money was dedicated to consumer education activities in 2000.

An in-house consumer education task force (including other state agencies, distribution companies, low-income consumer and environmental advocates, marketers, suppliers, and other interested groups) developed the Massachusetts consumer education plan. In addition to the projects listed above, the major components of the education program included baseline research, print advertising, television, radio, call center, web site, campaign logo, speakers' bureau, personal contacts, newspaper stories, media relations, and bill inserts. An advertising agency created the actual message concepts and was responsible for the outreach efforts. The Consumer Education task force retained editorial and direct control over how the messages were conveyed. The educational efforts on electric restructuring occurred primarily after the opening of the competitive market (in 1998) but were exhausted by the end of 1999.

Also, unlike other states, Massachusetts did not conduct an extensive television or public service announcement program. Rather, the consumer education plan relied on a toll-free hotline, consumer guides and brochures in various languages, an educational video used at small group presentations, and various DOER reports.

Universal Service Programs

The Massachusetts Department of Telecommunications and Energy has long required electric and gas utilities to fund low-income discounts or rate reduction programs for low-income customers as part of their regular revenue requirement reviews. The electric restructuring legislation required distribution companies to continue these programs "comparable to the low-income discount rate in effect prior to March 1, 1998." Program costs must be included in the rates charged to all other customers of a distribution company. Further, "Each distribution company shall guarantee payment to the generation supplier for all power sold to low-income customers at said discounted rate." The discount is available to customers with household income at or below 175 percent of the federal poverty guidelines.

The distribution companies are required to conduct substantial outreach to obtain a high penetration rate for these programs, including establishment of an automated program to match customer accounts with lists of recipients of means-tested public benefit programs. Before the end of the seven-year transition period, the Department must analyze and make recommendations concerning the affordability of electricity, consider modifications for expanding the program, and consider whether to adopt a sliding scale discount program (thus providing a better match between usage and income). Low-income customers who receive the rate discount must be provided service at Standard Offer rates and are exempt from Default Service, at least through the transition period. After March 2005, however, the Standard Offer Service will no longer be available, and all customers will receive the Default Service prices.

The legislation also required a five-year energy conservation program funded by distribution company rates at levels that are the highest in the nation. Funding started at 3.3 mills per kWh in 1998 and phased down to 2.5 mills in 2002, totaling about $500 million over this period. Included in this program is a permanent set-aside for low-income demand side management of .25 mills per kWh or 20% of each utility's residential conservation program. The program must be coordinated with the local Weatherization Assistance Program agencies and conform to statewide standards that will be set by the Division of Energy Resources.

While theoretically appealing, the universal service programs have a very poor penetration rate at most Massachusetts's utilities. In 1999, only 27 percent of eligible households (130,000 out of 360,000 eligible households) received the electric discount rates, yet the DOER reported at the same time that the distribution companies were in compliance with DOER Outreach and Eligibility Guidelines![xxvi] The DTE currently has a proceeding pending to examine policies and programs to increase the penetration rate for these programs. Consumer advocates have proposed more reliance on automatic enrollment and coordination between the utilities and the state financial assistance agencies, similar to the electronic communication of eligibility status in the New York Telephone Lifeline Program.[xxvii]

Municipal Aggregation

The nation's first exposure to an organized municipal effort to aggregate its residents for the purchase of electricity occurred with the formation of the Cape Light Compact in Massachusetts. Part Two (LINK) of this paper details the formation of the Compact and its status to date.

Preliminary Conclusions and Observations

There is a consensus among regulators in Massachusetts that market-based pricing in the form of Default Service can deliver the benefits of competition to the state's residential customers. The leadership of the DTE and the DOER are intent on creating a methodology that results in routine price changes (i.e., every six months) for residential customers to reflect short-term wholesale market developments. There is some concern that these price changes should not be volatile and that the DTE would supervise how utilities acquire this service by bids and purchases. However, there is no stated interest in exploring approaches that would provide a fixed rate over a multi-year period. Rather, Default Service is viewed as a means of soliciting marketer interest in serving Massachusetts customers and, under this approach, Default Service must not undercut short-term prices available on the wholesale market. Furthermore, unless the Legislature changes the current policy, Default Service will be the only form of electric service after the transition period is complete in early 2005.

A working group is currently exploring the various opinions and proposals for Default Service and its relationship to the stimulation of a competitive market in Massachusetts. A proposal is forthcoming from the DOER that will rely on short-term market pricing for this service. At least one utility (NSTAR) has suggested that a more stable and fixed price service should be devised, at least for residential customers. Consumer advocates are seeking a long-term stable pricing program for Default Service. Clearly, there is a wide gap in the intent and purpose of the various informal proposals that have surfaced to date. The views of Massachusetts legislators may be crucial to the final resolution of these issues in the next year.

Another issue that merits careful attention by consumer representatives is whether Massachusetts will attempt to move additional costs into the price for Default Service so that customers' generation portion of the bill will increase to reflect bad debt costs or other billing and collection costs. This would remove some portion of these costs currently reflected in distribution rates. Marketers have stated that this approach would allow them to compete on the true retail costs of providing generation service. However, it also raises concerns about redlining, or the possibility that marketers will be able to discriminate when soliciting customers to avoid those with poor credit history or payment problems. If this type of "cherry picking" occurs, payment-troubled and low-income customers are likely to remain with the higher cost utility service.

End Notes

i An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein, House No. 5117, November 19, 1997.

ii G.L. c. 164, '1B(d) and implemented in the Massachusetts DTE regulations, 220 C.M.R. '11.04.

iii.Massachusetts DTE, Letter to Massachusetts Electric Company regarding Pricing for Default Service, June 1, 1999.

iv. Order Instituting a Notice of Inquiry/Generic Proceeding into the Pricing and Procurement of Default Service, D.T.E. 99-60, June 21, 1999.
Ibid, Order at 2.

vi Div. Of Energy Resources, 2000 Market Monitor: Electric Industry Restructuring, February 2000, available at www.state.ma.us/doer

vii The DOER publishes monthly migration data on its website: www.state.ma.us/doer/pub_info/migrate.htm

viii. Massachusetts DTE, Investigation by the DTE on its own Motion into the Pricing and Procurement of Default Service Pursuant to G.L. c. 164, '1B(d), Order, DTE 99-60-B, June 30, 2000.

ix. Order Addressing Recommendation of the Working Group on Default Service Issues, DTE 99-60-C, October 6, 2000.

x. Ibid., at 10.

xi Re: Standard Offer Service Fuel Adjustments, DTE 00-66, 00-67, 00-70, December 4, 2000. The consumer organizations complained that this decision had been reached without the development of record evidence as to the fuel procurement practices of the utilities, but did not object to the Department's analysis of the legislation and the ongoing deferrals of fuel costs. Whether or not the Legislature exempted fuel costs from the rate reductions, the public education materials by all parties never explained to the public that the rate decrease would be subject to reconciliation of fuel costs in the future. See, e.g., the DTE website explanation of Electric Restructuring in Massachusetts: http://www.state.ma.us/dpu/restruct/competition/index.htm

xii The Commission rejected Mass. Electric's proposal to offer a 12-month fixed price option for Default Service in addition to the DTE-mandated six month option, stating that the six-month option sends the proper price signal to customers and that this should be accompanied by a renewed effort by the utility to market a 12-month budget billing plan to its customers. Letter Order, D.T.E. 99-60, MECo's Default Service Pricing, April 3, 2001.

xiii Many thanks to John Howat at the National Consumer Law Center, Boston, MA for the use of his graph.

xiv Order, Petition of Western Massachusetts Electric Co. for approval by the D.T.E. of a three-year Energy Efficiency Plan for 2000-2002, D.T.E. 00-79, September 25, 2001.

xv When asked why the prices for Default Service vary among utilities since they must all obtain this service from the same wholesale market, a representative of the DTE explained that the utilities were allowed to develop different acquisition programs and had sought bids for their load at different times.

xvi The DTE publishes the approved SOS and Default Service prices for each utility on its website: www.state.ma.us/dpu/restruc/competition/index.htm

xvii However, the DTE does not publish complaint statistics and cannot document the volume or type of customer contacts concerning competition and price changes under Standard Offer and Default Service.

xviii Massachusetts DTE, Order Opening Investigation into Competitive Market Initiatives, D.T.E. 01-54, June 29, 2001, at 1. This Order and the comments summarized in this section are available at the Massachusetts DTE website: http://www.state.ma.us/dpu/electric/compmarketisu.htm

xixInitial Comments of Competitive Suppliers Regarding Access to Customer Information, D.T.E. 01-54, August 10, 2001.

xx15 U.S.C. §7001 et.seq., eff. October 1, 2000.

xxi Comments of the Massachusetts Union of Public Housing Tenants and National Consumer Law Center, D.T.E. 01-54, August 10, 2001; Reply Comments, August 17, 2001.

xxii Initial Comments of the Office of Attorney General, D.T.E. 01-54, August 10, 2001.

xxiii Order, D.T.E., 01-54-A, October 15, 2001, http://www.state.ma.us/dpu/electric/01_54/1015order.pdf

xxivD.T.E. 01-63, Cape Light Compact Default Service Pilot. Subsequent to the issuance of the Competitive Service order, the DTE issued an approval of the proposal by the Compact to seek bids for serving the 42,000 default service customers within its municipal service boundaries at rates that would be above the Standard Offer price, but below the local utility's Default Service price.

xxv http://www.state.ma.us/legis/laws/seslaw97/s1970164.htm. July 3, 2001

xxvi DOER, Electric Discount Rate Outreach and Eligibility Report, Winter 2001-2002. Also available on the DOER website: www.state.ma.us/doer

xxvii Comments of the Massachusetts Community Action Program Directors Association and the Massachusetts Energy Directors Association, before the Massachusetts DTE, Docket 01-106, In Re Increasing the Penetration Rate for Discounted Electric, Gas and Telephone Service, January 31, 2002. Available at http://www.state.ma.us/dpu/electric/01-106/131comments.pdf

NEW YORK

Background

Unlike most other states, New York has implemented retail electric restructuring through administrative decisions by the Public Service Commission (PSC). There is no statutory mandate for retail electric restructuring. Since 1997, the New York Public Service Commission has issued orders and approved restructuring settlements that have phased in retail electric competition for all customers, but the implementation of restructuring has varied among the different electric utilities, and there is not a uniform market structure.

However, in all its restructuring decisions, the PSC has required the local electric utility to provide Default Service, referred to as the Provider of Last Resort, at least during the transition period, the terms and pricing for which varies by individual utility settlements. In most decisions, the settlement resulted in either rate freezes (e.g., New York State Electric and Gas Co.) or modest rate reductions for residential customers. Unlike other settlements, however, Consolidated Edison (which serves New York City and Westchester County) proposed to sell its power plants[i] (divest) by competitive bid and provide Provider of Last Resort Service by relying on the wholesale market and passing through this rate on a variable basis every month. At the time of the restructuring settlement, both Consolidated Edison (ConEd) and the Commission portrayed the settlement as one that would result in a 10 percent rate reduction for customers over the five-year term of the plan.[ii]

ConEd serves 2.5 million customers, but the average monthly usage for residential customers is very low compared to other electric utilities. Residential customers use an average of 350 kWh per month, due primarily to the plethora of multi-unit structures and apartments in New York City. Furthermore, ConEd's customers have always had a monthly variable in bills due to a fuel adjustment mechanism that raises bills in the summer even under traditional regulation. Finally, ConEd's rates have been very high historically due to the lack of sufficient generation sources within its service territory and reliance on high-priced nuclear power and on long-term and expensive Qualified Facility contracts negotiated in the 1980s.

The PSC has pending a major investigation of its 2000 competition policies, including the structure and role of utilities in providing POLR service.[iii] The PSC staff was required to issue a "strawman" proposal for POLR service in mid-January 2001.[iv] Options included the gradual elimination of the utility in providing commodity services and the use of competitive bids to obtain POLR service at market-based rates. The staff's approach was based on the notion that the utility should ultimately have no obligation to serve, except for regulated delivery or distribution functions, and that customers should be expected to enter the competitive market by a certain date and then be "given" to competitive marketers in proportion to the market share obtained by the marketer.

Among the many issues considered in the Working Groups formed by the Commission was whether the PSC had the legal authority to order or even approve any utility's proposal to exit the retail market and become a "wires"-only utility. The parties submitted briefs, but the PSC has made no decision or ruling on this significant issue. However, comments submitted by the New York Attorney General and the PSC staff suggest that any move to a model in which the utilities seek to exit the obligation to serve would not be possible without a statutory change to the New York Public Service Law.[v]

Also under consideration is whether New York should adopt a comprehensive program to assure reasonably priced electricity for low-income customers. While several utilities have agreed to small-scale programs to provide bill payment assistance to low-income customers, there is no consensus on any statewide program design or funding mechanism for such programs.

Rising prices, uncertain supply in the New York City area, and uncertainty about the market-monitoring role by FERC have stimulated more public attention to restructuring.[vi] Some policymakers have begun to raise significant concerns and urge the PSC to either slow down or make significant changes in this process.[vii] While the Commission continues to take the leadership role, the New York Assembly[viii] passed an overhaul of electric restructuring in mid-2002 that was favorably received in the State Senate and opposed by the Republican leadership, including the Governor.

The New York Commission has refused to review ConEd's retail rates and tariff provisions, even in the face of persistent public outcry and consumer advocates' attempts to force the PSC to review retail prices charged in the summer of 2000, in light of the statutory requirement of "just and reasonable" rates.[ix] However, the Commission approved a "hedging" mechanism in the market price rate structure that was implemented in August 2001.[x] Furthermore, the ability of New York to survive the summer without significant power outages and the existence of a FERC-approved price cap mechanism[xi] on wholesale prices tempered the price spikes that occurred in 2001 and 2002. Even so, the rates in effect for New York City residential customers remain very high.

On July 13, 2001, the Administrative Law Judges assigned to the PSC's generic competition proceeding published a Recommended Decision.[xii] Among the more significant recommendations were proposals to do away with the two-tiered system of consumer protections and apply the Home Energy Fair Practices Act policies to all competitive energy providers and require that all energy providers be directly regulated by the PSC. Also significant was the recommendation that the Commission adopt an explicit "universal service goal" for the electric industry and endorse low-income programs and rates. The judges recommended as well that the PSC focus first on the development of workable wholesale competitive markets prior to any full-scale implementation of retail competition. With respect to the Default Service issue, the report rejected the notion of a POLR service that is more expensive than service from non-POLR providers, stating that "Charging higher rates for essential energy services to those who have few, if any additional choices and who may be least able to afford them was not generally believed to be just and reasonable."[xiii]

While favoring competition models that eventually remove the utility from the obligation to provide the energy commodity, the judges recommended an approach that would not require a specific POLR, particularly if all energy providers were governed by the same consumer protection policies and rules and each had an obligation to serve. However, the judges did not make clear how all customers would be moved to competitive providers, and even the authors recognized that a POLR would have to exist for short-term services, such as when a provider goes out of business. In the short run, the decision recommended the continuation of utility-supplied default service until the wholesale market was viable and could be relied upon to provide reasonable price signals and stimulate suppliers to make offers to mass market customers. As of August 2002, the Commission has not ruled on these recommendations, and it is not clear why there has been such a significant delay.

Upstate New York utilities, such as New York State Electric & Gas Corporation (NYSEG) and Niagara Mohawk, have proposed multi-year rate plans in which prices for generation service will be locked in for a six- to eight-year period, while providing customers with the option to seek lower prices in the competitive market. This would substantially lengthen the transition period for these utilities. NYSEG has been very vocal about the need to provide stable and fixed prices for residential customers in particular and published an April 2001 paper on the New York State's electric energy crisis, describing the "broken train" that is the New York wholesale market. The paper linked the coming period of uncertainty in wholesale prices with the need to provide price certainty to consumers during this transition period.[xiv]

Supplier Activity

Most of the suppliers currently active in the New York retail electricity market are relatively "small" or "home grown" and not connected with energy providers that are active in other states. Furthermore, the number of competitive suppliers marketing to residential customers has dropped significantly in recent years. As of May 2002, ConEd's website[xv] listed eight suppliers who market electricity to residential and/or small commercial customers. However, two of these are local "cooperatives" limited to certain portions of the service territory, and several others are reported to be inactive with respect to residential customers. Those who do market to residential customers have attempted to contrast their fixed rate offers (typically for at least one year, and several suppliers require two- to three-year contracts) with the variable rates charged by ConEd.

Even with the relatively small number of suppliers, however, the number of residential customers who have chosen alternative suppliers has gradually increased in the ConEd service territory. As of May 2002,[xvi] 159,528 customers had "migrated" to alternative suppliers, 137,601 of which were residential customers. This is the largest number of residential customers who have shopped in New York compared to any other electric utility. Although this represents a 70 percent increase since December 2000, it is still only five percent of ConEd's residential customer accounts.

According to the web-based Energy Guide[xvii], there are five options available to residential customers in the ConEd service territory, two from ConEdison Solutions, the retail sales affiliate of Consolidated Edison, Inc. Of these five offers, one is for "green" energy, three are fixed rates, and two are variable rate offers. As of April 2002, every one of these offers project a higher bill than the current rates in effect for ConEd's default service rates. Furthermore, the fixed rate offers require a minimum monthly charge in addition to the cents per kWh rate charged by the supplier for actual usage, and this type of monthly charge results in higher per kWh charges, particularly for low-usage customers. Clearly, marketers who signed up customers for fixed rate deals during a period of high rates (last summer) are charging far more than the ConEd prices for market supply service. Finally, it should be noted that at least two of the marketers listed on ConEd chart have been the subject of investigation and civil suits by the New York Attorney General for violations of consumer protection laws.

An unusual feature of the New York retail market[xviii] is that when customers leave their local utility, they are not liable for certain state sales taxes on the distribution or delivery portion of the bill, thus allowing competitive marketers to offer savings that are based on tax loopholes rather than "real" energy savings. When this tax loophole is combined with onetime or upfront customer rebates or sign-up bonuses, customers are often led to believe that the supplier's offer is cheaper than the current utility rates.

Of course, customers in the ConEd service territory can only make decisions on annual savings based on the current six-month projected rates that are provided every May and November by the utility, thus complicating the comparison of the current rates with multi-year fixed rate offers from marketers. As a result of these unique features, ConEd's residential customers cannot simply compare rates for the generation portion of the monthly electric bill. The combination of the sales tax break on the distribution portion of the bill and the monthly change in the ConEd generation supply portion of the bill makes shopping for energy a very confusing concept for most customers. While some suppliers quote monthly total bill savings, others focus on the energy portion of the bill. The PSC has not mandated a uniform method of price disclosure to assist customers in making "apples to apples" price comparisons among competitive suppliers.[+]

Provider of Last Resort

Unlike other restructuring plans approved in New York, Default Service under both ConEd and Orange and Rockland (O&R, a subsidiary of ConEd) consists of a pass-through of wholesale market prices to all customers.

The method of passing through the wholesale market prices is complicated and not transparent to customers. ConEd provides its customers with estimated rates for the next six-month period every May and November. However, the actual price charged for the generation supply portion of the bill varies monthly according to a complicated formula designed to reflect the wholesale market. As a result, the projected six-month rates are "reconciled" and result in monthly bill changes for the energy portion of the bill.

Contrary to the public statements when the plan was adopted, this provision resulted in significant rate increases for the generation portion of the bill beginning in the summer of 2000. As of July 2000, ConEd residential customers were paying 10 cents per kWh for generation alone, far higher than the 4-5 cents paid by residential customers in upstate New York and far higher than the 3.3 cents per kWh paid by ConEd residential customers in 1997. The average monthly bill for residential customers increased from approximately $52 in November 1999 to almost $75 in July 2000 and leveled off at over $60 by late 2000.[xx] This resulted in a total bill rate of over 19 cents per kWh, a 40 percent increase compared to pre-competition prices.[xxi] The resulting furor[xxii] led to investigations that concluded that New York's wholesale market was flawed, and ConEd publicly warned the Commission that a "California-type" situation could result without prompt action from both the New York PSC and FERC. Both the PSC and ConEd initiated petitions to FERC to control prices on the wholesale market.[xxiii]

In the summer of 2001, customers were charged 10.9 cents per kWh in May, 9.37 cents in June, 12.16 cents in July, and 9.13 cents in August for the energy portion of the bill alone. Compared to 2000, the 2001 prices were significantly higher for May and August, but slightly lower in June and July.[xxiv] Since August 2001, the generation portion of the bill has averaged 5-6 cents per kWh, but rose in April to 7.16 cents.

Consumer Protection Programs and Policies

Whether due to the lack of underlying legislative authority or the PSC's own policy decision about the need for a "light" hand in the regulation of competitive suppliers, the fact remains that the PSC has not adopted enforceable rules that are directly applicable to competitive suppliers. Rather, the Commission has adopted "Uniform Business Practices"[xxv] that require utilities to adopt tariffs which require suppliers to adhere to certain practices as a condition of entering the utility's retail access program. While the PSC could have required suppliers to adhere to the uniform consumer protection rules applicable to regulated utility service, and embodied in the Home Energy Fair Practices Act (HEFPA), it choose to adopt a lesser standard.[xxvi]

HEFPA remains applicable to utilities that provide POLR service. Furthermore, competitive suppliers cannot disconnect service for nonpayment. As a result, some of the key consumer protections associated with access to payment plans (to avoid disconnection), medical emergencies, and disconnection itself remain applicable to all customers. However, competitive suppliers are exempt from some key consumer protection provisions associated with HEFPA, particularly those addressing deposits and prepayments, the obligation to offer payment arrangements, such as budget payment plans, or those in response to notice of contract termination (and return of customer to utility's POLR service), response to medical emergencies, handling of customer complaints, or limitations on late payment charges or contract termination fees.

Unlike other state commissions that have implemented retail electric competition, the New York PSC has not adopted strong disclosure rules that require uniform price disclosures (although the PSC has adopted a requirement for environmental disclosures). Furthermore, the Commission's requirements governing a Terms of Service disclosure document to new customers, bill format and disclosures, and regulation of certain contract terms, particularly renewals and contract termination notices, lack the specificity and enforceability imposed by commissions in other states. While the PSC does require that marketers be "certified" by the Commission[xxvii], this procedure is not the legal equivalent of the licensing program in effect elsewhere. For example, the Commission has not adopted any rules that govern suspension or revocation of such certification and cannot levy civil penalties directly on marketers. Rather, the PSC is typically left with the option of directing the utility to discontinue service to a marketer.[xxviii]

A recent survey by AARP of New York residents age 50 years or older documented strong support for consumer protection programs and policies that should accompany the move to retail energy competition. More than eight out of 10 New Yorkers surveyed believe that it is important for citizens to have the same consumer protection rights with a private energy company as they had with their public utility, and they support proposals to impose HEFPA requirements on competitive suppliers.[xxix]

A particular defect of the New York restructuring program is the lack of any direct PSC enforcement mechanism over competitive suppliers. Instead, the Commission appears to defer to the Attorney General for enforcement activities. Furthermore, the PSC does not resolve customer complaints with energy marketers, although it does monitor the number of complaints, and does not require marketers to refer customers to the Commission for informal dispute resolution. Rather, marketers are allowed to include mandatory arbitration or Small Claims Court provisions in their preprinted customer contracts.

The New York Attorney General's Office has initiated enforcement actions against several marketers under the state's Unfair Trade Practices law. In April 2001, the A.G. settled a lawsuit against Total Gas & Electric, Inc. (based in Florida), announcing customer restitution, modification in marketing and sales practices, and the payment of a $200,000 civil penalty.[xxx] This marketer, like many that have been subject to state enforcement actions, specializes in door-to-door sales. More recently, the A.G. announced that a suit had been filed against ECONnergy of Rockland, New York, alleging numerous deceptive practices associated with door-to-door sales of energy services in the ConEd and O&R service territories.[xxxi] Both of these entities are still listed on the ConEd website as offering energy services to residential customers, and the PSC has taken no formal action to investigate, suspend, or halt the marketing activities of either company, even though the A.G.'s investigation against ECONnergy has been underway for 18 months.

The most serious consumer protection failure occurred in western New York State when numerous gas marketers suddenly went out of business or declared bankruptcy after collecting deposits and prepayments from residential and commercial customers. In the case of Iroquois Energy Management, the company collected $1.8 million in prepaid natural gas service from customers, all of whom were transferred back to the utility at higher prices, with little hope of seeing a dime from the unsecured assets of the bankrupt marketer.[xxxii] In response to this debacle, the PSC published a staff proposal on May 9, 2001[xxxiii] to regulate supplier deposits and prepayments more strictly and to require marketers to submit evidence that funds collected from customers for prepayments or deposits would be held for the benefit of such customers. The staff also proposed that a residential customer deposit could not exceed twice the average monthly bill.

A full year passed before the Commission's Final Order on this proceeding, and in general the staff's proposal was not adopted.[xxxiv] Instead of focusing on direct PSC regulation of marketer security to prevent the loss of customer prepayments or deposits, the Commission directed utilities to amend their retail access tariffs to require marketers to submit evidence of creditworthiness prior to requiring prepayments or deposits from customers. A marketer with a sufficiently high bond rating would not be required to post any financial security. The staff proposal to regulate the amount of security deposits was rejected, along with the proposals of most consumer organizations to prohibit marketers from collecting prepaid service from residential customers.

The PSC has approved metering competition for larger commercial and industrial customers, as well as billing competition for all customers of competitive suppliers. Marketers can issue dual bills (for generation supply service only), opt to bill on the utility bill, or issue a consolidated bill that incorporates all the regulated utility charges as well as the competitive energy charges. However, marketers in New York are not required to comply with the mandatory consumer protection and billing rules applicable to utilities (i.e., HEFPA). Nor are marketers subject to similar bill format and disclosure rules. In fact, several marketers in New York only offer on-line billing, with automated payment by credit card or debit to the customer's checking account within 10 days of the issuance of the bill (and an e-mail to the customer), dispensing entirely with paper bills or the opportunity to pay by check.[xxxv]

Consumer Education

The consumer education effort in New York generally has been conducted by the PSC itself (with a modest $1 million budget for the entire state[xxxvi]) and by the individual utilities. The utilities have spent $5-6 million/year on this effort. The total expenditures by both the PSC and the utilities are equal to $1/year/customer. The Public Service Commission's theme, "Your Energy, Your Choice" is not mimicked by the utilities, but their themed approach is typically similar (e.g., NIMO's "You Choose, We Deliver"). In addition, the New York State Energy Research and Development Authority (NYSERDA) has conducted an extensive education campaign focused on energy efficiency and demand response activities that are funded by the PSC-sanctioned Social Benefits Charge.[xxxvii]

However, unlike Pennsylvania, Ohio, Maine, and other states, New York has not adopted a unified education plan for retail electric competition and does not require the utilities to contribute to a Commission-led and controlled education campaign. Nor are the utilities required to use the same terminology when referring to retail access, the sale of generation service, or the regulated portions of the utility business. Awareness levels among customers remain relatively low compared to states that have conducted more aggressive multi-media campaigns.

Universal Service Programs[xxxviii]

Utilities spend about $23 million annually on low-income programs in New York State, most of which is reflected in utility rates. These programs are utility-specific, and the bulk of the funding goes to energy efficiency programs (refrigerator replacement, lighting, weatherization, etc.). Several utilities operate bill payment assistance programs, mostly as arrears forgiveness or reductions in the monthly customer charge for low-income customers, such as Keyspan Energy's Residential Reduced Rate for natural gas customers or NYSEG's Power Partners Program, which coordinates the delivery of energy efficiency services with bill reductions. However, these programs are relatively small and enroll only a small percentage of the eligible low-income customers. Furthermore, the bulk of the dollars are directed to natural gas customers and not baseload electricity customers.

In addition to the utility-funded and controlled programs, the PSC ordered the implementation of the System Benefits Charge in 1996. In early 1998, NYSERDA was designated the administrator of the public benefits programs. These programs, collectively named the New York Energy Smart Program, include energy efficiency, low-income services (those not directly implemented by the utilities in the $23 million figure provided above), research and development, and environmental protection monitoring and analysis associated with the transition to competitive markets. Funding for the SBC was set by the PSC at $150 million annually in early 2001. Of this amount, 14.1 percent is allocated to low-income programs, a portion of which is used to educate low-income customers and communities on the opportunities to reduce bills through participation in the direct access or retail competition programs.

Due to the high concentration of multi-unit dwellings in New York, low-income consumer advocates often focus on bill reduction strategies that should be funded by utilities for these types of structures. According to one recent study, alternative suppliers have done little to market electricity or provide efficiency services to low-use and low-income customers. Furthermore, the New York practice of closely integrating its public assistance programs with direct payments to the client's energy vendor has not been replicated or unraveled among energy marketers to allow such customers to shop for electricity or natural gas and be assured that their assistance payments will follow them to new suppliers.[xxxix]

ConEd does not offer bill payment assistance to low-income customers generally, but it has frozen the monthly customer charge at pre-1996 levels for customers who receive automatic vendor payments within Public Assistance. No reconnection fee is charged for LIHEAP recipients disconnected for nonpayment. In addition, there is a modest refrigerator replacement program available to elderly and disabled customers who receive SSI or HEAP. However, ConEd's website does not describe this program or refer potentially eligible customers to any agency for possible low-income bill payment assistance.

Preliminary Conclusions and Observations

The pending PSC decision on its Market Structure proceeding will be crucial to the determination of the regulatory "rules of the game" in New York and in future iterations of the ConEd retail access program. As frequently pointed out by proponents of the retail access approach in New York, the lack of legislation does allow the PSC to make changes and react to unforeseen developments. However, the lack of certainty in the overall approach and industry structure — as reflected in part by the fact that the Recommended Decision in the Market Structure and the POLR proceeding have been pending for over a year — has certainly contributed to the lack of robust activity by competitive suppliers. While such lack of interest can be explained by the price stability and rate freezes in effect at most utilities, the price volatility experienced by ConEd customers has certainly not produced significant public or market interest in competition in that area.

The retail uncertainty in New York is only exacerbated by the uncertainty of the wholesale market and the pending proposal by FERC to combine the New York Independent System Operation with New England and/or the mid-Atlantic state market (PJM). Finally, the two-tiered system of consumer protections and the marketer failures and consumer losses associated with numerous natural gas marketers in western New York (as well as the violations of consumer protection laws documented by the Attorney General) has contributed to customer dissatisfaction.

End Notes

i There are only three power plants within Con Ed's service territory and they were sold to three different entities. With the transfer of ownership, the ability to regulate the prices charged by the owners of these facilities passed from the New York PSC to FERC.

ii.New York Public Service Commission, Case 96-E-0897, In the Matter of Consolidated Edison Co. of New York, Inc.'s plans for Electric Rate/Restructuring pursuant to Opinion No. 96-12, February 28, 2000. See also Opinion 97-16 at 2, ("New York City and Westchester consumers will receive lower average electric bills."), 15 ("For all other customers, there will be a 10% rate reduction phased in over the term of the Settlement."), 26 ("The 10% cumulative base rate reduction for commercial and residential customers is firm, and no longer dependent on future contingencies.")

iii. New York PSC, Case 00-M-0504, Proceeding on Motion of the Commission regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities.

iv.Energy Competition Next Steps, Draft Phase I and II Consensus Report, Case 00-M-0504, January 2001.

v. Press Release, New York State Electric and Gas Co., ANYSEG Proposes Electric Price Protection Plan that Freezes Rates and Assures Energy Reliability, March 8, 2001, http://www.nyseg.com

viBanerjee, Neela and Perez-Pena, Richard, "Power Politics: A Failed Energy Plan Catches Up to New York," New York Times, June 1, 2001.

viiSee, e.g., H. Carl McCall, New York State Comptroller, "Electric Deregulation in New York State: The Need for a Comprehensive Plan, Feb., 2001.

viiiNew York State Transitional Energy Plan, 11 separate pieces of legislation. These bills are summarized and links to the bills themselves are provided at http://www.pulp.tc.

ixAARP and the Public Utility Law Project (PULP) and others petitioned the PSC to initiate a proceeding to investigate rates charged by Con Edison in 2000, but the Commission denied that petition on May 2, 2001. New York PSC, Order Denying Petition, Case 00-E-1750.

xNew York PSC, Order Concerning Sharing Mechanism and Directing Filing of Tariff Amendment, Case 96-E-0897, July 18, 2001.

xiFERC finally approved a "circuit breaker" or automated mitigation procedure for NYISO in late June 2001. When bids on the day ahead market exceed $150 per MW hour, an automatic review occurs to prevent a generator from withholding capacity to drive up prices. This mechanism is separate from the wholesale price of power, which is capped at $1,000 per MWh throughout the Northeast.

xii Recommended Decision, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering Development of Retail Competitive Opportunities, Case 00-M-0504, July 13, 2001.

xiiiRecommended Decision, fn.87, at 46.

xivNYSEG, "New York State's Electric Energy Crisis and New York State Electric &Gas Corporation's Comprehensive Solution", April 2001, available at http://www.nyseg.com. .

xv www.coned.com/athome/custnews/residentialesco.html

xvi www.dps.state.ny.us/Electric_RA_Migration.htm

xvii http://www.energyguide.com/finder/showcost.asp?sort=alpha&txtWinterBill=29&txtSummerBill=67&zip=10018

xviii This sales tax exemption is not widely known and not publicized as part of the consumer education program. As a result, suppliers advertise savings and rebates that reflect this tax loophole without identifying the source of the projected bill reduction.

xix While several PSC staff members indicated that they thought that comparative shopping information could be provided independently by web-based or other entities. However, the Commission has not done any research to determine the scope or depth of customer awareness or use of the existing comparative information, such as that maintained by Energy Guide.com.

xx.Office of the State Comptroller, New York, "Electric Deregulation in New York State: The Need for a Comprehensive Plan," February, 2001, Chart C.

xxi PSC data as summarized by the Public Utility Law Project in their comments on the PSC Price Spike Mitigation Proposals, see fn. 42.

xxii Wall Street Journal, "Mismanagement of NY Power Mkt Costs MillionsBUtilities," October 5, 2000, http://www.interactive.wsj.com/archive/retrieve.cgi?id+DI-CO-200001005-006703.djml

xxiii See, Department of Public Service Pricing Team, Interim Pricing Report on New York State's Independent System Operation, December 2000; "Con Edison Asks FERC to Close Loopholes That Enable New York Generators to Exercise Market Power; Additional Price Protection for Customers and a More Competitive Marketplace Sought," Con Edison Press Release, March 2, 2001; APSC Chair Announces Five Point Plan for Regional Energy Markets and Managing Demand for Electricity, PSC Press Release, February 20, 2001.

xxiv Consolidated Edison provides price comparisons between its own prices and suppliers offering service in its territory at http://www.energyguide.com/finder/welcome.asp By the fall of 2001, prices offered by alternative suppliers (many of whom were offering fixed rates) were uniformly higher than the default service provided by ConEd, due to the drop in wholesale market prices compared to ConEd's estimates.

xxv The most recent version of the Uniform Retail Access Business Practices was adopted in November 2001. See http://www.dps.state.ny.us/ubr.htm for the history of this initiative.

xxvi Case 94-E-0952, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services, Opinion No. 97-5, issued May 19, 1997.

xxvii The certification application is extremely sparse and is accompanied by directions that indicate that the marketer must submit its Terms of Service and copy of its bill format as part of the application. However, there are no specific directives with respect to these disclosures, other than various "recommendations" for content. See www.dps.state.ny.us/escoapp.htm.

xxviii In the case of Iroquois Energy Management, Inc., the Commission issued an Order Allowing Discontinuance of Service that described how the underlying distribution utility (National Fuel Gas Distribution Corp.) had issued a notice of discontinuance to Iroquois pursuant to the Commission's Uniform Business Practices. The Commission affirmed the utility's decision and approved the less than 10-day notice on the grounds of emergency. Case 98-M-1343, October 26, 2000.

xxix AARP New York Energy Survey, March 2002, http://research.aarp.org/consume/ny_energy_1.html.

xxx http://www.pulp.tc/html/spitzer_s_pr_-_florida_utility.html

xxxi http://www.pulp.tc/html/attorney_general_files_suit_ag.html.

xxxii http://www.pulp.tc/html/customers_of_bankrupt_hamburg_.html.

xxxiii Case 00-M-0504, Notice Soliciting Comments, May 9, 2001.

xxxiv Case 00-M-0504, Order Concerning ESCO Deposits and Prepayments, May 9, 2002.

xxxv See, e.g., Smart Energy at www.smartenergy.com.

xxxvi The Commission's program has used newspapers, TV, and radio announcements, as well as an intensive person-to-person effort with Staff appearances at county fairs, community events, etc.

xxxvii See http://www.nyserda.org/newsbcprograms.html

xxxviii Most of this information was obtained by the NYSERDA Draft Energy Plan for New York, December 2001, available at http://www.nyserda.org/sep.html.

xxxix Hepinstall, David and Saffer, Rhona, Case Study of the Move to Retail Competition in the Electric Industry in NY State, Association for Energy Affordability, December 2000.

OHIO

Background

After an extensive and well-publicized two-year debate in the Legislature, Ohio adopted retail electric restructuring in 1999, with an implementation date of January 1, 2001.[i] This legislation reflects an overall approach similar to those adopted by Pennsylvania, Michigan, Virginia, Texas, and other states: Larger commercial and industrial customers gain access to the potentially more competitive prices in a deregulated retail electric market in return for protections for residential customers in the form of a rate decrease and a rate cap for a specified transition period.

The Ohio program retains the incumbent utility as the Default Service provider and establishes rate caps for the "market development period" through 2005. Except for certain energy efficiency and universal service riders and the effect of taxation changes, the unbundled rates must not exceed total bundled rates in effect in 1999. The restructuring statute also preserved and mandated rate reductions here the Public Utility Commission of Ohio (PUCO) had already approved rate decreases or such decreases were scheduled to go into effect. In addition, the generation portion of the bill for residential customers must reflect a five percent reduction (which appears on the customers' bills in the form of a credit) during the transition period. This rate reduction may be altered or removed by the PUCO no earlier than 2003 if the Commission finds that it has unduly discouraged market entry by competitors.[ii] However, the generation rate reduction has been the subject of negotiations and settlement provisions in the various utility transition plans.

The utilities were not required to divest their generation resources, but were required to adopt a structural separation plan for competitive retail and regulated distribution services.

Supplier Activity

When retail electric competition began in early 2001, the PUCO certified 38 companies to sell electricity. From the beginning, however, there was a distinct difference in provider marketing activity and customer switching between the northern and southern portions of Ohio. In the northern areas served by FirstEnergy utilities, prices were below wholesale market prices, and various marketers offered services to residential customers. In addition, municipal aggregation had its first and significant successes. In the southern areas, however, prices were already low and few, if any, providers sought residential customers.

At the end of the first full year of retail electric competition, the PUCO reported that 12 marketers had established customer bases; more than 150 local governments had enacted aggregation ordinances; and aggregation programs accounted for 85 percent of residential customer switching, more than 50 percent of commercial customer switching, and almost 25 percent of industrial customer switching.[iii]

As of the summer of 2002, the competitive activity had disappeared, even in the northern portions of Ohio. Of the 725,000 residential customers who have switched suppliers, over 90 percent are being served through the municipal aggregation programs. Active competition among competitive providers for individual residential customers is virtually nonexistent. The recent bankruptcy filed by New Power, one of the most active providers for retail electric service targeted to residential customers, has meant that consumers in central and southern Ohio have no alternative to their incumbent local electric utility. The only remaining active residential provider is an affiliate of FirstEnergy in northern Ohio. Residential customers of Dayton Power and Light, Ohio Power, and Monongahela Power have never seen an offer by a competitive provider.

Provider of Last Resort

The Ohio rate caps for generation supply are firm and do not include an exception for increased fuel costs. This aspect of Ohio's restructuring program is similar to the default service and rate cap policies in effect in Pennsylvania. The Default Service obligation under the rate cap provisions continues at least through the market development period, i.e., through 2005. The restructuring legislation requires the distribution utilities to offer a market-based price for this service, obtained through competitive bidding, beginning in 2006. The Commission must adopt rules setting forth the competitive bid process by January 1, 2004.[iv]

In the PUCO's restructuring rules, customers may be subject to a minimum stay requirement for Default Service. Customers who switch during the summer months are subject to a 12-month minimum stay provision, but customers who switch back into Default Service during any other month may do so without restriction. Residential customers were not subject to any minimum stay requirements during the first year of competition, i.e., calendar year 2001. The Commission also approved a maximum $5 switching fee.

Consumer Protection Programs and Policies

The restructuring legislation required the PUCO to adopt regulations to determine the licensing criteria and consumer protections that would apply to the new energy marketers. The Commission adopted comprehensive consumer protection rules in 2000 governing certification, marketing disclosures, contract disclosures, bill format and disclosures, and enrollment and switching procedures.[v]

Providers are required to disclose the type of price plan that is offered, whether the rate is fixed or variable, and an average monthly bill for various usage profiles in a cents per kWh format. A terms of service disclosure must contain the supplier's name, phone number, address and toll-free number, as well as the PUCO's complaint hot line, the itemized list of prices, fees and the amount of any recurring or non-recurring charges, information on the billing cycle and late fees, if charged. Customers can enroll on the telephone (the required consent and disclosures are recorded), over the Internet (accompanied by encrypted customer input), or via signature, followed by a notice received from the electric utility about the impending switch to the new provider. This notice also includes information on the customer's right to cancel the contract within seven days without penalty. The Ohio rules also allow customers to sign up with a Do-Not-Call list and prohibit licensed providers from telemarketing to such customers.

In addition to price and contract information, competitive providers must provide environmental disclosures about their fuel mix and air emissions in their terms of service documents.

Utilities must issue unbundled bills that state the "price to compare" for generation supply service so that customers can compare prices with competitive providers. Furthermore, the electric bill must calculate and disclose the customer's individual price for electric generation service each month using a cents per kWh disclosure.[vi] This allows customers to easily compare offers among providers because the alternative providers must calculate an average monthly bill in a kWh format as part of their terms of service disclosures.

Ohio adopted a procedure similar to Pennsylvania's, in which providers can get access to a mass customer list from the incumbent utility with customer names, addresses, telephone numbers, and historical usage information. Customers were informed of this list and their ability to "opt out" if they do not want their information shared with providers. However, this information does not contain billing or payment information, all of which the PUCO prohibited utilities from sharing with providers.

Utility incumbents must offer providers the option to include their generation supply charges on customer bills. Alternatively, providers can issue their own bills for generation supply. However, providers do not have the option of issuing and collecting a bill for the regulated distribution service that is billed by utilities. Furthermore, providers cannot threaten disconnection of service to collect unregulated charges, but they can terminate the contract with customers in default, thus returning the customer to the incumbent utility. Utilities retain their traditional collection tools, including the right to disconnect service, but only for regulated distribution charges and the Default Service generation charges.

Consumer Education

To prepare consumers for the new electric environment, the legislation required each investor-owned electric utility to contribute to a $33 million consumer education program (referred as the Ohio Electric Choice campaign), to be used during Ohio's five-year market development period. The Legislature allocated $16 million for the first year of the education campaign and $17 million in decreasing amounts for years two through five. The consumer education budget also funded each of the five electric utilities' required territory-specific education campaigns.

The coordinating committee for consumer education consisted of the Public Utilities Commission of Ohio, in conjunction with the Ohio Consumers' Counsel (OCC) and the Ohio Electric Utility Institute (OEUI). The PUCO, however, had final decision-making authority over the campaign. The target audiences were residential consumers, small- and mid-sized commercial customers, elected officials, community leaders and civic organizations, trade associations and consumer groups. Special emphasis was placed on reaching minority populations, rural populations, senior citizens and low-income customers.

The Ohio Electric Choice campaign conducted a baseline research study in June 2000 and a six-month survey in February 2001 to gather consumer opinions on electric choice. When baseline research results are compared with the six-month research results, it is clear that the two campaigns raised consumer awareness and knowledge levels. The baseline research and the follow-up study indicated that consumer awareness of electric choice increased from 38.2 to 62.3 percent. Knowledge of electric choice increased from 19.8 to 33.6 percent. In the fall of 2001, another survey indicated that 75 percent of consumers were aware of electric choice.[vii]

Since electric competition has been slow to develop in Ohio, both the Ohio Electric Choice campaign and OCC's electric choice campaign adjusted the messages sent to consumers. Both campaigns have been careful not to overstate the notion that consumers have a choice. The Ohio Electric Choice campaign has stopped airing television advertisements and is relying on print and radio advertisements, information on its website and collateral materials to maintain awareness and knowledge of electric choice.

Universal Service Programs

Ohio also legislatively endorsed the PUCO's long-standing universal service programs for low-income customers. The Percentage of Income Payment Plan (PIPP), in which low-income customers are required to pay no more than 15 percent of their annual household income for electricity and natural gas service, will continue as part of the federal LIHEAP or fuel assistance program administered by the Ohio Department of Development. Ohio uses a combined application form for LIHEAP and PIPP, so that customers who are eligible for LIHEAP are automatically enrolled in PIPP, thereby providing a "one-stop shop" for energy assistance statewide.

The Ohio restructuring legislation also funded an Energy Efficiency and Weatherization program targeting low-income customers. This program focuses on high-cost, high-usage buildings occupied by customers who are eligible for PIPP to help reduce electric costs (and the costs of the subsidy paid by all ratepayers).

Ohio will also build on its successful experience in aggregating low-income natural gas customers participating in PIPP.[viii] Under this program, individual utilities auctioned off their natural gas PIPP customers to certified marketers for natural gas supply service at prices lower than the incumbent utility's. The Ohio Department of Development is authorized to explore this same approach for electric PIPP customers. However, under these programs, the reduced costs associated with the aggregation of low-income customers are funneled to reduce the PIPP subsidy costs and do not directly benefit the low-income customers.

Riders included in regulated utility rates and paid by all customer classes fund the PIPP and energy efficiency programs.

Municipal Aggregation

An interesting and unique feature of the Ohio legislation is the emphasis on customer aggregation. Municipalities may adopt an ordinance that aggregates all residents within its boundaries. Part Two of this paper details Ohio's experience with aggregation to date.

Preliminary Conclusions and Observations

Obviously, the level of individual customer shopping and marketer activity in Ohio is far below the expectations of policymakers when restructuring was adopted in 1999 and implemented in 2001. However, the aggregation programs in Ohio can surely be characterized as a major success and one that has not been duplicated elsewhere. The increased attention and efficiencies associated with the implementation of the low-income programs, along with their legislative "stamp of approval" has contributed to public benefits associated with restructuring. Furthermore, the consumer protection rules and disclosure requirements imposed on new marketers are models for other states.

In recent months, both the PUCO and the Ohio Consumers' Counsel (OCC) have focused attention on the structure of the wholesale market in Ohio and market power issues. The OCC issued a Summer 2002 Electric Market Updateix that asks the PUC and other legislators to adopt a sense of urgency about the state of the underdeveloped electric market, pointing out that after the transition period, customers will be subject to market rates without a competitive market to temper those rates.

The OCC has also filed a formal complaintx with the PUCO against American Electric Power (AEP), alleging that the utility's methods for operating and pricing its transmission system have inhibited the development of the competitive market. The OCC strongly supports a single electric market for Ohio (in the form of the Midwest RTO) and opposes AEP's refusal to join a functional Regional Transmission Organization by the FERC deadline of December 15, 2001. The fragmented and uncoordinated approach to transmission pricing and access in Ohio is certainly a key factor in the lack of a regional market for electricity, along with the continued differences in prices and marketer activity between the northern and southern portions of the state.

End Notes

i. Amended Substitute Senate Bill No 3, 123rd General Assembly, eff. October 5, 1999.

ii .Sec. 4928.34 and 4928.40.

iii Public Utilities Commission of Ohio, The Ohio Retail Electric Choice Programs, Report of Market Activity for the year 2001, April 2002. Available at the Ohio PUC website: http://www.puco.ohio.gov.

iv. Sec. 4928.14

v See Rules for Competitive Electric Retail Service, Ohio Administrative Code, Chapters 4901:1-21. All the applicable orders adopting the competition rules can be accessed at http://www.puco.ohio.gov/ohioutil/Energy/ERIndustry/errules.html.

vi Ohio PUC, In the Matter of the Applications of the Electric Distribution Utilities for Approval of a Sample Bill Format for Electric Service, Case No. 00-1998-EL-UNC, October 26, 2000: The price to compare for nonshopping customers must be calculated by dividing the dollar amount of the current month's bill that would be avoided with switching by the number of kWh used that month. Utilities must also disclose a notice on all electric bill of the "Apples to Apples" price comparisons maintained on the PUCO website. Order at 2.

vii Results from the baseline survey and six-month survey can be viewed online at http://www.state.oh.us/cons/electric/market.asp

viii The PIPP rules require that the customer agree to this type of aggregation as a condition of entry into the program. The utility retains the billing and collection function under this program .

ix Available at the OCC website: http://www.pickocc.org

x Available at the OCC website: http://www.pickocc.org.

TEXAS

Background

The 1999 Texas electric restructuring statute[i] calls for the implementation of retail electric competition for all customers beginning January 1, 2002. Under the Texas approach, customers obtain electricity service from "retail electric providers," or REPs. A REP has the sole retail relationship with its customers and obtains the necessary transmission and distribution services, at wholesale, from the former public utilities. The REP is responsible for all of the necessary contacts with customers, as well as billing and collection for the total electricity service. As of January 1, 2002, customers in most Texas utility territories were switched to the "affiliate" REP — the retail REP formed by the former local electric utility to provide electric services to customers under the "Price to Beat."

The affiliate REP must provide service to all customers who are transferred to this service under the Price to Beat rate, which is at least six percent less than the rates in effect in 1999.[ii] In effect, the affiliate REP provides Default Service under a rate reduction scheme that resembles that in most states. However, customers who are transferred to the affiliate REP have left their "utility" and entered the competitive market, albeit at a rate that is regulated for a transition period. The Price to Beat remains in effect until January 1, 2007 (five years) or until at least 40 percent of the residential load served by the former electric utility is being served by a non-affiliate REP. Unlike the rate caps in effect in Pennsylvania and several other states, the Price to Beat rate is subject to adjustment, based on the cost of fuel, at least twice per year.

A unique aspect of the Texas restructuring model is the role played by the Electric Reliability Council of Texas, or ERCOT. The wholesale power market in most of Texas is under the control of the Texas PUC and not subject to the jurisdiction of the FERC. As a result of this anomaly, Texas is truly a "world unto itself" for electric regulation. ERCOT plays a crucial role in retail competition, as well as its paramount role in assuring reliability of service and proper pricing of transmission service in the wholesale market. ERCOT sought to provide the retail customer database for all REPs and supplant the role typically played by the local distribution utility in most states to implement customer access to competitive providers.

Under the Texas approach, a customer selects a REP, which then submits a switch order to ERCOT. ERCOT implements that switch by informing the customer of the impending transfer via postcard and allows the customer 10 days to cancel without penalty. ERCOT also electronically informs the new REP of the customer's premise, usage and meter information, which ERCOT obtains from the distribution company. Finally, ERCOT informs the old REP of the customer's "drop" of service. ERCOT has constructed a database that assigns every retail electric customer a unique identifier so that customers can be properly matched with their REP of choice (or their local affiliate REP if they do not choose).

One of the most closely watched aspects of the Texas version of retail electric choice was the operation of the ERCOT switch procedures, which were tested in a pilot program that began in July 2001. A certain percentage of customers of each utility were allowed to select a competitive REP. While residential customers showed a reasonable level of interest in this program, particularly in utility areas that received marketing attention from several REPs that offered service below current rates, there was significant delay and controversy in the operation of the ERCOT database and switching program. Most of the switches that occurred in the early months were manually handled, and the automated switch process was not operating at full speed until late in 2001. Most customers who selected a REP were not switched in time to receive more than one bill during the pilot period and before the need to decide whether to move to full-scale competition on January 1, 2002.[iii]

While there was some debate as to whether the Texas Public Utility Commission (PUC) should have recommended a delay in the January 1 implementation, the PUC did recommend that the full-scale competition program and the switch of all customers to the affiliate REP occur on January 1, 2002.[iv]

Prices and Supplier Activity

The number of competitive providers that participated in the pilot program varied by utility service territory, but was modest at best. Furthermore, one of the larger participants, Shell, dropped out of the retail market, and its customers had to go back to the utility or select another REP. As of January 2002, eight REPs were marketing in the TXU Energy (Dallas area) and Reliant Energy (Houston area) service territories, but only two or three REPs were marketing in Texas-New Mexico Power, West Texas Utilities, and Central Power and Light areas. According to the PUC's report to the Texas Legislature's Restructuring Oversight Committee on February 5, 2002,[v] the range of savings (compared to the Price to Beat) varied among the REPs, depending on a customer's usage profile. For example, several REPs in the Reliant service territory were offering higher prices (Green Mountain Energy, for 100 percent renewable power), but most offered savings in the 2-10 percent range for an average bill. In almost all cases, customers who used significantly below the average usage level of 1,000 kWh (i.e., at 500 kWh) would experience rate increases from all REPs because of the effect of the REP rate structure.[vi] The PUC reported that approximately 150,000 customers had switched to competitive providers as of mid-February 2002.

Starting in May 2002, the Commission began issuing monthly Report Cards on Retail Competition. As of June 2002,[vii] the PUC reported that there were eight alternatives to the Affiliate REP in two market territories and two to four alternatives in the other three service territories. There was only one renewable energy product available in four of the five market areas, and the number of products offered by REPs had decreased since earlier in the year. The Commission found that many products were being offered at higher prices, compared to April, but calculated that $277 million in annual savings would be realized, compared to the Price to Beat rates, if all residential customers moved to the lowest cost offer in their area.

Yet this savings level pales in comparison to the $1 billion saved statewide when the Price to Beat rates were instituted with the onset of retail competition in January 2002. The PUC report indicates that a total of 300,000 switch requests for all customers have either been completed or are in process, with over 260,000 completed as of June 17, 2002. This represents a 20 percent switch in MWh sold in the five market areas. These switch statistics do not distinguish between residential and non-residential customers.

One of the most aggressive marketers was New Power Energy, which offered two plans: "Basic Service Plan" (with a savings of 12 percent for users over 1,000 kWh per month in the Reliant territory) and "Texas Super Saver" (which shows a slightly lower level of savings at all usage categories, but locks in rates for a longer fixed period). This company, which was owned in part by Enron and AOL-Time Warner, first announced that it would acquired by Centrica, a U.K.-based energy company that also markets energy under the names of Energy America and Direct Energy. However, Centrica pulled out of the deal when it was unable to obtain a certificate from Enron's bankruptcy court that would remove it from any liability from Enron's debts or activities. New Power was widely assumed to be moving to bankruptcy itself when it abruptly announced that its 80,000 Texas customers would be transferred to Reliant Energy (north Texas) and TXU Energy (Houston area). The Texas PUC approved the transfer and waived all applicable customer notices required by its consumer protection rules.[viii]

The reliance on ERCOT to handle all customer switches has led to glitches and delays that remain the subject of criticism and concern. Customers seeking to initiate new services have been particularly hard hit because of reported delays of weeks, even at existing locations. As a result, landlords are being requested to leave the power on between tenants, and the initiation of new customer accounts in most areas is being handled manually. There are still reports that customers who selected a new REP in November had not been switched in February.

Consumer Protection Programs and Policies

Texas has adopted extensive consumer protection regulations[ix] that are applicable to REPs, all of whom must be licensed by the PUC. The following information is contained in a Texas PUC brochure that summarizes customer rights:

All Retail Electric Providers (REPs) must adhere to Public Utility Commission of Texas (PUC) rules and regulations designed to protect you against fraudulent, unfair, misleading, discriminatory or anti-competitive practices. These protections include:

* Non-Discrimination: In addition to standard discrimination prohibitions, a REP may not deny service or discriminate in the marketing of electric service based on a customer's income level, location in an economically distressed area, or qualification for low-income or energy efficiency services.
* Slamming and Cramming: Slamming is switching your electric service provider without your permission. Cramming is adding charges to your electric bill for optional services without your permission. Both slamming and cramming are illegal.
* Dispute Resolution: REPs must promptly investigate customer complaints and customers have the right to make complaints about a REP to the PUC.
* Privacy of Information: No REP can release any customer-specific information to another REP or any other companies without your permission.

In addition, all REPs must follow a new set of customer protections, by providing:

* The Electricity Facts Label: This gives a REP's pricing information, contract terms, sources of generation and levels of emissions in a standardized format so that you can compare REP offers. The pricing information for the particular REP will provide an average price per kWh in a cents per kWh format for a residential customer usage level of 500, 1,000, and 1,500 kWh.
* A Terms of Service document: This is your contract. It informs you of a REP's contract terms and conditions.
* A "Your Rights as a Customer" disclosure: This informs you of your standard customer protections as mandated by the PUC.
* Non-English language materials: All REPs must make customer information available in Spanish. Additionally, a REP must make all materials available in the language(s) in which they market electric service.
* Your REP will be responsible for functions such as billing and customer service. The Public Utility Commission of Texas (PUC) has established rules requiring REPs to provide you with a bill format that is standardized and easy to read. Additionally:
* You will receive a monthly bill via U.S. Mail.
* You have the choice of receiving your bill electronically, if both you and your REP agree.
* Your bill will include the "average price you paid for electric service this month" listed in cents per kilowatt-hour. This will allow you to compare your existing price to that of competing REPs.
* Your bill will include a toll-free phone number you can call during business hours with questions or complaints.
* Your bill will include a toll-free number you can call 24 hours a day, seven days a week, to report power outages and concerns about safety of the electric power system.

The Texas consumer protection rules prohibit any REP, including the affiliate REP, from physically disconnecting a customer for nonpayment. All REPs must notify customers of impending contract termination and offer level or average payment plans. The affiliate REP (offering the Price to Beat) is required to also offer deferred payment plans (current bill plus some portion of the overdue amount) for overdue balances as well. Customers who are terminated are then automatically sent to the Provider of Last Resort, the only REP that does have the authority to physically disconnect service for nonpayment. The customer's overdue balance owed to any non-POLR REP is not transferred, but the customer remains liable for the unpaid debt, and the REP can seek repayment through lawful debt collection programs and report the customer's nonpayment to a credit reporting agency.

Texas offers all customers the right to be listed on the Do-Not-Call list for a nominal fee, and 150,000 electric customers have registered for this list to prevent REPs from telemarketing them.[x] However, registered REPs do have access to a mass marketing list of all residential and small commercial electric customers that contains the customers' names, account numbers, usage profiles, and addresses and telephone numbers. Customers were informed that they had to register for the Do Not Call List to avoid telemarketing.

The PUC has jurisdiction over all REPs and has the necessary enforcement tools for a competitive market (i.e., the power to seek suspension or revocation of a license, assess penalties, and conduct investigations with access to the necessary books and records). The PUC also receives, investigates and resolves customer complaints concerning REPs, particularly claims of slamming, cramming, deceptive marketing, or other violations of the consumer protection rules. However, the PUC's customer complaint division has been under public scrutiny and heightened criticism due to the backlog of customer complaints, most of which have to do with telephone service. Consumer representatives fear that the Commission has not allocated sufficient resources to complaint handling and enforcement of consumer protection rules for the burgeoning competitive market.

Consumer Education

A professionally designed and implemented consumer education program accompanied the introduction of the Texas electric restructuring program. The budget for this program is $18 million for three years, with a potential extension for a fourth year. This program has resulted in a campaign theme (Texas Electric Choice: The Power is Yours. Use It), a website (www.powertochoose.com), brochures and fact sheets, presentations and speeches and, beginning this spring and summer, multi-media advertisements on radio and TV designed to raise awareness and customer understanding of how to shop for electricity. The PUC is seeking a contractor to evaluate the effectiveness of this consumer education campaign, particularly its success in increasing awareness, propensity to act (shop), and real knowledge. Survey results will track information for low-income, elderly, and other vulnerable constituencies. This information will be not available until later in 2002. The Commission has worked closely with a Customer Education Working Group in the design and implementation of its consumer education program.

Unfortunately, the consumer education program's advice concerning the role and pricing of POLR service cannot "fix" the adverse impact of this service. The Commission's brochure concerning POLR advises customers that they can avoid this service by paying their bills on time and establishing a good credit history.[xi]

Provider of Last Resort

Customers who do not qualify for the Price to Beat rate or who are terminated by the REP for failure to pay or maintain service conditions are not physically disconnected. Instead, they are transferred to the Provider of Last Resort service. This service is supposed to be provided by an entity selected by the Commission according to a bidding procedure designed to replicate the competitive market. The PUC issued final rules that govern the bidding process for this service and sought bids according to a Request for Proposals in mid-2001.

Pursuant to the Commission's rule, the POLR service provides a basic, standard retail service package to any customer no longer served by the customer's REP or whose REP defaults in its obligations to the distribution utility or other license conditions. The POLR service is viewed as a safety net service, but it is also available to any requesting customer. POLR rates distinguish between three customer classes: residential, small commercial, and large commercial customers above 1 MW. The POLR price is a firm, non-discountable, seasonally differentiated rate that must be fully hedged or fixed for the time period of the bid, established as a minimum of one year. The POLR service does not include any competitive service offerings, innovative rate structures, or options other than basic, standard rates and service options. The POLR provider has an obligation to serve, but may deny service based on the same criteria applicable to utilities under the PUC's pre-restructuring consumer protection rules. There are no minimum service terms or fees associated with this service, except that a customer who chooses a levelized or budget payment plan (which the POLR provider must offer) may be required to agree to a six-month term of service. Only the POLR provider may disconnect service for nonpayment.

Although customers who are "dropped" by a REP are automatically transferred to the POLR, such customers can seek to return to the Price to Beat service at any time, after they pay any deposit or other credit requirements imposed by the affiliate REP. Such customers can also seek service from any REP in the competitive market. Customers are not required to pay the "old" REP's unpaid debt to leave a REP and choose another or return to Price to Beat rates under the affiliate REP.

The PUC intended to award the POLR service based on competitive bids. However, the competitive bidding process failed to obtain enough acceptable bids. Finally, on July 27, 2001, the Commission appointed Assurance Energy, an affiliate of TXU Energy, as POLR for residential and small business customers in portions of the service territories of Reliant HL&P, Central Power & Light, and Entergy Gulf States, and negotiated contracts with Entergy Solutions to serve customers in northeast Texas (SWEPCO) and with First Choice Power to serve customers in the western portion of TXU's turf. Rates were established for the first six months of 2002, but the contrast among the POLR rates, the current utility rates, and the forthcoming Price to Beat (six percent less than current rates) were stark. Assurance Energy's contract reflected POLR rates for residential customers at 14.9-15.9 cents per kWh (inclusive of generation and distribution charges) in the summer and 11.9-12.9 cents per kWh in the non-summer months, plus a $10 monthly customer service charge. As a result, the POLR charges an average of $164 and $134, respectively, for a customer using 1,000 kWh for POLR service. However, a residential customer of Reliant HL&P paid only $110 for 1,000 kWh in July 2001. This represents a 50 percent rate increase for a customer who must use POLR service because the REP has cancelled the contract or stopped providing service for any reason. POLR customers served by other appointed POLR providers in other service territories are likely to pay even higher rates. compared to Price to Beat customers.

The PUC later signed contracts with StarEn Power (an affiliate of Reliant) to provide POLR services for the TXU customers in the Dallas-Fort Worth area and First Choice Power (an affiliate of TNMP) to provide POLR services to the TXU west service area other than Dallas-Fort Worth. These contracts also approve extremely high electric rates compared to current or projected Price to Beat Rates.

In addition to the higher rates for electricity, the contracts contain a number of additional fees and charges that result in higher bills for affected customers, such as an account initiation fee (amounting to a switch fee for being changed to POLR service), and requirements for deposits or prepayment for service that must be paid within 10 days of initiating service for customers with poor or no credit history. This poses a barrier to service that will likely apply to customers sent to the POLR because of failure to meet the REP's bill payment requirements. The POLR can seek to disconnect service for nonpayment of these deposit or prepayment requirements.

The initial POLR rates negotiated and approved by the PUC were highly criticized by consumer organizations and several legislators who were members of the Restructuring Oversight Committee. In addition, the Office of Public Advocate filed appeals of the Commission's POLR orders, alleging procedural and due process defects in how the contracts were negotiated and approved. Furthermore, the drop in price for natural gas (a key determinant of electric rates in Texas) also suggested that the POLR rates were too high. As a result, the PUC renegotiated the POLR contracts, and the final rates, while still 20-30 percent higher than the Price to Beat in all cases, are lower than the original POLR rates:

Comparing 2001, Price to Beat, and POLR Residential Rates:[xii]

	Corpus Christi	Houston	Dallas
12/2001 Rate	9.57	10.40	9.67
PTB Rate	8.80	8.62	8.25
POLR Rate	10.72	10.86	8.40-10.24
POLR as % of 2001 Rate	112%	104%	86-106%
POLR as % of PTB Rate	122%	126%	102-124%

These rates do not include the separate fees charged by most POLRs for new account initiation, deposits, or separate fees for certain collection activities, such as issuing a disconnection notice or conducting a premise visit.

Consumer organizations are concerned with more than the POLR price, however. They fear that REPs, including the affiliated REP, will cancel customer contracts at a much higher frequency than traditional utilities used the disconnection tool, in order to rid themselves of credit-risky and payment-troubled customers, thereby making it easier for the affiliated REP to provide the Price to Beat rates and still make a profit. As is typical of utilities in most states, Texas utilities have issued a vast number of residential disconnection notices each month, but disconnected a very low percentage of those “eligible” for disconnection under the consumer protection rules. Furthermore, Texas utilities actually disconnected residential customers at significantly different rates, according to statistics gathered by the Texas Legal Services Center.

Consumer advocates argue that any REP, including the affiliated REP, will have no incentive to retain customers and work with them to avoid termination of service, because there is no risk to the REP in canceling customer contracts and transferring the payment problem and the increased collection costs associated with such customers to the POLR. Will payment-troubled customers be able to obtain lower priced service from alternative REPs, or will the electric version of the “phone sharks” appear, promising these customers a lower rate than the POLR, but a much higher rate than the Price to Beat service? Customers can seek to transfer to the Price to Beat service from the affiliate REP, but will they understand this right and be able to do so with the credit requirements imposed by the new REP? Will they understand the penalty incurred by moving to POLR service (in the form of much higher prices) before the bill becomes unaffordable and disconnection inevitable? These are the questions troubling both the consumer representatives and the PUC as they move into retail competition.

While the Commission refused to renegotiate the POLR contracts or review the POLR rule prior to January 2002, at least one Commissioner promised the Legislative Oversight Committee that a review of the POLR rule and potential changes would be done early in 2002. A workshop was held to review potential alternatives to the structure of the POLR service and the POLR selection process on February 26, 2002. In June 2002, the PUC published a formal proposal to change the POLR rule.[xiii] These changes would require any REP that terminates a residential customer's service to transfer that customer to the affiliate REP at the Price to Beat rates, thus avoiding any transfer to a higher priced POLR service for residential customers. Furthermore, under this approach, the affiliate REP would be able to physically disconnect such customers.

The POLR concept would be retained for service to non-residential customers and to any customer, including a residential customer, whose supplier defaults or a customer who does not choose an energy provider. This proposal, which was universally endorsed by consumer groups, was accompanied by a proposal to allow any REP to disconnect a customer for nonpayment beginning in 2005, unless the Commission determined that such a policy change would be "injurious to the market or would result in unlawful disconnections of residential and small commercial customers." The consumer organizations roundly criticized this provision and urged the Commission to approve the POLR rule changes without expanding a REP's ability to seek physical disconnection of service for unregulated prices.

On August 23, 2002, the PUC adopted an amendment to the POLR rule that will switch defaulting residential customers to the affiliate REP at the Price to Beat, thus ending the transfer of nonpaying customers to the higher priced POLR. Furthermore, the Commission delayed any decision about the right of all REPs to disconnect for nonpayment until completion of a PSC staff report in June 2004. Unfortunately, this change was also accompanied by separate actions to raise Price to Beat Rates by five to six percent, as allowed by the fuel cost provisions of the Texas restructuring rules.

Universal Service Programs

As part of the electric restructuring legislation, low-income electric customers (defined as those with household income at or below 125 percent of federal poverty guidelines) are eligible for a rate discount of 10 percent (or more, depending on available funding), which must be provided by all REPs.[xiv] Texas is also attempting to use automatic enrollment procedures to reach eligible customers. All recipients of Food Stamps, TANF, and Medicaid or Low Income Medicare will be automatically enrolled in the low-income electric discount under the LITE-UP TEXAS program. Automatic enrollment is being accomplished through an electronic data transfer from the Texas Department of Human Services to ERCOT, the keeper of the customer database. However, there have been reports that the transfer is encountering problems in enrolling eligible customers promptly,[xv] and low-income advocates have called for expedited enrollment procedures and urged all REPs to solicit eligibility and enrollment directly from customers. Low-income customers who are not already enrolled in the underlying financial assistance programs may self-certify their income eligibility by filling out an income calculation worksheet.

In the summer of 2002, the PUC significantly expanded the amount of the discount, from 10 to 17 percent, on the grounds that there was sufficient funding available for this purpose.[xvi] As a result, the "value" of the discount significantly increased, a fact that will prove important if the Commission acts to increase Price to Beat rates due to fuel factor filings by most utilities in mid-2002. As of June 2002, approximately 470,000 customers were receiving the low-income discount, and $7.3 million in discounts had been provided.[xvii]

Preliminary Observations and Conclusions

The Texas version of retail electric competition is unlikely to provide much in the way of precedents for other states, although it is widely regarded in the media as the focal point for discussion of the "right" way to restructure. The Texas jurisdiction over the wholesale market, the role of ERCOT, and the role of the REP as the sole point of contact with retail customers have not been replicated elsewhere. Nonetheless, the importance of the Texas model cannot be dismissed.

From the perspective of low-income customer representatives, the new rate discount and the protections associated with the Price to Beat rates are welcome. They provide a safe haven at least for the transition period. The major concern for residential consumer advocates is the proposed right of all REPs to disconnect customers for nonpayment, which will be decided after June 2004.

It might have been expected that the sudden collapse and bankruptcy of Enron, headquartered in Houston and one of the foremost champions of retail electric competition in Texas, would have repercussions. However, except for the January resignation of the PUC's Chairman, Max Yzaguirre, due to his failure to report certain connections with Enron, there has been little impact. In part this is due to the lack of activity by Enron in the retail sale of electricity in Texas (and elsewhere) and in part to the broad support for retail competition in Texas among state policymakers, legislators, and utility leaders.

End Notes

i. Senate Bill 7, amending the Public Utility Regulatory Act (PURA), ''39.101, et seq.

ii The PUC set the Price to Beat rates in December 2001 and reflected a greater than 6% rate decrease for most utilities to reflect recent price drops in natural gas. For example, the average cents per kWh for Reliant Energy was reduced 17%, from 10.40 cents to 8.62 cents per kWh. This rate is all inclusive of distribution, transmission and energy charges. Overall, rates were reduced from an average of 8.5 cents per kWh in effect in late 1999 to 8 cents per kWh on 1/1/02.

iii ERCOT in fact switched 67,000 customers during the pilot program and has stated that it can now switch at least 15,000 switch orders per day. See the ERCOT website for further information: www.ercot.com

iv The Commission has delayed retail competition for those non-ERCOT utilities serving areas in northern Texas and southeastern Texas (Entergy, Southwestern Electric Power or Swepco).

v http://www.puc.state.tx.us/about/oversight/EURLOC.pdf

vi Under Texas price disclosure rules, REPs must factor in the effect of both fixed and variable charges in calculating the average cents per kWh for Electricity Facts Labels. As a result, a REP that charges a fixed monthly fee in addition to what appears to be a low cents per kWh energy charge may end up costing the customer more than the Price to Beat rates, particularly for low usage profiles.

vii http://www.puc.state.tx.us/electric/projects/25645/reportcard/June02reportcard.pdf

viii http://www.puc.state.tx.us/nrelease/2002/061002.cfm

ix Chapter 25, PUC of Texas Substantive Rules.

x A separate Do-Not-Call list is maintained to prohibit telemarketing by telephone companies and 180,000 customers have registered for this list.

xi http://www.powertochoose.com/downloads/polr_fact.pdf

xii This Chart was presented by Commissioner Perlman at a conference in Austin, TX on February 26, 2002, but the "apples to apples" comparisons are not otherwise available on the PUC's website. Instead, the PUC website provides POLR rates as energy only (without the T&D portion) and the Price to Beat Rates are presented as all-inclusive rates.

xiii Project No. 25360, Rulemaking Proceeding to Amend Requirements for Provider of Last Resort Service.

xiv Section 25.454 (c) of PURA authorizes the Rate Reduction Program and Section 25.453(f) authorizes a Targeted Energy Efficiency Program. These programs are funded by means of a System Benefit Charge imposed on all customer classes. The Commission approved a non-bypassable fee of $.65 per MWh for FY 2002 (total of $62.3 Million) to be charged as part of the transmission and distribution utility nonbypassable charges. See http://www.puc.state.tx.us/electric/projects/24116/24116.cfm for further information on the funding orders.

xv In mid-January, low-income advocates alleged that 500,000 eligible customers were not receiving the discount because of computer snafus and delays.

xvi http://www.puc.state.tx.us/nrelease/2002/052302.cfm

xvii See the previously cited June 2002 Report Card on Retail Competition.

i. Senate Bill 7, amending the Public Utility Regulatory Act (PURA), ''39.101, et seq.

ii The PUC set the Price to Beat rates in December 2001 and reflected a greater than 6% rate decrease for most utilities to reflect recent price drops in natural gas. For example, the average cents per kWh for Reliant Energy was reduced 17%, from 10.40 cents to 8.62 cents per kWh. This rate is all inclusive of distribution, transmission and energy charges. Overall, rates were reduced from an average of 8.5 cents per kWh in effect in late 1999 to 8 cents per kWh on 1/1/02.

iii ERCOT in fact switched 67,000 customers during the pilot program and has stated that it can now switch at least 15,000 switch orders per day. See the ERCOT website for further information: www.ercot.com

iv The Commission has delayed retail competition for those non-ERCOT utilities serving areas in northern Texas and southeastern Texas (Entergy, Southwestern Electric Power or Swepco).

v http://www.puc.state.tx.us/about/oversight/EURLOC.pdf

vi Under Texas price disclosure rules, REPs must factor in the effect of both fixed and variable charges in calculating the average cents per kWh for Electricity Facts Labels. As a result, a REP that charges a fixed monthly fee in addition to what appears to be a low cents per kWh energy charge may end up costing the customer more than the Price to Beat rates, particularly for low usage profiles.

vii http://www.puc.state.tx.us/electric/projects/25645/reportcard/June02reportcard.pdf

viii http://www.puc.state.tx.us/nrelease/2002/061002.cfm

ix Chapter 25, PUC of Texas Substantive Rules.

x A separate Do-Not-Call list is maintained to prohibit telemarketing by telephone companies and 180,000 customers have registered for this list.

xi http://www.powertochoose.com/downloads/polr_fact.pdf

xii This Chart was presented by Commissioner Perlman at a conference in Austin, TX on February 26, 2002, but the “apples to apples” comparisons are not otherwise available on the PUC’s website. Instead, the PUC website provides POLR rates as energy only (without the T&D portion) and the Price to Beat Rates are presented as all-inclusive rates.

xiii Project No. 25360, Rulemaking Proceeding to Amend Requirements for Provider of Last Resort Service.

xiv Section 25.454 (c) of PURA authorizes the Rate Reduction Program and Section 25.453(f) authorizes a Targeted Energy Efficiency Program. These programs are funded by means of a System Benefit Charge imposed on all customer classes. The Commission approved a non-bypassable fee of $.65 per MWh for FY 2002 (total of $62.3 Million) to be charged as part of the transmission and distribution utility nonbypassable charges. See http://www.puc.state.tx.us/electric/projects/24116/24116.cfm for further information on the funding orders.

xv In mid-January, low-income advocates alleged that 500,000 eligible customers were not receiving the discount because of computer snafus and delays.

xvi http://www.puc.state.tx.us/nrelease/2002/052302.cfm

xvii See the previously cited June 2002 Report Card on Retail Competition.