THE ELECTRICITY EMERGENCY ACT OF 2001

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENERGY AND AIR QUALITY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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THE ELECTRICITY EMERGENCY ACT OF 2001

TUESDAY, MAY 1, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND AIR QUALITY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to notice, at 1 p.m., in room 2123, Rayburn House Office Building, the Hon. Joe Barton (chairman) presiding.

Members present: Representatives Barton, Cox, Largent, Burr, Whitfield, Norwood, Shimkus, Shadegg, Pickering, Radanovich, Bono, Walden, Tauzin (ex officio), Boucher, Hall, Sawyer, Doyle, Waxman, Markey, McCarthy, Strickland, Barrett, Luther, and Dingell (ex officio).

Also present: Representatives Eshoo and Harman.

Staff present: Jason Bentley, majority counsel; Joe Stanko, majority counsel; Bob meyers, majority counsel; Dennis Vasapoli, Fellow; Karine Alemian, professional staff; Peter Kielty, legislative clerk; Andy Black, policy coordinator.

Mr. BARTON. The subcommittee will come to order.

Today we are going to hold the first day of hearings on the Electricity Emergency Relief Act of 2001. We will have a second day on Thursday at 10 a.m., and since the second day's hearing is a continuation of today's hearing, we will do opening statements today, but we will not do opening statements on Thursday.

We are here today to discuss legislation concerning the looming electricity shortages this summer. The Electricity Emergency Relief Act cannot completely solve the expected problems in California and other States this summer, but it can help. And if there is something that we as the Congress can do legislatively, even if it is a little bit of help, I think we have an obligation and responsibility to do so.

The California Independent System operator's latest assessment for the summer electricity situation in California indicates that the supply of electricity will not equal the demand for electricity in that State. I quote, "For the months of June through September, the ISO forecasts a peak demand resource deficiency ranging from 600 megawatts to nearly 3,700 megawatts per hour. Given this forecast, the ISO expects that load curtailments (blackouts) will occur this summer."

I want to repeat that. This is from the California Independent System Operator. This is not from myself. This is from the people that run the power grid in California.

"Given this forecast, the ISO expects that load curtailments (blackouts) will occur this summer."

I have heard estimates that California will probably experience blackouts more than 30 days this summer, and that the total outage time could surpass over 200 hours. Other States, such as New York, could also have problems getting enough generation on line to meet the summer peak.

This subcommittee has been very active in learning about the California situation. We held a formal field hearing in San Diego last summer. We have dealt with this issue in three hearings in this Congress.

At our last California hearing on March 22, I explained my interest in putting together legislation. Later that day I circulated a list of possible bill elements. I have asked for inputs from subcommittee members on both sides of the aisle.

On March 28, I sent out a revised list of possible legislative elements, and I held a meeting the next day to which all subcommittee members were invited. Approximately two-thirds of the subcommittee did attend that meeting.

On April 6, I released a discussion draft and asked for input. On April 23, based on the input from the April 6 discussion draft, I released another discussion draft, and on April 26, brought the final bill for introduction, which happens today.

The process has been and continues to be an inclusive process. It is my intention to work with all members of the subcommittee on both sides of the aisle on a bipartisan basis.

I look forward to continuing the productive conversations that we have had so far with all subcommittee members, and with the ranking member, my good friend, Congressman Boucher from Virginia.

The bill that is before us today attempts to reduce electricity demand through, among other things, Federal facility conservation in States that have declared electricity emergencies; a national clearing house for voluntary demand response options; and open to everyone west-wide demand auction program which should help shave peak load that causes high prices and potential blackouts; and latitude to offer daylight savings time in the West on a State-by-State basis if those States choose to do so.

The bill also attempts to increase electricity supply in States that might have shortages by, among other things, keeping PURPA qualifying facilities, providing power when they are not getting paid by the local utility; letting FERC license hydroelectric generators modify their license terms during emergencies if the Governor of that State asks for such action; giving federally owned hydroelectric facilities the ability to increase generation, again at the request of a state's Governor; allowing temporary flexibility for much needed new power plants to come on line quickly if requested by a Governor and approved by the Federal EPA; allowing existing natural gas powered plants in certain emergency back-up generators to operate with certain environmental limitations when blackouts are imminent if, again, requested by a Governor and approved by the EPA; allowing Governors to request the Federal Government to operate its own generators during emergencies to decrease the amount of electricity that the Federal Government must buy

from the grid; and creating a new Department of Energy Tribal Energy Office to assist Indian tribes wishing to develop energy resources on tribal lands.

With regards to transmission infrastructure, the bill would direct the Federal Government to construct a new transmission line in central California, the so-called Path 15 line, to relieve the state's most notorious transmission constraint; would order the FERC and the DOE to report to the Congress on transmission constraints and present a plan to address those constraints; would authorize the Department of Energy to coordinate the establishment of transmission corridors across Federal lands; would order the transmission lines sold to the State of California be subject to Federal requirements for fair, open access and reasonable rates and would allow the formation of a western region, regional transmission organization if ten of the 14 Governors of the States in the West voted to do so.

Finally, the bill would direct the Department of Energy to work with the Federal Emergency Management Agency to undertake preparations for emergency actions and public education in States most likely to experience widespread blackouts.

I want to thank the witnesses for coming today. Our FERC Commissioners are getting to be almost honorary members of this subcommittee they have been here so often, but it is always good to see you.

We are going to have a number of witnesses later in the week on this same subject, and I would like to say before I recognize Mr. Boucher, with regard to the timing, it would be wonderful if we could spend more time studying this subject. The problem is that summer is going to be here in less than a month.

And unless the Congress has the ability to literally stop time by saying it shall not go over 90 degrees in California until we have decided with all due deliberation what to do about the problem, the fact remains that if we are going to help California and other States this summer, this subcommittee has to act in the very near term.

I cannot stop time. This is not a science fiction movie that we can just wait and wait and wait. We have got to act, and it is my intention based on the hearings this week that if it appears that the bill's elements are reasonable, to attempt to act some time next week.

With that, I would yield to my ranking member, the distinguished gentleman from Virginia, Mr. Boucher, for an opening statement.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I want to thank you, in particular, for inviting the members of the Federal Energy Regulatory Commission to be the first witnesses on this series of hearings examining the approach that Congress should take in addressing the pressing problems in the Western interconnect.

I welcome this opportunity for a discussion with the FERC Commissioners concerning the provisions of their most recent order relating to the reasonableness of wholesale electricity prices. Today and again on Thursday, we will have the benefit of comment on the new FERC order and on the recommended parameters of needed

legislation from a range of interested parties, including California officials and power marketers.

We need to hear from the administration concerning this pending legislation, and I very much hope that perhaps on Thursday the subcommittee will be favored with that testimony, as well.

I want to thank Chairman Barton for acceding to my suggestion that a second day of hearings be held on this measure this week, for his cooperation in working with our staff, and for postponing beyond this week subcommittee markup of the legislation. We need this extra time for a proper evaluation of its provisions.

The FERC order that was issued last Wednesday is, in my opinion, a step in the right direction, but it does not go far enough in meeting the FERC's responsibility to insure that wholesale electricity prices are just and reasonable.

The State of California has no authority to protect either utilities or electricity consumers from unjust and unreasonable wholesale power pricing. Under current law, only the FERC can exercise that authority, and in my view, the most recent FERC order is deficient in major respects.

Initially, the order only mitigates wholesale prices during periods when an operating reserve emergency has been called, specifically, when the reserve deficiency is 7.5 percent of normal requirements or greater.

Price mitigation should occur during all hours, not just during times of power reserve deficiencies. The FERC has had substantial evidence presented, and it is a part of its record, that economic withholding by power marketers has been occurring during all hours, not just during the hours of constrained reserves.

Apparently, this evidence was either disbelieved or ignored in the decision to limit wholesale price mitigation to the hours of severe reserve constraints. In making this decision, the FERC, in my view, has missed the mark, and I think it has failed to meet its responsibility to insure just and reasonable wholesale prices.

As a second matter, I am perplexed by the provision in the FERC order that would make even the limited wholesale price review the agency is willing to provide conditional on a filing by the California Independent System Operator and the three investor-owned utilities in California by June 1 of a proposal for California to join a regional transmission organization for the Western States.

Whatever the merits of an RTO for the Western interconnect, through this provision in the order, the FERC is abdicating its responsibility to insure that wholesale prices are just and reasonable unless the RTO filing is made. These issues should not be joined in this fashion. The FERC has an absolute mandate in the law to insure that wholesale prices are just and reasonable. The provision of that essential protection should not be conditioned and offered only if the State is willing to join an RTO.

The FERC has had numerous opportunities to address the runaway wholesale prices that beset California, often averaging between above ten times the $30 per megawatt hour, which in previous years has been the norm, and the FERC still has not provided the protections that are necessary.

Therefore, I have reluctantly concluded that this subcommittee should approve legislation which offers the wholesale price protec-

tion the FERC has failed to provide, and I look forward to working with members of this committee as we consider the best approach to meeting this need.

Unfortunately, the bill now before us contains no provisions on this very essential subject.

The bill does contain a number of provision that could seriously undermine a range of Federal environmental protection requirements. Among the most troubling provisions are those vesting the Department of Energy with the sole authority to site power lines on Federal lands and the provisions relating to an override of the rules governing the operation of hydroelectric facilities, and there is a longer list.

I respect the efforts that Chairman Barton has made through extensive hearings to inform the members of this subcommittee about the power problems that affect the Western States.

I also appreciate his efforts to draft a legislative response to those problems. Legislation is needed, but a major revision of the bill now before us will be required before the legislation to be effective is presented.

I look forward to a cooperative effort among interested members of this subcommittee to draft that effective response.

Thank you, Mr. Chairman, and I look forward to the witnesses' testimony.

Mr. BARTON. We thank you, Congressman Boucher.

The distinguished full committee chairman, Mr. Tauzin, is recognized for an opening statement.

Chairman TAUZIN. I thank my friend, Chairman Barton, and I particularly want to express my appreciation for the hard work that you and the staff have already put into these hearings.

Time is running out for California and other Western States if they are to avoid serious electric disruptions this summer. Previously in one of the many hearings on this issue before the subcommittee, experts testified that California is likely to experience as many as 20 hours of rolling blackouts this summer, and the situation sounds, frankly, something more like we might read about a developing nation as opposed to a high tech center that California has become.

Blackouts not only affect the lives and livelihoods of Californians, but they affect the security of all Americans. Our Nation's businesses, and the growing high tech economy demand perhaps even more than ever before, reliable and affordable sources of electricity.

Our families need the comfort of knowing that we can walk into our homes and flip a switch and the lights will come on. We deserve electricity that is generated efficiently and cleanly and will not break our pocketbooks.

U.S. consumers demand all of this, and our nation's electric power industries and energy providers are, frankly, capable of delivering on those requests. However, we now see how poor planning and excessive regulation and over reliance on a single source can lead to shortages.

Make no mistake. The situation in California is a direct result of a failure to build new power facilities in that state. It has been compounded by a poorly designed market and the continuing drought in the Northwest, but the source of the problem is that the

State relies too heavily on their neighbors to meet their energy needs, coupled with the fact that retail price controls have restrained conservation efforts by as much, we are told, as 8 percent while driving energy demand up.

In reality, achieving electric security will require the dual approach of increasing energy generation capacity and reevaluating how we use power. There is not sufficient time to build new power plants for California this summer, but there are smarter and more efficient ways to use existing electric power in the West without discouraging investment in this new generation.

And there is only so much the Federal Government can and should do to effect local electric power issues. Our job is to focus on the interstate aspects of the problem, examining how existing Federal laws affect the local situation and to offer help where we can, particularly in managing the impending crisis.

Unfortunately, we cannot help those who do not wish to help themselves. We can, however, try to minimize the effect of one state's action on another, and, Chairman Barton, I believe your bill focuses on the right issues by providing short-term stability in California and the West. And making the most of existing generation is really the only option in the near term given the shortage of power in the West.

The short-term solution is to encourage existing generation that is able to operate to be operatable, and that what few supplies of electricity are out there, to get where they are needed in the most efficient fashion and where they are needed most. That is pro conservation, pro consumer. It will encourage the most efficient use of existing supplies, and will not discourage the much needed investment in new capacity.

Mr. Chairman, I would also like to make a couple of comments about our process. First of all, your subcommittee will make a decision very soon as to when and whether to mark up this bill and what shape it finally takes. I hope my friends who have always worked in a bipartisan fashion with us on national issues like this will work with us in making those decisions and making them right.

I am in discussions with the leadership today and later this week, and you will be there with me, Joe to get a read from our leadership on when and how we should proceed. I want to make it clear that we are getting no signals that the administration is asking us not to consider this. We have heard that in the press. That is not true.

The administration will tell you that they have responded to 17 to 18 requests made by the State of California in trying to be of assistance to the State in its problems. We in Congress are doing nothing short of the same thing, of looking at whether there are things we can do to help manage this crisis and to assist the State where it wants help and where it might need authority to waive an existing provision of some law to get some power moving to the places where it is necessary to avoid these dire situations we read about.

We are going to do this in a collaborative fashion across this committee, and, Joe, I want to thank you for working so well with your ranking member, and I want to commit to the ranking minority

member of the full committee, Mr. Dingell, our continued cooperation as we move forward to make sure that our dialog and our concentration continues as we explore whether or not to move and to move what parts or all of this bill.

In the meantime, you have done, I think, this committee a great service in these hearings, in all of the meetings in discovering what it is we can do to help, if, in fact, California and the West desire our help in this situation. I commend you for it and encourage you in this hearing, as well.

[The prepared statement of Hon. W.J. "Billy" Tauzin follows:]

PREPARED STATEMENT OF HON. BILLY TAUZIN, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

I would like to thank Chairman Barton for his hard work on this issue and for putting together these hearings. Time is running out for California and other Western states to avoid serious electric supply disruptions. Previously, in one of the many hearings on this issue before the Subcommittee, experts testified that California could experience as many as 20 hours of rolling blackouts this summer. The situation sounds like something from a developing Nation as opposed to the high-tech center California has become.

Blackouts not only affect the lives and livelihoods of Californians, they affect the security of all Americans. Our Nation's businesses and growing high-tech economy demand reliable, affordable sources of electricity. Our families need the comfort of knowing that we can walk into our homes, flip a switch, and the lights will come on. We deserve electricity that is generated efficiently and cleanly and that will not break our bankbooks. U.S. consumers demand all of this, and our Nation's electric power industries and energy providers are capable of delivering.

However, we are now seeing how poor planning, excessive regulation, and over reliance on one source can lead to shortages. Make no mistake, the situation in California is a direct result of a failure to build new power plants in that State. It has been compounded by a poorly designed market and the continuing drought in the Northwest, but the source of their problem is that they rely too heavily on their neighbors to meet their electricity needs. In reality, achieving electricity security will require the dual approach of increasing generating capacity and reevaluating how we use power. There isn't sufficient time to build new power plants for California this summer. However, there are smarter and more efficient ways to use existing electric power in the West without discouraging investment in new generation.

There is only so much the Federal Government can and should do to affect local electric power issues. Our job is to focus on the interstate aspects of this problem, examine how existing Federal laws affect the local situation and offer help where we can. Unfortunately, we cannot help those who do not wish to help themselves. We can, however, try to minimize the effect one State's actions have on another. Chairman Barton, I believe your bill focuses on the right issues for providing short-term stability in California and the West. Making the most of existing generation is the only option in the near term given the shortage of power in the West. The short-term solution is to ensure that existing generation is able to operate and what few supplies of electricity are out there get where they are needed most. It is pro-conservation, pro-consumer, will encourage the most efficient use of existing supplies, and will not discourage much-needed investment in new capacity. I look forward to hearing from our witnesses on this important subject.

Mr. BARTON. I thank the chairman.

We would now like to recognize the distinguished ranking member of the full committee, the gentleman from Michigan, Congressman Dingell, for an opening statement.

Mr. DINGELL. Mr. Chairman, I commend you for holding this hearing, and I hope as the hearing proceeds we can move forward to a relief which will address the concerns and the problems of the people and the electrical users in the State of California.

I would observe that this is not just a California problem. I would observe also that the problem is in good part created in Cali-

fornia by two situations, the first of which is failure to construct plants out there to generate the necessary electric power, and also that wonderful deregulation package which they have pushed forward some years back, which has had appalling consequences on users in that State and which offers us all the opportunity to share in those disadvantages.

Mr. Chairman, I would observe to you that I am not sure that bringing FERC before us today is going to be much help in this particular matter. I am reminded by a statement that my dad used to say, and that is you can take a jackass to water, but you can't make him drink.

And I would simply observe that there is a simple solution to many and much of the problems that confront us today, and that is for FERC to carry out its statutorily mandated responsibility to establish just and reasonable prices for service in the State of California and in States adjacent thereto.

The Congress wrote this into legislation a long time back because of inability of States to protect themselves from the behavior of persons who sell electric power into those States from outside of the States and from the ability of the several States to address the problems of interstate commerce and the sale of commodities into their State from other places.

I would not that we do need here then to hear from FERC why they have not carried out their statutory responsibility to see to it that the law long in place is carried out, that sales into California and other States in the northwest and the west are conducted at fair and reasonable prices.

I would note that there are many issues in this legislation which are complex and difficult. I would note that there are a lot of people that we will need to hear from. For example, Fish and Wildlife Service. What are the requirements that are in the bill going to do to impact salmon runs at a time when salmon are approaching endangered species positions in the environment?

Also the Forest Service, the National Marine Fisheries Service, which has similar responsibilities, the Bureau of Reclamation, the California Public Utilities Commission, the American Rivers Council, the National Council of Rural Electric Cooperatives, the Northwest Public Tower Council, the Northwest Sport Fishing Industry Association, Consumer Federation of America and the Consumer's Union, the National Taxpayers Union or the Northeast-Midwest Institute.

I would also note that amongst witnesses invited too late we Governor Davis, who does have, I am told, some strong views on the matters before this committee at this time.

It is, however, interesting to me to note that one of the early witnesses will provide us testimony is Reliant Energy. That is one of the companies that has prospered mightily on their electricity sales in the State of California, selling essentially power to Californians on the spot market instead of on the contract or on the regulated market.

Most curious. Perhaps they have something to say, and I will seek to elicit some answers or some responses from them that may of value to us.

I repeat we need to look to see what it is that FERC is doing. I have the distinct impression that they have been resting tranquilly beside their statutory responsibilities.

Having said this, I would note that there are a lot changes in existing law which are important. For example, many Federal and State environmental laws are suspended, and that even includes sighting of facilities, including transmission facilities. It authorizes in Section 302, the bill authorizes Governors of States in the Northwest to request Bonneville or the Bureau of Reclamation to maximize electric generation.

If they agree, then the bill states that absolutely no laws, rules, or plans shall apply to any facility of the Bureau of Reclamation throughout the country, and apparently there are wide exemptions being given for the construction of facilities on publicly owned lands and places.

And one must inquire. Is this authorized construction without the normal constraints across, let's say, Arlington Cemetery, the Mall, perhaps the Grand Canyon or Yosemite. This will be an interesting question which I will enjoy exploring with whoever it is feels qualified to discuss those matters with me.

In any event, the bill is an interesting one. I commend you for your efforts on the matter, and I hope to work with you and with my distinguished friend, the gentleman from Louisiana, the chairman of this committee, to try and see to it that what we do is the best that we can do for the American people. No less is, I believe, inappropriate.

Having said these things, I do still wish to have FERC explain to me why they have not used their statutory authority, why we are embarking upon what could very well turn into a monstrous sawing of the error and a grand exposition of wonderful political oratory with perhaps very little timely intervention in a situation which I am sure the Californians are finding quite desperate.

Thank you, Mr. Chairman.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, you are to be commended for recognizing there is an electricity problem in the West that demands our attention. Unfortunately, the same cannot be said about President Bush and his Administration, which having declared it to be a "California problem" have chosen to completely ignore it.

Unfortunately, while you are to be commended for tackling the issue, I continue to have concerns about the hearings on the bill. Witnesses from the Department of Energy, Department of Interior, and the Environmental Protection Agency will not appear despite their important roles in the bill you have introduced. Do they think the California electricity problem is not important, or do they think your bill is not important? I don't know.

The Minority requested a number of witnesses to give us an understanding of the issues raised in this bill, but you denied most of them, including:

U.S. Fish and Wildlife Service
U.S. Forest Service
National Marine Fisheries Service
Bureau of Reclamation
California Public Utilities Commission
Alliance to Save Energy or Union of Concerned Scientists
American Rivers
National Rural Electric Cooperatives
Northwest Power Planning Council

Northwest Sportfishing Industry Association
Consumer Federation of America/Consumers Union
National Taxpayers Union or Northeast/Midwest Institute

Many of our requested witnesses were invited too late to attend, including Governor Davis.

It is not surprising that the first witness to provide testimony was Reliant Energy, one of those companies who have fared extraordinarily well in their electricity sales in California. They apparently were among the first to be invited.

Mr. Chairman, when you began the legislative process you asked the Members about what should be done. Democrats on the Subcommittee suggested that we look at how the Federal Energy Regulatory Commission was carrying out its responsibilities, and if the public was not being protected from unjust prices, we suggested new legislation on this subject might be necessary. We also stated that we should not weaken Federal environmental regulations, since none had been identified as the cause of the problems. Unfortunately, it appears our advice was not heeded.

There is little doubt that the California deregulation law was a big mistake. Nonetheless, it is also clear that the Federal Energy Regulatory Commission (FERC) was at fault for agreeing to it. Ever since, the FERC has been reconsidering its decisions. Unfortunately, the Chairman of the Commission refuses to do anything substantial about California's dysfunctional electricity markets in California and prices that reflect the market power of price gougers, not the cost of service.

The FERC's most recent order will do little to change that. That is why Commissioner Massey dissented, calling the order "paltry" and a "half-a-loaf solution." It is not coincidental that the problems in the West were triggered by California's decision to deregulate its retail markets, and FERC's rubber stamping of the California plan.

I have stated at previous hearings that I believed it was clear that the Federal Power Act required FERC to ensure that prices be just and reasonable, and that further legislation should not be necessary. It now appears, however, that the Chairman of the FERC is adamant that he will not do his job. There may be little choice but to clarify the Power Act to ensure he does. Unfortunately, the bill before us gives FERC no new direction. Instead, it appears to legitimize sales and resales of electricity at sky high prices, and FERC's refusal to protect consumers.

On the other hand, the bill is nothing short of an assault on the nation's environmental laws. It allows the waiver of virtually every environmental law on the books in the name of energy. Sometimes we use hyperbole around this body to describe a bill, but in this case, the hyperbole is in the bill. Look at section 302 of your bill, which authorizes governors of states in the northwest to request Bonneville or the Bureau of Reclamation to maximize electric generation. If they agree, then the bill states that absolutely no laws, rules, or plans will apply to any facility of the Bureau of Reclamation throughout the country!

But who will testify about this provision? Apparently not the Bureau of Reclamation. Apparently not the Northwest Power Planning Council, the Fish and Wildlife Service, the National Marine Fisheries Service, or groups like American Rivers.

Mr. Chairman, we are prepared to legislate, even if we have to get our information independently. We will contact the witnesses you have not invited, and we will be prepared to deal with this issue at markup.

Mr. BARTON. We thank the gentleman for that opening statement.

We are now going to go to the non-chairman and ranking members. The rules allow a 3-minute opening statement. We are going to show some leniency in that, but would ask members to try to stay generally within the 3-minute rule.

We are going to recognize Congressman Cox of California for the first 3-minute statement.

Mr. COX. I thank you, Mr. Chairman, and I welcome our panelists.

I think we are ripe as a committee and as a Congress and a Federal Government to be focused upon the problems of blackouts impending this summer in California. Any policy, State policy or a Federal policy, that countenances blackouts as an acceptable form of energy rationing should be dismissed out of hand by responsible adults.

Recently I have had the opportunity to talk to places of business in my own district in Southern California and outside my district throughout the State to ask them what have been the effects of our shutdowns, our unannounced interruptions in power that are threatened even more severely this summer.

A heart valve manufacturer told me that when they lose power, they cannot maintain their clean room conditions, and they have to scrap their inventory. A silicon chip fabricator told me that the process, being somewhat akin to baking a cake and finding that the power in the oven is shut off and the cake falls, cannot be resumed once it is started, and they have to scrap their inventory. For a 5-minute power interruption, the cost of work in process that they would have to scrap would be about $1 million at a facility not far from my district office. It also would take them 3 days to start anew where they left off.

My office is hardly unique in getting calls from constituents who complain that life support for elderly citizens has been interrupted without notice. They have attempted to call the hospital, and the lines are busy, and they ask their Members of Congress what can they do.

This should not happen in the 21st Century anywhere in the United States of America. Our problems at the margins include more than just lack of supply to meet demand. We have, as has been much discussed problems of price gouging and the horribly irrational system that was put in place in California law a few years ago.

Enforcing laws against price gouging is, of course, vitally important, just as important as insuring that California's consumers aren't given the theoretical right to buy power at a low price only to be told there is none available.

That is why ignoring roughly $6 billion in unpaid bills for power form late 2000 and early this year is not an option. Past due bills must be paid if California is to expect power in the future.

We have got to do everything within our power to insure that we eliminate the economic waste, the human misery and the unpredictable, life threatening consequences of blackouts. That is why the focus of this hearing and focus of this legislation are so important.

Thank you, Mr. Chairman.

Mr. BARTON. I thank the gentleman from California.

We are now going to go to another distinguished gentleman from California, Congressman Waxman for a 3-minute opening statement.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

Today this subcommittee begins legislative hearings on the Electricity Emergency Act of 2001, and I want to begin today by commending Chairman Barton for taking an interest in the serious energy problems facing California.

This is a very serious issue, and the subcommittee has devoted significant time to it. There is a pressing need for congressional scrutiny on this issue, and I want to thank the chairman for beginning this process. It is genuinely refreshing to have someone in Washington to be concerned about what is going on in California.

And I want to pay tribute, as well, to our very capable ranking member of the subcommittee, Mr. Boucher, and our very distinguished ranking member of the full committee, Mr. Dingell, for their leadership and their expertise.

Unfortunately, despite the chairman's good intentions in drafting the bill that is before us, the substance of the Electricity Emergency Act is fundamentally flawed. In fact, the bill will do more harm that good. There are four critical problems with this legislation.

First, it fails to address runaway wholesale electricity prices. FERC, the Federal Energy Regulatory Commission could address this issue today and order refunds wherever gouging has occurred. However, in the absence of meaningful action at FERC, Congress needs to act.

Congress must act to enact legislation to prevent gouging this summer. This ought to be the centerpiece of this legislation because this is what California needs the most. But unfortunately, there is no provision in this legislation to give us that relief.

Second, it interferes with California's actions to address the electricity crisis. California has been working around the clock to address these energy issues, and we should be careful to insure that we do not undermine the state's efforts.

Unfortunately, the legislation suspends important long-term energy contracts in California. It impedes California's efforts to acquire and operate electrical transmission lines, and undermines California's innovative demand reduction programs.

Third, this legislation creates massive loopholes in the nation's landmark environmental laws. It authorizes the construction of power lines through national parks and wilderness areas, allows requirements of the Endangered Species Act to be suspended, and relaxes air pollution controls.

And finally, the legislation fails to adequately promote energy conservation.

We have carefully examined each provision in the legislation and consulted extensively with the State of California about the bill. To summarize what we have learned, I am releasing today a detailed analysis of the legislation which I would ask be included in the record of this hearing.

Mr. BARTON. Without objection. I am sure we will do it, but we would like to look at it before we put it in the record.

Mr. WAXMAN. We are asking this analysis be part of the record.

We have consulted with the administration and the State of California, and they have told us that this bill does them harm, but we still have not heard from the administration in this city as to what they plan to do for California and whether they even support the bill that is before us.

I look forward to working with the chairman and all of the members of the subcommittee on this important issue. I hope we can work together, and with the State of California, to find solutions that will actually protect the consumers within our state.

Mr. BARTON. Would the gentleman yield briefly?

Mr. WAXMAN. Certainly.

Mr. BARTON. I am told that you shared your analysis with our staff, and we see no reason not to put it into the record. We thank you for sharing that.

Mr. WAXMAN. Thank you very much.

And I thank the chairman for the unanimous request to put it in the record and for this opportunity to make an opening statement, and I look forward to working with you and others.

Our State needs help. This bill does not do it. Let's get a bill that will really meet our needs.

Thank you.

[The analysis follows:]

DETAILED ANALYSIS OF THE "ELECTRICITY EMERGENCY RELIEF ACT"

Prepared by Rep. Henry A. Waxman

The "Electricity Emergency Relief Act" being drafted by Rep. Barton has the stated intention of assisting California and the West with the current electricity crisis. Unfortunately, this legislation, if enacted, would not achieve this goal. Instead, this legislation would likely increase energy costs in the West, undermine state efforts to address the electricity crisis, and result in significant environmental degradation throughout the country.

There are four critical problems with this legislation. First, it fails to address runaway wholesale electricity prices. Second, it interferes with California's actions to address the electricity crisis. Third, it creates massive loopholes in the nation's landmark environmental laws. Finally, it fails to adequately address conservation.

I. THE BILL DOES NOT PROTECT CALIFORNIA CONSUMERS FROM EXORBITANT ENERGY PRICES

The single most important federal action for California is the immediate adoption of cost-of-service based wholesale rates in the Western region. California's dysfunctional energy market has resulted in exorbitant spikes in wholesale prices of electricity, while creating opportunities for manipulation and gouging. Wholesale prices have jumped as high as $1,400 per megawatt hour (MWh). The California Independent System Operator (Cal-ISO), the state's power grid operator, has projected that electricity which cost $7 billion in 1999 will cost $70 billion this year. These skyrocketing prices can only partly be explained by natural gas price increases and increased energy demand. Indeed, Cal-ISO has calculated that there have been over $7 billion in overcharges.

The Federal Energy Regulatory Commission (FERC) has the authority to adopt regional cost-of-service based rates to address these price spikes and prevent gouging. It has consistently refused to do so. On April 25, 2001, FERC announced a price mitigation plan, but the FERC order has been widely criticized. The order only lasts for one year; it only applies when power reserves fall below 7.5% in California, despite Cal-ISO's finding that excessive prices are being charged even when such emergencies do not occur; and it "caps" prices at the marginal cost of the highest-cost generator, ensuring windfall profits for most energy producers.

In the absence of action on FFRC's part, Congress must enact legislation to institute cost-of-service based wholesale rates in the West to prevent gouging this summer. This approach should be the centerpiece of emergency legislation to address California energy issues. Without cost-of-service based wholesale races, California's citizens will continue to be exposed to exorbitant wholesale price spikes, and the economies of the state, the West, and indeed the nation may suffer long-term damage.

Unfortunately, this legislation fails to address wholesale prices. As a result, this legislation is simply "window-dressing" that ignores the main problems facing California.

II. THE BILL INTERFERES WITH CALIFORNIA'S EFFORTS TO ADDRESS THE ENERGY CRISIS

Although it is supposed to help California cope with the energy crisis, the legislation in fact contains provisions which will interfere with California's efforts to address its energy problems. For example, the bill would move significant generation out of long-term contracts and into the spot market, creating additional price volatility; it would inhibit California's ability to acquire and upgrade the state's transmission facilities; and it would create new opportunities for gaming the energy mar-

ket and directly conflict with California's own demand-reduction programs. The legislation also interferes with other state efforts to educate, plan, and reform the electricity market.

A. Section 205: PURPA Contracts

Under the Public Utility Regulatory Policies Act (PURPA), qualifying facilities (QFs) are power suppliers that produce electricity with a specified fuel type (cogeneration or renewables) and meet certain ownership, size, and efficiency criteria established by FERC. Under PURPA, these facilities are allowed to sell their electric output to the local utility at avoided cost rates (the cost the utility would incur but for the existence of the QF).

In California, QFs are an important source of energy. Although QFs have recently been contributing about 3,000-4,000 megawatts (MW), it has not been uncommon for QFs to provide 8,000 MW, or almost 25% of generation into the California electricity system. Most QFs operate under long-term contracts with California's two major utilities, Southern California Edison (SoCal Edison) and Pacific Gas and Electric Co. (PG&E). Under the terms of these long-term contracts, QFs are paid at rates that are significantly above California's historical electricity prices, but are also significantly below the current exorbitant prices.

Section 205 would allow QFs to escape their obligations under their long-term contracts until they have been fully repaid for all past sales of energy. Since PG&E is currently in bankruptcy court and owes QFs over $300 million, and since SoCal Edison currently owes QFs over $800 million, the effect of section 205 is to exempt QFs from their long-term contracts for the foreseeable future.

By effectively releasing them from their long-term contracts, Section 205 allows QFs to sell their power production on the spot market. It thus moves California in exactly the wrong direction—away from long-term contracts and toward increased reliance on spot markets. This approach would not bring more energy to the market; instead it would simply allow QF owners to double or triple their profits.

Section 205 is not needed to ensure that QFs are paid for the energy they are currently generating. In March 2001, the California Public Utilities Commission (PUC) ordered PG&E and SoCal Edison to pay QFs for all prospective sales, and QFs are now being paid for the energy they generate.

B. Section 108: Sale of Transmission Assets to State of California

A major component of California's strategy to address the energy crisis is to acquire ownership of the electricity transmission lines currently owned by SoCal Edison and PG&E. State ownership of the transmission lines will serve several vital purposes. The state plans to upgrade and modernize these facilities quickly in order to address critical infrastructure needs, while the sales will infuse the state's financially troubled utilities with sufficient funds, allowing them to begin to return to economic health.

Under current law, the transfer of the transmission lines from the utilities to California would require FERC approval. However, California would be free to operate the transmission lines without being subject to FERC regulation, just like any other governmental entity that owns transmission facilities. Governmental entities have never been subject to FERC jurisdiction, because unlike investor-owned utilities or other private companies, a state is always accountable to the electorate through the political process.

Section 108, however, provides that if California obtains ownership of the transmission lines, California shall be subject to FERC's regulatory jurisdiction. This unprecedented action could substantially interfere with California's efforts to address its energy problems. FERC has extensive regulatory powers that it could use to block or impede California's efforts to upgrade, modernize, and operate transmission lines. This is a particular concern because FERC has already proven itself unsympathetic—if not hostile—to the needs of California and the West.

Moreover, section 108 singles out California for treatment that is unlike any other state or municipality in the country. It represents a significant federal intrusion upon traditional state prerogatives. Other state and municipal utilities are not subject to FERC regulation, and there is no justification for singling out California. In fact, any effort to subject California to FERC jurisdiction raises serious constitutional questions, and the provision might run afoul of recent Supreme Court precedents affirming the importance of state sovereignty and discouraging federal efforts to directly regulate state power.

C. Section 102: Price Mitigation in Western Market through Demand Management Incentives

Section 102 directs FERC to establish and manage a market that would allow retail consumers of electricity, including individual households, to sell energy that

they do not consume. Regardless of the theoretical merits of such a market, the operational aspects of section 102 are incredibly complex and offer countless opportunities for gaming. Major aspects of the program would be counter-productive, conflicting with California's own demand-reduction programs.

California has established many programs to encourage energy conservation and demand reduction at the retail level. Virtually all of these programs would be jeopardized by section 102. For example, many large retail users of electricity in California have entered into "interruptible load" agreements whereby the retail customers are paid to reduce their electricity use during times when demand is high. If section 102 were enacted, many of these customers would seek to abandon their "interruptible load" agreements. It would be more profitable for them to speculate in the section 102 market, which would further increase California energy prices.

Similarly, section 102 directly conflicts with California's innovative 20/20 Energy Rebate Plan, under which residential, commercial, and industrial customers will receive a 20% rebate on their 2001 summer electric bill if they cut back their electricity use by 20% over last summer's level. Under section 102, California could end up paying twice for the same demand reduction: once under the 20/20 program and once through the section 102 market.

Section 102 could also increase energy consumption. The section allows individual consumers to sell "the total amount of electric load the consumer would otherwise reasonably be expected to consume." This provision invites consumers to increase—rather than decrease—consumption in the short run in order to establish high baselines from which future sales can be made. It also invites energy middlemen to game the system by claiming (and selling) artificially large demand "reductions."

These operational problems are compounded by the fact that FERC has no institutional capacity to manage the retail energy market envisioned by section 102. FERC is an overtaxed regulatory agency. It has no experience or qualifications to run the day-to-day operations of the complex energy market created by section 102. In fact, giving FERC this role would represent a vast federalization of responsibilities normally handled by state or regional authorities.

D. Section 107: Guarantee of Payment Required for Certain Emergency Power Sales

The Federal Power Act (FPA) gives the Secretary broad authority to order power sales in the event of war or any emergency that threatens "a shortage of electric energy." To protect consumers, the prices charged by energy generators under these orders must be "just and reasonable" under the circumstances.

Section 107 would seriously undermine the ability of the Energy Secretary to protect consumers during energy emergencies. Section 107 provides that the Secretary cannot require the sale of electricity or natural gas without a guarantee that the seller will be paid "the full purchase price when due." The section does not define "full purchase price," nor does it ensure that the "full purchase price" is fair or reasonable. As a result, since the provision explicitly overrides "any other provision of law," it appears to allow a seller to charge any rates it can obtain during the energy emergency, including rates that gouge desperate consumers. This would significantly interfere with an authority that has been relied upon by both the Clinton Administration and the Bush Administration.

Furthermore, section 107 also extends to court orders, which could have broad, perhaps unintended consequences, such as limiting a court's discretion in resolving an otherwise straightforward contractual dispute between a buyer and seller of energy. An energy generator could readily take advantage of this provision, knowing that under section 107 a court could not order it to abide by its contractual obligation to sell without a FERC-certified guarantee that it will receive "the full purchase price."

E. Other Provisions That Interfere with California's Efforts To Address the Energy Crisis

1. Section 101: Demand Management Agreements Clearinghouse—This section could result in an increase in the cost of electricity while eliminating the ability of FERC to redress prices that are not just and reasonable. Because section 101(b) deems as a matter of law the price of any willing transaction to be just and reasonable, FERC will be unable to redress prices that would traditionally be found to not be just and reasonable. The section also fails to prevent affiliate transactions which could result in abuse of the provision to escape FERC jurisdiction. Oversight would be extremely difficult as the transactions would be opaque to public scrutiny. Furthermore, California has already initiated many significant demand management programs, and this provision is not coordinated with any of those programs.

2. Section 104: Path 15 Transmission Expansion—Section 104, which authorizes the Western Area Power Administration System (WAPA) to remove the major trans-

mission constraint at Path 15, appears to overlook and potentially interfere with important work that has already been done at the state level. A March 2001 PUC staff report identified constraints on Path 15 as a cause of major reliability problems. Following a PUC order, PG&E applied in April 2001 for authority to upgrade Path 15. It is not clear that WAPA is the best entity to undertake the transmission expansion. Section 104 raises the possibility that WAPA and state efforts to fix Path 15 will conflict with each other.

3. Section 103: Transmission Constraints Study—Section 103, which calls for FERC and the Secretary of Energy to conduct a joint study of transmission congestion, appears to duplicate and potentially undermine measures that have already been taken in California. In March 2001, after extensive investigation, the PUC directed the utilities to undertake thirty-one transmission projects to relieve system congestion by this summer in specified areas of the state. At the same time, the PUC also identified potential system constraints that needed to be addressed for the 2002-2005 timeframe, and announced its intention to explore these and other longer-term transmission planning issues.

A nationwide study of transmission problems may have benefit. However, in the case of California, which has already examined and identified ways of fixing its transmission constraints, a six-month delay for a federal study of the problem seems unwarranted and ill-advised.

Furthermore, given the fact that Section 103 does not provide for any consultation with or input from California or the public, legitimate fears may be raised about whether the proposed federal study would take into account the state's and the public's concerns.

4. Section 202: Preparation for Electricity Blackouts—This section, authorizing the Secretary of Energy to prepare for electricity blackouts, appears to duplicate at the federal level efforts that are already being taken at the state level in California. Since the section does not call for any consultation with affected states, it raises the possibility that the Energy Secretary and the Federal Emergency Management Agency (FEMA) may develop emergency plans that are inconsistent with or duplicative of existing state plans. Furthermore, it raises the possibility that state consumers will be subjected to confusing, contradictory messages from state and federal authorities about emergency blackout preparations.

5. Section 306: Regional Transmission Organization in Western Region—Section 306 would establish a regional transmission organization (RTO) to manage transmission facilities if ten or more governors of the fourteen Western states agree to take part. FERC has promoted RTOs as a means of increasing efficiency, reliability, and competitiveness in wholesale electricity markets while eliminating the undue discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility. Indeed, FERC conditioned its April 26, 2001, order addressing California prices upon Cal-ISO and the three California investor-owned utilities proposing plans to form an RTO by June 1, 2001.

Despite FERC's endorsement of a single Western RTO, there appears to be little support, if any, in California or the other Western states for such an organization. Instead, most states seem to favor the creation of several regional RTOs within the Western states. Moreover, it is not clear that such a massive RTO would even be feasible. Federal efforts to force an RTO upon the Western states are heavy-handed and intrusive.

III. THE BILL CONTAINS ANTI-ENVIRONMENT PROVISIONS

This legislation would create new loopholes in the Clean Air Act, the Clean Water Act, the Endangered Species Act, the Federal Power Act, the National Forest Management Act, the Federal Land Policy Management Act, and the National Park Service Organic Act, as well as numerous other laws. It creates threats to public health, increases the risks to endangered species, and threatens water rights throughout the country.

A. Section 106: Federal Transmission Corridors

This provision creates a supermandate to establish transmission facilities on any federal lands where "necessary or appropriate." From Old Faithful to the National Mall to the last remaining roadless areas, every acre of federal land appears to be open for transmission lines under this provision. The Department of Energy would be designated as the lead agency for purposes of the National Environmental Policy Act. This would put DOE in charge of analyzing impacts for which they have historically not been responsible, and have not developed expertise,

This provision would open up 80.7 million acres administered by the National Park System, 91.0 million acres administered by the Fish and Wildlife Service,

191.0 million acres administered by the U.S. Forest Service, and 270.0 million acres administered by the Bureau of Land Management. Additionally, it appears to apply to lands under the jurisdiction of the Department of Defense and the legislative branch. The provision even opens Arlington National Cemetery, the White House lawn, and the U.S. Capitol grounds to the construction of new power lines.

B. Section 301: Hydroelectric Power License Conditions

This provision would undermine federal and state efforts to protect endangered fisheries, with unknown but potentially harmful consequences to water rights holders throughout the nation, especially the West. This provision amends all 1,016 hydropower licenses issued under the Federal Power Act to allow for two-year waivers of any requirement during an undefined "electric supply, generating, or system reliability emergency." Upon request by a governor, hydropower facilities will be able to act in violation of the Clean Water Act, the Endangered Species Act, the Federal Power Act, and the National Environmental Policy Act, or any other requirement contained in the license for a two-year period. Project operations affecting the environment, endangered species, federal trust responsibilities, water rights, water quality, fisheries management, and recreation could all be affected. This section would apply retroactively to previously issued licenses in addition to those licenses issued at a future date.

C. Section 302: Federal Hydropower Generation

This section would allow waivers of any "Federal law, plan, rule, or order, including any court order issued before the date of enactment...)" that applies to the operation of any facility "including dam, powerplant, or other facility" under the administrative jurisdiction of the Bonneville Power Administration (BPA) or the Bureau of Reclamation. Waivers are not subject to judicial review. While a governor must request such action, this provision has the unusual feature of allowing a governor to unilaterally trigger a waiver of all federal requirements. This provision sets a dangerous precedent for the enforceability and stability of environmental protection laws.

This section is a direct attack on the recently released federal Snake and Columbia Rivers salmon recovery plan, which requires BPA to set river flow and spill levels to aid the migration of spring and summer salmon runs. Furthermore, it could negate a recent court decision to bring four lower Snake River dams into compliance with the Clean Water Act.

This section is drafted so broadly that it allows waivers of requirements that have no bearing on electricity generation. For instance, this section appears to authorize even waivers of minimum wage laws and other labor laws, such as the Family Medical Leave Act.

D. Section 303: NO_X Preconstruction Requirements for New Generation

California has taken steps to ensure that environmental requirements do not interfere with its efforts to get new generation online in time for this summer. Certain required pollution-control equipment, known as selective catalytic reduction (SCR), has limited current availability and is time-consuming to install. As a result, California has carefully crafted an approach to get new generation online while putting in place enforceable measures to protect air quality and ensure that SCR is installed as soon as possible.

California has allowed up to a one-year delay of SCR installation for some natural gas peaker units. In each case, the state has maintained requirements that offsets be obtained. Also, a 25 ppm NO_X emission limit remains in effect during the one-year period. All preconstruction reviews proceed even though installation is being deferred in these limited situations.

Section 303 goes far beyond California's actions. This provision allows EPA upon the request of any state to waive requirements of section 111 of the Clean Air Act relating to oxides of nitrogen and the preconstruction requirements relating to oxides of nitrogen under the state implementation plan. This waiver is very broad and takes place with no opportunity for public comment. It waives all preconstruction requirements for NO_X in both attainment and nonattainment areas, not just installation of SCR technology. The waiver applies to all new electricity generation units located in the state, instead of on a case-by-case basis where discretion can be exercised and generation capacity, potential emissions, and equipment availability can be considered. Importantly, offsets are waived, which will ensure that air quality suffers during the waiver period.

Moreover, the section 303 waivers can apply nationwide. This means that if Midwestern governors request a waiver under section 303, air quality in downwind states on the East Coast could be degraded.

The broad waivers in section 303 are unnecessary. The California Air Resources Board (CARB), the California Energy Commission, and EPA Administrator Christine Todd Whitman have all stated that environmental regulations have not limited energy production in California. CARB has specifically testified that federal legislation on this matter is unnecessary. Moreover, any industry fear of citizen suits is without basis and does not justify section 303. State and federal regulators have used "administrative orders" under the enforcement provisions of the Clean Air Act to authorize the delayed installation of SCR in California, precluding any citizen suits against generators.

E. Section 304: Federal Generation During State Emergencies

This provision appears to create an open-ended opportunity for federal entities to operate their generators, including backup and portable generators, in order to generate electricity for use by the federal entity or for sales to a state, Backup generators produce emissions far worse than other forms of generation. This provision, however, does not include the concept of environmental dispatch by which dirtier generation is not dispatched until all cleaner options are utilized. Additionally, this provision may be construed to authorize mothballed facilities to be brought back into service with unknown consequences.

F. Section 305: Emergency Generation

In order to avoid or delay the installation of pollution-control equipment, some energy generation facilities in California proposed limitations on their hours of operations as an alternative to state-required emissions controls. As generation is needed beyond these limited hours, California is working with generators on a case-by-case basis to allow continued operation. In some cases, the state has levied mitigation fees, which allow the state to achieve contemporaneous reductions through other air-pollution-control programs in order to protect public health. In other cases, the state has worked with generators to install pollution controls, so that hourly limitations are unnecessary.

Section 305 goes much further than California's approach, creating unnecessary loopholes in the Clean Air Act. This section creates an expedited state implementation plan (SIP) amendment process, the goal of which is to approve SEP amendments that allow waivers of emissions limitations during energy emergencies. First, subsection (c) allows the waiver of NO_X emissions limitations for existing natural-gas-fired electricity generation. Second, subsection (d) allows the waiver of "any otherwise applicable requirements" of the SEP if the person or entity generating energy also consumes it, even if the requirement is not inhibiting electricity generation. Waivers last for up to six months at a time, with no limit on the number of consecutive six-month periods. Waivers appear to apply on a statewide basis, not on a case-by-case basis. Mitigation fees are also waived under this section, preventing the state from obtaining offsetting emission reductions from other sources and removing any financial incentive for the electricity generation facilities to reduce emissions.

As in the case of section 303, section 305 applies nationwide. Section 305 waivers could be allowed in the Midwest, where they could lead to additional air pollution on the East Coast.

EPA may approve the SEP amendment only if EPA determines that the amendment will not increase the net emissions of any air pollutant in any "affected air quality region" and that the amendment "otherwise meets" the requirements of the Clean Air Act. This determination in all likelihood would be a legal fiction. Under section 305, EPA does not approve waivers for individual sources and would not have the details of these waivers before it.

IV. THE BILL'S APPROACH TO CONSERVATION IS INADEQUATE

The legislation fails to adequately address conservation. The legislation provides only a "tip of the hat" to conservation at a time when conservation is the only opportunity to keep the lights on in California this summer.

A. Section 203: Conservation at Federal Facilities

Section 203 would require federal facilities in a state whose governor has declared an electricity emergency to reduce consumption by at least 10%. While this is a step in the right direction, it does not do as much as is possible or necessary. California state facilities have reduced their electricity consumption by 20%. It is appropriate for federal facilities to do the same. Additionally, federal facilities should conserve energy and enhance energy efficiency throughout the country, especially the entire West.

Furtbermore, this provision inappropriately sunsets in October 2003. It is interesting to note that the provisions in the bill which promote conservation and energy

efficiency sunset, while provisions which relax environmental protections are permanent changes to federal law.

B. Section 201: Emergency Conservation Awareness

Section 201 authorizes the Secretary of Energy to conduct emergency awareness campaigns to promote conservation. While the Secretary is supposed to act "in consultation and coordination with affected states," this section raises the possibility that California consumers could receive contradictory messages from state and federal officials about "the likelihood and consequences of electric energy shortages." For example, if the Secretary and the Governor were to come to different conclusions about the likelihood of imminent shortages, this section could result in consumers receiving confusing and inconsistent information about whether those shortages would occur and what steps, if any, should be taken.

V. THE BILL DOES LITTLE TO HELP CALIFORNIA

The bill contains only one provision that would actually help California. This is the provision allowing California and three other Western states to adjust their standard time if such a move would alleviate an energy crisis. Studies have shown that such an action could save about 1% of energy usage.

Mr. BARTON. The gentleman from Georgia, Mr. Norwood is recognized for an opening statement.

Mr. NORWOOD. Mr. Chairman, I thank you for conducting this legislative hearing today on Electricity Emergency Act. I appreciate the opportunity to hear our witnesses' testimony to determine what available options might be most effective to alleviate this crisis, and most importantly, to avoid blackouts in the coming months in any state.

This subcommittee, thanks to the leadership of its competent Chairman, has been following the events in California and the Western energy markets closely since the last Congress.

Since the subcommittee's first hearing in San Diego last fall, we have conducted additional hearings from the outset of the 107th Congress to try to stay on top of this issue. Throughout these hearings various witnesses have testified sharing their views on the contributing causes for the current problems out West.

Some of the more prevalent and obvious have included the flawed California market structure, lack of sufficient generating capacity, transmission constraints, lower than expected rainfall for hydroelectric supplies, and high natural gas prices.

I am interested in separating the issue into two parts. What can we do in the long run to avoid future similar crisis, and what can we do right now?

Though these factors have magnified and exacerbated California's electricity problems, at the end of the day it seems to rest fundamentally on the imbalance between supply and demand. On any given day in California, it has been estimated that demand could exceed supply by three to 5,000 megawatts.

Steps should be taken to encourage investment in new generation capacity to correct this inequity. However, with summer and increasing temperatures on the way, expediting permitting for construction of new capacities will not help at all in the short term.

To me, this is where the challenge to this committee lies. What can we do now?

One suggested interim solution that has intrigued me throughout this crisis is an officer, I understand, made by Reliant Energy which was discussed at a House Government Reform Committee hearing in San Diego on April 12.

Reliant's witness that day was John Stout, and he is testifying here today on the second panel, and I am anxious to ask him in view of earlier comments about their offer back on April. Mr. Stout revealed that his company as a major supplier of electricity to California has had an offer on the table since last December to supply electricity for 2 cents per kilowatt hour, provided the State purchase the natural gas.

I am interested to hear more about this proposal, but because it does not sound like that is a proposal from a company that is trying to gouge people or make large profits.

There are other similar possible solutions that might prove beneficial in the short term.

The situation out West has worsened as other States have suffered, too, providing the unavoidable interconnect of these markets. This fact alone should reinforce the critical importance of electricity to the entire public interest. Very simply, it is the lifeline of our economy, and disruption and unreliability on a national scale would be nothing short of catastrophic.

Mr. Chairman, I applaud you for your efforts in this area, in fact, all of the members of the subcommittee in trying to craft this legislation, where we can develop short-term and long-term solutions if California and others will let us, if we can help them.

As was pointed out earlier, people must be willing to help themselves, and California has got to help themselves if we as a Congress and as a Federal Government can be of any help to them.

So I look forward to hearing the testimony and thank the witnesses for being here, one more time, and I hope today we can meet our objectives of some decent legislation that will help the good people out West.

Thank you, Mr. Chairman.

Mr. BARTON. Thank you. We thank the gentleman from Georgia.

I recognize the distinguished gentleman from Massachusetts, Mr. Markey, for a 3-minute opening statement.

Mr. MARKEY. Thank you.

First, I would like to begin by commending you, Mr. Chairman, for recognizing that there is an electricity crisis out in California and in the Pacific Northwest, and that there is a need for Federal action to help address this crisis.

It is heartening to see that there is at least one Texas Republican out there who is willing to acknowledge the need for Federal action to help consumers out in California.

Sadly the Bush administration does not appear to share your concern or your desire for action. In fact, over the weekend, Vice President Chaney help out no hope of relief for Californians threatened by rolling blackouts and escalating prices. He said, "There is almost nothing you can do to produce a lot more kilowatt short term for California. They are going to have to go through a tough summer." Have a tough summer. Don't expect any help from the Federal Government. You are on your own.

That is the message from the Bush administration. Aggressive indifference is the Bush-Chaney prescription for California's energy problems. Perhaps that is why the subcommittee will not be hearing from the Secretary of Energy, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, or any

other Bush administration policymaker regarding your proposed legislation.

Perhaps they are just too busy meeting behind closed doors talking to people from the oil and the natural gas and the nuclear and the coal and the electric utility industry to actually come up here and testify on the crisis in California, or perhaps they are just too busy rolling back energy efficiency rules for air conditioners, a breakthrough breathtaking step backwards that will force us to have to build 40 additional large power plants over the next 20 years.

In any event, the one Federal agency that we will be hearing from, the Federal Energy Regulatory Commission, has been doing quite a good job at implementing the Bush policy of aggressive indifference toward California's crisis. Indeed, the FERC appears to have completely abdicated its responsibility to enforce the Federal Power Act's requirements that wholesale electricity prices be just and reasonable.

In the 1960's, the Mamas and Papas big hit was "California Dreaming." Today we have FERC's versions of Mamas and Papas here before us to sing a new tune, and it goes something like this.

Mary? No.

"All the streets are dark, blackouts every day. FERC just takes a walk and lets the gougers play. I'd still stand a chance if I was in L.A."—inside joke—"California scheming on such a winter's day and spring and summer."

Now, I will not sing the whole song for you, but I will ask unanimous consent to put it into the record.

Mr. BARTON. I would keep your day job if I were you, Congressman.

Mr. MARKEY. Thank you so much.

It seems to me that if Congress is going to legislate to address the electricity crisis in California and the West, we need to step in and correct that failure on the part of the agency responsible for regulating rates.

Right now your bill does not require FERC to mitigate the ridiculous, out of control prices being charged in California.

Mr. BARTON. The gentleman's time has expired, but I will give him another 15 seconds though to wrap up.

Mr. MARKEY. I thank you.

The bill does not give FERC a directive to take action to address the exercise of market power in Western electricity markets, and your bill proposes ill advised measures to weaken environmental rules affecting our nation's air, its water, and the protection of public lands as a solution for California's energy crisis.

I do think we need an Electricity Emergency Relief Act. I think if we work together in a bipartisan fashion that we can craft one to help that great State before it suffers an economic calamity.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Edward J. Markey follows:]

PREPARED STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Thank you, Mr. Chairman. I am looking forward to this afternoon's hearing on your legislation to address the electricity crisis in California and the West.

I would like to begin by commending you, Mr. Chairman, for recognizing that there is an electricity crisis out in California and the Pacific Northwest, and that there is a need for federal action to help address this crisis. It is heartening to see that there is at least one Texas Republican out there who is willing to acknowledge the need for federal action to help consumers out in California. Sadly, the Bush Administration does not appear to share your concern or your desire for action. In fact, over the weekend, Vice President Cheney held out no hope of relief for Californians threatened by rolling blackouts and escalating prices. He said. "There's almost nothing you can do to produce a lot more kilowatts short-term for California. They're going to have to go through a tough summer."

Have a tough summer. Don't expect any help from the federal government. You're on your own.

Aggressive indifference is the Bush-Cheney prescription for California's energy problems. Perhaps that is why the Subcommittee will not be hearing from the Secretary of Energy, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, or any other Bush Administration policymaker regarding your proposed legislation. Perhaps they are just too busy meeting behind closed doors with lobbyists from the oil, natural gas, nuclear, coal, and electric utility industry to actually come up and testify before the Subcommittee regarding your legislation. Or, perhaps they are too busy rolling back energy efficiency rules for air conditioners—a breathtaking step backwards that will force us to have to build 40 additional large power plants over the next 20 years.

In any event, the one federal agency we will be hearing from, the Federal Energy Regulatory Commission, has been doing quite a good job of implementing the Bush policy of aggressive indifference towards California's crisis. Indeed, the FERC appears to have completely abdicated its responsibility to enforce the Federal Power Act's requirements that wholesale electricity prices be just and reasonable.

In the 1960s, the Mamas and the Papas big hit was "California Dreamin'". Today, we have FERC's versions of the "Mamas and the Papas" here before us to sing a new tune. And it goes something like this:

All the streets are dark
Blackouts every day
FERC just takes a walk
And lets the gouger's play
I'd still stand a chance
If I was in L.A.
California schemin' on such a winter's day

Now, I won't sing you the rest of the song, but I will ask unanimous consent for the full text to be inserted into the Record following my statement!

It seems to me that if Congress is going to legislate to address the electricity crisis in California and the West, we need to step in and correct that failure on the part of the agency responsible for regulating rates. Right now, your bill does not require FERC to mitigate the ridiculous out of control prices being charged in California. Your bill does not give FERC a directive to take action to address the exercise of market power in Western electricity markets. And your bill proposes ill-advised measures to weaken environmental rules affecting our nation's air, its water, and the protection of public lands as a "solution" for California's energy problems.

I think that we need to correct these and other problems with the "Electricity Emergency Relief Act" if we proceed to a mark up of this legislation, and I look forward to working with you and other Members of the Subcommittee to make that happen.

Thank you again, Mr. Chairman, for calling today's hearing.

CALIFORNIA SCHEMIN' BY REP. EDWARD J. MARKEY (D-MA)

(With Apologies to the Late John Phillips)

All the streets are dark
Blackouts on the way
Prices on an arc
We've all got to pay
I'd be safe and warm
If I was in L.A.

California schemin' on such a winter's day

Going down the tubes
Too many bills to pay

They've brought us to our knees
and help's not on the way
FERC is so cold
They look the other way

California's screamin' on such a winter's day

All the streets are dark
Blackouts every day
FERC just takes a walk
And lets the gouger's play
I'd still stand a chance
If I was in L.A.

California schemin'
on such a winter's day
on such a winter's day
on such a winter's day

California screamin'
on such a winter's day
on such a winter's day
on such a winter's day

Mr. BARTON. I thank the gentleman from Massachusetts.

I would go to the gentleman from Oklahoma, Mr. Largent for an opening statement.

Mr. LARGENT. Mr. Chairman, thank you for holding this afternoon's hearing on legislation that you introduced today, the Electricity Emergency Act of 2001.

The bill was crafted in an open and deliberate fashion and incorporated the ideas of many members of this subcommittee, as well as Congressman Sherman's legislation to allow Western States to adjust daylight savings time if they so choose.

Some pay feel compelled to criticize this bill for what it does not contain. However, I prefer to highlight the many positive aspects of this legislation that will help California's and the West's electricity problems this summer.

The bill includes a creative provision which directs FERC to establish a clearing house system to facilitate agreements between wholesale sellers and wholesale purchasers who are willing to forego the purchase of electricity. Unlike rate caps, this provision does nothing to discourage new generation, yet it does offer a financial incentive to those customers which choose to conserve.

Another pro conservation provision, Section 102 of the bill, directs FERC to establish a program to allow consumers within the Western System's Coordinating Council to resell at market prices a portion of the electricity they would otherwise be entitled to consume under contract.

This legislation begins to address transmission problems by authorizing $220 million to build out Path 15. It also directs DOE and FERC to study transmission constraints and report back to Congress within 6 months.

Additionally, the bill authorizes DOE to establish electric power transmission corridors across Federal lands.

Title III of the bill is testament to Chairman Barton and the committee staff's resourceful efforts to maintain a balance between Federal authority and preserving state's rights. The sections in

Title III only go into effect if requested by a Governor or Governors of a state.

For those who feel compelled to criticize this title, I would ask them to read the language carefully. Title III provides States flexibility. It does not issue Federal mandates.

Mr. Chairman, the Electricity Emergency Relief Act is a positive first step to alleviate some of the power problems in the West, and I look forward to hearing our distinguished panel of witnesses' thoughts on the legislation.

I yield back my time.

Mr. BARTON. We thank the vice chairman for his opening statement and look forward to working with him to perfect the legislation.

We now go to the distinguished gentleman from Texas, the ramking Member on the Science Committee and someone who has studied these issues in some detail, Mr. Hall.

Mr. HALL. Mr. Chairman, I have good news and bad news for you. First, I am sorry that you cannot stop time. I would be extremely happy if you could crank back time to the 1950's, 1960's, 1970's, and 1980's, and I am sure the gentlemen from California, New York, and other States that are part of the 40 States that use energy for the 10 States that produce it; I think they would have some different attitudes toward the request and suggestions that have brought us to the situation we are in now.

I agree with Judge Cox. I think the problems with——

Mr. HALL. [continuing] very serious problems, and as I have told Mr. Waxman, whom I admire and respect, I want to aggravate him all the way to the front gate about not allowing any production, not allowing any transmission, and all of that.

But when we get to the front gate, I want to help him because they are sister States. They produce much for this country. They have many contributions, and California has to be helped.

I just think that we cannot keep saying that the President is not going to help us. The good news and bad news is that Mr. Markey identifies the President as the problem, and I guess that is the bad news to me. The good news is that you did not give him anymore time to sing. I am the closest one to him here.

But you know, the truth is that we have got to act, and we have been here since January. We knew when we got here that California and other States were in trouble. We sat here all this time up to this very minute. A roof does not need any repair until it starts raining, and yet we have had all of that time.

An ugly July is lurking out there, waiting for those people in California, and really we have not done hardly anything. I think we could be not drilling ANWR yet. It takes time to get ready for that, but we ought to be preparing them for it.

And if it is not the solution, it is an indication that we want a solution.

Offshore? Those offshore rigs are not as unsightly if you stop and view them as a troop ship with our children and grandchildren going somewhere to fight for energy, and that is the answer to it because we look at home starts and we look at auto sales for the barometer on how the economy of this country is going, but the ba-

rometer on energy is $4 gasoline and body bags, I am sorry to say, because the country will fight for energy.

We sent 450,000 kids to the desert for energy. Japan went south in Malaysia for energy in 1939 and 1940. Hitler went into the Ploesti oil fields. Countries will fight for energy.

We can do something about it. Here it is May. July is almost on us. I think, Mr. Chairman, that we need to recognize the need for energy. We need to recognize the need that we absolutely need to do something and have to get underway. We ought to already have a bill on the President's desk.

But, Mr. Markey, the President cannot help you until this Congress does something and presents him with a bill that he can sign or veto, and I might ask what the President the last 8 years has done to keep this from happening out there on the West Coast in the finest and one of the largest States in this union.

I certainly support you in your position to represent your people as you see fit. However, I disagree with you on the energy thrust, and I think you know that.

We had a gentleman come here one time that was misquoted when he sat right at those tables there. His name was Jim Nugent. He was Chairman of the Railroad Commission of Texas, and some of you guys had heard him make a speech to the effect that let the Yankees freeze and starve in the dark, and you asked him about those question.

You had a copy of his speech. He said, "No, that is not what I said. I was misquoted."

I do not know if Mr. Chaney was misquoted or not, but he was misquoted. Finally I got him on direct, and I said, "Tell the gentlemen from Massachusetts and from California what you actually said."

He said, "I said, 'Let the thieving Yankees freeze and starve in the dark.'"

Sometimes we do not exactly quote people correctly. I do not have that feeling about the thieving Yankees, but I do have a feeling that we have got to do something about California.

We are late doing something about California. I wish I had time to ask about the order that you all entered last Friday night, and I would like to ask Mrs. Breathitt about her position on it. I did not read where you had expressed anything, but you did vote. I think Mr. Massey voted no.

Mr. BARTON. The gentleman's time has expired.

Mr. HALL. If we have time, we will get back to him.

Mr. BARTON. Your opening statement time has expired about 2 minutes ago.

Mr. MARKEY. Can I say, Mr. Chairman?

Mr. HALL. I will yield a minute to Mr. Markey.

Mr. MARKEY. I do not even need a minute.

I just want to say that we agree with you up in Boston about the thieving Yankees.

We have the exact same view that you have.

Mr. HALL. That is a New York Yankee.

Mr. BARTON. All right. The gentleman from Illinois, distinguished Mr. Shimkus, Congressman Shimkus, is recognized for an opening statement.

Mr. SHIMKUS. Thank you, Mr. Chairman.

I say God bless Ralph Hall. I appreciate his strong commitments, and actually I think my friend Steve Largent went through the good aspects of the bill.

I have learned a couple of things through this process, a few lessons, and we may have problems in other parts of the country. So these are lessons learned through those other parts in the country.

Lesson one, you know, if you want to use electricity, you have to produce it. So if there is any of you who want to use electricity, you ought to produce electricity, and that is part of the California ISO report that we all have at our desk, which says page 5, "no new major generation has been built within the State of California during the last decade."

California, if you want to use electricity, you have to produce it.

Lesson two, if a State wants to deregulate their market, they should be a net exporter, not a net importer. California ISO report, page 6, the California ISO control area is a new importer in most areas. California's current energy crisis is partly a function of declining imports. California is a new importer.

The last lesson is, you know, if we want to use electricity, we ought to be able to get the power from Point A to Point B, which means increasing the grid.

Those of us who have been talking on this energy deregulation debate, for me it has been 5 years. The grid has to be expanded. The provisions in this bill that would try to use Federal land to expand the grid are important provisions that will be very, very helpful not just for California, but for the whole energy debate across this nation.

I am pleased with the attempt that the chairman has made to move on some legislation that can help mitigate the severe crisis we are going to see in California this summer. And if we can mitigate it at all through some of the provisions in the legislation, then we ought to try to do it, and we ought not try and us this for political benefit. We ought to try to do what we can this summer to ease the burden that is going to be on the average citizen.

I think this is well intentioned. I think we have worked hard and attempted in a bipartisan manner to get to places where we can agree, and obviously we are hearing a lot today of where we disagree.

Mr. Chairman, I hope you continue to want to push forward with the legislation, and I am in full support of it, and I yield back my time.

Mr. WHITFIELD [presiding]. Thank you very much.

The next opening statement will be Mr. Sawyer of Ohio.

Mr. SAWYER. Thank you, Mr. Chairman.

We are all aware of the seriousness of the situation in California. The lesson is clear we cannot take power for granted, and it is clear that the urgency of the situation is undeniable.

But it is also clear that the solution must reflect the complexity of the situation, as well as its urgency. We have got to weigh which combinations of policies will form the most appropriate response and which governmental bodies are best suited to finding that response. Any solution to California's problems will have broad implications for all of the rest of us, maybe not next week, and perhaps

not even next summer, but in the words of Humphrey Bogart, "Soon."

I am encouraged that the bill before us today recognizes the need to expand transmission networks. The problems in California and elsewhere are not simply about inadequate supply, although it is about that, or the rising prices of fuels and availability of fuels, although it is about that.

But the inability of our current transmission system to handle the distribution of electricity especially during periods of peak demand is critical to any combination of solutions. The effort to relieve that congestion is a vital first step, but we cannot let our efforts rest after that step.

Currently California finds itself caught between the old model of regulation and the promise of competitive and well governed electrical markets. We need to provide for the expansion of transmission networks so that not only Californians, but all Americans can feel confident about the future of their electrical service.

Combined with other measures, expansion of transmission can help to establish truly competitive electrical market. Only then can the American people enjoy the benefits of electric deregulation.

RTOs are part of that solution, and they have already demonstrated their ability to act as wholesale clearing houses to provide innovative demand management programs, but as the gentleman from Virginia observed, it is not a sufficient solution.

I support the instruction in this bill that Secretary of Energy, who I wish were here, and the FERC undertake a study on transmission constraints. The study is needed, but they should also use the study as an opportunity to address ways to improve the process of siting new electrical lines and sources of generation.

We have a responsibility to find a new way to resolve siting issues in an equitable and efficacious manner. Siting by a short-term legislative fiat is just not sufficient.

I would further recommend that the Secretary and the Commission invite the commentary of the States and the public as they research their report and draft their plan to relieve constraints.

Just as California made the mistake of taking only half measures while moving from regulation to deregulation, we should not make the analogous mistake of taking half measures in our response to the problems of California and the other Western States.

A recent survey of California residents found that only 2 percent of respondents are purchasing energy efficient products as a result of the crisis. Other measures of conservation efforts are just as troubling. If we're facing an electrical emergency, then we should have a conservation campaign that reflects that emergency, not one focused only on consumer behavior during periods of peak demand.

At the same time, we should be careful that we not allow California's electricity problems to be used as an excuse to waive important clean air and hydroelectric regulations. Unless the citizens of California express their concern and demonstrate the fact that clean air and hydroelectric regulations are a sufficient impediment to new generation, we should not set up broad waivers, some of which are not even subject to judicial review.

The crisis in California is most obviously a problem of today, but a lasting solution to the problems of California and elsewhere in

this country will take a comprehensive effort. This emergency bill is not that effort, and we should not squander the opportunity to craft an effective response to this country's energy problems.

I look forward to the work across the aisle to make sure that this response does do exactly that.

I yield back the balance of my time.

Mr. SHIMKUS [presiding]. I appreciate the comments from the gentleman from Ohio.

Next we will turn to the gentleman from Oregon. Mr. Walden is recognized.

Mr. WALDEN. Thank you very much, Mr. Chairman.

I would like to follow up on the comments from my colleague from Ohio because I appreciated the tenor and tone with which you approach this issue. It is refreshing because I think when the lights go out, they do not discriminate between whether your house is held by a Republican or a Democrat or an independent.

We have got an enormous issue in the West and in the Northwest. I am going to be interested today to learn more about how FERC's recent decision on wholesale price caps will affect the Pacific Northwest versus how it may affect California, and if you squeeze the energy bubble at one side, does it come out on the other? And so I will be interested in that.

And I sit here today a bit troubled because I have sat through most of these hearings, and we have heard that NO_X limits are not a problem in California. We have had a representative of the California Public Utility Commission say that he believed there was no correlation between price and conservation.

And we have heard from the California Energy Commission, a representative who repeatedly both to me and to Congresswoman Bono said that California had adequate supplies to meet demand this summer. I asked that repeatedly, and repeatedly the response was the same. California would have adequate supplies to meet demand this summer.

Ladies and gentlemen, does anybody here buy that?

I do not, and I do not see why they should, but that is what we heard.

So today we have a bill before us. Some of the provisions I like. Some I have some concerns about, but basically what I have heard from the other side of the aisle is a call for wholesale price caps and that is it. No proposals to add kilowatts this summer. Criticism of the administration, but no alternative to actually add supply this summer.

This weekend I was out in my district, as I am nearly every weekend. I looked into the faces of steelworkers whose aluminum plant is shut down, 1,285 people, a combined area of about 20,000. If that mill does not come back, we could have an unemployment rate of upwards of 38 percent in the neighboring county, 38 percent.

This community went through this same happening in about 1980 when the plant shut down. The value of people's homes in that town dropped in half. They only recently have recovered.

We are talking an economic crisis of enormous proportion in the Pacific Northwest. I want to do what I can in a bipartisan spirit to break the logjam, to get more megawatts into production, to

solve the reliability and capacity problem of our transmission grid throughout the West and throughout the United States.

That is what we have got to get to. My friend from California, Mr. Cox, was right. America should not have to suffer this problem in the 21st Century.

So, Mr. Chairman, I look forward to working with you and my colleagues on the other side of the aisle who truly want to sit down and find a solution. It is not to Oregon's benefit, or to Washington's, to have California suffer like this. We are all paying the price.

Mr. BARTON. I thank the gentleman from Oregon.

We now go to the gentle lady from Missouri, Congresswoman McCarthy, for an opening statement.

Ms. MCCARTHY. I thank you, Mr. Chairman, for this hearing and the hearings to come, and I appreciate the opportunity to hear from the witnesses who are experiencing the crisis or trying to manage it first hand and encourage them to comment on how this draft legislation will be helpful to them.

Mr. Chairman, if there are concrete steps the Federal Government can take to alleviate the problems in California, Oregon, and other Western States, or at least make it easier for the authorities involved in managing the problems to address them, then we should propose those actions with all deliberate speed.

I remain concerned that this subcommittee may be considering steps based upon the draft bill that will not help the immediate crisis that the Western States will face this summer and may very well have unintended consequences that further complicate the situation and do harm.

Given the attention that this subcommittee has had to the restructuring debate, I am concerned that the inclusion of certain provisions may create loopholes in the Federal Power Act that provide golden opportunities for ambitious suppliers. Based upon Vice President Chaney's comments yesterday, my concerns on how we find our way out of this supply crisis have grown really into strong fears.

Mr. Chairman, we have heard testimony in the subcommittee that casts strong doubt on any of the assertions that environmental regulations had anything to do with the current energy supply crisis in California and neighboring States. Given the amount of time that it takes to build a new generation facility, there is no chance that any of the regulatory relief provided in this bill will help speed the construction of any facility enough to have it provide power this year.

If there are permit and review processes that can be expedited to help site new generation needed in Western markets, that is one thing, and as I understand, there is sufficient flexibility to do so under current law.

Suspension of clean air requirements is quite another, and entirely unacceptable even in the short term. While I appreciate the inclusion of conservation education in the draft, that is not enough. As a part of any effort to address the short and long term energy needs of this country, there must be a solid commitment to conservation and the development of alternative resources.

Conservation and efficiency is one of the best ways to address short-term supply needs, and both have a role in our long-term energy policy.

We also need a diversified mix of fuel sources, and the goal should be to make them all as clean as possible. For instance, co-firing coal in many existing and idle plants with a mix of readily available biomass creates a cleaner burn, diversifies our energy supply, and helps the rural economy as well.

There should be strong conservation requirements that should be met before any Governor with an energy emergency is granted broad latitudes to temporarily suspend air regulations, if ever.

I want to help the consumers in Western States avoid additional financial hardship and blackouts. The esteemed FERC Commissioners we have before us today and others who will come before us this week have the tools they need to handle the situation and make the proper decisions to address runaway wholesale prices in order to get the Western markets back in shape and enable other regions to avoid a situation like this in the future.

So I look forward to their testimony today and explanation of how we can all work together to help consumers, and I thank you, again, Mr. Chairman, for holding these hearings.

Mr. BARTON. We thank you.

The gentleman from Arizona, Congressman Shadegg, is recognized for an opening statement.

Mr. SHADEGG. Thank you, Mr. Chairman.

I want to begin by commending you and by noting that as we listen to the opening statements here this morning, it seems to me that your task here is much akin to the description of no need deed goes unpunished.

It seems to me that you have made a valiant effort to address a very serious problem, and while the seriousness of the problem has been acknowledged by many here on the dias today and most offer criticism, few offer constructive suggestions.

The Electricity Emergency Relief Act which you are proposing today and on which this hearing is being held, I think, is a creative and energetic effort to address a very, very serious problem confronting not only California, but the entire Western United States.

I hear the criticism, but I do not, and I associate myself with the comments of Mr. Walen, I do not hear any alternatives that are being proposed.

It seems to me that if you look at the criticism that's being made and then stack it up against the legislation that's being offered, many of the provisions of the legislation will go a long way toward addressing the problem even this summer.

Let me just highlight Section 101, the first section of the bill. That is a section of the bill which will not in any way result in any increased pollution. It will not result in the elimination of any regulation. It simply is a good idea to try to facilitate both conservation and competition in a way that will increase the supply of energy available to the consumers in California this summer and deal with the shortage.

I listen to the critics on the other side of the aisle, and I can't help but be frustrated in hearing that comments over and over again, and the acknowledgement that this, in fact, is a supply cri-

sis. There is not enough supply, and yet no one wants to do anything about how to deal with that lack of supply. All we have a chance to do is to criticize the attempts in this legislation to deal with that shortage of supply.

Of course, there are long-term solutions that need to be enacted, but I commend you, Mr. Chairman, on putting forward a thoughtful piece of legislation.

With regard to the criticism of the environmental implications of this act and the ideas that are set forth in some of the other titles that are not the subject of today's hearing, though they are being criticized at this hearing, I would point out that not a single one of them is being mandated upon the States. There is not a single waiver of an environmental provision that is forced upon a State under this legislation. It is all left to the voluntary decision of local officials, specifically the Governor of a state, to make the decision.

It seems to me imminently reasonable for the Federal Government to look at those kinds of regulations and say to the people most affected by this kind of crisis: do you want to be able to make a choice that would enable you to temporarily suspend a particular regulation in order to add to the supply of available electric power at a given crisis point in time, that is, at the heat of the day in the hottest month this summer when there is a desperate need for electricity.

I would also like to associate myself with the comments of Mr. Cox. This is not a casual matter. We are talking about life and death with regard to life support systems of people in California. We are talking about economic life and death both, for example, for the companies that he mentioned, where an unanticipated outage, blackout can cost thousands, indeed hundreds of thousands, indeed millions of dollars when a chip line is brought down or when, as he indicated a heart relief valve is brought down or, as Mr. Walden indicated is being suffered by his constituents in the Northwest, in Oregon, who are not even subject to the lack of foresight by the State of California in now allowing power plants to be built.

I have been a part of this process since the beginning. I was there in Pasadena, California, Mr. Chairman, when you aggressively took a look at this issue and when we heard from the incumbent utilities. We heard from the merchant providers to that state, and we heard from the State regulators, and I think this legislation is a very thoughtful attempt to address those issues and to put very, very many options.

It clearly takes into account the various suggestions that were put before your committee, including the proposal that I've already referred to, which simply allows utilities in one part of the West to go into a market and buy a reduction in power from another state.

That was an issue that was brought to my attention, and I brought it to the committee. For example, right now a utility in the State of Arizona that wants to buy back power from someone that has a contractual right to that power can only do that within its incumbent load. That means that a utility in the State of Oregon cannot currently go to the State of Arizona, find a consumer in the State of Arizona that has a right to consume electricity, and buy

that right back from them so that they would be able to use that electricity and supply power to other consumers.

Section 101 of your bill provides that ability on an area-wide basis, and will help not only the people of California, but the people of the entire West.

I commend you for your effort, Mr. Chairman, yield back the balance of my time.

Mr. BARTON. We gave you a little extra time because you were not singing. So we appreciate that.

Mr. SHADEGG. You should be glad I was not singing, Mr. Chairman.

Mr. BARTON. Mr. Strickland was here. He is not here. There are no other members of the subcommittee here. We will go to the gentle lady from California, Congress woman Eshoo, who is a member of the full committee, for an opening statement.

Ms. ESHOO. Thank you, Mr. Chairman, and for your legislative courtesy to have me participate in today's hearing.

I want to thank you for making the Western energy crisis a priority item for consideration in this subcommittee. I think that more than any other non-Californian on your side of the aisle you have gone out of your way to try to respond to the crisis in the West.

Having said this, however, I think the bill before us unfortunately is not what most Californians and Westerners had hoped to see. At its best, I believe the bill will do nothing to resolve the crisis. At its worst, the bill tells Western States the only answer to our short-term energy woes is sacrificing the environment, and I do not believe that this is either appropriate, nor is it necessary in terms of an answer to our problems.

As members of this subcommittee know, a big reason that we are here today is because of badly crafted deregulation legislation adopted by the State of California. The legislature, the Governor, the lobbyists, the utility companies, all together badly failed the people of California.

Every assumption in that legislation was turned on its head, and we are here today looking for an answer at the Federal level in how we can help not only California, but the Pacific Northwest.

But adopting hastily crafted legislation before the subcommittee today would simply repeat this error on a national stage. California State officials reviewing this bill continue to find more flaws daily.

On April 30, the L.A. Times reported that this legislation will dismantle the state's attempts to secure long-term contracts with qualifying facilities because it would release them from any contract from which payments are still outstanding.

To the extent that this bill applies to other States, I imagine that there will be other concerns. I am also concerned that we have not heard enough from Federal agencies about this bill. I am concerned because witnesses from a number of Federal agencies, particularly the Department of Energy were either not invited by the majority or chose to decline the subcommittee's request.

And regrettably, I think the administration has dealt at best with this crisis at arm's length.

California, Oregonians and Washingtonians have been asking for Federal relief from excessive wholesale electricity prices since this Congress came to town. These people are our constituents. They

are not just Democrats; they are not just Republicans. They are not just those that voted for President Bush or those that voted against him. They are people who recognize that they cannot afford to pay electricity rates that, in the case of California, will grow from $7 billion—that is with a B—in 1999 to $27 billion in the year 2000 to $70 billion this year.

Other States have recognized the price problem and have suggested cost of service rates. Before the Bush administration took a different view, the Governors of Arizona, Montana, Nevada, Utah and Wyoming, all Republican Governors, supported cost of service rates.

In a January 12 letter of this year to Governor Davis, they wrote, "Our immediate solution to protect consumers from skyrocketing prices may be for the Federal Energy Regulatory Commission to implement a temporary cost plus pricing requirement. Among other actions, this approach would provide the benefits of constraining prices without forcing generation to shut down."

Other members, I think, have come to the conclusion that we not only need conservation. We need generation, and we need to address that, but we also need to ask the appropriate question of the commissioners that are before us as to why they have not implemented the power that has been granted to them through the Federal Power Act.

The bill waives several key environmental laws. I do not even believe that there is the power to waive the Clean Air Act, the waiver relative to the Bonneville Power Administration and the Bureau of Reclamation to waive any Federal law that might impede the production of energy at a plant under their authority during a power emergency.

Mr. BARTON. If the gentle lady could wrap up.

Ms. ESHOO. I will.

Mr. BARTON. She is almost 2 minutes over the 3 minutes.

Ms. ESHOO. The bill suspends, I believe, the Endangered Species act, the suspension of OSHA and the Fair Labor Standards act, and it would allow the BPA and the Bureau to keep workers on the job longer and under circumstances that could place their health at risk.

So, Mr. Chairman, while this bill may be the only train leaving the station, I think it is critical that we add another car to it, a provision for cost of service based rates which will get consumers the price protection they need.

I think we have a ways to go on this, but there is growing consensus around this, and I hope that if, in fact, you decide to mark up this legislation, that you will meet with us that are on the full committee, not members of the subcommittee, to further pursue this option.

There are those that say, and this is the last sentence, there are those that say allow the markets to work; allow the markets to reign. The fact of the matter is, we do not have a market in California. If we did, competition would be underscoring everything.

And so I thank you, again, for the courtesies that you have extended to me, and I am glad the Commissioners are here for us to question them today.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Anna G. Eshoo follows:]

PREPARED STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

First, Mr. Chairman, I want to thank you for making the western energy crisis a priority item for consideration in this Subcommittee. More than any other non-Californian on your side of the aisle, you've gone out of your way to respond to the crisis in the West.

Having said this, the bill before us, unfortunately, is not what most Californians and westerners had hoped to see.

At its best, the bill will do nothing to resolve the crisis. At its worst, the bill tells western states that the only answer to their short-term energy woes is sacrificing the environment. I don't believe this is an appropriate or necessary answer to our problems.

As members of this Subcommittee know, a big reason that we're here today is because of badly crafted deregulation legislation adopted by the State of California. Adopting the hastily crafted legislation before the Subcommittee today would repeat this error on the national stage.

The more that California officials review this bill the more flaws they find. On April 28, 2001, the Los Angeles Times reported that this legislation could jeopardize the state's attempts to stabilize prices because it would release Qualifying Facilities (QFs) from any contract for which payments are still outstanding and allow them to sell on the open market at substantially higher market prices. To the extent that this bill applies to other states, I imagine that there will be other concerns.

I'm also concerned that we have not heard enough from federal agencies about this bill. A number of federal agencies, particularly the Department of Energy, were either not invited by the majority or chose to decline the Subcommittee's request to testify.

And regrettably, the Administration has dealt with this crisis at arms-length.

I particularly want to point out a letter that Secretary of Energy Abraham sent to members of Congress on April 10, 2001, detailing the Administration's work on the western energy crisis. Of the eleven action items listed in the letter, six were responses to direct requests made by Governor Davis or the State of California, two items were undertaken by the independent FERC, and three were simple conversations that the Secretary had about the energy crisis. This is not the kind of response western consumers were counting on.

Yesterday, I joined more than 30 members of Congress from California, Oregon, and Washington, in responding to the Secretary's letter. We reiterated our support for cost-of-service based rates in the western region. These rates would reflect the cost of generating power, plus a reasonable rate of return. They would apply for no more than the next two years and would exempt new plants from this pricing regimen. I ask for unanimous consent for both letters to be included in the record.

Californians, Oregonians, and Washingtonians have been asking for federal relief from excessive wholesale electricity since the 107th Congress came to town. These are our constituents. They are not just the Democrats or those who voted against President Bush in the last election. These are people who recognize that they cannot afford to pay electricity rates that, in the case of California, will grow from $7 billion in 1999 to $27 billion in 2000 to $70 billion in 2001. Other states have recognized the price problem and have suggested cost-of-service based rates as a solution. Before the Bush Administration took a different view, the governors of Arizona, Montana, Nevada, Utah, and Wyoming—all Republicans—supported cost-of-service based rates. In a January 12, 2001 letter to Governor Davis, they wrote:

> "One immediate solution to protect consumers from skyrocketing prices may be for the Federal Energy Regulatory Commission to implement a temporary cost plus pricing requirement. Among other actions, this approach would provide the benefits of constraining prices without forcing generation to shut down..."

This should not be a partisan debate. Our colleagues, Duncan Hunter, Randy "Duke" Cunningham, and Darrell Issa have joined in supporting bipartisan legislation designed to lead to the imposition of cost-of-service rates.

Regrettably, the Administration has clung to an erroneous belief that the western energy market is a free, competitive market. FERC has followed suit with orders that make a passing reference to its responsibility to ensure just and reasonable rates without taking any meaningful action. Similarly, this bill ignores the overwhelming wish of consumers and uses the current crisis to advance environmental rollbacks that no one in California has requested.

For example, the bill grants waiver authority of air quality standards to governors who declare an energy state-of-emergency. In spite of the energy emergency in Cali-

fornia, the Governor, the California Air Resources Board, and the EPA have never found air quality standards to be an impediment to the generation of electricity.

On the subject of Clean Air Act waivers, the State of California's request to waive the Clean Air Act's oxygenate requirements has been pending at EPA since 1999. Even if waiver authority were justified in energy emergencies, I have no great faith that EPA would act properly.

The bill allows the Bonneville Power Administration and the Bureau of Reclamation to waive any federal law that might impede the production of energy at a plant under their authority during a power emergency. This provision not only waives key environmental legislation, such as the Endangered Species Act; it would allow the suspension of the Occupational Safety and Health Act and the Fair Labor Standards Act, allowing BPA and the Bureau to keep workers on the job longer and under circumstances that could put their health at risk. There would be no legal recourse to dispute these decisions.

Instead of these measures, we need proper enforcement of the laws that are already on the books. Specifically, we need FERC to set "just and reasonable" rates to protect consumers in the West.

I'm pleased that all of the Commissioners have made themselves available for this hearing on such short notice. I look forward to their testimony and to hearing an explanation of their most recent order.

While this bill may be the only—train leaving the station—I believe it's critical that we add another car to it—a provision for cost-of-service based rates, which will get consumers the price-protection they need.

THE SECRETARY OF ENERGY
WASHINGTON, DC 20585
April 10, 2001

The Honorable ANNA G. ESHOO
U.S. House of Representatives
Washington, DC 20515-0514

DEAR REPRESENTATIVE ESHOO: In response to a number of inquiries from Members of Congress, and in light of recent discussions of possible legislation addressing energy issues in the West, and particularly California, I thought it would be helpful to provide you with an update on the crisis.

First, it is important to note that this crisis is a supply crisis. Simply put, the principal problem—and thus the proper focus of our attention—should be on the problems of the blackouts and shortages. Proposed solutions that do not either lead to increased supply or reduced demand will not address the core problems confronted in the West.

Thus, the Administration has taken a number of actions to support California in its efforts to address critical supply issues.

- One day after being sworn into office, the President directed me to call Governor Davis to discuss the crisis and ask how we could help address the power shortages.
- Three days after taking office, at Governor Davis' request, we extended the emergency electricity and gas orders to give California time to develop legislation aimed at maintaining electricity supplies.
- In February, also at the request of Governor Davis, President Bush issued an executive order directing Federal agencies to expedite permits relating to construction of new power plants in California. The U.S. Environmental Protection Agency has issued air permits for three power plants in the past month.
- President Bush and I have engaged in discussions with the Government of Mexico about increasing electricity imports from Mexico. DOE is also working expeditiously to approve two cross-border electricity expansions between California and Mexico that should be approved later this year.
- In early March, at the behest of Governor Davis, I sent a letter to the Federal Energy Regulatory Commission (FERC) asking that the agency act on his request for an extension of the waiver for qualifying facilities from certain fuel requirements.
- In response to a request from the State of California, the U.S. Environmental Protection Agency has provided other assistance, clarifying rules relating to operation of backup generators.
- While the imbalance between supply and demand is the reason for high energy costs and power shortages, the Bush Administration was the first to take action on overcharges. FERC took unprecedented action and ordered the first-ever re-

funds to address overcharges by generators on market-based rates after we took office and after a Republican took over as Chairman.

- On March 14, FERC issued a series of orders designed to expedite energy supplies to California, including streamlining regulatory procedures for wholesale power sales, expediting natural gas pipelines, and urging hydropower licensees to assess the potential for increased hydropower generation.
- As follow up to a meeting with Governor Davis, I issued a letter indicating that the Administration did not oppose the State's proposed purchase of the California utility transmission systems, conditioned on the adherence to open access requirements.
- Just two weeks ago, I met with a group of California energy suppliers to impress upon them that the next several months should not be viewed as "business as usual," and to ask for their help to avoid foreseeable disruptions in supply.
- Last week, I met with a group of electricity experts to discuss the California electricity crisis and to explore actions that could be taken by the Federal Government and State to increase supply or reduce demand.

As you can see, the Administration has taken constructive action from its first day to help California deal with its electricity crisis. Governor Davis has expressed his appreciation to both the President and me for this help.

Regrettably, our well-founded opposition to price caps has been claimed by some to suggest the Administration either does not care about California and the West or is doing nothing to address the problem. Certainly, the actions described in this letter show this is simply untrue.

The only thing we have opposed has been the imposition of price controls because they would not prevent blackouts and would drive away the new supply California and the West so badly need. The Administration is not alone in its opposition to price caps. In February, eight of the eleven Western Governors sent me a letter expressing their opposition to price caps. Those eight governors reiterated their opposition in an April 6 letter to FERC Chairman Curt Hebert, calling them "penny wise and pound foolish."

By contrast, advocates of price controls have failed to indicate how price caps would increase supply, decrease demand or prevent blackouts this year.

I appreciate the opportunity to brief you on the numerous actions the Administration has taken since our first day to support California. Please be assured that we will continue to look for constructive ways to remove obstacles to new electricity supply in California and the West.

Sincerely,

SPENCER ABRAHAM

CONGRESS OF THE UNITED STATES
WASHINGTON, DC
April 30, 2001

The Honorable SPENCER ABRAHAM, *Secretary*
U.S. Department of Energy
Forrestal Building
1000 Independence Avenue, SW
Washington, D.C. 20585-1000

DEAR SECRETARY ABRAHAM,

We write regarding your April 10, 2001 letter to members of Congress about the western energy crisis.

We appreciate receiving a report of the steps you have taken to respond to the specific requests of the governor of California and others. However, we are in a crisis that requires proactive federal action that goes beyond conversations and phone calling. Your letter also indicates a misunderstanding of the wholesale price mitigation measures that we have called for. In addition, the price mitigation measures adopted by the Federal Energy Regulatory Commission (FERC) on April 26, 2001 were wholly inadequate and arbitrary. Thus, we will again describe our position. First, however, it's important to review the condition of the western energy market.

The West is experiencing an electricity crisis that threatens to come to a head this summer with very dangerous consequences. Many factors have contributed to this crisis, including a flawed deregulation plan, a severe drought in the Northwest, high natural gas prices, poor regional and national forecasting of energy demand, inadequate industry investment in new generation and transmission, and rapid growth in the regional population and economy. Consumers have played no conscious role in creating this crisis, and environmental regulations have not limited the avail-

ability of energy. Indeed, Environmental Protection Agency Administrator Christie Whitman went so far as to say:

> "I asked our people to go back and to give me the environmental clean air regulations... that were hampering the ability of the utilities in California to provide power and we couldn't find any [the television program *Crossfire,* February 26, 2001]."

Clearly, the record shows no reason to sacrifice consumer and environmental protections as we craft a remedy to the crisis.

Because of the factors we have cited, power supplies will not meet demand this summer. California alone is expected to have a daily shortfall of 5,000 megawatts, which could lead to 34 days of rolling blackouts, according to the California Independent System Operator (Cal-ISO). With supply so tight, there is no competition among generators to provide electricity at the lowest price possible; instead, there is a strong incentive to gouge.

It is generally accepted that the region cannot build enough new generation to meet demand for this summer (and probably the next)—no matter how quickly FERC, the Department of Energy, the Environmental Protection Agency, and state agencies review matters related to the development and siting of new power plants and transmission lines. In addition, the other Administration actions that you mentioned in your letter will have a negligible effect on supply in the short-term. Consequently, the western energy market will continue to be out of balance, and consumers will be at the mercy of generators who have virtually no restraint on the rates they charge.

In speaking about Administration initiatives to increase short-term energy supply in the West this summer, FERC Commissioner William Massey testified before the House Energy and Air Quality Subcommittee on March 20, 2001:

> "These quick fix measures, though well motivated, will not close the gap between supply and demand substantially in the short term... In these circumstances, what will restrain prices? Absolutely nothing."

At least twice, FERC has found that the western electricity market is dysfunctional and that prices are "unjust and unreasonable" under the Federal Power Act. Under the law, the Commission is supposed to take steps to bring these unreasonable rates into line. Yet, the Commission has refused to undertake any meaningful action. Meanwhile, rates continue to rise. On April 15, 2001, economist Paul Krugman wrote in the *New York Times*, "contracts for August 2001 power are currently running as high as $750 per megawatt-hour."

In spite of overwhelming evidence, FERC Chairman Curtis Hebert has repeatedly stated that consumers should be left to bear whatever costs the market charges; however, left alone in this dysfunctional market, consumers will face unreasonably high utility bills. The Commission's attempts at price mitigation may temporarily protect the reputations of some Commissioners, but they will do little to protect California's consumers and nothing to aid consumers in the Northwest and other western states.

The risk of exorbitant prices goes beyond residential consumers. More and more businesses, including major utilities, could be driven into bankruptcy, and the nation's economic driving wheel in the West could grind to a stop.

Mr. Secretary, you recognized the inadequacy of FERC's response under the Clinton Administration when you wrote the following:

> "California was in an energy meltdown. Yet no action had been taken by the Clinton-appointed Federal Energy Regulatory Commission (FERC) to force refunds of excessive charges for wholesale electricity... [*Washington Post,* April 16, 2001]."

We wonder what has changed since then. Although the Commission issued orders (which might or might not lead to refunds) regarding possible generator overcharges, it also publicly declared that wholesale rates as high as $430 per megawatt were reasonable. These FERC-approved rates are ten times greater than the average wholesale rate of one year earlier. In a dissent to a March 9, 2001 order, Commissioner Massey called FERC's perfunctory actions, "arbitrary, capricious and an abuse of discretion." He later added, "Our refund orders have been paltry and, in my opinion, arbitrary [FERC public meeting April 25, 2001]."

Based on current conditions and predictions for this summer, the Commission's April 26, 2001 price mitigation order could only be called reckless. California is paying exorbitant rates for electricity every minute of every day (at an average daily rate of $73 million in April). Yet FERC only will apply price mitigation measures during the limited time-periods when the Cal-ISO declares a Stage 1, 2, or 3 alert. According to the ISO's analysis of bidding behavior from May to November of 2000, applying price mitigation measures only in a stage alert would have missed 93% of the hours when market power drove up prices. Moreover, the cost-of-service based

rates in this order would be pegged to the operating costs of the most inefficient plant in the state (the use of similar standards led the Commission to make its March determination that $430 per megawatt was a justifiable price). Although it did initiate a much-needed investigation of the western energy market, the Commission did not make even minimal price mitigation measures offered to California available to other western states.

Inexplicably, the relief in the April 26th order—no matter how inadequate—is conditioned on the Cal-ISO and California utilities submitting a Regional Transmission Organization filing to FERC by June 1, 2001. If this filing is at all tardy, the entire order—even those provisions dealing with other states—will be voided. California's efforts are now appropriately devoted to planning for energy shortages that are expected in the coming months. FERC has unexpectedly created a capricious short-term deadline for the state. Due to this misguided action, California must forego critical efforts to plan for this summer or risk the region's only avenue of protection from skyrocketing prices.

We believe that the Commission has been fundamentally wrong in its judgments and in its dogmatic opposition to meaningful temporary price mitigation for the West. By publicly opposing price mitigation, the Administration has been complicit in sanctioning exorbitant rates, which could lead to corresponding increases in the retail price of electricity and an economic slowdown in the region.

For these reasons, we support the imposition of real cost-of-service based rates in the West either through administrative action or through legislation. These are not arbitrary price caps, as you describe them in your letter. The rates would be calculated individually for each plant in the West—reflecting the real costs of generating power—plus a return on invested capital and a reasonable profit. The promotion of new generation is vital to the region, so we propose exempting new plants from this pricing regimen. Moreover, cost-of-service based rates would be imposed for no more than two years—long enough for new generation already in development to come on-line and help reestablish a competitive marketplace.

A regional cost-of-service based approach has significant support. Commissioner Massey, over forty Members of Congress, and the governors of California, Oregon, and Washington have all backed regional cost-of-service based rates. In fact, before this Administration took a contrary position, the governors of Arizona, Montana, Nevada, Utah, and Wyoming also supported cost-of-service rates. In a January 12, 2001 letter to Governor Davis, they wrote:

> "One immediate solution to protect consumers from skyrocketing prices may be for the Federal Energy Regulatory Commission to implement a temporary cost plus pricing requirement. Among other actions, this approach would provide the benefits of constraining prices without forcing generation to shut down..."

Mr. Secretary, we strongly urge you to call on FERC to uphold the law and restore just and reasonable rates in the West by adopting meaningful cost-of-service based rates. Otherwise, you risk the well-being of residential and business consumers, who may be the only ones without blame in crisis. They should not be sacrificed for the sake of a fallacious "competitive market."

Although the Administration has made limited efforts to resolve the energy crisis, it only seems committed to a supply-side energy policy. As we all know, our supply needs are dictated by demand. Reductions in demand will be the only the way to avoid electricity disruptions in the West this summer. In fact, most industry observers and western governors agree that conservation and efficiency are indispensable tools in meeting western energy needs. With that in mind, we were deeply disappointed by your failure to make energy conservation, along with research and development of renewable energy sources, a priority in the Department of Energy's budget. A 27% ($277 million) cut in funding for energy efficiency and renewable energy R&D programs (apart from grants to low-income households for home weatherization) is certainly not the answer to our energy problems.

Given your concerns about the nation's long-term energy needs, we were also baffled by the Administration's decision to weaken the efficiency standards for air conditioners and heat pumps. This regulation would have made a major difference in energy use in the West in years to come. It was even supported by Goodman Manufacturing Co., one of the nation's major manufacturers of air conditioners.

We welcome the opportunity to meet with you to discuss these issues in greater detail. Indeed, many of us have requested to meet with you and other members of the President's energy task force. Although most of us have not had that opportunity yet, we certainly hope that we will be consulted before the task force's recommendations are finalized.

We look forward to your prompt reply.

Sincerely,

ANNA G. ESHOO, *et al.*

Mr. BARTON. We thank the gentlelady from California.

We would now like to hear from another gentlelady from California, a member of the full committee, Congresswoman Harman, for an opening statement.

Ms. HARMAN. Thank you, M. Chairman, and thank you for accommodating, again, my attendance at one of your subcommittee hearings, in this case a hearing on a bill that you have authored to try to bring to help to California.

Mr. Chairman, today is May 1, the start of the 2-month period during which California Governor Gray Davis has predicted my State could face serious rolling blackouts. The problem is that summer is almost here, and that there is no new power on line.

He predicts, and I would agree, that relief is expected later in this year, but not now.

Regrettably, the bill before us in the subcommittee does not hurry relief. It has no bipartisan support, at least none expressed so far, and it has no administration support, at least none expressed so far, and it has, the best I can tell, no serious prospects of passing in the Senate, should the House passing in the near term.

As Mr. Waxman's memo explains, there are several provisions in this bill that would be harmful to California. Title II, Section 205 undermines California's effort to enter into long-term contracts for energy.

Title III, Section 303 permits NO_X waivers and undermines the Clean Air Act.

And there are several big issues not addressed at all in the bill: cost base rates for wholesale electricity; incentives for energy efficiency; and support for renewable sources of energy, including fuel cells, wind, and solar.

I would like to commend California's Governor Gray Davis for providing incentives for conservation, for expediting the siting of new power. None has been sited in all of the Western States in the last decade. So it is really unfair just to claim that California has not done this, and for entering into long-term contracts for energy.

Mr. WALDEN. Will the gentlewoman yield?

Mr. BARTON. Let her finish her opening statement.

Ms. HARMAN. I would be happy to yield. I am going to finish in 2 seconds, and I would be happy to yield if I have anymore time, happy to yield.

I would hope, Mr. Chairman, to support a revised bill that author. I enjoy working with you, and we often agree, and I hope that that bill will truly help California, all the States in the country, and be bipartisan.

I would happily yield to my friend.

Mr. BARTON. I would ask that we allow members to do their opening statements. We can engage in a debate later on if that is——

Mr. WALDEN. But there was a factual issue, Mr. Chairman.

Mr. BARTON. Well, members make statements. So let's recuse ourselves from observations about factual observations until the appropriate time. We are operating in good faith on both sides of the aisle here.

The gentlelady is finished with her opening statement?

Ms. HARMAN. I am, Mr. Chairman.

[The prepared statement of Hon. Jane Harman follows:]

PREPARED STATEMENT OF HON. JANE HARMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr.Chairman and Ranking Member Boucher, thank you for holding this timely legislative hearing to address the serious issue of the energy crisis in the west. The intent of the Electricity Emergency Relief Act to address the crisis is good. However, I do have serious concerns regarding process and the substance of this bill.

My colleagues and I on this side of the aisle have not played an active role in drafting this legislation. The state of California and the other western states were not consulted regarding the drafting of this bill. There has been a problem with getting facts about the bill and witnesses who should be testifying regarding the provisions of this bill are not. Finally, the substance of the bill itself is troubling. I must question whether or not it will truly provide the emergency relief proposed by its title or whether it will create more problems.

This bill does not protect consumers in California from high energy prices. The most important federal action for California and the western states is the immediate adoption of cost-of-service based wholesale rates like the approach proposed by Representative Inlee's Energy Price and Economic Stability Act 2001-HR 1463 supported by Members from California, Oregon and Washington. The California Independent System Operator (Cal-ISO) has calculated that California's dysfunctional energy market has resulted in huge price increases in the wholesale rates in the western region. According to Cal-ISO, there has been over $7 billion in overcharges. This bill fails to address the issue of wholesale prices.

This bill will interfere with California's efforts to address the energy crisis. This bill will move significant generation out of long-term contracts and into the spot-market under Title 2, Section 205, which addresses Public Utility Regulatory Policies Act (PURPA) contracts. This will create additional price volatility. By allowing qualifying facilities (QFs) to sell their power production on the spot-market, this will lead to increased reliance on spot markets. This approach would not bring more energy to market, it would instead allow QF owners to double or triple their profits. How does this benefit the consumer?

Mr. Chairman, it is clear that the marketplace is defined by a set of rules—some of which are financial and some are environmental. Of those rules, the American people overwhelmingly support strong environmental protections. According to yesterday's Los Angeles Times, Americans are growing increasingly concerned about the environment and believe that protecting it should take precedence over economic development and other concerns.

A clear majority of Americans—54% to 34%, do not support the President's decision not to reduce the emission of carbon dioxide from power plants in order to keep down the costs of power production. Americans do not support a roll back of environmental standards. We have cleaner air in Los Angeles and other parts of the country as a result of laws, which protect our environment.

President Bush supports marketplace incentives and he believes that energy policy should be dictated by market forces. In Title III, Section 303 of his bill, which addresses Nox preconstruction requirements for new generation, Chairman Barton is suggesting rolling back environmental standards by delaying certain Nox emission requirements applicable to newly constructed power plants that would be coming on line.

The Chairman is effectively suggesting a change in the marketplace regarding environmental standards. If these environmental standards are rolled back, how is that not altering the marketplace? The cost of this change is the health of the American people and an increasingly more polluted environment. In addition, this section goes beyond California's actions to get new plants on-line. California has taken steps to ensure that environmental requirements do not interfere with its efforts to get new generation on-line for this summer. By implementing enforceable measures to protect air quality and ensure that pollution control equipment, known as selective catalytic reduction (SCR) is installed as soon as possible, California is working to implement environmentally sound policies.

Section 303 of this bill allows EPA upon the request of any state to waive the requirements of section 111 of the Clean Air Act relating to oxides of nitrogen and the preconstruction requirements relating to oxides of nitrogen under the state implementation plan. This waiver is very broad and takes place with no opportunity for public comment. It waives all preconstruction requirements for Nox in both attainment and nonattainment areas, not just the installation of SCR technology. Off-

sets are also waived, which will ensure that air quality will suffer during this period. This is too broad.

In yesterday's Washington Post, Vice President Cheney outlined a national strategy relying heavily on oil, natural gas and nuclear power development—but not conservation. The Vice President also stated that coal remains the most available, most affordable way to generate electric power. The Bush administration has budgeted an additional $150 million for next year to support development of "cleaner coal" technologies, which would not ensure additional electricity or reduced pollution.

Instead of investing in the development of power that could have an adverse effect on our environment and rolling back environmental standards like this bill does, why not support research and development for alternative energy sources, which the American people support. I believe that we should be taking better advantage of some of the alternative energy sources that are available.

This is a good investment—and from a policy perspective, it is no different from what Chairman Barton is offering in this bill to address the crisis in the west. We must look at the long-term effects of this bill and the proposed actions of the administration.

The federal government should be playing a larger role in helping nurture those technologies that can provide clean energy at a reasonable cost.

Just as all of our major energy sources were subsidized during their early stages such as coal, oil, hydroelectric and nuclear energy, alternative energy sources should also be subsidized to provide clean energy at a reasonable cost and allieviate the current strain on our existing power plants to meet the demands of a growing population nation wide.

This is not just a California or western states problem. The Vice President has issued a warning that the whole nation could face California-style blackouts if we do not chart a new course. We must employ a strategy that will provide effective emergency assistance and a long-term solution to our current problems.

Alternative energy sources can provide some aid, but we must fund these sources at adequate levels.

The budget slashes energy efficiency programs, which have saved businesses and consumers roughly $180 billion over the last two decades; more than $200 for every dollar of federal money spent to develop them.

We must continue to look at alternative energy programs that work—like distributed generation. Honeywell International in Torrance, California, within my Congressional district, has begun the development of a new type of "planar solid oxide fuel cell" hybrid system. Honeywell was selected by the National Energy Technology Laboratory under the Department of Energy's Office of Fossil Energy. The development effort is planned as a three-and-a-half year effort valued at approximately $5 million. The Energy Department will fund about $3.48 million.

Honeywell's planar solid oxide fuel cell will be made up of stacked sheets of flat ceramic material—anodes, electrolytes and cathodes—that resemble a stack of record albums sealed at both ends. Natural gas and air will be fed into the fuel cell, and an electrochemical process—much like the process a battery uses to generate electric current—will produce one source of electricity.

This is the type of research and development that we must continue to fund to find other ways to provide electricity to consumers. Distributed generation fuel cells are one of the most promising new technologies for virtually emission-free electricity for homes and businesses. Even so, the Bush budget would cut research and development for distributed power fuel cell systems by $7.5 million, or 14.2 percent.

Mr. Chairman, wind power is the fastest growing source of electricity worldwide. 450 new windmills along the Oregon-Washington line will generate 300 megawatts (MW) by the end of 2001. This is enough electricity for 70,000 homes. And a 107 MW wind farm in Minnesota sells power at an average cost of 3 cents per kilowatt hour (kWh), which is competitive with conventional power.

In their first 15 years, nuclear and wind power produced roughly the same amount of energy. However, conventional nuclear power plants received subsides totaling $1411 per U.S. household, compared to wind energy which received only one-fourtieth the amount or $11 per household, over its first 15 years. Considering the electricity wind can produce, the cuts in the budget for energy efficient programs is not good policy.

Geothermal plants have been producing electrical power in the U.S. for more than 40 years and provide more than 2,700 MW of electricity to U.S. residents. This is comparable to 60 billion barrels of oil per year, enough for 3.5 million homes. Geothermal electricity produced in the U.S. displaces the emission of 22 million tons of carbon dioxide a year. And Solar power is taking off around the world as an alternative energy source.

We have an opportunity to address the crisis in the western markets, contain the crisis and make a long-term plan for the future to address our energy needs. This hearing is a good start to continue the dialogue over potential emergency actions and other solutions, but this bill is not the answer. We must not lose this opportunity to invest in alternative energy sources that will be beneficial for our environment and will provide electricity to a growing population well into the future.

Mr. BARTON. Seeing no other member present who has not had an opportunity to make an opening statement, the Chair would ask unanimous consent that all members of the subcommittee not present be allowed to put their opening statement in the record.

Is there any objection?

[No response.]

Mr. BARTON. Hearing none, so ordered.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. GREG GANSKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. Chairman: It has been said many times before and I am sure it will be said again here today. The real problem in California is a shortage of supply being pursued by an over abundance of demand. The only true long term solution to this problem is to end the imbalance. I hope that is something to which we can all agree.

I believe this legislation will help move us in that direction and that this bill will help the state of California deal with the problems it will face this summer. It is important on the federal level that we provide flexibility for the State of California to respond to this crisis and that we try to create incentives to help prevent economic disruption and discomfort and to help ensure the safety of the people of California.

This legislation should help alleviate some of the problems which are expected in the western power grid as a result of a generation shortfall this summer. The real solution to the problem, the long term rebalancing of supply and demand, may take more time.

The energy emergency in California must provide a learning experience for the rest of the country. We can not take the generation of electricity for granted. It is an essential part of our modern society, a key ingredient of a successful economy, and a resource which must developed in an appropriate manner. We must have an energy plan which allows the market to function in a reasonable manner, consistent with the basic rules of economics. We can not pretend that investment and capitol for energy development will flow into an artificial and unsustainable situation. We can not address energy generation by saying "Not in my backyard" and pretending the problem will go away. If we do not learn these lessons, this experience will be repeated across this country and the provisions of this legislation will have to be utilized far more than its authors intend. We should not let that happen. We need to act to assist California in dealing with this serious problem and we need to learn from this experience.

Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, the "Electricity Emergency Relief Act" is a very important bill. The first anniversary of the California energy crisis is this month. California's mess began last May when a three-day heat wave, from May 21 to May 24, set records in some areas of the state and drove up the demand for electricity as Californians sought relief with air conditioning. Four months ago this week, more than seven months into the crisis, the Governor brought the Legislature into special session to launch a fast-track drive to solve California's energy crisis. However, it is a litany of one disaster after another, and legislators are frustrated that the fast-track has not delivered substantial results.

The Governor has stated that California is principally responsible for correcting this situation. The Federal government role should focus on removing barriers. Our criteria for federal action must be:

- to prevent compounding the problem,
- to prevent misguided actions,
- and to encourage actions that increase electricity conservation and supply.

This bill is appropriately focused on managing demand, resolving transmission constraints, preparing for blackouts, maximizing hydro, QF and self-generation sources, and reducing Clean Air act impediments to supply. The WAPA construction of Path 15 should be conditioned on agreement that the State of California not purchase the adjacent lines.

The reaction to the measures imposed by the FERC was predictable. It points out the difficulty of establishing fair and efficient price controls that are satisfactory to everyone. We should not prejudge these price controls now based on perceptions. We should let them take effect and evaluate them when there is data on their effectiveness. In the meantime, I have asked the GAO and subsequently the Department of Justice to investigate the allegations of manipulated electricity prices.

There are two very positive features of the FERC imposed price controls that deserve emphasis. In my view the most important is the requirement that load serving entities establish demand response mechanisms in which they will identify the price at which load should be curtailed. That is, California needs to establish the level at which blackouts are preferrable to paying the cost of power. In my view, this requirement, more than the price cap, will provide the leadership the Governor so far has failed to provide. It is key to establishing control of the market. The Electricity Emergency Act provides tools to help in this regard.

The second feature is the conditioning of the controls on an RTO proposal. The FERC commissioners strongly support RTO-WEST and have recognized that the future of California is with the deregulated market. California must not go it alone with its electricity future.

I look forward to the testimony of the witnesses.

PREPARED STATEMENT OF HON. MARY BONO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I want to thank you for taking on the challenge to address the ongoing energy crisis in the West. Your work on this matter is of great importance.

However, while Congress works on this issue, we still need the ongoing cooperation of the Administration and FERC.

Although I am opposed to wholesale price caps, I believe that FERC's most recent order to impose price mitigation during all three stages of emergency is a first step in the right direction. In addition, while FERC's order of refunds is also positive, I encourage the commission to explore whether or not additional reimbursements would be in order.

While I encourage FERC to exercise its jurisdiction over 47% of the generating industry, the State of California has a responsibility to address the other 53%.

Last week, I had a private discussion with Governor Gray Davis to reiterate that we, in Congress, want to give him the tools necessary to deal with this crisis. I believe the Governor understands the importance of working cooperatively on a sensible solution. It is time that we make our decisions based upon sound policy, not self-serving politics.

The bill we are evaluating today takes many positive steps towards this goal. It does not sacrifice long term stability for short-term solutions.

In addition, it does not forget what Californians will face this summer.

I am pleased to see how this legislation shores up the federal end of emergency management. In California's 44th Congressional District, where temperatures can climb to over 120 degrees, it is critical for the federal, state and local governments to anticipate the repercussions a black out might have on the elderly, those dependent on electrical life support systems and others sensitive to extreme temperatures. Again, it is not a matter of quality of life, but of life itself.

Mr. Chairman, while this legislation has many positive aspects, the desert heat will cause an unprecedented increase in consumers' electric bills. Therefore, I look forward to working with you on finding ways for LIHEAP to better aid our constituents. I would not want individuals to risk the health of their families due to their inability to pay their electric bills.

Thank you and I yield back my time.

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. Chairman: Thank you for continuing these hearings regarding the electricity crisis in the West and now the Electricity Emergency Relief Act. You should be commended for your vigilance in investigating the sources and proposing solutions. I appreciate the opportunity to hear from witnesses who are experiencing the crisis or

trying to manage it first hand and encourage them to comment on how this draft legislation will be helpful to them.

Mr. Chairman, if there are concrete steps that the federal government can take to alleviate the problems in California, Oregon and other western states, or, at least make it easier for the authorities involved in managing the problems to address them, then we should propose those actions with all deliberate speed. I remain concerned that this subcommittee may be considering steps, based upon the draft bill, that will not help the immediate crisis that the Western States will face this summer, and may very well have unintended consequences that further complicate the situation.

Given the attention in this subcommittee to the restructuring debate, I am concerned that the inclusion of certain provisions may create loopholes in the Federal Power Act that provide "golden" opportunities for ambitious suppliers. Based upon Vice President Cheney's comments yesterday regarding the Administration's long-awaited energy plan to drill our way out of the supply crisis, my concerns have grown into very strong fears.

Mr. Chairman, we have heard testimony in this subcommittee that casts strong doubt on any of the assertions that environmental regulations have had anything to do with the current energy supply crisis in California and neighboring states. Given the amount of time that it takes to build a new generation facility, there is no chance that any of the regulatory "relief" provided in this bill would help speed the construction of any facility enough to have it provide power this year. If there are permit and review processes that can be expedited to help site new generation needed in western markets that is one thing, and as I understand, there is sufficient flexibility to do so under current law, but suspension of clean air requirements is quite another entirely and is unacceptable, even in the short term.

While I appreciate the inclusion of conservation education in the draft, that is not enough. As a part of any effort to address the short and long term energy needs of this country, there must be a solid commitment to conservation and the development of alternative resources. Conservation and efficiency is one of the best ways to address short term supply needs, and both have a role in our long term energy policy. We also need a diversified mix of fuel sources, and the goal should be to make all of them as clean as possible. For instance, co-firing coal in many existing and idle plants with a mix of readily available biomass creates a cleaner burn, diversifies our energy supply and helps the rural economy as well. There should be strong conservation requirements that should be met before any Governor with an "energy emergency" is granted broad latitudes to temporarily suspend air regulations, if ever.

I have strong reservations about using this legislation to extend FERC jurisdiction over public power systems and rural electric cooperatives who have expressed opposition to such an extension as unwarranted. In addition, the Chairman's restructuring legislation in the 106th Congress contained a tax title with provisions designed to clear up conflicts with the tax code for these entities participation in (regional transmission organizations) RTOs. I understand that question has not been cleared up as yet by the Ways and Means Committee and is another reason to move forward with caution. Broaching the jurisdiction issue begs the question of why I continue hearing about repeal of the Public Utilities Holding Company Act (PUHCA) in the context of helping California. In light of the many questions that have arisen regarding high levels of profits by "unregulated" subsidiaries of larger utility holding companies, the provisions of this draft that allow suppliers to set the fair cost of energy create a stronger need to examine the question of jurisdiction, but not for the non-profits, for the companies that get the potential windfall. Either way, the question of jurisdiction only serves to complicate the discussion of an emergency bill.

I want to help the consumers in western states avoid additional financial hardship and blackouts. The esteemed FERC Commissioners we have before us today, and the others who will come before us this week, have the tools they need to handle this situation and make the proper decisions to address runaway wholesale prices in order to get the Western market back in shape and enable other regions to avoid such a situation in the future. I look forward to their explanation of how we can work together to help consumers.

There are many important energy supply, reliability and transmission matters that you, Mr. Chairman, and the other members of this committee have worked diligently on over the past couple of years in the context of broader energy legislation. Those issues require our attention so that we do not get lost in the immediate problems of today and shortchange the resources for the long term needs of our country. We have before us a key opportunity to recognize once and for all that we must diversify our energy resources and make the necessary investments to advance our

energy infrastructure and achieve real progress with renewable and alternative sources of energy.

I look forward to a continued productive dialogue on these broader energy policy matters, but remain concerned that trying address them in the context on an emergency bill will not produce the desired results for the West, or for our energy resources in the future.

Mr. BARTON. We now want to go to our first panel. They are familiar faces to us all and friends of us all. We have all of the FERC Commissioners that are currently empowered to be FERC Commissioners before us.

We are going to start with the Chairman of the Commission, the Honorable Curtis Hébert of Mississippi. Then we will go to Mr. Massey of Arkansas, and then the clean-up hitter will be the gentle lady from Kentucky, Commissioner Breathitt.

So, Mr. Hébert, we are going to recognize you for 7 minutes. If you need a little bit longer, that is fine, but whatever additional time you take, be aware that your other Commissioners will be given that time also.

So your statement is in the record in its entirety, and we welcome you to the subcommittee once again.

Be sure to turn the microphone on.

STATEMENTS OF HON. CURTIS L. HÉBERT, JR., CHAIRMAN; HON. WILLIAM L. MASSEY, COMMISSIONER; AND HON. LINDA K. BREATHITT, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION

Mr. HÉBERT. Thank you, Mr. Chairman.

And thank you for the opportunity to appear here today to discuss the proposed Electricity Emergency Relief Act. I commend you and the subcommittee for introducing this bill and holding this hearing today.

Electricity markets in California and the Western United States are faced with a substantial imbalance of supply and demand. While no one can build generating capacity fast enough to eliminate the imbalance this summer, this bill contains a range of measures that can help mitigate the problems. Let me mention several involving the Commission's authorities and responsibilities.

Sections 101 and 102 would encourage conservation through a market driven approach instead of exhorting or requiring consumers to conserve. These sections provide incentives for consumers to conserve by allowing them to sell the saved energy at market prices.

Consumers will decide how much to conserve by comparing the market price of saved energy to the cost of conservation. Section 108 states that if the transmission facilities operated by the California ISO are transferred to the State of California or an entity formed by the state, the facilities will remain available for use by market participants on an open access, nondiscriminatory basis, and also will be subject to the same rules on regional transmission organizations that apply to public utilities.

This section will help insure that all market participants are able to continue using these facilities efficiently and economically.

We cannot separate generation and transmission. They must both help to resolve supply and demand imbalances in the West,

and as Congressman Dingell stated, this is not just a California problem.

Section 205 would insure that a qualifying facility under PURPA that has not been paid for its electric energy, when required by contract, may sell its energy to another buyer. Similar issues are pending before the Commission, and I cannot comment on the merits of those issues based on currently applicable law.

However, I believe that prompt resolution of these issues is critical to freeing up for immediate sale into California this summer several thousand megawatts of existing, and I repeat "existing," capacity that I

understand are lying idly by for lack of payment.

Federal legislation may be the best way to reach a comprehensive resolution of these issues immediately. Of all measures I have read in the legislation, this measure, I believe, does give the most short-term benefit to the people of the State of California, at this point giving enough electricity to supply 3 million households.

Again, this electricity is sitting idly by and not being used.

Section 306 would require the Commission upon request by at least 10 of 14 Western Governors to form a West-Wide regional transmission organization or regional transmission organization called an RTO. I strongly support the formation of such an RTO. A West-Wide RTO will increase trading opportunities for both buyers and sellers throughout the West.

Last week the Commission took major steps toward RTO formation in the West, approving an RTO spanning eight Western States and conditioning its California marketing monitoring and mitigation plan on the filing of an acceptable RTO proposal by California utilities.

For these reasons and others cited in my written testimony, the Electricity Emergency Relief Act takes important steps in the right direction and will help mitigate the current imbalance of supply and demand and the problems caused by the imbalance.

Finally, let me mention a major order that the Commission issued last week. In that order the Commission packaged together a number of related measures intended to help remedy California's dysfunctional electricity market and to offer immediate relief to customers.

Among its provisions, last week's order helps insure that customers are adequately protected against unjust and unreasonable rates, while also providing a market oriented price for California generators.

Starting in late May, a safe harbor price for real time electricity will be determined each day based on market costs for electricity inputs, natural gas, and emission allowances; in the fuel usage ratio, the heat rate and emission rate for the least efficient generator needed to meet demand that day. All California generators bidding at or below this market driven price will be paid this price. Any California generator above this price and selected to run by the ISO will be paid its price subject to refund and justification, but its bid will not raise the proxy or safe harbor price.

The price mitigation approach reflects the way pricing works in competitive markets. As in the competitive market, the price is set by the highest priced supply needed to meet demand. The Commis-

sion also required that most California generators offer for sale in California all power that is available in real time and not already scheduled or committed by contract.

This must sell obligation applies even to California generators that are not otherwise FERC jurisdictional entities. The only exception is for hydroelectric facilities because of their multi-purpose characteristics.

Also, all public utilities buying from the ISO must submit demand bids identifying the price that they are willing to curtail power purchases if prices exceed that amount. This requirement will help the ISO's real time market behave more like a competitive market where increases in price reduce demand.

The plan enhances the ISO's ability to coordinate planned outages. The ISO must submit weekly reports to the Commission on outages so that the Commission can continue to monitor those outages.

Further, the Commission modified the market based rate authority of public utility sellers to prohibit anti-competitive bidding behavior in the ISO's real time market. All elements of the plan, except for the price mitigation in the real time market, operate 24 hours a day, 7 days a week during the specified duration of the plan.

The safe harbor or proxy price applies when California reaches a Stage 1 emergency, in other words, when generating reserves are at or below 7.5 percent.

The Commission's plan terminates not later than 1 year from now. The plan will terminate sooner if the ISO and California's three investor-owned utilities do not file an acceptable RTO proposal by June 1, 2001.

Again, we must look to generation and transmission alternatives, thereby making more supply available to the people of California, which will, in effect, lower prices.

The Commission also instituted an investigation into wholesale prices in other parts of the West. The Commission is seeking comment on what forms of price relief and market monitoring are appropriate for Western sales outside of the California ISO.

The Commission has stated that its intent is to mirror its approach in the ISO's real time market to the extent possible.

And in closing, Mr. Chairman, I would like to say it is interesting as we go through this debate how different parties are breaking this down. It is interesting, the position that we have taken at FERC as opposed to what we read in the mainstream media and what we are hearing from those who are debating these issues.

For instance, at FERC the majority has said we are interested in more supply and lower prices at hydro facilities on a temporary basis. What the nay sayers want to talk about are loopholes.

What we have said at FERC is, in fact, that we should look at refunds, and in fact, we have, and we should look at cost justification, and in fact, we have, and that we should have price mitigation, and in fact, we do, but what they want to talk about is gouging in the past.

What we say at the FERC is we need a regional transmission organization to build infrastructure, to build and deliver more supply

so that California consumers can have more supply and, therefore, have lower prices and not have their lights to go out.

What the nay sayers want to say is, "How dare you tell them to file an RTO? How dare you tell California what to do?"

Well, I have also said we can look at generators. We can barge in generators. We can bring in available capacity, and what do the nay sayers say? "We do not burn diesel here, and we are not interested in your supply."

Well, the estimates by the California Energy Council are that they are down about 3,800 megawatts for this summer from their peak load. Of the things that we are talking about here and the things that this Committee is talking about, Mr. Chairman, the QFs. The information that I have been given is that 3,000 megawatts are sitting idly by, 3,000.

I was having a conversation with producers, and producers shared with me, Mr. Chairman, that, in fact, they would have the ability to hook up some generators as well, and guess what they are doing with the natural gas at this point that they would use to fuel those. They are flaring it, 1,000 megawatts right there.

We are at 4,000 megawatts. Five percent demand reduction for the 46,000 megawatt load. That is about 2,300 megawatts. So you add that together. You are at 6,300 megawatts, well above what they are saying they are going to be short.

You can also look at the inclusive nature of what we have done at FERC, the must sell requirement, the bidding and outage requirements, the price mitigation of the real time market, reductions in aggregation of load. That itself, we believe, might be another 1,000 megawatts. So you are at 7,300 megawatts.

Now, let me make this clear, and I want to make this abundantly clear not only to this committee, but to the American public because we spend enough time trying to blame people. We spend enough time talking about I hear your answer, but your answer is not right, and it is time we got about fixing the problem, Mr. Chairman.

But I will tell you nothing, and I repeat nothing, can be done without the affirmation and the hard work of the leaders in the State of California. We seem to use livestock as an example here today. Well, my father shared some things with me, too, and he told me, he said, "Son, you can lead a horse to water, but you cannot make her drink."

You cannot make California drink. I can give them proposals. We can try to make things happen, and that is what this agency is doing. We have got to do something about the imbalance between supply and demand.

Just saying no to alternatives is not good enough, and it is not fair to the people of the West. It is not fair to the people of California.

Thank you. I will be happy to answer your questions.

[The prepared statement of Hon. Curt L. Hébert follows:]

PREPARED STATEMENT OF HON. CURT L. HÉBERT, JR., CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

I. OVERVIEW

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to appear here today to discuss the proposed Electricity Emergency Relief Act. I commend the Chairman of this Subcommittee for introducing this bill and holding this hearing today. Electricity markets in California and the Western United States are in disarray, with a substantial imbalance of supply and demand. While no one can build generating capacity fast enough to provide adequate supply in these markets this summer, this bill contains a range of measures that can help mitigate the problems.

The Commission recognizes that it, too, must confront these problems to the full extent of its authority. In this respect, I would like to make three main points and identify the Commission's recent steps addressing these problems.

First, we need to encourage new supply and load reductions. Market prices are sending the right signals to both sellers and buyers (at least those not subject to a rate freeze). Market prices will increase supply, promote delivery, enhance infrastructure and reduce demand, thus correcting the current imbalance. Last week, as described below, the Commission adopted a market monitoring and mitigation plan for California consistent with these principles. Among the provisions of that plan, the Commission adopted a market-oriented approach that will produce for real-time sales, in emergency hours, a price that will ensure that customers are adequately protected against unjust and unreasonable rates, but that also will provide a safe harbor for California generators. This will allow them to sell above that price if they can justify their costs. It also instituted an investigation into wholesale rates in Western states outside California, and is seeking comment on what other relief may be necessary.

Second, infrastructure improvements are greatly needed throughout the West and especially in California. We need to create the appropriate financial incentives to ensure that the transmission system is upgraded and that new natural gas pipelines are built. The Commission has taken action on these issues recently, and is considering additional action.

Finally, we need a regional transmission organization (RTO) for the West. California is not an island. It depends on generation from outside the State. The shortages and the prices in California have affected the supply and prices in the rest of the West. The Western transmission system is an integrated grid, and buyers and sellers need non-discriminatory access to all transmission facilities in the West. A West-wide RTO will increase market efficiency and trading opportunities for buyers and sellers throughout the West. As described below, the Commission took important steps last week to promote RTO formation in the West.

The Commission's recent actions are an important part of the backdrop for the legislation under consideration today. My testimony begins by describing these actions. Then, my testimony discusses the sections of the Electricity Emergency Relief Act affecting the Commission's authorities and responsibilities.

II. THE COMMISSION'S RECENT ACTIONS

A. Market Monitoring and Mitigation

1. Action to Help California—In the past few months, the Commission has issued dozens of orders to address dysfunctional wholesale energy markets in California and the West. Just last week, the Commission adopted an innovative plan for market monitoring and mitigation in California. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Service, et al.*, 95 FERC ¶61,115 (2001). This plan strikes an appropriate balance by bringing market-oriented price relief to the California electric market, providing greater price certainty to buyers and sellers of electric energy, promoting conservation, and—importantly—simultaneously encouraging investment in generation and transmission.

The Commission established price mitigation for the real-time market run by the California Independent System Operator Corporation (ISO). However, the price mitigation, based on a safe harbor price determined from a market-oriented formula, applies only when California reaches a Stage 1 emergency, i.e., when generating reserves are at or below 7.5 percent.

The price mitigation simulates the price a competitive market would produce. Under the price mitigation, a market-driven price for real-time electricity would be determined each day based on market costs for electricity inputs (natural gas and emission allowances), and the fuel usage ratio ("heat rate") and emission rate for the least efficient generator needed to meet demand that day. All California genera-

tors bidding at or below this market-driven, safe harbor price would be paid this price. Any California generator bidding above this safe harbor price and selected to run by the ISO would be paid its price, subject to refund and justification, but its bid would not raise the safe harbor price.

The price mitigation would apply to marketers as well. A marketer could accept the safe harbor price or specify its own price. If its price exceeds the safe harbor price, the marketer would be required to justify its price based on the amount it paid for power.

This price mitigation plan reflects the way pricing works in competitive markets. As in a competitive market, the price is set by the highest priced supply needed to meet demand. The plan also provides certainty to the market. All bidders below the market price are paid that price, and need not provide subsequent justification.

The plan provides incentives for investments in efficient generation. The market price under this plan is set by the price of the least efficient generating facility used each day. Any new facility will receive this same price. Thus, the more efficient the new facility is, the more it will earn. Conversely, the plan provides incentives for retiring or replacing inefficient, dirtier facilities.

The plan does not set price caps. A price cap is a fixed limit on sellers' prices that does not change over time, *i.e.*, a snapshot. By contrast, the Commission's price mitigation allows prices to vary each day based on market changes in the cost of electricity inputs. Moreover, each generator can bid any amount it chooses, so long as the generator can justify any bid above the announced market price. For example, if a seller's own gas costs exceed the gas costs used in determining the safe harbor price, the seller can seek to justify the higher costs.

Nor does the plan discourage the sale of generation into California from facilities located outside of California. Out-of-state facilities have no obligation to sell into California. If they do, they can recover any bid, even if in excess of the safe harbor price, that is accepted by the ISO.

The plan contains several other important elements. For example, all jurisdictional sellers with "participating generator agreements (PGAs)" with the ISO must offer all power that is available in real-time and not already scheduled or committed by contract. Other California generators whose sales are not jurisdictional but who sell in the ISO's markets or use the ISO's transmission facilities must do the same as a condition of being able to participate in ISO markets and also a condition of using Commission jurisdictional transmission facilities. In addition, the non-jurisdictional sellers also must agree to abide by the same price mitigation and monitoring that applies to the other generators. These conditions were put in place by the Commission so that *all* generators-even those that are not otherwise subject to the Commission's jurisdiction-participate in helping to solve California's problems. The only exception is for hydroelectric facilities, because of their multi-purpose characteristics (*e.g.*, irrigation, recreation and power production).

Also, all public utilities buying from the ISO must submit "demand bids" identifying the price they are willing to pay for power and the load to curtail if prices exceed that amount. This requirement will help the ISO's real-time market behave more like a competitive market, where increases in price reduce demand.

The plan enhances the ISO's ability to coordinate and control planned outages. The ISO must submit weekly reports to the Commission on outages and bid data, so that the Commission staff can continue to monitor the market. Further, the Commission modified public utility sellers' market-based rate authority to prohibit anti-competitive bidding behavior in the ISO's real-time market. All of the elements of the plan, with the exception of the safe harbor price, operate 24 hours a day, seven days a week, during the specified duration of the plan.

Finally, the Commission imposed two important limits on its price mitigation plan. First, all of the mitigation terminates not later than one year from now, so that California cannot rely indefinitely on mitigation in lieu of new generation and conservation. Second, all mitigation is conditioned on the ISO and California's three investor-owned utilities filing an acceptable RTO proposal by June 1, 2001. This last point is discussed below with respect to the Commission's effort to encourage development of RTOs.

2. *Investigation of Other Real-Time Western Sales*—As part of the same order last week, the Commission opened a formal investigation into prices charged by public utilities for real-time wholesale power sales (i.e., up to 24 hours in advance) throughout the West (other than sales through the ISO). The Commission proposed: (1) to mitigate prices charged by all public utilities; and, (2) to impose mitigation as a condition on all non-public utilities using the interstate transmission facilities of public utilities. Similar to the Commission's approach for the ISO's market, price mitigation here would apply only when contingency reserves fall below 7.0 percent in any control area in the WSCC. The Commission sought comments on what the

price mitigation for these sales should be, stating that its intent is to mirror its approach in the ISO's real-time market to the extent possible. The Commission also proposed, as it required in the ISO's market, that generators should have to offer all energy available in real-time. As above, hydroelectric generation would be exempt from the "must-offer" requirement but not from the price mitigation rules.

After receiving and reviewing public comment on its proposal, the Commission will determine the market monitoring and mitigation plan for real-time wholesale sales in the West other than sales through the ISO.

B. Other Commission Efforts to Increase Supply and Reduce Demand

Six weeks ago, the Commission issued an order seeking to increase energy supplies and reduce energy demand in California and the West. *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States,* 94 FERC ¶61,272 (2001) ("Order Removing Obstacles"). The Commission implemented several measures immediately, including:

- streamlining filing and notice requirements for various types of wholesale electric sales, including sales of on-site or backup generation and sales of demand reduction;
- extending (through December 31, 2001) and broadening regulatory waivers for Qualifying Facilities under the Public Utility Regulatory Policies Act of 1978, enabling those facilities to generate more electricity;
- expediting the certification of natural gas pipeline projects into California and the West; and,
- urging all licensees to review their FERC-licensed hydroelectric projects in order to assess the potential for increased generating capacity.

The Commission also proposed, and sought comment on, other measures such as incentive rates and accelerated depreciation for new transmission facilities and natural gas pipeline facilities completed by specified dates, blanket certificates authorizing construction of certain types of natural gas facilities, and greater operating flexibility at hydroelectric projects to increase generation while protecting environmental resources.

The Commission received many comments on these proposals. I expect the Commission to complete its review of these comments and finalize its actions on these issues soon. In addition, the Commission already is acting on many of the initiatives it announced in its *Order Removing Obstacles.* For example, in the month of April, the Commission significantly expedited its processing of applications—approved in a mere three or four weeks—to add significant amounts of natural gas pipeline capacity to California.

C. A West-wide RTO

The development of a West-wide RTO is vital to preventing future problems in the West. The shortages and prices in California have affected the supply and prices in states throughout the West because the Western transmission system is an integrated grid. A West-wide RTO is critical to support a stable interstate electricity market that will provide buyers and sellers the needed non-discriminatory access to all transmission facilities in the West. A West-wide RTO will increase market efficiency and trading opportunities for buyers and sellers throughout the West.

Last week, the Commission took major steps toward RTO formation in the West. First, the Commission accepted key parts of a proposal for an RTO that will span eight Western states, RTO West. RTO West will operate (but not own) more than 90 percent of the high voltage transmission facilities from the U.S.-Canadian border to southern Nevada. The Commission said RTO West can serve as a platform for the ultimate formation of a West-wide RTO.

In the same order, the Commission accepted a proposal for an independent transmission company within the RTO West structure, TransConnect. TransConnect will own and operate the transmission facilities of six utilities in the region.

Finally, as noted above, the Commission conditioned its price mitigation in the California ISO's real-time market on the ISO and California's three investor-owned utilities filing an RTO proposal by June 1, 2001, consistent with the characteristics and functions set forth in the Commission's Order No. 2000. As the Commission stated, this condition "recognizes that the only real solution to supply problems that affect the western United States is to create a regional response."

III. ELECTRICITY EMERGENCY RELIEF ACT

This proposed legislation contains a number of sections affecting the Commission's authorities and responsibilities. These sections are addressed seriatim below. While my testimony does not contain suggestions for technical revisions, the Commission's staff can provide such analysis later if you would find the analysis helpful.

Overall, this legislation would improve FERC's ability to respond to the problems in electricity markets in California and other Western States. It represents a welcome legislative response to current market problems in the West. However, the likely extent of the improvement this summer is hard to estimate.

Section 101 would require the Commission to establish a clearinghouse system to facilitate agreements under which wholesale buyers would forego purchasing electric energy that they are entitled to buy under contractual arrangements. The compensation paid for foregone purchases is deemed to meet the requirements of the Federal Power Act. This authority would end on October 1, 2003, except for contracts already executed. The Commission must report to Congress by January 1, 2003, on the section's effect and whether Congress should extend the section's authority.

Section 101 (and **Section 102**, discussed below) reflect a market-driven approach to encouraging conservation. Instead of mandating conservation, these sections provide incentives for consumers to conserve and sell the saved energy at market prices. Consumers will decide how much to conserve by comparing the market price of saved energy to the cost of conservation. While certain states are taking steps toward such programs (and, as explained below, the Commission is respectful of such programs), federal legislation on this issue will ensure a comprehensive program is in place to maximize opportunities for participation.

However, I have two minor reservations as to *Section 101.* First, this section eliminates the Commission's statutory authority to determine whether rates for such arrangements are just, reasonable and not unduly discriminatory or preferential. The Commission should continue to have this authority, at least for purposes of affiliate arrangements. Second, this section eliminates the Commission's authority for establishing a clearinghouse beyond October 1, 2003. However, I believe the Commission already has authority to establish such a clearinghouse under the existing FPA and the new provision could be read as eliminating pre-existing authority. I would be happy to have my staff provide technical language modifications to address this problem.

Section 102 would establish a program allowing any electric consumer of an electric utility in the Western Systems Coordinating Council (WSCC) to sell at market prices the portion of electric load the customer is willing to forego out of the total amount it is entitled to consume. The latter amount is based on the customer's contract, applicable regulation or the amount "the consumer would otherwise reasonably be expected to consume, as determined by the Commission." This program would end on October 1, 2003, except for contracts already executed.

The Commission has some authority to implement, and in fact recently implemented, such a program. *Order Removing Obstacles, supra,* 94 FERC ¶61,272. The Commission's program applies to retail and wholesale customers, while the draft legislation would apply to "any electric consumer," a term defined to exclude wholesale customers. However, the Commission's authorization for retail customers is mindful of its limited jurisdiction under the Federal Power Act and respectful of traditional state jurisdiction over state demand-side initiatives; accordingly, it is effective only "as permitted by state laws and regulations." The Commission's program also imposes certain minimal reporting requirements, to ensure compliance with the Federal Power Act. Finally, the Commission's program ends on December 31, 2001, while the draft legislation's program would continue until October 2003.

Section 103 would require the Secretary of Energy and the Commission to prepare, within six months after the bill's enactment, a study of electric power transmission congestion and a plan to relieve constraints that reduce the efficiency of the transmission grid within various regions and with Canadian and Mexican transmission systems.

Section 107 would prohibit the Commission and other governmental entities from requiring a sale of electric energy or natural gas "unless there is a guarantee that, as determined by the Commission, is sufficient to ensure that the seller will be paid the full purchase price when due."

The Commission's authority to set the rates, terms and conditions of jurisdictional services applies to creditworthiness requirements. The Commission generally does not mandate such requirements, and instead lets sellers address the issue as they see fit, so long as any creditworthiness requirements they propose are just and reasonable. However, the Commission recently has taken action to prevent a weakening of creditworthiness requirements in the markets run by the California ISO. *California Independent System Operator Corp.,* 94 FERC ¶61,132, *clarification granted and reh'g denied,* 95 FERC ¶61,026 (2001); *California Independent System Operator Corp.,* 95 FERC ¶61,024 (2001). There, the ISO sought to lower its creditworthiness requirements to allow continued purchases by certain financially-stressed utilities. The Commission said that the ISO's proposal would cause "an in-

appropriate unilateral shifting of unacceptable financial risks to both large and small third-party suppliers." The Commission also said the proposal would increase prices paid by consumers because sellers would likely add a "risk premium" to their prices.

Accordingly, the Commission rejected the ISO's proposal for purposes of such third-party sales. However, the Commission said sales to the financially-stressed utilities could continue if the utilities arranged adequate credit-support arrangements, and noted that California's Department of Water Resources had provided such support previously.

Section 107 may apply well beyond the scope of the current problems in California and the Western United States and the type of sales ordered several months ago by the former and current Secretaries of Energy. The applicability and effect of this section warrants careful consideration and analysis.

Section 108 provides that, if the State of California or any entity established by the State owns or operates transmission facilities acquired from a Commission-regulated public utility, the State or such entity will be subject to Commission regulation with respect to such facilities to the same extent and in the same manner as would be the public utility itself. This section would ensure that these transmission facilities remain available for use by market participants on an open access, non-discriminatory basis, and also would be subject to the same RTO rules that apply to public utilities. I believe any disposition of ownership or control of these facilities by the California IOUs or the California ISO to the State of California or a California entity would require Commission approval under existing section 203 of the Federal Power Act, and section 108 would maintain Commission jurisdiction after the disposition.

Section 205 would require the Commission to revise its rules to provide that a qualifying facility under the Public Utility Regulatory Policies Act of 1978 (PURPA) that is not paid for its electric energy when required by contract may sell its energy to another buyer. This section also addresses the need for transmission, interconnection and distribution services to facilitate such alternative sales.

Similar issues are pending before the Commission, and I cannot comment on the merits of those issues based on currently applicable law. These issues also are pending before various courts. I believe that prompt resolution of these issues is critical to freeing up, for immediate sale into California this summer, several thousand megawatts of existing capacity that, I understand, is lying idle because of the inability of California utilities to pay for PURPA capacity. Federal legislation may be the best way to reach a quick and comprehensive resolution.

I can also add that the Commission provided various waivers and authorizations in its *Order Removing Obstacles, supra,* that enhanced the ability of PURPA qualifying facilities to generate electricity above historical levels.

Section 301 requires the Commission to promulgate a standard license article allowing hydroelectric licensees, upon request by the Governor of the affected State, notice to the Commission and consultation with relevant resource agencies, to modify or suspend otherwise applicable license conditions, for up to two years, in order to increase generation in response to a state-declared electric supply, generating, or system reliability emergency.

This section could significantly alter the Commission's existing authority and responsibilities. Under Part I of the Federal Power Act, the Commission (along with federal and state agencies possessing mandatory conditioning authority) currently determines the conditions contained in licenses it issues. Section 301 provides that licensees unilaterally would decide whether to include the new standard condition in their licenses. It also provides that licensees, rather than the Commission, would make the decision to modify or suspend the terms of their licenses, with whatever environmental or safety implications such decisions may entail. Under this scenario, the Commission's role of balancing public interest factors, including power, environmental considerations, and issues such as dam safety, would be disturbed.

Section 301 could, however, allow the Commission's hydroelectric licensees to respond, and respond more quickly, to energy shortfalls by increasing generation, both this summer and in the case of future energy shortages. The Commission recently proposed, to the extent consistent with the existing provisions of the Federal Power Act, allowing for greater operating flexibility at licensed projects to increase generation while protecting environmental resources. *Order Removing Obstacles, supra,* 94 FERC ¶61,272.

Section 306 would require the Commission, upon request by at least 10 of 14 Western Governors, to form a West-wide RTO. The Bonneville Power Administration and the Western Area Power Administration would be required to participate, as would each other entity (including municipally owned entities and cooperatives)

owning or operating transmission facilities in the WSCC. The RTO would not be required to continue operating for more than three years.

I strongly support the formation of such an RTO. While such action would provide short-term efficiencies and economies in the West, the RTO could continue to provide such benefits well beyond the horizon of the current imbalance of supply and demand. If formed, the RTO should be allowed to cease operations or transfer operational control of transmission facilities to another entity only upon a Commission finding that such action is consistent with the public interest. This requirement applies already to such actions by public utilities under section 203 of the Federal Power Act (as does a requirement for Commission authorization to terminate rate schedules under section 205), and the proposed legislation should be clarified to avoid any ambiguity about its applicability here, too.

IV. CONCLUSION

The Commission will continue to take steps that, consistent with its authority, can help to ease the present energy situation without jeopardizing longer-term supply solutions. As long as we keep moving toward competitive and regional markets, I am confident that the present energy problems, while serious, can be solved. I am also confident that market-based solutions offer the most efficient way to move beyond the problems confronting California and the West.

The Electricity Emergency Relief Act is a step in the right direction. While certain provisions in the bill warrant minor revisions, the bill will help mitigate the current imbalance of supply and demand and the problems caused by that imbalance.

Thank you.

Mr. SHADEGG [presiding]. Thank you, Commissioner Hébert.

By my count, you went over by about 4½ minutes. Commissioner Massey, you are recognized and have an extra 4½ minutes.

STATEMENT OF HON. WILLIAM L. MASSEY

Mr. MASSEY. Mr. Chairman and members of subcommittee and full committee, thank you for this opportunity to testify on the proposed Electricity Emergency Act of 2001.

I know that Chairman Barton has worked hard to find legislative measures that will help the Western States deal with the electricity crisis they are now experiencing. While I will comment on many of the measures that are in this bill, I must first discuss a very important measure that is not in the bill.

Unless there are dramatic improvements in supply, weather, or demand responsiveness, we are likely to see shortages of electric generating capacity this summer with a continuation and probably with an escalation of out-of-control prices in the West. Frankly, I fear for the worst.

To stem the likely economic pain and dislocation, I believe Congress should enact effective price mitigation for the Western interconnection now. We need a time out in this dysfunctional Western electricity market.

Now, under normal circumstances, I would not recommend that market price issues be addressed through legislation. I believe that it is this Commission's responsibility to adopt effective price mitigation when necessary. The Commission has ample authority to do so under the Federal Power Act's just and reasonable standard and acting under that standard is, frankly, the more appropriate course.

But circumstances are dire in the West as it faces the second summer of an electricity emergency, and the Commission has failed to impose effective price mitigation. The Commission's recent order on which I dissented imposes price mitigation only in California spot markets and then only when reserves drop below 7.5 percent.

Yet there is evidence that sellers exercise market power in all hours, 24 hours a day, 7 days a week. How do we know this? We have a number of studies before us that tell us so.

Anjalie Sheffron, the ISO's market monitor, has told us this in a very sophisticated report filed this spring. Professor Frank Wallach from Stanford, a distinguished economist who is the outside market monitor, the independent market monitor, has told us so repeatedly. Dr. Paul Joskow of MIT, who has been favoring competitive markets for as long as I can remember, has told us that he believes that there is price gouging in the market.

Here's what he said in a report that he submitted to us this last fall. "There is considerable empirical evidence to support a presumption that the high prices experienced in the summer of 2000 were the product of deliberate actions on the part of generators or marketers controlling the dispatch of generating capacity to withhold supply and increase market prices."

Thus, with summer fast approaching, I have no choice but to recommend that Congress act in this area. Without more forceful and comprehensive price mitigation, I fear for the health of the Western economy as high prices ripple through the region over the next few months.

The California disaster has now been well documented. Power that cost $7 billion in 1999 cost $28 billion last year. Who knows what it will cost this year?

Outside of California there has already been a severe economic impact. The city of Takoma, Washington has increased rates by from 50 to 70 percent. The Seattle-Takoma airport has budgeted 25 percent of its entire budget this year for electricity, up from 5 percent last year.

The Bonneville Power Administration has announced that it may have to increase prices this fall up to 250 percent. Georgia Pacific shut down a plant in Bellingham, Washington because of high electricity rates, putting 406 workers out on the streets.

Now, ideally, effective price mitigation must apply to the entire Western interconnection during all hours. It must have a definitive endpoint and should be based on costs. In my prior testimony I described a generator specific cap that would be based upon a variable cost plus a reasonable profit.

There may be other ways to craft effective price mitigation that will restore just and reasonable prices in the Western interconnection. I would recommend immediate congressional action in this area.

Now, I think there are six compelling arguments for a price cap. Let me go through them. It will stop the economic and physical withholding of generation from the marketplace.

Now, there is a question. How do we provide more generation for the summer? If you believe that withholding is a serious problem, let's stop the withholding.

How would it stop the withholding? By taking away any incentive to withhold to drive up the price because it would not do you any good to do so. Let's bring every available megawatt to the market.

Point two, which is connected with point one, it would actually increase reliability. How would it do that? Because it would take

away any incentive a seller may have to risk a blackout in order to force the ISO to pay an exorbitant price in the last minute market.

Point three, it would stabilize prices and restore necessary credibility to the justness and reasonableness of wholesale prices in the Western interconnection. Those prices have no credibility right now.

Point four, I should have said this first. It would stop the immediate economic harm.

Point five, it would actually facilitate retail competition programs, I believe. Roger Hamilton, a member of the Oregon Commission, stated as much in our Boise conference a couple of weeks ago. He said that Oregon had been on the verge of moving to a retail competition program. They have now been frightened off because of the exorbitant prices in the wholesale market and because of the chaos.

Nevada has officially backed off through legislation. They have said, "No, we do not want to move forward with the competition program."

And point No. 6, the current chaos and instability, I think, makes lenders nervous, those who might lend to generation projects.

Marilyn Showalter, who is the Chairman of the Washington PUC, said as much when she came to our Boise conference. She said she is concerned that the current chaos and instability in her State makes it difficult to borrow money to build new facilities.

Now, there are six reasons.

In other respects, I applaud various provisions of the bill before you, Mr. Chairman. I applaud the demand response provisions of Sections 101 and 102. They move in the right direction.

I believe that Congress should transfer transmission siting authority to FERC or at least establish FERC as a backstop when State authorities fail to act. The lack of State action in siting transmission is a serious problem.

Section 108 should not be limited to the transmission facilities that are required by the State of California. Congress should place all transmission facilities in all States in the Nation under one set of open access rules.

Section 306 should be broadened to give FERC the express authority to require a single RTO for the West whether or not it is requested by ten Governors—this is an interstate issue—and to authorize the Commission to require the formation of RTOs and to shape their configuration in all States.

The hydro license provisions of Section 301 should be explicitly amended to require a balancing, a reasonable balancing with environmental concerns. I do not see that balance reflected in Section 301.

And finally, Congress should promulgate mandatory reliability standards that would be reviewed by the Commission and applied by RTOs.

Thank you, Mr. Chairman. I will look forward to your questions.

[The prepared statement of Hon. William L. Massey follows:]

PREPARED STATEMENT OF HON. WILLIAM L. MASSEY, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee on Energy and Air Quality: Thank you for the opportunity to testify on the proposed Electricity Emergency Act of 2001. I know that Chairman Barton has worked hard to find legislative measures that will help the western states deal with the electricity crisis they are now facing. While I will comment on many of the measures currently in the bill, I must first discuss a very important measure that is not in the bill.

EFFECTIVE PRICE MITIGATION

Unless there are dramatic improvements in supply, weather, or demand responsiveness, we are likely to see shortages of electric generating capacity this summer with a continuation, and probably an escalation, of out of control prices in the West. To stem the likely economic dislocation, I believe Congress should enact effective price mitigation for the Western Interconnection now. We need a time out in this dysfunctional electricity market.

Under normal circumstances, I would not recommend that market price issues be addressed through legislation. I believe that it is the Commission's responsibility to adopt effective price mitigation when necessary. The Commission has ample authority to do so under the Federal Power Act's just and reasonable standard, and acting under that standard is the more appropriate course. But circumstances are dire as the West faces the second summer of an electricity emergency and the Commission has failed to impose effective price mitigation. The Commission's recent order, on which I dissented, imposes price mitigation only when reserves drop below 7%. Yet there is evidence that sellers exercise market power in all hours to drive up prices. Thus, with summer fast approaching, I have no choice but to recommend that Congress act. Without more forceful and comprehensive price mitigation, I fear for the health of the western economy as high prices ripple through the region over the next few months.

Ideally, effective price mitigation must apply to the entire Western Interconnection, during all hours, must have an end point, and should be based on costs. In my prior testimony, I described a generator specific cap that would be based on variable costs plus a reasonable profit. There may be other ways to craft effective price mitigation that will restore just and reasonable prices in the Western Interconnection. I would recommend immediate Congressional action in this area.

DEMAND RESPONSIVENESS

Section 101 (Demand Management Agreements Clearinghouse) and section 102 (Price Mitigation in Western Market through Demand Management Incentives) provide measures that will help improve demand responsiveness in electricity markets. Demand responsiveness is a critical feature that is largely absent from electricity markets. Without the ability of customers to respond to price, there is virtually no limit on the price that suppliers can fetch in shortage conditions. Consumers see the exorbitant bill only after the fact. This does not make for a well functioning market.

The demand responsiveness provisions of the bill move in the right direction and I support them. I support the market based approaches in the bill and observe that the Commission may be able to use the private sector for organizing a clearinghouse for agreements, subject to Commission oversight. I would recommend, however, that the Commission be allowed to make a recommendation to extend the provisions of section 102 beyond the proposed October 1, 2002 termination date, as is allowed for in section 101.

TRANSMISSION ISSUES

Section 103 (Transmission Constraints Study), section 104 (Path 15 Transmission Expansion), section 105 (Tribal Energy Office), section 106 (Federal Transmission Corridors), and section 108 (Sale of Transmission Assets to the State of California) of the bill address important transmission issues. Identifying transmission constraints and developing a plan for relieving them, identifying transmission corridors across Federal land, and finally relieving the long standing constraint on California's notorious Path 15 are all positive developments and I support them. I must observe, however, that those provisions are unlikely to have much impact on the market over the next several months.

I would add two observations. First, constraints should be relieved in the least cost manner. Constraints may be relieved by adding generation, adding transmission, or increasing demand responsiveness. I recommend that Congress require that constraints be relieved in the least cost manner.

And second, I strongly believe that the major impediment to the addition of new transmission facilities is the inability to site them. To address this problem, I recommend empowering the Commission to site new transmission facilities. The transmission grid is the critical superhighway for electricity commerce, but it is becoming congested due to the increased demands of a strong economy and to new uses for which it was not designed. Transmission expansion has not kept pace with these changes in the interstate electricity marketplace. The Commission has no authority to site electric transmission facilities that are necessary for interstate commerce. Existing law leaves siting to state authorities. This contrasts sharply with section 7 of the Natural Gas Act, which authorizes the Commission to site and grant eminent domain for the construction of interstate gas pipeline facilities. Exercising that authority, the Commission balances local concerns with the need for new pipeline capacity to support evolving markets. We have certificated 10,000 miles of new pipeline capacity over the last six years. No comparable expansion of the electric grid has occurred.

I recommend legislation that would transfer siting authority to the Commission or at least establish the FERC as a backstop when state authorities fail to decide on proposed expansions within a specified period of time. Such authority would make it more likely that transmission facilities necessary to reliably support emerging regional interstate markets would be sited and constructed. A strong argument can be made that the certification of facilities necessary for interstate commerce to thrive should be carried out by a federal agency.

Section 108 of the bill would subject to FERC jurisdiction any transmission facilities that are acquired by the State of California. I support the principle underlying this recommendation but see no reason to limit its application to California only. Congress should place all interstate transmission under one set of open access rules. That means subjecting the transmission facilities of all municipal electric agencies and rural cooperatives, the Tennessee Valley Authority, and the Power Marketing Administrations to the Commission's open access rules.

In addition, all transmission, whether it underlies an unbundled wholesale, unbundled retail, or bundled retail transaction, should be subject to one set of fair and non-discriminatory interstate rules administered by the Commission. This will give market participants confidence in the integrity and fairness of the interstate delivery system, and will facilitate robust trade by eliminating the current balkanized state by state rules on what is essentially an interstate delivery system.

WESTERN-WIDE RTO

Section 306 of the bill would require all entities in the WSCC to participate in a single RTO if at least ten of the fourteen governors within the WSCC agree. I would interpret this provision as a strong Congressional endorsement of a Western Interconnection RTO. I wholeheartedly agree with that goal. The Western Interconnection functions as a single market. I firmly believe that large RTOs consistent with FERC's vision in Order No. 2000 are absolutely essential for the smooth functioning of electricity markets. RTOs will eliminate the conflicting incentives vertically integrated firms still have in providing access. RTOs will streamline interconnection standards and help get new generation into the market. A single RTO for the West will help ensure access to the western power market, improve transmission pricing, regional planning, congestion management, and produce consistent market rules across the West. We know for a fact that resources will trade into the market that is most favorable to them. Trade should be based on true economics, not the idiosyncracies of differing market rules across the region.

To realize these many potential benefits, RTOs must be truly regional in scope—large and well shaped. Markets are regional in scope—this has been well demonstrated recently as prices over the entire West rose and fell with events in California. Thus, we need an RTO that covers the entire West.

I would add two caveats to my support for this provision. First, the FERC should have the express authority to require a single RTO for the West whether or not it is requested by ten governors. Establishing the needed institutions for just and reasonable terms and conditions for interstate wholesale markets is a federal responsibility.

And second, I recommend that the Congress clarify existing law to authorize the Commission to require the formation of RTOs and to shape their configuration in all states, not just those in the West. I continue to believe strongly that the development of well structured Regional Transmission Organizations is a necessary platform on which to build efficient electricity markets. The full benefits of RTOs to the marketplace will not be realized, however, if they do not form in a timely manner,

if they are not truly independent of merchant interests, or if they are not shaped to capture market efficiencies and reliability benefits.

EMERGENCY POWER SALES

Section 107 prohibits orders requiring emergency sales of electricity or natural gas unless payment is guaranteed. This is a reasonable provision and I support it. I agree that sellers should be paid for their product. But I must emphasize the obvious: payment should be for prices that are just and reasonable.

PURPA CONTRACTS

Section 205 of the bill provides for the ability of a PURPA QF to sell its output to a third party if the utility purchaser is unable to meet the payment terms of the power purchase agreement. This is a reasonable provision and I support it.

FEDERAL ASSISTANCE AVAILABLE DURING ELECTRIC EMERGENCIES

Although section 201 (Emergency Conservation Awareness), section 202 (Preparation for Electricity Blackouts), section 203 (Conservation at Federal Facilities), and section 204 (Daylight Savings Time) of the bill do not appear to directly implicate FERC authority, they appear to be reasonable proposals that I would endorse.

HYDROELECTRIC POWER LICENSE CONDITIONS

Section 301 would require the Commission to promulgate a standard license article, applicable and available to all FERC licensed facilities. The article would permit any licensee to suspend, for up to two years, any or all of its minimum flow requirements. The licensee's authority to invoke the article would be triggered by an emergency declaration by the Governor of the State in which the licensee's facilities are located.

I am concerned with the breadth of this provision. Although the section does provide for a consultation period, in which relevant resource agencies could express their concerns, the licensee could suspend any minimum flow regimes previously required by the Commission. Many of these minimum flow provisions are critical tools in balancing power generation and resource protection.

The Federal Power Act provides that the responsibility for determining the proper balance between the development of hydro power and environmental protection rests with FERC. The Commission recently encouraged Commission licensees in the West to examine their projects for the purpose of identifying any efficiency modifications that could result in increased generation, while identifying any environmental impacts that could occur. This approach will allow FERC to expedite consideration and approval of proposals to increase generation in emergency situations, while respecting environmental considerations.

ADDITIONAL RECOMMENDATIONS

I made recommendations for Federal legislation in some of the earlier sections of this testimony. The following additional recommendations for legislation will ensure that the nation reaps the benefits of well-functioning electricity markets.

We need mandatory reliability standards. Vibrant markets must be based upon a reliable trading platform. Yet, under existing law there are no legally enforceable reliability standards. The North American Electric Reliability Council (NERC) does an excellent job preserving reliability, but compliance with its rules is voluntary. A voluntary system is likely to break down in a competitive electricity industry.

I strongly recommend federal legislation that would lead to the promulgation of mandatory reliability standards. A private standards organization (perhaps a restructured NERC) with an independent board of directors would promulgate mandatory reliability standards applicable to all market participants. These rules would be reviewed by the Commission to ensure that they are not unduly discriminatory. The mandatory rules would then be applied by RTOs, the entities that will be responsible for maintaining short-term reliability in the marketplace. Mandatory reliability rules are critical to evolving competitive markets, and I urge Congress to enact legislation to accomplish this objective.

And second, I recommend legislation that would give the Commission the direct authority to mitigate market power in electricity markets. It should be clear by now that, despite our efforts, market power still exists in the electricity industry. The FERC, with its broad interstate view, must have adequate authority to ensure that market power does not squelch the very competition we are attempting to facilitate. However, the Commission now has only indirect conditioning authority to remedy market power. This is clearly inadequate. Therefore, I recommend legislation that

would give the Commission the direct authority to remedy market power in wholesale markets, and also to do so in retail markets if asked by a state commission that lacks adequate authority.

CONCLUSION

I stand ready to assist the Subcommittee in any way, and I thank you for this opportunity to testify.

Mr. BARTON. We thank you, Commissioner.

We would now like to hear from Commissioner Breathitt, and let's set the clock at 9 minutes because Mr. Herbert took about ten and Mr. Massey took about nine. So we will set it at nine.

STATEMENT OF HON. LINDA K. BREATHITT

Ms. BREATHITT. Good afternoon, again, Mr. Chairman and members of the subcommittee, and Mr. Whitfield, my neighbor, in Western Kentucky.

I appreciate this opportunity to appear before you today to discuss the Electricity Emergency Relief Act and the energy crisis that is affecting electric markets in California and throughout the West.

The proposed legislation provides for a number of remedies to address this serious situation, and in general, I am supportive of the proposals set out in the legislation. For several years the Commission has focused its attention on finding solutions to problems confronting the wholesale electricity markets.

Last week the Commission issued an important order addressing price volatility in Commission and the West. Our order established a market oriented plan for monitoring and price mitigation in California. This approach addresses price volatility in California's real time energy markets while not discouraging necessary investment in California's transmission and generation infrastructure.

Our order also established an investigation under 206 of the Federal Power Act into wholesale electricity transactions within the Western States Coordinating Council. I supported the Commission's order, and I believe that for the most part, the Electricity Emergency Relief Act provides similar market oriented solutions which I can accept.

My written testimony discussed the provisions of the act that have implications for the Commission, and this afternoon I will touch briefly on just a few of those provisions.

Section 101 would require the Commission to establish a demand management clearing house system. This concept is a good one and is similar to an action take by the Commission on March 14 of this year authorizing wholesale customers who reduce purchases to sell these reductions at market based rates.

But Section 101 as drafted is not clear what type of clearing house system the Commission is expected to establish. There may be practical difficulties with the Commission establishing such a clearing house within 30 days of enactment.

As for declaring that all market prices for foregone purchases are just and reasonable, this may eliminate tools the Commission would otherwise use to prevent gaming and affiliate abuse.

Section 102 would establish a program allowing any customer of an electric utility in the WSCC to sell at market prices the portion of electric load the customer is willing to forego, the retail component of your act.

However, the section specifies that these sales would not be treated as sales for resale under the Federal Power Act. As with Section 101, the concept of this section is laudable and is a similar measure to one the Commission has taken earlier this spring.

In that order, however, the Commission had assumed such sales would be jurisdictional where the customer sold its reduced consumption at wholesale. The proposed legislation would remove Commission jurisdiction over such transactions.

Section 103 requires the Secretary of Energy and our Commission to undertake a joint study of electric power transmission congestion. I am supportive of a planned approach to the development of electric infrastructure. However, this section of the proposed legislation is unclear as to what Congress will do with the infrastructure study once it is completed.

And as I stated before this subcommittee on March 20, I believe that the Commission does need to have explicit siting authority for new electric interstate transmission infrastructure because shortages of transmission are not just State issues.

The electric grids of the Western States are inextricably linked. I believe that transmission siting has become an interstate commerce issue that needs input from the Commission, and I would support legislation giving siting authority to the FERC.

Section 107 would prohibit the Commission and other governmental entities from requiring a sale of electric energy or natural gas unless there is a guarantee that the seller will be paid the full purchase price when due. The principle of the section that generators should not be forced to sell to customers that are not able to pay them is sound.

However, if interpreted too broadly, it may have the unintended effect of limiting the amount of resources that could be made available to assist the West with its supply of deficiencies.

I note that the Commission included a measure in our recent price mitigation order for California that requires all sellers with purchasing generator agreements with the California ISO, as well as non-public utility generators located in California, to offer all of their available power in real time during all hours.

There should be sufficient discretion provided in the legislation that such sales into the California market could be required as long as there are adequate assurances of payment from a credit worthy party.

Section 301 concerns hydroelectric power license conditions, and regarding this section, my support is tempered with a concern that any actions taken should not negatively impact the long-term health of the environment. It is important not to create additional problems through the lack of measured consideration.

And finally Section 306 requires the Commission to establish an RTO for the region covered by the WSCC upon the request of at least ten of the 14 Western Governors. I view the formation of RTOs in the West as important to the efficient operation and enhanced reliability of the transmission grid, and I believe that RTOs will reduce barriers to access to the transmission grid and will address many of the remaining impediments to wholesale electric markets.

So if there was broad based support by the Governors of the region for a West-Wide RTO, I would be supportive of such action.

That concludes my formal opening statement, Mr. Chairman. I would be happy to provide more thoughts on the order that we issued on Wednesday night.

[The prepared statement of Hon. Linda Breathitt follows:]

PREPARED STATEMENT OF HON. LINDA BREATHITT, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee: I appreciate this opportunity to appear before you today to discuss the energy crisis in California and the worsening conditions of electric markets throughout the West. My testimony begins by describing an order issued by the Commission last week. Then, my testimony discusses the provisions of the Electricity Emergency Relief Act that has implications for the Commission.

Just last week the Commission issued an important order addressing the price volatility in California and the West. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 95 FERC ¶61,115 (2001) (Price Mitigation Order). Through this order the Commission established a plan for market monitoring and price mitigation in California that will become effective later this month. This order fashioned a market-oriented approach which addresses the price volatility in California's real time energy markets while not discouraging the necessary investment in California's transmission and generation infrastructure. In addition, the Commission's order established several demand side measures that should promote conservation.

The Price Mitigation Order also instituted an investigation, under section 206 of the Federal Power Act, into the rates, terms, and conditions of sales for resale within the Western Systems Coordinating Council (WSCC). This investigation will target the transactions and prices in the WSCC in a manner that does not conflict with the Commissions' actions in California. I believe that the requirements of this order are consistent with the objectives of the Electricity Emergency Relief Act.

I will only comment on those sections of the Electricity Emergency Relief Act that affect the Commission's authorities and responsibilities. In general, I am supportive of the proposed legislation.

Section 101 would require the Commission to establish a clearinghouse system to facilitate agreements under which wholesale purchasers would forego purchasing electric energy that they are entitled to buy under contractual arrangements. The compensation paid for foregone purchases is deemed to be just and reasonable. The Commission must report to Congress by January 1, 2003, on the section's effect and whether Congress should extend the section's authority.

The concept of creating a marketplace where wholesale purchasers who forego entitlements to purchase power can be compensated at market rates for their foregone purchases is a good one. In fact, in a March 14, 2001 order, the Commission authorized, under our existing authority, wholesale customers who reduce purchases to sell these reductions at market-based rates. *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States,* 94 FERC ¶61,272 (2001) (Order Removing Obstacles).

Section 101 as drafted is not clear what type of clearinghouse system the Commission is expected to establish. There may be practical difficulties with the Commission establishing such a clearinghouse system within 30 days of enactment. As for declaring that all market prices for foregone purchases are just and reasonable, this may eliminate tools that the Commission would otherwise use to prevent gaming and affiliate abuse.

Section 102 would establish a program allowing any electric consumer, *i.e.* a retail customer, of an electric utility in the WSCC to sell at market prices the portion of electric load the customer is willing to forego out of the total amount it is entitled to consume. The section specifies that these sales would not be jurisdictional under the Federal Power Act.

As with Section 101, the concept of this section is laudable and is similar to a measure the Commission has taken in its Order Removing Obstacles. However, the Commission had assumed such sales would be jurisdictional where the customer sold its reduced consumption at wholesale, whereas this section removes Commission jurisdiction over such transactions.

This section also imposes upon the Commission the responsibility to determine the amount of power a consumer is entitled to consume where it is not specifically limited by contract or regulation. This could be a difficult and burdensome deter-

mination to make, depending upon how many different customers require this determination.

Section 103 requires the Secretary of Energy and the Commission to undertake a joint study of electric power transmission congestion. This section also mandates that a plan be developed to relieve electric constraints that reduce the efficiency of the transmission grid within the United States and with Canadian and Mexican electric transmission systems.

I am supportive of a planned approach to the development of electric infrastructure. I also believe that such a planned approach is needed to address natural gas infrastructure needs. The issue of whether adequate takeaway capacity exists on intrastate pipelines in California needs to be addressed.

This section of the proposed legislation is unclear as to what Congress will do with the infrastructure study once it is completed. As I stated before this subcommittee on March 20, 2001, I believe that the Commission needs to have siting authority for new electric interstate transmission infrastructure, because shortages of transmission are not just state issues. The electric transmission grids of the Western states are inextricably linked. I believe that transmission siting has become an interstate commerce issue that needs input from the Commission.

Section 107 would prohibit the Commission and other governmental entities from requiring a sale of electric energy or natural gas "unless there is a guarantee that, as determined by the Commission, is sufficient to ensure that the seller will be paid the full purchase price when due."

The principle of this section, that generators should not be forced to sell to customers that will not be able to pay them, is sound. However, if interpreted too broadly, it may have the unintended effect of limiting the amount of resources that could be made available to assist the West with its supply deficiencies. I note that the Commission included a measure in our recent price mitigation order for California that requires all sellers with Purchasing Generator Agreements with the California Independent System Operator (ISO) as well as non-public utility generators located in California to offer all their available power in real time during all hours. There should be sufficient discretion provided in the legislation that such sales into the California market could be required as long as there are adequate assurances of payment from a creditworthy party.

Section 108 provides that, if the State of California or any entity established by the State owns or operates transmission facilities acquired from a Commission-regulated public utility, the State or such entity will be subject to Commission regulation with respect to such facilities to the same extent and in the same manner as would be the public utility itself.

As I testified before this Subcommittee on March 20, 2001, I believe the issue is not so much who owns the transmission system in California or elsewhere. The real issue is that the transmission system, whether public or private, needs to be part of a regional grid. Only independent, regionally operated grids will ensure competitive electricity markets that are open, efficient, reliable, and free from discrimination. What's truly important is that California's transmission system remain as much a part of the Western regional grid as it is today. This section is one way of ensuring that the facilities continue to provide open-access services as part of a regional grid.

Section 301 requires the Commission to promulgate a standard license article to permit increased generation at licensed hydroelectric facilities to alleviate electric supply, generating, or system reliability emergencies. The proposed legislation provides that, upon notice to the Commission and after consultation with the appropriate resource agencies, a licensee may operate with a temporary modification of any minimum flow requirement during the emergency. Such actions would only be taken upon request by the Governor of the affected State.

My support for this approach is tempered with a concern that any actions taken should not negatively impact the long-term health of the environment. It is important not to create additional problems through the lack of measured consideration and foresight.

Section 306 requires the Commission to establish an RTO for the region covered by the WSCC, upon the request of at least 10 of 13 Western Governors.

I view the formation of RTOs in the West as important for the efficient operation and enhanced reliability of the transmission grid. I believe that RTOs will reduce barriers to access to the transmission grid and will address many of the remaining impediments to competitive wholesale electric markets. If there was broad-based support by the Governors of the region for a West-wide RTO, I would be supportive of such action.

In closing, for several years now, the Commission has focused its attention on finding market solutions to problems confronting the wholesale electricity markets.

While the situation in California and the West has certainly challenged this resolve, I have remained steadfast in my belief that market-oriented solutions are preferable to those which might further hinder the development of competitive wholesale electricity markets. I believe that, for the most part, the Electricity Emergency Relief Act provides the type of market-oriented solutions that I can accept.

Thank you.

Mr. BARTON. We thank you, Commissioner.

The Chair would recognize himself for the first question period. We are going to go 5 minutes, and we will probably go two rounds of 5 minutes each.

A brief statement before I start my questions, and time me on this. I do want it to take away from my time.

We have really tried the last 3 to 4 months to get all input possible on what, if anything, the Congress could do in the Western States this summer, and I mean all input. And we have looked at every idea. Staff has met with probably hundreds of interested parties. Members of the subcommittee have all been very receptive to meeting with individuals that came by their offices.

So we are now to the point where we are trying to distill what could be done and what makes sense and perhaps what should not be done, and the Chair is very pleased that we are getting to the substantive part of the debate.

And I do not take it as a negative that members on the minority take great issue with some of the proposals. I think that is a positive step, not a negative step.

So having said that, I want to begin the question period. Section 205 of the bill that we are considering moving legislatively would allow PURPA qualifying facilities to suspend a contract if they have not been paid for the power that they were submitting under the contract.

Now, I have information that there is somewhere between 1,000 and 3,000 megawatts of qualifying facility power in California that is currently idle. Chairman, what is the FERC's analysis in the amount of QF power that is available that is currently not being generated?

Mr. HÉBERT. Well, actually, Mr. Chairman, we do have some pending issues before us on the QF, but I will tell you, if I may, I would rather speak to your legislation to keep myself from——

Mr. BARTON. Well, I am not trying to get into that. I mean just generally does the Commission—let me rephrase the question.

Does the Commission have reason to disagree that there is somewhere between 1,000 megawatts and 3,000 megawatts of QF power in California that's currently not being generated?

Mr. HÉBERT. No, I do not, Mr. Chairman, and let me elaborate just a bit. As I said in my opening statement, I do believe most people are suggesting there is, in fact, around 3,000 megawatts. Studies will prove out that, in fact, per 1,000 megawatts is a million households. So you are talking about roughly 3 million households in California of capacity that is sitting idly by.

We do have some issues that are unresolved that are pending before our Commission. We will act immediately, but I will tell you this is one section of the bill that I think gives more immediate short-term help than anything else in the legislation, and I will commend you for it.

Mr. BARTON. Well, some of the members of the subcommittee that commented on specific parts of the bill expressed some concern about this section of the bill, and I have gone back and reread it since those concerns were expressed, and you know, it is a qualifying facility who has an existing contract that they have not been paid for. If that is the case, they can petition to enter into another sale until they are paid for the power under the long-term contract, or until they negotiate a settlement with the long-term contract, or until October of 2003.

So we have got three safeguards, and in the short term, if you have generators that are there, that could sell power that is clean power, natural gas or alternative energy fired power, it would seem to me that this would be one section of the bill that we ought to act upon. Are there other safeguards that we should put into this section to guarantee the sanctity of these long-term contracts?

Would Commissioner Massey or Commissioner Breathitt like to comment on that? Mr. Massey.

Mr. MASSEY. Well, Mr. Chairman, given the nature of the emergency, I think this may very well be a reasonable provision.

Mr. BARTON. Commissioner Breathitt?

Ms. BREATHITT. I had no negative comments when I was reviewing your legislation on this section either.

Mr. BARTON. Okay. Section 107 of the act guarantees payments. It says if a Federal agency is going to force a seller to sell power, the seller of that power, needs to be paid for the power or does not have to put it into the market.

Chairman, do you have a problem with Section 107 of the Act?

Mr. HÉBERT. No, actually we have spoken to it to some degree in that we had a case earlier in the year as to credit worthiness. Credit worthiness is something that has been an issue historically before the Commission as to tariffs that are filed on behalf of pipes or public utilities.

This would certainly clear that measure up because what FERC does is say there is a credit worthy requirement, but we do not go further and into the extent of what that requirement would be.

Mr. BARTON. Okay. Commissioner Massey and Commissioner Breathitt?

Mr. MASSEY. I do not object to the provision as long as we apply this caveat, that the prices has to be a just and reasonable price for which they are being paid.

Mr. BARTON. Okay. Commissioner Breathitt?

Ms. BREATHITT. And I had commented that if this section is interpreted too narrowly, it could tend to limit some megawatts into the market, and that it might be sufficient enough to have discretion in the legislation that the sales going into California could be required as long as there were adequate assurances of payment from a credit worthy party.

Mr. BARTON. Okay. My last question, and I would like a brief answer.

We also have a section of the pending bill that allows the Path 15 build-out, that the Federal Government would actually pay for that build-out. Does the Commission have a position individually on that section of the bill?

Let's start with ladies first here, Commissioner Breathitt.

Ms. BREATHITT. I am delighted that this legislation seeks to address that very serious bottleneck which tends to restrict the imports and exports of sales coming into and going out of California, and so I think it would be wonderful if we could get Path 15 fixed.

You know, the way that you go about it in your legislation seems reasonable to me, but I would like to put a plug in for siting authority.

Mr. BARTON. All right. I understand that. Chairman Hébert and then Commissioner Massey.

Mr. HÉBERT. I would certainly concur with everything that Commissioner Breathitt said, and I would tell you that Path 15 is something that, while I am 38 years old, they have been debating Path 15 and what to do about it since I got out of college, and I did finish college in 4 years.

Mr. BARTON. Okay.

Mr. HÉBERT. So it is something that needs to be done. The $220 million, is that enough? I am really not clear on that, but that is close to the number. So I would commend you for that. I think it is the right thing to do because it is not just a generation problem. It is a transmission problem and the ability to be able to deliver capacity.

Mr. BARTON. Okay. Commissioner Massey.

Mr. MASSEY. It causes you to wonder why the path has not been fixed before. Of course, it is difficult to site transmission anywhere, but point two, there are winners and losers when you complete that project. There are those who can charge more and those who can charge less, and I think market participants understand that to a fare thee well.

I think this is a reasonable provision, with one caveat, and that is that necessary environmental values in the siting are protected.

Mr. BARTON. I agree.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

And I want to join with you in thanking our witnesses from the Federal Energy Regulatory Commission for taking part in our discussion this afternoon.

Chairman Hébert, I am concerned that your order entered last Wednesday is not adequate to assure that full sale electricity prices in California are going to be just and reasonable, and I would like to spend a few minutes asking you some questions about various aspects of that order.

Your order only constrains wholesale prices during the hours when reserve power resources are not at least 7.5 percent of current demand. Did you conclude that unjust and unreasonable wholesale prices would only be imposed during these times of constricted reserves and not during any other time?

And if that, in fact, was your conclusion, I would be interested in knowing what evidence you have in your record that economic withholding by power marketers has only occurred during those times of constricted power reserves.

So if you would, please respond to whether or not you concluded that unjust and unreasonable prices would only be imposed during these times of constricted power reserves.

Mr. HÉBERT. That is certainly not what the Commission said through its order. What the Commission, in fact, said was that it was going to attempt to constrain prices at all times. I think maybe what has been communicated to you perhaps is the price mitigation measure, which is not to say in times other than the mitigation measure outside of the 24-hour period that prices will not be constrained because prices will be constrained through the must sell arrangement, through the bidding requirement, and through demand responses. So the constraint will be there.

The concerns that we had actually if you are talking about the Stage 1 were from numerical requirements from reserve requirements that we and others thought get them into an emergency standard.

Mr. BOUCHER. Mr. Massey, I would like to ask you to respond to the same question if you would. Do you believe that the Commission's order adequately constrains wholesale prices in times other than those periods during which the reserve margins are at 7.5 percent or less?

Mr. MASSEY. Congressman, I do not believe it does. In fact, it would be my expectation that prices will rise in those hours since they will not be subject to the price mitigation measures.

Mr. BOUCHER. So would, in your opinion, a proper order have applied the price mitigation measures not just in these times of constricted reserves, but all the time?

Mr. MASSEY. It would have, yes.

Mr. BOUCHER. Ms. Breathitt, let me get you to comment on that same question, please.

Ms. BREATHITT. Yes. There are two features of the order, and if you look at them together, I think it addresses the concern that you may be asking us about, and that is the feature that institutes the price mitigation plan, the price mitigation portion of the order. It is triggered in Stage 1, which does call in when reserves are 7.5 or below.

I have been told by some of our senior staff and not having the crystal ball now, that they expect that supplies are going to be so short this summer that we will probably be in the stages most of the summer, but if we are not, that feature, coupled with the feature that requires sellers to offer all of their available power that is not tied up in a contract in the real time, 24 hours a day, 7 days a week, serves to disallow the economic and physical withholding.

So that is addressed in that feature and coupled with the fact that we will have many, many, many hours each day, I believe, when we are in the stages that we are going to be price protected.

Mr. BOUCHER. All right. Mr. Massey, let me get you to respond, if you would, to the suggestion by both Chairman Hébert and Ms. Breathitt, that there are features of the order other than the direct price mitigation features that should taken together prove sufficient to assure that unjust and unreasonable charges will not be imposed in times other than times of constricted reserve margins.

Mr. MASSEY. There are some good features of the order. However, I do not think they will be sufficient. If you apply the standards of the order to last summer and last fall when prices were wildly out of control and when the ISO alleges that the overcharges in the market were over $6 billion, this order would only capture

about two to 3 percent of those transactions because there were very few Stage 1, 2, or 3 alerts during all of last year. There was only one 2-hour Stage 3 alert that I recall.

So this order is going to be insufficient. If, in fact, we are in Stage 1, 2, or 3 alerts most of the summer, then it seems to me that cuts both ways. Why not go ahead and insure that prices are mitigated in all hours.

We are here at the 11th hour. It is not time for half a loaf solutions. It is time to be problem solvers and to fix this serious economic problem for the West.

Mr. BOUCHER. So your recommendation would be that the direct price mitigation features of this order be applied all the time and not just during the time of constricted reserves.

Mr. MASSEY. Yes.

Mr. BOUCHER. Thank you very much.

Mr. Chairman, my time for the present has expired. I have some other questions about this order, and I will return to that in the second round.

Mr. LARGENT [presiding]. I thank the gentleman from Virginia.

I think the chairman indicated that there would be a second round of questioning of this panel.

I am going to recognize myself. I was the next in order, and I am now the Chair, and I can do whatever I want. So Commissioner Massey, I want to ask you a question. Do you agree that the principal problem in California is a problem of shortage of generation?

Mr. MASSEY. I think that is one of the problems. I think economic and physical withholding of available generation is also part of the problem.

Mr. LARGENT. If we had abundant generation in California, would we be here this afternoon?

Mr. MASSEY. If we had abundant generation and the right market rules that insisted that the generation was bid into the market when available, we probably would not be here today.

Mr. LARGENT. So it is a generation shortage?

Mr. MASSEY. In part. It is also a lack of effective demand response in the marketplace which allows the price to be bid up above efficient levels, and this bill attempts to address that problem. That is another serious problem.

It is transmission constraints in the marketplace. There are a variety of problems.

Mr. LARGENT. How will whole price caps increase generation in California?

Mr. MASSEY. It will increase generation in the short term by eliminating any incentive to either withhold physically or economically. If you believe withholding is a problem——

Mr. LARGENT. How do price caps incent contributing more generation into a market?

Mr. MASSEY. It incents it by taking away any incentive to withhold that generation in order to get a higher price because there is no higher price available. You may as well go ahead and bid it into the market at the capped price as soon as you possibly can.

Mr. LARGENT. So you do not believe that price caps served to discourage the construction of new generation in the State of California?

Mr. MASSEY. If it is applied on a temporary basis, if new generation is exempted, I think it may actually increase the supply of generation over the next 6 months.

Mr. LARGENT. So you would exclude new generation from price caps.

Mr. MASSEY. I would, yes.

Mr. LARGENT. Okay. Commissioner Massey, last time you were here, we had a conversation about defining just and reasonable prices. Have you been able to come up with a working definition that you use for defining just and reasonable prices?

Mr. MASSEY. I know what the courts have told us. They have told us that a just and reasonable price is a cost of service price or a just and reasonable price is a price that arises from a well functioning market that FERC is paying adequate attention to. We have neither of those.

Mr. LARGENT. Commission Hébert, if you were to rate California's current actions to mediate their crisis, ten being they are doing everything possible and zero, they are doing nothing, how would you rate their effort at this time?

Mr. HÉBERT. I think it depends on the individual, and I am not dodging the question, but I will tell you I think some of the leaders are understanding more and more that there is a problem.

I would have said a zero or a one earlier in the year. I would say they are getting closer to a 5 and a 6.

Filing an RTO, which we have asked them to do some almost 18 months ago would certainly move us—I am sorry—13 months ago in that direction.

So they asked for FERC's assistance. They asked for us to issue rulings and findings. I would ask that they follow them.

Mr. LARGENT. The reason I asked that question is because I ended up having an educational conversation with a gentleman just by happenstance on an airplane flying back and forth from Washington, DC. I cannot honestly tell you even what the name of the company that he worked for was, but he was talking about the fact that they had several turbines sitting in warehouses in Houston at this time that they could get on line within 90 days in the State of California, and yet they continued to be stonewalled by the State of California about bringing those turbines on line.

Mr. HÉBERT. If you are asking for a difference in leadership style, let me compare New York State to California. I received a phone call from the Governor, Governor Pataki's office, several months back, and in fact, I had made the statement that they were going to be it looked like short on the southeast side, perhaps have a rolling blackout.

Obviously the Governor's office was not happy with my statement. It is certainly not something they wanted to hear, and we had a long conversation about it.

Within just a couple of weeks I had received a phone call back saying, in fact, that they were going to get some small generating units, and they were going to put them on.

Now, they have had some difficulty putting those units on due to some environmental considerations, but they are trying to move beyond that. They are trying to be creative.

So I would suggest to you that there are differences in leadership style. I think the norm of California has been that the States outside of California will send energy to them and take care of their problem and that their markets will be capped and that, therefore, they will be taken care of, and we have got to make certain that we make good and tough decisions to help them get on their feet not only in the short term, but in the long term.

Mr. LARGENT. All right. Thank you, Commissioner.

Mr. HÉBERT. Thank you.

Mr. LARGENT. I am going to yield time, and let's see whose time it is. Mr. Waxman from California. I am sorry.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

I want to share with the members of the subcommittee a cartoon over on the other side. This cartoon depicts a secret meeting of utility companies discussing the energy debacle in California. The executives are talking about what a huge mistake it was to embark on the road to deregulation.

In the third frame, one executive tells the others, "Well, there is only one thing to do now."

Another responds, "You mean accept the responsibility for our ludicrously shortsighted course of action and beg the public's forgiveness?"

And the executive answers, "No, you moron. Blame the environmentalists."

It ends with them saying, "Think anybody will buy it? Hey, what have we got to lose?"

Although this cartoon should probably be about the generators instead of the utilities, it does appear to reflect what's going on here on Capitol Hill: a flawed State law, generators who manipulate the system and neglectful Federal regulators have all contributed to the mess we now find ourselves in.

So we find ourselves in the situation where electricity generators are getting rich while FERC stands idly by. I released a report on April 25 that documents this problem, and I will make this report available today for the press and ask that it be inserted into the record.

For example, at the Williams Energy Marketing and Trading Company, which sells energy from California's facilities, profits increased nearly tenfold, from $104 million in 1999 to over $1 billion in 2000, and that Reliance Wholesale Energy business segment which supplies electricity to California, operating income rose over 17 times, from $27 million in 1999 to $482 million in 2000.

Unfortunately, the Federal Government has done nothing. The President hasn't even visited California, and FERC refused to put in place any meaningful price restraints.

There should be no mistake. The key action to address runaway wholesale electricity prices, that is what we need to have done, and until this bill is amended to do this, it is only window dressing.

Mr. Massey, do you think that FERC has fulfilled its responsibilities to protect California?

Mr. MASSEY. In my opinion, we have not done nearly enough. The one thing that would provide the most help, which is effective price mitigation, we have not provided.

Mr. WAXMAN. And that is why I think Congress should act. Do you believe that Congress should act to put this in place?

Mr. MASSEY. Regretfully, I believe Congress must act. I would not normally suggest that for price mitigation measures, but I think it is necessary.

Mr. WAXMAN. When the chairman, Mr. Barton, asked questions, he asked about this Section 205, the QFs, and I have a letter that I would like to insert into the record. It is from Southern California Edison. It pretty much says that these QFs are an important source of energy. They operate under long-term contracts with California, California's two major utilities, and that if we had this Section 205, which would allow QFs to escape their obligations under the long-term contracts, it would effectively release them from their long-term contracts and allow QFs to sell their power production on the market, and that it is unnecessary, that the Public Utilities Commission has acted.

And I will put this in the record so others can see it.

Mr. BARTON. Without objection. I assume that we have seen that.

Mr. WAXMAN. Well, you will have an opportunity to see it. I do not think you have because otherwise your questions might have been different.

Mr. BARTON. I doubt that.

Mr. WAXMAN. As I said, the bill is fundamentally flawed because it does not help California consumers by stopping price gouging, but there is another fundamental flaw in the bill. That is the loophole it creates in our nation's environmental laws. The bill weakens the Clean Air Act. It allows provisions of the Endangered Species Act to be waived.

I want to focus on one provision in the bill, Section 107, to illustrate these anti-environment provisions. Section 107 creates a super mandate directing the Department of Energy to establish transmission facilities on Federal lands where, quote, necessary or appropriate, end quote.

This provision makes every acre of Federal land available for electricity transmission lines, including over 80 million acres administered by the National Park Service, 91 million acres by the Fish and Wildlife Service, 191 million acres by the U.S. Forest Services, and 270 million acres by the Bureau of Land Management.

In addition, this provision appears to apply to lands under the jurisdiction of the Department of Defense, Energy, and legislative branch.

Should Congress grant this kind of dramatic new authority to the Department of Energy? I would like to ask Mr. Hébert. What do you think about that? Do you think that the transmission line should be permitted to cut through Yellowstone National Park or other wilderness areas?

Mr. HÉBERT. Congressman Waxman, as you know, I am Chairman of the Federal Energy Regulatory Commission, and I do not work for the Department of Interior or the Department of Energy. Those questions are more suited for them. Therefore, I would rather not reply.

I do not have a position.

Mr. WAXMAN. Okay. Either of the other two of you want to comment on it?

Mr. MASSEY. I would not want transmission wires through Yellowstone National Park. I believe that any provision that Congress enacts should make very clear that environmental values are protected.

Mr. BARTON. There is no way to make them temporary to meet what I hope will become a less than 2 year crisis we are in, in California and the West. I am certainly amenable to Federal action that can help in the very short term, but there is no way. I do not see that once they went up in Federal lands that they would be taken down.

Mr. WAXMAN. Yes, that bothers me, too.

Mr. BARTON. So it would be a very sensitive requirement.

Mr. WAXMAN. I think one of the problems in this section in the bill is that it gives the Department of Energy the power to make these changes, and those changes are going to be permanent changes, and they do not address the short-term problems and could cause us a long-term loss of a very important national resources. So I raise that as one serious loophole, environmental loophole in a bill that should be addressing the short-term problem, which is, I think putting some restraint on the gouging of Californians for these high prices that are not justified.

I see my time has expired, Mr. Chairman. I will look for a second round.

Mr. BARTON. Thank you.

I have quickly looked at this letter of April 30. We will put it in the record without objection.

I can put the gentleman's mind at ease because the letter says that they are opposed to anything that abrogates existing contracts. Nothing in this legislation abrogated existing contracts.

Mr. WAXMAN. Will the gentleman yield?

Mr. BARTON. So we will put this in the record, but we only say if under the existing contract the QF is not being paid, that they be allowed to generate power for a seller that can pay for it.

Mr. WAXMAN. If the gentleman would yield, as I read the section of the bill, it would allow sales outside of the contract that is a long-term contract, and if that happens, it does abrogate the terms.

Now, maybe we have something to talk about on that section, but as I read the section and as other read the section, maybe it is not your intention, but it would allow the reversal of sales under a long-term contract to go right on the spot market, and I think that would be a very dangerous provision.

Mr. BARTON. Well, let me just read the relevant section. It is on page 13. It says, "The owner-operator of a qualifying small power production facility or qualifying cogenerating facility is defined as a public utility... sold electric power pursuant to contract under this section, electric utility and such owner-operator has not been paid for such energy within the payment period provided in the contract."

That is clear language.

Mr. WAXMAN. If you go further, it says, "Such owner-operator who has not been paid for such energy within the payment period

provided in the contract, such owner-operator may suspend so much of the contract as required, the power and energy"——

Mr. BARTON. Suspend, not abrogate, suspend.

Mr. WAXMAN. Well, if he suspends the long-term contract, then he sells his power on the spot market, and that reverse exactly what California is trying to get away from. They want the stability of the long-term contracts that were entered into when it was advantageous for these QFs.

And if they could then turn around and sell on the spot market, they will get a much higher price which makes our problems even worse in California.

Mr. BARTON. I do not think the gentleman from California wants people that own facilities to generate power to produce it and not ever be paid for it.

Mr. WAXMAN. But the Public Utilities Commission in California has provided that they must be paid. So I do not think that we need Federal legislation, and if you will look at the second page of that letter from——

Mr. BARTON. I read the second page of the letter.

Mr. WAXMAN. They say Federal legislation is not necessary.

Mr. BARTON. They say help is on the way, and we are going to provide additional help from Washington for this problem, but anyway, we can work on this. But this letter clearly states abrogation, and there is nothing in this legislation that abrogates these QFs.

Mr. WAXMAN. If you can suspend your obligations during the long-term contract, you are abrogating your requirement.

Mr. BARTON. Well, we can engage in this debate.

Mr. WAXMAN. Would the gentleman yield?

Mr. BARTON. Well, let's move to the next questioner, who is Mr. Shimkus of Illinois, I believe.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Of course, I enjoyed the discussion. I think Commissioner Breathitt has mentioned transmission a lot. Acceding to my colleague's from California argument that allowing transmission lines in national parks would, in essence, be placing a high power transmission line in every acre of every national park, that is like saying in the Arctic National Wildlife Refuge that you are going to drill in all 20 million acres when the footprint is only 2,000 acres. That is the debate.

Can you have environmental sound policies and a reliable source of energy? The answer is yes, but those on the left who want to say, "We want to use electricity, but we do not want to produce it. We do not want to import it. We just want to engineer ourselves out of this. We do not want to use coal. We do not want to use nuclear. We sure do not want to use our hydroelectric generators any more powerful than they are."

This debate is just crazy. But I was interested in, Commissioner Breathitt, your comment because you talked about the importance of FERC authority to site. Expand on that for a little bit because I want to follow up with a follow-up question on it.

My impression is you think that is important, and tell me why.

Ms. BREATHITT. Congressman, I think it is important because our markets are becoming more regional in nature. I am defining my support to interstate transmission only, not power plants and

not distribution facilities, and because our markets are becoming more regional in nature, and the interstate commerce component of that crosses State lines, it is apparent how difficult it is to site transmission lines now.

And with multiple State jurisdictions and planning authorities, I just believe it would be cleaner, appropriate, and afford the elimination of bottlenecks and needed transmission if the siting authority resided with us as it does with interstate natural gas pipelines.

Mr. SHIMKUS. Let me follow up. Can I paraphrase you in saying it is the NIMBY factor prohibits us to expand the grid to wheel power across State lines?

Ms. BREATHITT. Yes, sir, and it does with us, with gas pipelines, and we do have to be sensitive to landowner concerns more and more now with gas pipelines than we ever have, and I think our agency does a good job of listening to our landowner concerns and dealing with them.

Mr. SHIMKUS. So let me follow up in response to the questions of my colleague from California, and it seemed that you were also reticent for siting transmission lines on Federal land which the NIMBY factor should not be as great, except with a small sector of our society.

Ms. BREATHITT. It may go back to one of the first jobs I had in my summers in college and my first summer out of college where I worked in a national park in Wyoming, and our national parks are precious and dear to me.

Mr. SHIMKUS. So tell me what is going to be easier, to site through a suburban community, a rural community, or a national park?

Ms. BREATHITT. Siting, having eminent domain, legal authority is——

Mr. SHIMKUS. So wait. Let me go on. I know what you are going to say.

Ms. BREATHITT. Okay.

Mr. SHIMKUS. So it is okay for the Federal Government to use imminent domain to take private property, but we are not willing to use imminent domain to go into the national parks.

Ms. BREATHITT. No. Well, what I would like to say is that, in what I hope would be very rare instances where an interstate natural gas pipeline or an interstate electric transmission line, if it was absolutely necessary for interstate commerce and health and safety for a line to go through a park and every alternative had been looked at, then the Commission must do so in a very sensitive, thoughtful way, and make sure there are no other alternative routes.

Mr. SHIMKUS. And do not get me wrong. I think transmission is as big an issue as generation. We have talked about it in the energy deregulation bills, and I appreciate your comments. I just think there is a disconnect on this national parks issue when we control the land, and it is difficult enough in siting on personal property, and I do not think we should make a judgment on which property is more important, Federal land or personal property land.

And with that, Mr. Chairman, I will yield back my time. Thank you.

Mr. BARTON. The gentleman from Massachusetts, Mr. Markey, for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman.

Chairman Hébert, you say that the Barton bill represents a welcome legislative response to current market problems in California and other Western States, but you also say, however, the likely extent of the improvements this summer is hard to estimate.

Isn't it possible that even if the Barton bill passed it would not have any significant impact on the problems in California for this summer, Mr. Chairman?

Mr. HÉBERT. If the legislation passed as is?

Mr. MARKEY. As is.

Mr. HÉBERT. Do I believe there is an ability for it to have no effect?

Mr. MARKEY. Very little effect. Is said isn't it very possible it would have very little effect on this summer, even if it did pass as it was written?

Mr. HÉBERT. I do not believe that is true, and let me tell you why I do not believe it is true.

One, I think I made it very clear as to the short-term benefit of bringing those QFs on, and the QFs somewhere estimated as high as 3,000 megawatts, which is over 3 million households in the State of California.

Other measures that are within the provision certainly clear up some of our jurisdictional calls at the FERC and what direction this Commission should be taking. Some are somewhat consistent with some of the things we have done through previous orders, including our order removing obstacles and impediments, trying to free up some type of additional hydro capacity when and where available——

Mr. MARKEY. So how many——

Mr. HÉBERT. [continuing] while not conflicting with environmental concerns.

Mr. MARKEY. How many total megawatts are we talking between the QF and the hydro?

Mr. HÉBERT. I would roughly say 4,000.

Now, it is hard to say on the hydro because let me give you an example of how we——

Mr. MARKEY. Are you saying these are QF and hydro that cannot come on line otherwise?

Mr. HÉBERT. No. You have got QF that is sitting idly by, and then you have got some requirements. The 3,000 megawatts of QF capacity that are sitting there for non-payment, they are not running because they have not been paid.

Mr. MARKEY. Yeah.

Mr. HÉBERT. If you look at the hydro, is there ability to release some additional water to get some available capacity?

I think when you get into an extremely short situation like you may see in California below the 7½ or like you might see in the West below the 7 percent as a standard of the contingency reserve for the WSCC, then you might in that control area see it in your heart——

Mr. MARKEY. Why wouldn't some——

Mr. HÉBERT. [continuing] to leave enough water that it would not harm the environment, but would keep the lights on.

Mr. MARKEY. Okay, but why did Southern California Edison say that only 300 megawatts are affected by the QF?

Mr. HÉBERT. That may be actually dealing with Southern Cal. I do not know that, but at the same time, I know there has been some disagreement as to what the letter says. I have not read the letter, but I would tell you if at any point those QFs are paid off, at the first date of the following month, they would come back under the contract and be obligated.

Mr. MARKEY. No, this is the letter, April 30 to the Vice President from Steven Frank, the Chairman of Southern California Edison, and he says it is 320 megawatts of generation——

Mr. HÉBERT. And that was what date, sir?

Mr. MARKEY. April 30.

Mr. HÉBERT. Okay. I am not familiar with the letter.

Mr. BARTON. It was yesterday.

Mr. MARKEY. And 700 total for the state.

Mr. HÉBERT. Well, the estimates we are hearing are certainly on the short side, 1,000 megawatts, the high side 3,000 megawatts.

Mr. MARKEY. Three thousand, right, and they have got a shorter side here. They have a short side.

Mr. HÉBERT. Well, I have not heard anything below 1,000. That would be new information to me.

Mr. MARKEY. Yes, 700. And did you have any reason to doubt Stephen Frank on this number?

Mr. HÉBERT. I have no reason to doubt what you have told me. I have not read the letter.

Mr. MARKEY. well, do you have any reason to doubt that I am reading Stephen Frank correctly?

Mr. BARTON. Would the gentleman yield?

Mr. HÉBERT. I have no reason to doubt what you are reading.

Mr. BARTON. Would the gentleman yield?

Mr. MARKEY. Yes.

Mr. BARTON. Does the gentleman have any idea how much Southern Cal. Edison owes qualifying facilities; so there might be a biased reason for them to be a little bit on the low side?

If you owed up to half a billion dollars, might you——

Mr. MARKEY. I know you would doubt them. I was wondering if he doubted them.

That is the big news today, you know, if he doubts them.

Mr. BARTON. We have thrown the word "thieving Yankees" around, but there are people outside the Northeast that sometimes do not want to pay what they should pay, and some of those people might actually be in the Golden State.

I am just pointing out, that is a letter that was written yesterday. There is a reason for the author of that letter to have some prejudices that would tend to low ball some of these issues the subcommittee. That is all.

Mr. HÉBERT. Mr. Chairman, if I might finish my answer, I have no reason to doubt anyone, but with the letter being drafted yesterday, and Mr. Frank not being here to testify today, I think he would be more qualified to answer that question than I would.

Mr. MARKEY. Okay. Well, I am going with Mr. Frank.

Commissioner Massey, you appear to be recommending immediate relief, though, guaranteed relief by insuring that you would deal with the immediate impact of this price spike.

Mr. MASSEY. I would. The economic impact is rippling throughout the West now.

Mr. MARKEY. In your statement, you said that FERC's recent order imposes price mitigation only when reserves drop below 7 percent, even though there is evidence that sellers exercise market power in all hours to drive up prices.

Chairman Hébert and Commissioner Breathitt, what is so magic about 7 percent? Isn't it possible for generators to exercise market power even when reserves are above 7 percent?

Mr. HÉBERT. Actually it is 7.5 percent in California. The 206 that we sent out on the West is the 7 percent, but the 7.5 standard is a standard that has been embraced by NERC, by the ISO, by the State of California.

Mr. MARKEY. But where did you get 7 percent from?

Mr. HÉBERT. That is where they go to a Stage 1 emergency.

Mr. MARKEY. No, I know, but where does the 7 percent come from?

Mr. HÉBERT. The 7 percent in the WSCC comes from what they call their contingency reserves in their control areas.

Mr. MARKEY. But is there anything magical about that number, that above that point there can be no market manipulation or price gouging?

Mr. HÉBERT. It has been historically described as a period of emergency.

Mr. MARKEY. Ms. Breathitt?

Ms. BREATHITT. I was going to describe generally the stages. You probably know this, but the California ISO has determined when they are approaching levels that need to alert the public that they are close to blackouts, and Stage 1 is the least severe, Stage 2 is 5 percent, and Stage 3 is 1.5 percent.

Mr. MARKEY. Well, the question I am asking is is there anything magical about the number 7 percent form your analysis in terms of that representing the absolute point at which gaming of the system is or is not possible?

Ms. BREATHITT. With respect to the 206 investigation or with respect to what we're doing in California or both?

Mr. BARTON. This will have to be the gentleman's last question in this round.

Mr. MARKEY. With regard to the 206.

Ms. BREATHITT. The reason that we used 7 percent in the 206 investigation which will determine if we need to do price mitigation in the entire West was used because that is the Western States Coordinating Council's measure for when emergencies are imminent.

And, also, what we do in the West needs to as closely as possible coexist with what our plan is in California so that you do not disincent sellers that could come into California or sell out of California.

Mr. MARKEY. Mr. Chairman, could Mr. Massey just offer his dissent on this point?

Mr. BARTON. Sure. We will let everyone comment on it before we go to the next questioner.

Mr. MASSEY. Well, based upon what I have seen, a lot of the high prices in the Pacific Northwest are not necessarily related to emergency conditions at all. It is buyers having to go into the market and buy at very high prices during all hours, No. 1.

No. 2, there is nothing magic at all about 7 percent or 7.5 percent. The compelling evidence before us is that the problem exists in all hours, period, and time and time again a number of economists from different walks of life, from Massachusetts, from California, have told us that, and I do not know why we ignore that evidence.

Mr. MASSEY. Thank you, Mr. Chairman.

Mr. HÉBERT. Mr. Chairman, if I may finish.

Mr. BARTON. Please, but be brief because we want to go to——

Mr. HÉBERT. So that Congressman Markey will have the full extent of the edification of this order.

I would hope that everyone in this room and everyone viewing this would try to at least get the order and read it and look at it. It is being miscommunicated to everyone that, in fact, the FERC is not looking into price gouging and market manipulation.

Twenty-four hours a day and 7 days a week, we are doing that. We are continuing to do that. As you know, we had our refund orders where we looked at January and February, March, April. We have yet to look back and deal with November and December, but we are going to do that, and that is what the price mitigation plan is on a going forward basis.

Twenty-four hours a day, 7 days a week we are going to be looking for that, and if we find it, they are going to dread the day they ever thought about doing it. The only time anything is not 24 hours a day, 7 days a week is on the real time market price mitigation, but we are always looking for price manipulation.

Mr. BARTON. The Chair wants to recognize Congressman Radanovich, but I want to comment on this Southern Cal. Edison letter because I may have mischaracterized it. It was addressed to Vice President of the United States, not to Congressman Waxman, although Mr. Waxman put it into the record, and it is a straightforward letter. There is nothing at all unfoward about what is in it.

I will point out that Southern Cal. Edison asked to testify at this hearing today. We agreed to allow them to testify, and then they decided they did not want to testify. So we could have had quite a bit of input from Southern Cal. Edison, had they wished to honor their request initially made to testify today.

The gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman.

I apologize for being out. We were meeting on an important issue, the California energy crisis actually, and I am back, and I appreciate the opportunity to perhaps make a statement since I did not get a chance to do any opening remarks.

And I do have a prepared text if I could submit it to the record.

But I just want to say that I am not sure. You know, we have heard a lot of talk about finger pointing at the administration and if the President would just impose caps on the market in California everything would just be rosy.

And as being a member from California and who is out in the district the last couple of weeks, I get very frustrated when people ask for help and you try to develop a list of things you think you can do from the Federal level, and you realize that there is not anything, very little that can be done from the Federal level, and that most of the problem or the tools that are there to solve these problems are in the Governor's tool chest, and he is refusing to use them.

California was a special set of circumstances. I mean it was hit by a wave. It was like that Poseidon adventure movie where the Poseidon was flip-flopped, and the cost of energy far exceeded the ability for the retailers to generate any revenues, and that has not been righted yet.

And on the issues of caps, I think early on, they may have been very helpful in order to write this ship and get market prices below retail prices early on because the real problem of this bad agreement in 1996 was the fact that they should have had long-term negotiations and contracts in place before they lifted the market so that not 100 percent of our energy was on the spot market.

And unfortunately that did not happen, but what should have happened right away, and I think I could have supported caps under circumstances like this, whereas if they were temporarily imposed so that along with some rate increases so that wholesale prices would have been driven down below retail prices through the form of long-term contracts and then they would be lifted, then I think we would have had this problem solved months ago, and we would not be creating a $20 billion mistake and making it a $70 billion mistake for California.

The problem that I have is that even if you did impose caps, there is no guarantee if California would be using any of those caps effectively. And while the Bush administration is getting a lot of finger pointing to here, I want to say that I do not think that if the Governor of California had price caps in his tool chest that he would be able to use them in an effective manner in the first place because he has not shown that he has really been dealing with this electricity crisis very well in the first place.

For example, the Governor is out negotiating contracts while there is a big disparity between market prices and retail prices. We had a cogen in our office the other day that went to the Governor and offered 7½ cents per kilowatt hour, and the Governor refused and finally settled on 21 cents per kilowatt hour.

I mean, what kind of nonsense is this? So do not be thinking that market caps are going to solve the problem in California and save us from problems this summer.

The problem is that we have had a Governor that is not dealing very realistically with this problem, and there is not a lot that the Fed. can do. You cannot create a law that can produce a better Governor. And I think that people need to realize that there is very little that the Federal Government can do right now and accept that fact and stop pointing fingers to the Federal Government for solving problems that they have no ability to solve.

And it is not in the form of a question for anybody, but I think it is something that needed to be said.

Thank you.

Mr. BARTON. Is the gentleman through? Okay.

Mr. Sawyer, I think, is recognized for 5 minutes. for questions.

Mr. SAWYER. Thank you very much, Mr. Chairman.

If I might, the gentleman from California has asked to make an observation or two.

Mr. WAXMAN. Well, I thank you for yielding.

I think it is unfair to try to say that all of our problems are Governor Davis' fault because this whole deregulation scheme which everyone agrees was thoroughly flawed and reduced this dysfunctional market, was adopted before Davis became Governor. In fact, Governor Pete Wilson was in that office at that time, but it was adopted by unanimous vote of the State legislature.

So it looks to me like politicians on both sides of the aisle could come together behind an idea that was wrong in practice and has done so much harm. Now the solution ought to be bipartisan, not just saying the Governor is not doing a good enough job.

I think we need to have the first thing, restraints on the gouging that is taking place in California, and that is why I think we need these limits on wholesale prices because it is clear we are being taken advantage of by those who are manipulating the market to raise the prices so high that it is causing us in California to have interruptions in supplies.

I thank you for yielding to me.

Mr. SAWYER. Thank you all very much for your testimony and for your response to questions.

I was struck in the discussion about siting about the repeated use of interstate transmission. Let me ask just a very basic question.

As a practical matter, given the flow of electricity among interconnected markets, is there such a thing as a practical distinction between intrastate and interstate transmission?

As a matter of the kind of discussion we are having here, doesn't Path 15 have an effect on interstate flows of electricity? Are you not saying, in effect, that in advocating for interstate siting authority, you are looking for transmission siting authority, period?

Mr. MASSEY. I think that is what it amounts to, yes. Practically speaking, all transmission is interstate transmission. Local distribution is not. That is something different.

Mr. SAWYER. Yes, I understand, yes.

Commissioner?

Ms. BREATHITT. I just wanted to add that in Order 888, we defined interstate transmission using a seven factor test, and it helps determine, if there is a question, if a line is intra or distribution versus interstate. That section of the order guides the reader to help determine that.

Mr. SAWYER. Thank you very much for that clarification.

Let me go back to Section 102 in the bill. Given the benefits that can be obtained from the demand management programs that are discussed in that section of the bill, do you see any reason that 102 should be limited only to the Western States or would it make sense to allow other States to benefit from the same measures?

Mr. MASSEY. I think it is generally an excellent idea that should be considered for universal applicability.

Mr. SAWYER. Other comments?

Mr. HÉBERT. I just think as long as you can ensure through the legislation that FERC has the ability to maintain the just and reasonableness of rates, that it will be adequate, and it certainly would resolve considerations and concerns that industrials would have if, in fact, they had entities in different States which may subject them to PURPA law, which obviously would create a problem.

So it moves absolutely in the right direction.

Ms. BREATHITT. I think that the focus on demand measures in this bill is very important, and I think those are terrific features. With respect to Section 102, I had a particular comment that I gave in my opening statement, and it has to do with who has jurisdiction once the retail seller sells those megawatts back into the market.

Mr. SAWYER. Let me ask a similar question with regard to 108 and the FERC's jurisdiction over State owned utilities. Do you see any reason that that should not be extended more broadly across the United States or does it make sense, as the bill seems to, to limit it only to California?

Mr. MASSEY. My view is that all transmission, regardless of who owns it, whether it's a state, a municipal, a rural electric cooperative, an investor owned utility, TVA, Bonneville, should be subject to the same set of rules, and so I would broaden that provision.

Mr. SAWYER. Mr. Chairman?

Mr. HÉBERT. Certainly there is a reason to try to level up the playing field and get everyone playing the same game under the same rules. I will tell you that FERC under what are Orders 888 and 2000, in insuring open access and comparability, that we are going to be looking at the public interest as to any acquisition or change of assets.

Ms. BREATHITT. I like Section 108 of this bill very much. I commented on what effect California's transmission being taken over by the State would have in my March 20 testimony, and I think that this section deals with the fact that it is very important that it remain in interstate commerce and be subject to FERC jurisdiction.

Mr. SAWYER. Thank you for your latitude, Mr. Chairman.

Mr. BARTON. I thank the gentleman from Ohio. I am just sitting up here basking in the glow of Commissioners saying they like something in our bill very much. I was just really enjoying that warm and fuzzy feeling. I'm sorry I was not quite on the ball here.

The gentleman from Oregon, Mr. Walden, is recognized for 5 minutes of questions.

Mr. WALDEN. Thank you, Mr. Chairman.

I want to look at Section 110 and ask the Commissioners about the need to have FERC have jurisdiction for purposes of remedial action to public utilities, co-ops and PMAs. How appropriate is that?

Ms. BREATHITT. Mr. Walden, did you say 110?

Mr. WALDEN. I believe it was Section 110. Maybe I am off. I am sorry. I am working off an old draft. It is the investigation of Western wholesale market prices.

Ms. BREATHITT. Okay.

Mr. WALDEN. That may have been that was out.

Ms. BREATHITT. Okay.

Mr. WALDEN. That was in the original draft. I am sorry. Let me proceed then to this issue of just and reasonable rates because we hear it a lot, and I am still trying to figure out how to define it.

I know in real estate, that sort of thing, you have, you know, willing buyer, willing seller to determine what the marketplace is. How is just and reasonable defined, and where is it defined?

Anybody who wants to answer that, I would welcome it.

Mr. MASSEY. It is defined in court decisions. There is a D.C. Circuit Court of Appeals decision called Farmers Union that we still cite that in my judgment stands for the proposition that it means either a cost of service rate or a rate that arises from a well functioning market that FERC is very attentive to and is watching very closely.

Mr. WALDEN. Mr. Hébert, do you have any additional comment on that?

Mr. HÉBERT. Well, actually it is defined in the case law, but I will tell you as we have moved away from cost based rate making, we will have to tell you the question of exactly what is just and reasonable is something that is somewhat hard to define because we have moved toward market based rates. That is, in fact, what we have in the West.

So what we're attempting to do at this point is to make certain that there is not market manipulation, that there is not gouging, that it is exactly what the price mitigation measure does, 24 hours a day, 7 days a week, and we will continue that with a vigilant effort.

Mr. WALDEN. What assurance do we have to the north of California, since your new proposal applies just to California, that this balloon won't get squeezed down there and we'll pay higher rates outside of the California area because we're all interconnected.

Mr. HÉBERT. What we are trying to do through the 206 is somewhat mirror what we have done in California, but with certain exceptions. In other words, it is 7 percent in the WSCC as opposed to 7.5 percent in California. When they are at 7 percent or below, they will be subject to the price mitigation. They would be in a must sell arrangement as well, fall under the same bidding criteria, the same demand management style techniques, but they would not be forced to sell into California, and they would not be forced to be subject to the must sell when they were in an emergency situation at 7 percent or below within that control area, as well.

Because one of the very concerns that you have expressed to me in previous hearings involving this Commission is, in fact, that you do not want to suck the energy out of other States, providing it to California, but if, in fact, they do bid down to California, they would get the bid price and not be subject to the proxy price.

Mr. MASSEY. I think the answer to your question is that there is no assurance that you will not be adversely affected. In fact, you already are. Bonneville is talking about raising it rates by 250 percent. The economic harm has already spread.

Mr. WALDEN. That is, I guess, my question, which is it sounds like this may just protect California and shift the burden north, but you are saying it does not.

Ms. BREATHITT. Congressman, after our 206 investigation notice is published in the Federal Register, we will set a refund effective date 60 days hence. That would be about July 1 because it takes approximately a week for what we did last Wednesday night to be published in the Register.

Your protections will come into place on July 1 if we find in the 206 investigation, in the fact-finding, that we need to employ a price mitigation plan in the entire West as well.

Mr. MASSEY. May I comment on that, please?

Mr. WALDEN. Yes, please do.

Mr. MASSEY. I have a slightly different interpretation. I consider the 206 investigation that was just opened into the Western interconnection to be so narrowly circumscribed that I do not think effective price relief is going to be available.

You have to understand that we are only investigating transactions of 24 hours or less that occur during reserve deficiencies of 7 percent. Any other time is off limits, and the refund protection only applies to that narrow investigation.

If we were to receive comments that there was actually a broader problem, which I think we will receive those comments, we would have to issue another notice. There would be another 60-day buffer window. So relief for a broader market would be pushed forward because the refund effectiveness of the current order is very, very limited.

Mr. WALDEN. Thank you.

Mr. BARTON. Has the gentleman concluded questions?

Mr. WALDEN. My time had expired, Mr. Chairman. Thank you.

Mr. BARTON. The gentleman from Pennsylvania, Mr. Doyle, is recognized for 5 minutes.

We will allow Congresswoman Eshoo to ask questions, but after all members of the subcommittee ask questions.

Mr. DOYLE. Thank you, Mr. Chairman.

Chairman Hébert, I just want to hear your thoughts about the juxtaposition between FERC's recent order and bill that we are considering, the Electricity Emergency Relief Act. When you describe FERC's order, you stated that this plan strikes an appropriate balance by bringing market oriented price relief to the California electric market, providing greater price certainty to buyers and sellers of electric energy, promoting conservation and simultaneously encouraging investment in generation and transmission.

If that is the case, do you think that congressional legislation regarding California is necessary?

Mr. HÉBERT. I think the legislation that is before us has measures within it that will make additional supply available to the people of the State of California through many measures. I mentioned the QFs. I mentioned the hydro facilities as well.

I think there are further measures that somewhat clarify what our jurisdiction is, especially as to acquisition and change of venue of assets. So I do think there are true benefits to the legislation that coupled with the price mitigation order that we issued the other day, price mitigation, the must sell, the bidding requirements, the demand side management techniques; I think all of that taken together, yes, brings tremendous benefit to California if California acts.

Mr. DOYLE. Commissioner Breathitt, let me ask you a similar question. Instead of asking you does California need this bill, let me ask you does FERC need this bill. You have stated the FERC has been looking for several years at finding market solutions to the wholesale electricity markets. If FERC had additional authority outlined in the bill that we are considering, could the California situation been addressed by FERC in a more timely manner?

Ms. BREATHITT. Well, the bill requires us to do certain things, such as come up with a clearing house for selling megawatts that would come to the clearing house from a demand response, and that would be a good thing.

You know, I would also like to see the bill give us siting authority, but it does not do that at the present time. I think the bill is positive. Some of its features will be more of the mid-range and not immediately this summer, but it has got important features that can help.

Mr. DOYLE. Thank you.

Mr. Massey, let me ask you. You have mentioned that you think it is a good idea for Congress to place all interstate transmission under one set of open access rules. Can you provide us some insight as to how the States feel about that proposal?

Mr. MASSEY. Well, if you mean all transmission, such as transmission owned by municipals, rural electric cooperatives, TVA, I do not know that the States object to that. I am not certain.

If you are talking about giving FERC jurisdiction over even bundled retail transmission, I know that a number of States object to that. There is a case pending before the U.S. Supreme Court right now that should resolve that question.

Mr. DOYLE. Thank you.

Mr. Chairman, I yield back my time.

Mr. BARTON. The gentleman yields back his time?

We go to the gentle lady from California, Congresswoman Bono.

Ms. BONO. Thank you, Mr. Chairman.

I thank all of the panelists for being here and apologize to you for skipping out during your testimony, but I will take the written versions home and read them tonight.

I also went to the same meeting that George Radanovich and Chris Cox attended with the Vice President.

I just wanted to say to Congressman Markey—he is not here—he wanted me to sing back-up on that song for him, and he wrote on here, "With apologies to the late John Phillips." And I knew John Phillips, and I can tell you he was no John Phillips when we wrote that song.

Next time I will try to help him out.

I just want to state, and I submitted hopefully my testimony for the record, I believe there are a lot of good components to this bill, and there is a lot that we can do here. And I know my constituents are looking for leadership from Washington, DC.

I specifically like the part in the bill where we do all we can to encourage Federal facilities to conserve. I spoke with the Governor on Friday, and he is really asking for all of the help we can given in that aspect, and I would like to do what I can to help encourage Federal facilities to conserve by up to 20 percent.

But my first question is for Chairman Hébert, and if either of the two of you would like to also answer, please feel free. This is getting off the subject of the legislation, but I would like to bring to your attention an item which was a concern to me that I read in yesterday's Wall Street Journal, and it described a proposal to impose a fee on electricity sales to reimburse generators.

Mr. Chairman, utilities in California are having a tough enough time paying off their current bills. How could a surcharge help the situation?

Mr. HÉBERT. Well, we are not certain. That is why we are asking for comment on it, and actually in seeking the comment on that proposal, when we look at costs and how costs are going to be explained beyond a certain level, one of the things we have to look at is credit risk.

So I think it is interesting in the entire debate when you look at credit risk, the surcharge would probably do away with credit risk if, in fact, there is a surcharge.

If there is not a surcharge, there would probably be some type of adder in the cost justification on credit risk, and that is why it is there.

I read the same article that you read. I had a conversation with Rebecca Smith, who reported it. I asked her why in the world she would be reporting on such a minuscule part of that entire order, and she said it was something that got her attention. So we are trying to answer that call, but that is why we are seeking comments on it.

Ms. BREATHITT. Congresswoman Bono, I do not love that feature of the order that we issued Wednesday night. Because it asks for comment, and it was not ordered, I was, in the spirit of compromise, willing to vote the order out with that component.

Mr. MASSEY. Well, if they can't pay the high prices that have been charged so far, you wonder how they will pay the surcharge, but we have asked for comment, and I have an open mind.

Ms. BONO. Can any of you explain to me what that surcharge would actually mean to the consumer on top of the 40 percent rate increase they are already going to experience?

Mr. HÉBERT. Again, I do not know. We are seeking comment on it. I do not know. It was a question. You can look at it one of two ways. You can either look at the credit risk, or we can look at some type of adder, whether or not there is a surcharge.

But the fact remains we will have to address it because it will be an issue in cost justification. We are not saying there is going to be a surcharge. We just want to put it out for comment to see what the commenting parties tell us.

Ms. BREATHITT. I think there would be an impact on the consumer. I do not know what it would be.

Ms. BONO. All right. Thank you.

And this proposed legislation, as well as your last order, depend upon the State of California entering into an RTO. The Governor has expressed fear that he could actually enter into an RTO in the same timeframe that you are asking him to do. Can you comment on that? Can we enter into an RTO in time enough to meet your order?

And I am sorry if this was asked earlier when I was out. So okay. Thank you.

Mr. HÉBERT. It is difficult for me to answer what can California do when you are looking at three IOUs there. You are looking at the ISO, the leadership of the CPUC and the Governor's office.

I think the better question is: will they?

Can they? You bet. Will they? I do not know. I am just trying to make that horse drink the best I can because I will tell you this. If I do not solve Path 15, if I do not add infrastructure in the State of California, not only when it comes to electric transmission, but also when it comes to natural gas on intrastate and take away capacity, they will continue to be, your constituents, in the dark for many years to come because you will not be able to get the supply to them, period.

Ms. BREATHITT. Again, that was not my favorite feature of the article, of the order, but I was willing to vote for it because I do believe California should file its RTO application, and that is what we were asking the California ISO to do, is file its application, and then there is a process that the Commission goes through in determining whether their application meets our RTO characteristics and functions.

We want that initial RTO filing.

Mr. MASSEY. I support a Western interconnection-wide RTO, but that provision of our order seems to me to stand for the proposition that the Commission will abdicate its responsibility to insure just and reasonable prices in the short term unless California files an RTO proposal by June 1.

I consider that to be arbitrary and unlawful.

Mr. HÉBERT. One, that is not what we said, but I am tickled to hear Commissioner Massey suggest, in fact, the order that Commissioner Breathitt and I voted out insures just and reasonable rates, and, in fact, if they do not file an RTO, that will be taken away from them.

That is the first time I have heard that, but I am glad that he shared that because I think it is important.

Mr. MASSEY. Well, I am glad you want me to clarify. It is a meager and insufficient step toward just and reasonable rates, but the Commission is saying we will not even do this if you do not make the RTO filing.

I think that is absolutely unlawful.

Mr. HÉBERT. Let me also clear up one thing because you asked could the State of California do it, and I told you I would suggest the question is will the State of California do it.

I have offered up three of the FERC's best and brightest. We have recently sent a letter over suggesting that General Counsel Kevin Madden, Dan Larkamp, and Shelton Cannon has already been made available to help them get that done. So I am willing to help them help themselves.

Ms. BONO. Thank you very much, Mr. Chairman.

My time has expired, and I yield back.

Mr. BARTON. I thank the gentle lady from California.

We now go to the gentleman from North Carolina, Mr. Burr.

As soon as all members of the subcommittee have asked questions, we will let the gentle lady from the full committee ask questions.

Mr. BURR. I thank the chairman.

And let me take this opportunity to welcome the Commissioners.

I did not give an opening statement. I thought there were plenty of people here to do that, and with the chairman's blessing I have had so many opportunities to give opening statements on this, I did not think I had anything else to contribute today.

In my absence though, Mr. Waxman mentioned the possibility or the concerns that he had about clean air rollbacks. Mr. Massey, are you concerned about clean air rollbacks?

Mr. MASSEY. If a couple of the provisions of this bill are interpreted in a way that there are clean air rollbacks without any sort of consideration of environmental balance, yes, I am.

Mr. BURR. In October 1, 1998, you gave a speech sponsored by the Energy Daily. It was a keynote address. I am sure it was a good one. I have had an opportunity to read it. You referenced in there to the price spikes of that year, that, for example, EPA announced last week a delay in the compliance date for NO_X emission reductions. EPA Administrator Carol Browner stated that the delay was in response to the Midwest utility concerns about generation availability and reliability.

Was it wrong for her to do that, to delay that then?

Mr. MASSEY. I cannot remember the facts there. I stand by whatever I said.

Mr. BURR. Well, you said FERC must also better coordinate with other agencies that have responsibility over the electric industry. I know you think that better coordination is what regulators say when they do not know what else to recommend, but here I think it may make a difference.

For example, and quote, the fact is that in that price spike, as we look back, and you wrote this speech afterwards or gave this speech afterwards, you cited that as an important thing for EPA Administrator Carol Browner to have done, and that was to delay the NO_X reductions.

Mr. MASSEY. Yes.

Mr. BURR. So it is not inconceivable that if we postponed or took the current standards and said we are going to rely them, if you, Governor, decide that it is an emergency would not be a bad thing. It has been done before.

Mr. MASSEY. If we just wipe them out, it would be a bad thing. If it is done with some thought to providing additional power while maintaining an environmental balance, I would support it.

Mr. BURR. You also are calling for price caps today, hard caps. Let me just read you a couple of your statements out of that speech, if I could. You said some called for the Commission to impose price caps. "I do not believe this largely self-correcting price spike demands such a drastic measure. I would feel differently if spikes had not been corrected. As a general matter, however, it is much more preferable for market participants to get real price signals. Price signals are necessary to attract new generation to the market."

Mr. MASSEY. Right.

Mr. BURR. Now, how can you be for hard caps and at the same time you refer to in your six points the need to attract the financial markets to build the generation which we know we need in this region?

Mr. MASSEY. Congressman, I am smarter now than I was 3 years ago. I think that there is withholding in the California market, and one of the ways to stop it is to eliminate any incentive to withhold.

Mr. BURR. You also went on in that speech to say price caps could stifle new generation.

Mr. MASSEY. I am smarter now. I think the price caps should be temporary. I do not think it should be permanent. If the problem is withholding of generation, I think the price cap can bring that withheld generation into the marketplace, and No. 3——

Mr. BURR. But is this a permanent problem or is this a temporary problem that we are in?

Mr. MASSEY. It has been permanent for the past 11 months. The spike in the Midwest market lasted a couple of days and self-corrected. This has gone on pretty much for 11 months without change.

Mr. BURR. Let me go on in your speech, if I could. "I have no interest in turning back the clock. I do, however, strongly favor turning the clock forward. My preliminary conclusion is that the events of last June underscore the importance both of accelerating our pro competitive policies at the Federal level and accelerating retail choice."

I do not think I have heard you an advocate of retail choice today.

Mr. MASSEY. No, I feel like I am smarter now than I was 3 years ago. I have changed my mind about that. I would not push retail choice on the States. If my agency is willing to assure just and reasonable prices, I think States will move to retail choice, but right now I do not think they have confidence in us in doing that.

That is my opinion.

Mr. BURR. What has changed since the summer of 1998? What has increased your knowledge?

Mr. MASSEY. An absolute unmitigated disaster out West that is causing untold economic harm, Bonneville proposing to increase its rates by 250 percent.

Mr. BURR. What is the reason for it?

Mr. MASSEY. There are a lot of reasons. One reason is not enough generation. Another reason, in my judgment, is withholding of generation. Another reason is not enough transmission. A final reason is not enough demand responsiveness in the marketplace.

Mr. BURR. Did you know there was a generation shortage in October 1998 when you gave this speech?

Mr. MASSEY. A generation shortage in California?

Mr. BURR. Yes, sir.

Mr. MASSEY. No, sir, I did not.

Mr. BURR. You had no idea that there was a generation shortage?

Mr. MASSEY. I do not think there was one. It short of appeared last May or June.

Mr. BURR. Well, I would challenge you——

Mr. MASSEY. Well, the prices——

Mr. LARGENT. Would the gentleman yield?

Mr. BURR. I would be happy to yield?

Mr. LARGENT. I know for a fact that some authorities from EIA were out talking to Governor Gray Davis over 2 years ago about the looming generation shortage that they have in California. Now, how did EIA know that but the Commissioner at FERC would be totally unaware of that? That is incomprehensible.

Mr. MASSEY. Well, it is a matter of opinion. When the Commission issued its report on the Midwest price spike, we cited a 35 percent reserve margin in the Western interconnection. It was the most generous of any interconnection in the United States.

So I think, frankly, a lot of this has caught my agency by surprise.

Mr. LARGENT. Well, if the gentleman would continue to yield.

Mr. BURR. I would be happy to.

Mr. LARGENT. We are in a situation where California's growth rate over the last 10 years has been, you know, double digit at a time when their actual capacity to generate electricity has declined.

Now, how would you not anticipate a generation shortage in the State of California as a FERC Commissioner? That is——

Mr. BARTON. The gentleman's time has expired. We will let the Commissioner answer this question, and then we are going to have to go to Mr. Pickering.

Mr. MASSEY. Well, I do not know that any Commissioner at the agency—and there have been five of them—appreciated the nature of the problem. Nobody came to us that I am aware of with any evidence of it.

In fact, there is a whole lot of interest, it seems to me, in hanging this noose around Gray Davis' neck, and perhaps he has made mistakes, but a lot of those years were during a Republican Governor. You know, I do not want to be partisan about this, but——

Mr. LARGENT. Good.

Mr. MASSEY. [continuing] this is not all his problem.

And, frankly, I think recently he is doing quite a good job of trying to negotiate long-term contracts. He has a new demand response program, and they have raised rates. In order to pay for these wholesale costs, they would have to quadruple the rates, and they did not do that, but they raised them by 50 percent.

So I think they have done their part, and I think my agency should do its part.

Mr. BARTON. All right. We are going to go to Congressman Pickering for 5 minutes.

Mr. PICKERING. Mr. Chairman, thank you.

You know, our purpose here today is not to blame a scapegoat, but to learn from previous mistakes and try to solve the problems that face California and the West, but it is really a national problem because what happens in California and the West affects all regions and all of our country's economy.

Let me set the stage a little bit better and put it in context as far as learning lessons. I think one of the reasons we are here today is because a public policy was adopted that was in conflict or in contradiction with different elements of that public policy. They tried to reconcile mutually exclusive priorities or purposes in public policy.

For example, you deregulate wholesale, and you cap retail. You make an assumption that we will keep out any new generation, as Mr. Largent was saying; that even though our growth is double digit, that we will not need a higher growth of generation and power supply capacity.

All of those things were in conflict and contradicted itself in public policy objectives, and today we find ourselves where we are. And so we do not want to repeat that mistake.

But what I am hearing from you and from others seems to follow that same path of inherent contradiction and conflict, and so I want you to help me walk through your logic so that we can try to avoid those types of mistakes.

Earlier you said we should have price caps, and in response to Mr. Largent, you said that will free up generation that is being withheld from the market in hopes of a higher price. Is that your position?

Mr. MASSEY. Yes, if you believe that economic and physical withholding is a problem, that is a solution.

Mr. PICKERING. But then you came back, and he asked you a second question. Would that be a disincentive for new generation to address the problem you just raised of lack of general and supply in the market, and you had a second part. You said if it is temporary.

Now, when you combine the first part of your answer with the second part of your answer, it is in conflict. It is in contradiction. One is have a price cap that will free generation to go into the market, but then you back end it with it being temporary. The temporary increases the incentive not to go into the market, to withhold until the price cap is removed and the price is higher.

Isn't that logical?

Mr. MASSEY. I do not think they would withhold for 2 years. I am talking about withholding from 1 day to another or 1 hour to another. I think a price cap would——

Mr. PICKERING. But then 2 years, but with no guarantee that that might not be temporary, wouldn't you then be a disincentive for new generation?

Mr. MASSEY. Let me argue this. The biggest disincentive for new generation is if this market self-destructs this summer and the State of California condemns all of the generation and just buys it because they feel like they have no other choice to solve this problem because we have not helped them. That is the biggest disincentive to new investment in generation that I can see.

Mr. PICKERING. Which is the greater economic harm, high prices or blackouts and loss of reliability?

Mr. MASSEY. Oh, they are both horrible problems.

Mr. PICKERING. Have you done, has the FERC done any study of which is worse, blackouts or prices?

Mr. MASSEY. I think it depends on how deep your pockets are.

Mr. PICKERING. Let me—yes.

Mr. MASSEY. For some users that have a lot of money that want high reliability and are willing to pay any price; they are desperate for it; maybe they are less concerned about high prices, but the average consumer is very concerned about it.

Mr. PICKERING. Let me ask what is the best public policy way to encourage conservation. Is it through government mandate or through pricing?

Mr. MASSEY. It is through allowing the consumer to see a just and reasonable price.

Mr. PICKERING. If it goes above that, you keep the price artificially low as California has done through this crisis. You do not reduce demand, and you continue to have the high demand, which then leads to the rolling blackouts.

Mr. MASSEY. Yes, and when you throw——

Mr. PICKERING. And the shortages. So if you have a higher price, don't you accomplish the conservation and efficiency public policy objectives?

Mr. MASSEY. Oh, sure. You can have a price that is high enough to put half of the economy out of business out West, and you save a lot of power. I do not know what that accomplishes.

Mr. PICKERING. Well, if you do not have conservation and efficiency, what does a blackout and loss of reliability do?

Mr. MASSEY. Oh, I think it is a very serious problem, but it seems to me that Congress has determined that prices at the wholesale level shall not exceed a just and reasonable level, even if an unjust price would encourage more conservation. Congress has said you cannot go there.

So the limitation is a just and reasonable price. We saw what happened when residents of San Diego were thrown onto the spot market. There was an absolute political revolt. So there is a political element to electricity that cannot be avoided. Prices have to be reasonable.

Mr. PICKERING. And if they are artificially low, what happens?

Mr. MASSEY. Consumers use too much of it.

Mr. PICKERING. We force bankruptcies.

Mr. MASSEY. Consumers use——

Mr. PICKERING. We force rolling blackouts.

Mr. MASSEY. Consumers use too much power. They are not supposed to be artificially low. They are supposed to be just and reasonable.

Mr. PICKERING. But haven't they been artificially low?

Mr. MASSEY. It depends on how you measure it. If you are arguing that California should have flowed through all of these high wholesale prices, they would have had to triple or quadruple rates.

Mr. PICKERING. Mr. Massey.

Mr. MASSEY. I would not have done that if I would have been a local official.

Mr. BARTON. This will have to be the gentleman's last question of this round.

Mr. PICKERING. Sure. But it seems to me that as we try to help California and the West, again, in contradiction and in conflict, you on one hand say save California on price. Do not mess with California on supply, and as long as you take that position, you are going to have a contradictory and failed policy, and the outcomes will not be good for the region or good for the country.

Thank you, Mr. Chairman.

Mr. BARTON. I thank the gentleman from Mississippi.

The gentleman from Arizona, Mr. Shadegg, for 5 minutes.

Mr. SHADEGG. I thank you, Mr. Chairman.

Let me start, Mr. Massey, with you since everybody is focusing on you for the moment. You said that you applaud Section 101 and 102. Those are the two sections that deal with—one is the market so that you could buy megawatts basically.

Mr. MASSEY. Right.

Mr. SHADEGG. You believe both of those are productive sections?

Mr. MASSEY. I do, yes.

Mr. SHADEGG. Okay, and they will, in fact, enable there to be more power to be sold to those who, in fact, need it this summer and would be helpful?

Mr. MASSEY. I think they will, yes, if we can get them implemented quickly. I think they are good provisions. I would apply them all across the country.

Mr. SHADEGG. Okay. You also said that you favor the siting authority that is granted in the legislation to FERC.

Mr. MASSEY. I do not know that there is any siting authority for FERC in the legislation. For transmission, I would——

Mr. SHADEGG. Yes, for transmission.

Mr. MASSEY. [continuing] favor granting FERC siting authority over interstate transmission. I agree with Commissioner Breathitt on that.

I do not think that would help much for the summer, but as a long-term matter, it is a good idea.

Mr. SHADEGG. With regard to the section of the legislation which allows a Governor to waive certain environmental requirements in order to meet this crisis, I believe you said you did not think there was anything wrong with that provision. However, you thought there ought to be language in there that requires a balance to be struck with regard to environmental impact.

Mr. MASSEY. I do. It seems to me that the way the section is drafted right now, the only issue is providing as much power as possible, and I would be worried about the environmental impact of that. I think there ought to be a reasonable balance.

Mr. SHADEGG. So you would favor amending that section or adding language to that section which just requires some sort of environmental balance?

Mr. MASSEY. I would require reasonable environmental balance, yes.

Mr. SHADEGG. I want to go back to a point that Mr. Pickering was focused on. You said that price caps will stop withholding and take away any incentive to withhold. First of all, I would like to go with this issue of withholding.

Isn't the largest problem with withholding in terms of the current situation at least, or wasn't it when they were operating the California law, the fact that it commanded the use of the spot market?

That is, one way to deal with withholding is to require or to allow the purchase both of short-term and long-term contracts, but the California law essentially commanded the use of only the spot market, which encouraged the 1-hour withhold that you are talking about.

Mr. MASSEY. That is true. Yes, I think that was a mistake. I wish I had never voted for it 4 years ago.

Mr. SHADEGG. Going back to this issue of a price cap would stop withholding, let's say you are a producer, and you have been told, well, there is a temporary price cap on power coming out of your plant, but it is going away. It is going away in 2 years, I guess is what you favor.

The first question I have, and we may disagree about this, I do not know how you can convince business that, in fact, that price cap is temporary, but let's assume you do. Let's assume you say to a producer, "Well, this price cap is only going to exist for 2 years."

Let's say that producer says, "You know what? We have got some deferred maintenance on this plan. We could shut it down for the next 6 months or we could shut it down for the next 2 years and do this maintenance now, or we could sell its power only at a capped price and get that work done. That way a year and a half after that, if it takes 6 months to do that maintenance, we will be out from under the price cap."

Wouldn't a price cap encourage withholding, as you use that term for, for example, that kind of maintenance?

Mr. MASSEY. If it was necessary maintenance that needed to be done, that can be done now. If it is make-up maintenance that does not really need to be done, it is just done to drive up the price, I think a cap would make that less likely.

Mr. SHADEGG. But you follow my point. Let's say you have maintenance that can be done any time in the next 5 years or let's say you have environmental additional clean-up equipment that you can add, and you can add it any time in the next 5 years.

If you have a price cap for a period of 2 years and you say to yourself, well, I can do this maintenance now or I can do these additional environmental clean-up installations now. It will require me to shut my plant down for a period of time, or I can do it later. I can put it off for 3 years because maintenance does not necessarily always get done the day it ought to be done.

Wouldn't a price cap encourage, contrary to your statement about it would incent people not to withhold; at least under that example it could incent or encourage people to withhold, couldn't it?

Mr. MASSEY. I am willing to concede that it possibly could, but I would build into it sufficient profit so they would want to run.

I also think that the generators know that this dysfunctional market cannot last forever.

Mr. SHADEGG. Well, now, wait a minute.

Mr. MASSEY. I think the bigger problem for them is this market is self-destructing, and I think more stability and pricing is what we need.

Mr. SHADEGG. I guess I do not understand. You used that phrase a moment ago, and I wrote it down. "This market is self-destructing."

I do not know how this market self-destructs. You have got people out there that want electricity. They are going to need it this year. They need it this summer, and they are going to need it next summer, and they are going to need it the summer after that and the winter after that.

I guess I just do not quite understand that.

Mr. MASSEY. Well, can I tell you what I think?

Mr. SHADEGG. Sure.

Mr. MASSEY. I think it self-destructs if out of frustration the people of California are so frustrated with prices of this summer that they simply condemn all of the generation and buy it and turn it into one big, municipal authority, and they have now passed a power authority bill in the legislature that would allow them to do just that.

Mr. SHADEGG. So the market is dysfunctional, but we could have it self-destruct?

Mr. MASSEY. Sure, absolutely.

Mr. BARTON. This will have to be your last question of this round.

Mr. SHADEGG. If that is true, then I want to ask Mr. Hébert. I view this as not a price problem. It is a price problem in part, but I view it as a supply problem, and I actually would like to ask you, Mr. Hébert, and then maybe both of the other Commissioners to give them a chance to comment.

One, the first question I have is: what do you think a statutory price cap put into law by the Congress will do with regard to incentivizing or not incentivizing production to get us out of this problem in the long run? That is No. 1.

And then No. 2, I would like to ask all three of you. It appears there is a divide here pretty clearly. Some of us think price caps will not solve the problem. Others think price caps are the only problem. I would like you each to give me your opinion on whether, assuming that price caps are not in the bill, and they are not in the bill right now; statutory price caps are not in the bill; are we, in your opinion, better off to pass the legislation or are we better off to just let it die because we cannot resolve this divide on the issue of price caps?

Mr. Hébert, if you could answer the first question.

Mr. HÉBERT. I think obviously there is tremendous benefit to getting some of these provisions in this legislation out. Specifically I have talked about the QFs. That is a great opportunity to get some short-term capacity to the market to keep the lights on in California.

Specifically, the hydro facilities as well clears that up. I think that moves us in the right direction.

I identified it in my opening statement. I will stick to that. I have not changed my mind, but as to the price caps, whether or not they incentivize production and what benefit they bring or what detriment they bring, let me resolve it with five different points.

One, let me clarify when it comes to J&R whether or not price caps are or are not and what Congress has and has not done. Congress has not told this agency what to do on J&R. The courts have, and they have given us great discretion. I think it is important you know that that was wrong.

It is correct to say that the courts have given us great discretion to balance, to provide the balance so that we do get this adequate supply, so that we do have choices in the future, so we do not have people going dark like we do right now based on the fact that we have not had an energy policy in this Nation for the last couple of years.

Second, price caps. Temporary. Well, if you want to know what effect temporary price caps have, the retail customers and the utilities in the State of California because they had temporary retail caps for over 2 years.

And guess what. They have since decided they were wrong, and it has destroyed their market.

Next point, price caps. What happens when you issue a hard cap? What did California do when they had the cap previously? We know what they did. They made people like Congressman Walden upset in Oregon because it sucked energy from their State because, quite frankly, California went out of market to get everything else above the cap.

Fourth point, price caps. As Chairman of this agency, and I am proud to say the majority of this agency has not been comfortable telling the American people, quite frankly, that we know in Washington, DC what price at which they should turn their lights off.

You know, the American people are intelligent people. They can make their own decisions, and I would rather allow them to keep the lights on as opposed to telling them there is a price at which we say you must go dark.

Last point. They want a price cap in California? They have got a Governor. He can say, "There is a price at which we are not willing to pay," and take it somewhere else. They can have a price cap. They are going to have to make that choice, and I would be willing to bet you that the people of the great State of California will not make that choice.

Mr. SHADEGG. Well, you answered that question. On balance, you said the legislation is better.

Mr. HÉBERT. Absolutely.

Mr. BARTON. Than the absence of legislation.

Either of the other two?

Ms. BREATHITT. Yes, you asked me.

Mr. BARTON. Briefly. One question has taken an additional 5 minutes for an answer.

Mr. SHADEGG. But we just have to let these witnesses answer, Mr. Chairman. That is only fair.

Mr. BARTON. I know. We are all ears.

Ms. BREATHITT. Congressman Shadegg, we did institute price controls on Wednesday night. I hope they do not have a detrimental effect, but I thought it was very important that we institute price controls on Wednesday night.

They are not cost based. They are not cost based, hard price caps, but they are price controls, and I believe they will be effective without disincenting generation. I have not heard if generators think that it will decrease new entry into the market. I hope it does not, but I think the price controls that we approved and will employ possibly all over the West will be effective.

Mr. SHADEGG. Your view on the final passage of the bill? Is it a net gain?

Ms. BREATHITT. I think it is a good bill. I offered some comments on several of the features, and I am sure you will go over those again. I think the bill is good.

Mr. SHADEGG. Commissioner Massey?

Mr. MASSEY. Well, my view is that effective price mitigation is the most valuable thing this committee could do, and without it, I think there is a major defect in the legislation.

Mr. SHADEGG. And without it you would not pass this legislation?

Mr. MASSEY. Are you asking me to put myself in the position of a Member of Congress? Am I a Republican or a Democrat?

Mr. SHADEGG. That is your choice, but you know, just your advice to us. Assuming we cannot resolve that issue, is it better to pass this bill and do what we can do or is that not worth doing?

Mr. MASSEY. There are some valuable features in this bill, but I would not purport to put myself in a position of a Member of Congress and answer that question.

Mr. SHADEGG. Fair enough. All right.

Mr. SAWYER. Mr. Chairman, I just wanted to add as a matter of record, given the earlier conversation here, that we down at this end of the table have conferred, and it is our conviction that any resemblance between whatever it was that Ed Markey was singing and anything that John Phillips ever wrote is entirely coincidental.

Mr. BARTON. We appreciate that elucidation.

We are going to go to Congressman Boucher to start the second round. When Congresswoman Eshoo comes back, whatever the order we are in, we will let her go since she had to go do an interview.

So Congressman Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman.

I would like to return to a conversation about some of the provisions of the order that the FERC entered last Wednesday, which is directed to wholesale prices in the Western States.

And, Mr. Massey, let me begin by asking you if, in your opinion, there is any justification for the provision in the order that says that even the limited mitigation of prices that the order provides will be conditioned upon the willingness of the California Independent System Operator and the three investor owned utilities in California to file a plan with the FERC by June 1 that would bring California into a regional transmission organization.

Is there any justification in your opinion for conditioning even that limited relief on the willingness of California to join an RTO?

Mr. MASSEY. I support California joining an RTO, but I do not support a condition in our order that says we will not even take modest steps toward insuring just and reasonable prices in the short term unless they make an RTO filing that only has impact in the long term. I consider that to be arbitrary and irrational.

Mr. BOUCHER. Mr. Hébert, why is that provision in the order? You have heard Mr. Massey say that even if California were to begin to take the steps by making this filing on or before June 1, that would bring California into an RTO. The effect of California being in the RTO would not begin to be felt in terms of market conditions and pricing for a long time into the future.

And what we are dealing with in your order is really a short term circumstance, and that is the energy emergency that exists now. So why have you chosen to condition price mitigation on the willingness of California to announce entry into an RTO?

Mr. HÉBERT. I would insist that over the past few years I have been having a continuing conversation in that what has brought us

to this point is that so many people continually say, "Why are you doing this because it is a short-term measure that we are looking to take, and we do not want to look at long-term measures?"

But when you do not look at long-term measures, you get what happened in California. You do not get adequate supply. You do not get the availability and the opportunity to move that supply. You cannot segregate out transmission from generation.

We have supply problems in that there is not enough supply sited within the State of California, but we also have transmission problems in that you cannot move it adequately so that consumers get better and lower prices and their lights do not go out.

We have got to solve the problem now. I have made certain that they have got the resources available by giving them three of the best and brightest at the Federal Energy Regulatory Commission to help them. If they want to file this, they can get it filed.

We are willing to help them, and they need to file it for the benefit of the consumers of California.

Mr. BOUCHER. Okay. Mr. Massey, let me explore another subject. As you noted in response to a question previously, the price mitigation provisions in the order are only applicable for transactions that have a duration of 24 hours or less, and longer term contracts are not subject to the price mitigation provisions.

Is there any information available to you or was any information presented to the Commission as it was examining this matter that would indicate whether the majority of the withholding that is causing the overcharges in the wholesale market to take place with respect to the transactions of 24 hours or less, or whether the majority of the withholding took place with regard to transactions of 24 hours or more?

Mr. MASSEY. I do not think the evidence is certain on that point. I supported an investigation in the Western interconnection that would be much broader based, with a potential refund obligation that is much broader based, because I think especially in the West as a whole, we do not have enough information to make that decision right now.

The mitigation plan is focused only on the California spot markets, the last minute markets, and there is certainly a lot in the record to indicate that at least with respect to those markets, there has been considerable withholding.

Mr. BOUCHER. So you would agree that there is a significant defect in the order, that it does not cover transactions that are for the duration of more than 24 hours?

Mr. MASSEY. I do think that the Commission needs to inquire into longer transactions. I know for a fact that in the Pacific Northwest, for example, a lot of the transactions that are causing the high prices are much or for longer terms than 24 hours.

Mr. BOUCHER. Let me ask you one other question. Because of the various defects in the order that we have discussed previously, you have recommended to the committee that we approve legislation which would address the problem of wholesale power pricing and impose constraints on overcharges, and I would like to ask you if you are prepared to recommend to us a formulation that we should adopt for that kind of price mitigation.

The Commission has chosen to use a test that involves the costs that are associated with the most inefficient generator that is actually called into service. Would you recommend that we take an approach such as that and simply apply it across the board without the kinds of limitations that are in the FERC order, or would you recommend that we use a formulation that involves the actual costs that are incurred by each generator that is called into service?

Mr. MASSEY. That would be my——

Mr. BOUCHER. So should it be cost based for each generator or a cost based on the most inefficient generator?

Mr. MASSEY. The cost for each generator on a generator-by-generator basis plus a reasonable profit would be my preference. There are a lot of ways to skin this cat. I also am concerned about the high gas prices, and as long as the prices in California for natural gas are so high, electricity prices may stay higher than they should be even with that kind of price cap because a lot of the generators are natural gas fired. So that is a separate problem before the Commission right now that we need to address as well.

But my recommendation would be a generator-by-generator cap that allows them to recover their cost plus make a reasonable profit. I would not apply it to new generation, and I would limit its duration.

Mr. BOUCHER. What duration would you limit it to?

Mr. MASSEY. I would limit it to 18 months to 2 years, I think.

Mr. BOUCHER. Thank you very much, Mr. Massey.

Thank you, Mr. Chairman.

Mr. BARTON. The Chair would recognize himself.

Before I ask some questions, I want to just make a general statement about the environmental aspects of the bill. There has been some concern that they would be detrimental to the environment in the States that issue those environmental waivers. I would point out that in order to get into the environmental section of the bill, the State first has to declare a general electricity emergency. Then the State has to ask for specific permission to take specific actions.

In most cases those specific actions are for a limited amount of time, and in some of those cases, it's only when there's a Stage 3 emergency, and in every case the environmental sections of the bill are suspended. They are not repealed, and in most cases they have to be made up at a later date.

So if there is concern about negative environmental impact, I would say that we have gone to some length in drafting the bill to try to give as much authority as possible and discretion as possible to the State and the State agencies, and even then it is for specific periods of time, and it is a suspension, not a repealing.

The first question is to you, Commissioner Massey. You said several times in answer to other questions in the first round that you feel like the State of California may decide this summer to do the equivalent of nationalization of the power generation in the State of California.

I did not take a lot of economics, but I did make As in the courses I took, and it would appear to me that before they nationalized or "statized" 42,000 megawatts, that they would just decide to build the marginal capacity because you would only have to build

four or 5,000 megawatts, and it is who controls the marginal unit of supply, not the totality.

So if, in fact, the State decides that the private sector cannot deliver, why wouldn't they just go out and build 4,000 megawatts as opposed to buying 40,000 megawatts?

Mr. MASSEY. I am not saying they will make a smart decision. I think out of frustration, they may overreact.

I think there is a great deal of frustration that the prices are so high, the economic bleeding is so great, and not enough is being done about it. So I think there is a good chance that the public will rise up and try, through an initiated act, to take control of the situation.

I do not claim that that would be a good decision, but I think it is a very realistic possibility.

Mr. BARTON. Well, I am not a resident of the Golden State, and I have followed this now for quite some time, and I would be very, very skeptical that they would try to buy the power generation, just from a cost standpoint. There are other options that are available.

Plus you would have to approve it. The Commission would have to approve it.

I want to ask the Chairman a question. Again, this goes to some things that Commissioner Massey has said in answer to previous questions. He is of the opinion that there might be private sector generators that are withholding power from the market, or have withheld power from the market in the past to manipulate the price.

I know there have been some pending investigations, and I am not going to ask about that. My question is: do you have any evidence that there are currently generators of power in the California market that are either currently withholding power, or planning to withhold power for this summery?

Mr. HÉBERT. We are continuing to be vigilant in looking for what might be defined as gouging or market manipulation or physical or economic withholding. That is what the price mitigation order is, in fact, about, the must sell requirement, bidding requirements, the outage alerts, the filing on a weekly basis by the ISO.

Those mechanisms will prevent the economic and the physical withholding, and I can assure you as we are looking at December and November of this previous year, as we looked at the months previous to now, and as we are going to look once we have this order in place and effective, if there is gouging or if there is market manipulation, we will be vigilant. We will ferret it out, and we will make sure we act at the FERC appropriately.

Mr. BARTON. Well, let's assume for debating purposes that Barton, you know, Barton Gouger, Incorporated has got a power plant in California, and I am consciously trying to manipulate the market. Okay? I am very unscrupulous, and I broadcast that I am doing it. I mean, I do not even try to hide it.

What steps can the Commission take to prevent me from operating in that fashion?

Mr. HÉBERT. Well, what we have done previously and what we have the ability to do actually is to eliminate market based rates.

We can issue refunds. We have got the effective date here where we can move forward with that.

Mr. BARTON. So if somebody is really trying to do that, the Commission can take steps to prevent it?

Mr. HÉBERT. We are, and we are looking for it, and if we find it, 24 hours a day, 7 days a week, any time regardless of what market it is in, we are going to act appropriately.

Mr. BARTON. Okay.

Mr. HÉBERT. That has not been done before because, quite frankly, we have not had the must sell requirement before. You haven't had the bidding requirements before. These are new provisions.

Mr. BARTON. My last question to Commissioner Massey, who reserves the right to change his mind. You have been generally in the last several years opposed to price caps. Congressman Burr alluded to some statements that you have made, but like all American citizens, you can change your mind, and you have changed your mind.

But if, in fact, it is your opinion that price caps are necessary, what is so different about a price cap as opposed to a buy cap that the State of California has right now? They can just refuse to buy anything above a certain price. They are basically the sole buyer of power in the State of California. I am sure there are exceptions, long-term contracts, but generally any power that is being purchased, the State of California is purchasing it.

So why can't the California PUC or the Energy Commission or Los Angeles Water and Power Department just say, "We will not pay any more than $250"?

I mean, what is the difference in a buy cap, which the State has the authority right now to impose, in some sort of a legislative price cap.

Mr. MASSEY. A buy cap would apply only to the California market. If the sellers weren't willing to sell at that price, they'd just sell elsewhere.

Mr. BARTON. Well, but then you would have the same problem with the price cap. It would only apply to——

Mr. MASSEY. No, you would apply it to the entire Western interconnection. They cannot sell anywhere else. It is applicable in the entire interconnection.

Mr. BARTON. But then if you are logical, in order for that to work, you would have to apply it to the whole country.

Mr. MASSEY. Just apply it to the Western interconnection. There does not appear to be that type of serious problem in the whole country. The price in the PJM market when it has been hovering at $300, $400 an hour in California has been about $40 to $45.

But, yes, I think what I have learned over the last 3 years is that electricity markets are delicate, and when they get out of control, the transfer of economic wealth is just like that, and my agency needs to step in and be a tougher cop on the beat. That is what I have learned.

Mr. BARTON. Well, I understand that. I am not opposed to tough cops on the beat, but by your own answer to that question, if a buy cap would not work because it was only in California and so you have to go regional, a price cap will not work. So you have to go regional, and you are back where we were. People are not going to put power into the market.

And that does not do anything to generate new power supplies, which is the long-term solution to the problem.

Mr. MASSEY. Well, I think they would if it was a temporary cost based cap that could get us through the next couple of years. There have been a couple of generation companies that have advocated it recently, saying the market is unstable, and we need it to stabilize the market. It is not just a radical left-wing idea.

Mr. BARTON. I have not used the phrase——

Mr. MASSEY. No, no, no.

Mr. BARTON. [continuing] radical left wing.

Mr. MASSEY. No, no, you have not.

Mr. BARTON. Nobody from Arkansas can be radical and left wing. I mean just by definition.

Mr. MASSEY. Well, one of my friends called me and told me it was radical and left wing.

Mr. BARTON. Maybe he or she——

Mr. MASSEY. But, no, you have not said that. In fact, it is a very reasonable idea when the price is not just and reasonable, and in fact, it is the law of the land.

Mr. BARTON. Well, my time has expired.

We are going to go to the gentle lady from California for her first and second round. We will give you 10 minutes.

Ms. ESHOO. Thank you, Mr. Chairman, again, for extending the legislative courtesy to a member of the full committee who is not part of your subcommittee.

Thank you to the Commissioners and to the Chairman. Welcome, Commissioner Breathitt. It is nice to meet you. We have met with Chairman Hébert before and have met Commissioner Massey.

Let me just comment on my colleague, Representative Walden's question earlier about how does one recognize just and reasonable. It reminds me of the story of the question that was asked of I think it was Justice Douglas. How do you know something is pornographic?

And he responded by saying, "I know it when I see it."

So when you see utility bills, Congressman Walden, you know that those rates are not just and reasonable.

I also think that it is important to state for the record that the courts have held, the counts have held in our Nation for over 60 years and upheld the defined term. So this is not something that is vague. This is not something, a term that has just come up with the looming crisis and now the established crisis in California and the Pacific Northwest.

I think that it would be well for members to have their staffs go back and do some research on this because the Federal Power Act has been around since 1935, and there are many, many court cases that have held this.

If I have time left, after being here for over 4 hours, then I will yield to you, but I wanted to make those observations.

My first question deals with this whole area of just and reasonable. Obviously much attention was paid to the refunds that the FERC ordered for February and March, and what I am really concerned with because constituents have asked this. This made big news out on the West Coast. What I am concerned with is that these refunds, No. 1, only dealt with transactions—and this has

been brought up over and over today, but I still think it is worth going back to—that it only dealt with transactions that occurred during Stage 3 alerts, which means that it only caught about 2 percent of suspected overcharges.

I would like to know from the chairman or any one of the members, perhaps the chairman, what is the status of refunds today. Who has been paid, and who is disputing the order? And of the $124 million—I think that is the correct figure—in refunds that the FERC ordered, how much has been returned to the utilities.

I have another question on the heels of that because the chairman just said earlier about we are doing and will do in the future everything we can to pursue people that are gouging. Why would we have confidence in a statement about the future if, in fact, there is not full confidence of the FERC securing and making good on the order that it set forward on the overcharging and gouging?

My second question is: why is it preferable for FERC to allow generators to overcharge and then order refunds? I mean, it seems to me that it is a policy that is really on its head. Wouldn't it be more sensible to set forward something that is concrete, something that can sustain itself that is predictable on a cost of service based rate so that consumers will not be saddled with unnecessarily high rates, and that all parties will understand the rules of the road?

My third point is really more of a query to see. I know you are smiling, sir, but we know that if we do not get out questions out that time runs out when the answers are given. So I would rather get my questions out, and then you will be given time to answer them.

As you know, under California's restructuring plan, the investor owned utility, the IOUs, were required to sell off their hydroelectric plants. We know that consumers made an investment in those plants through their utility bills. We all paid something. We are or were essentially shareholders in the construction of the plants through our electricity rates.

So now as a result of deregulation or so-called deregulation, flawed deregulation, the plants are now owned by independent and out of State generators who obviously who obviously ar gouging customers. The FERC made that finding that people are being gouged.

Don't you think that we should acknowledge the role that consumers play in the financing of those plants by at least applying a cost of service based rate to them during all hours of operations?

And my last comment is somewhat harsh, but I have to tell you that in setting through the hearing today, which I am very grateful that the chairman has called and the work that he is trying to do. Where I disagree and disagree vehemently with many sections of the bill, he is trying to do something, and I think that is what people want us to do.

If I were turned in today as a consumer, I have to tell you that I think that at the Federal level we have failed people. I would not understand the jargon that was used. I would not understand when this Federal commission is going to actually do something about price gouging.

You made the findings. People are still being gouged, and it is 24 times 7. There is complicated and complex terminology that ap-

plies to all of this energy stuff, but I really think that the Commission has the power of the law right now, and I do not find the power of the law coming into play at the Federal level.

California has its faults. California has acknowledged California has plants on line. California has to not only generate, but we have to conserve as well, and for anyone to come here and do a rating of politicians, I have to say I really this is a little off the charts.

It offends me, and I think it offends my constituents whether they are independents, whether they are Republicans or whether they are Democrats.

So I would like to ask the Chairman to address the issue, the first question; the second point about generators overcharging and then ordering refunds. Why wouldn't we stick with going at it the other way, which was, I think, the way the FERC began? And why would we have confidence in saying you are going to do it in the future if you have not applied it to the past? And what about the idea that I outlined about investor-owned utilities and consumers having made an investment in that through their utility bills?

Maybe the Chairman would like to start.

Thank you.

Mr. HÉBERT. I will be glad to. Thank you.

One, I think you wanted to start with the gouging. The Commission has not found gouging. What the Commission has found is that rates were not just reasonable during certain times at certain conditions.

I understand we are talking about semantics, and I certainly follow what you are saying and what your concerns are, but in that, if you are asking about what this Commission has done, and I am assuming you are talking about since I have been Chairman——

Ms. ESHOO. No, Mr. Chairman, excuse me. I would like you to answer my question very directly.

Who have the refunds gone to? How much has gone out? And who's disputing them?

Is there a refund to anyone after you determined that there was price gouging?

Mr. HÉBERT. It is subject to rehearing at this point.

Ms. ESHOO. So nothing has been done?

Mr. HÉBERT. I cannot control that. Neither can this agency.

Ms. ESHOO. I beg your pardon?

Mr. HÉBERT. It is subject to rehearing. People have rights, due process of law.

Ms. ESHOO. I understand, but the determinations that were made, no actions have been taken as a result of it because of what, your process?

Mr. HÉBERT. This agency in the last 90 days since I have been Chairman has moved to do something that has not been done before, and that is, in fact, to refund. We have issued refund orders. We did——

Ms. ESHOO. So do you have a timeframe around that? I mean, what can we tell our constituents you are doing?

Mr. HÉBERT. You can tell them that we have issued refunds, and it is subject to rehearing for January and February.

Ms. ESHOO. And how much has been refunded of the——

Mr. HÉBERT. I am going to say March in a moment.

Go ahead.

Ms. ESHOO. All right. How much has been refunded in terms of the overcharges that you found to be made?

Mr. HÉBERT. It is $125 million at this point that is subject to rehearing.

Ms. ESHOO. Rehearing or refund?

Mr. HÉBERT. Rehearing that has been refunded.

Ms. ESHOO. So no refunds have been made. How long does it take for the rehearings?

Mr. HÉBERT. Refunds have been ordered by this Commission, but those refunds that have been ordered by this Commission are statutorily subject to rehearing at this point.

Ms. ESHOO. I understand. So how long will it take—this is not a difficult question. I do not know the answer to it. You are the Chairman. What is your process? Is it 30 days, 60 days, 90 days, 120 days, 12 months, 18 months? How long does this process take to make the determination, and who is disputing it?

Mr. HÉBERT. I cannot give you an exact date. I am prohibited from giving you a date on which this Commission would act or what we might act on, but I can tell you if you have looked at the record of this Commission in the last 90 days, you will find and you will know that, in fact, we will act expeditiously. So as quickly as we have the——

Ms. ESHOO. Well, I think "expeditious" has many meanings here.

I want to note that in December of 2000, Commissioner Massey recommended a broad price investigation and consideration of the cap. So I do not know how broad the investigation was. I was cheered momentarily when you made the finding, but it doesn't sound as if there is anything that is going to be forthcoming at least in the near future.

Mr. PICKERING [presiding]. The gentlelady's time has expired.

Ms. ESHOO. Yes. Can the Chairman address the other two questions?

Mr. PICKERING. We are trying to get to a second panel. We have given more than 10 minutes, if that is okay with the gentle lady. It is now——

Ms. ESHOO. I would like to ask that the Chairman and/or either Commissioner, but certainly the Chairman, respond directly for the committee to the direct questions that I asked today since he is not going to state them verbally.

But I would like a clear answer. I really do not want a correspondence for the next 14 months. I think it is unfair to my constituents and everyone else's.

Thank you, Mr. Chairman.

Mr. HÉBERT. Mr. Chairman, if I may, I do not want there to be any misunderstanding. I am more than happy to put them out verbally or I would be more than happy to give them to her in written format if it would expedite the hearing.

Mr. PICKERING. Thank you, Mr. Chairman.

I now recognize the gentleman from California, Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

We have heard a lot about California's out of control wholesale electricity prices, and they are really incredible because California prices are way out of proportion to the rest of the country, but this

is the result of a lot of different things, but we used to have regulation, and the rats were based on the cost of service, and that was how much the generator was able to charge, and we deregulated, and suddenly the prices went through the roof.

Now, that is for electricity, but we also have a problem with natural gas. California imports much of its natural gas, which means it has to pay for the cost of transmitting that gas to the State border via pipeline. These interstate transactions are regulated by the Commission.

In February 2000, however, FERC removed the price caps that are on the resale pipeline capacity for a 2-year period. So we have the price limits on natural gas importation lifted in February of 2000.

At that time FERC stated that its objective was to, quote, improve the efficiency of the market while continuing to protect against the exercise of market power, end quote.

The result has been a huge increase in California's border price for natural gas. By the end of 2000, natural gas prices at the Southern California border of TOPAC hit record highs, rising from about $3 per million BTU in December 1999 to almost $60 per million BTU in December 2000. So in 1 year from $30 to $60 per million BTU.

The base price for natural gas has gone up in that time, but most of the increase was attributable to the now unregulated secondary capacity market.

On December 12, 2000, when the natural gas border price at TOPAC hit $59 per million BTU, roughly $49 of that total, more than 80 percent, was attributable to the unregulated resale market. Compare that $49 to FERC's previous cap on secondary sales of 67 cents, $49 to what used to be a limit of 67 cents per million BTU, and you get some idea of how out of control the state's gas market has become.

The dramatic increases have not been seen elsewhere in the nation, and California gas prices continue to be out of whack.

Now, this also has an impact on electricity rates because California relies on natural gas to produce roughly 30 percent of its power for the high cost of natural gas imported into California translated into higher wholesale electricity bids, and these are the high bids that set the market clearing price that all sellers are paid.

In fact, lawyers for Southern California Edison estimated in filings with the Commission that every ten cent increase in the price of gas at the California border causes electricity costs to rise at least $34 million per year.

Unfortunately FERC is once again doing nothing, and this is not the case of California not getting more power plants. This is natural gas being imported in. So without that limit, the prices are going through the roof.

FERC has refused to help California reign in these skyrocketing gas prices. It is also unfortunate the bill we are considering today has nothing to say about this gas crisis.

If we are going to try to help California, we must be doing more to lower natural gas prices. Ms. Massey, do you agree with that?

Mr. MASSEY. I agree with that. It is a complex problem, but I have noted the transportation differentials into California often exceeding $10, and as you point out, much higher. The transportation differential from Texas-Louisiana to the Chicago city gate the other day was 9 cents, and the transportation differential from the same basins into New York was 47 cents, and it is often over ten bucks or higher into California.

That is a serious problem that somehow we have to address.

Mr. WAXMAN. What do we have here? Not that I fully understand it, but what do we have? The combination of the lifting of the limits on natural gas prices at the same time we have the previously regulated ceilings on electricity prices?

Mr. MASSEY. Yes. There is an argument that the high price of electricity is actually driving the high price for natural gas because the bidders know that they can include in their bids for electricity the highest price in the market. They do not have to include their actual cost, and so they have actually created a market in California for very high priced gas, which actually is another rationale—glad I thought about it—for the electric price cap to deflate the natural gas market. Perhaps there would not be buyers for gas at that very high price if the generators knew they could not buy it at that price.

There is a complicating factor. It is called the gray market, and it is where a marketer takes supply, interstate transportation, intrastate transportation, and perhaps transportation behind the city gates, rebundles that, and sells it at a delivered price, and the best I can tell, that is not regulated by anyone.

Ms. ESHOO. But the Chairman is about to tell me my time has expired, but I do think it is only fair to ask the other two if they want to comment on this issue, and in doing so, I want to know whether Mr. Hébert can give us any information of when FERC is going to act on filing pending since December 7, 2000 that would address this problem with the secondary market and pipeline capacities.

Can you give us some information when you expect a decision? And if either of you two want to add anything to this natural gas issue.

Mr. HÉBERT. Congressman Waxman, I would be glad to. Actually there are several matters pending before us that are issues that you brought before us. One, the El Paso case; certainly the San Diego case. Again, I am prohibited from giving you a date on which this Commission would act, but I can tell you the staff has been told to act expeditiously on this. We will get it out as quickly as possible.

But this Commission has gone very much in the direction of not only moving forward with our audit, but making sure that we understand how, in fact, gas markets work; that there are not only interstate considerations, but intrastate and take away capacity considerations as well.

We are looking at all of those, but as far as what this Commission can do expeditiously, Kern River is a great example of that. This agency acted on moving forward with Kern River, the interstate gas project within 3 weeks, something unheard of before, and

I am very proud of not only the staff at the Commission, but my colleagues for working so quickly.

Ms. ESHOO. Ms. Breathitt.

Ms. BREATHITT. The natural gas pricing issues in California have been a concern of mine for a number of months. I talked about them when I was here on March 20. I included some of my comments in today's testimony.

I did not talk about them in my opening statement because it was not germane to your legislation, but I felt a need to bring it up again in my testimony today.

I am delivering speeches with commentary on the natural gas situation in California, particularly with respect to intrastate capacity or take away capacity. There are bottlenecks at the border.

You mentioned TOPOCK. There is a big bottleneck there with getting the gas to market, once it gets to some of these border hubs, and it needs to be looked at further by our Commission. And I hope that we will all agree that a technical conference devoted to the natural gas infrastructure is needed and that we do so in the near term, and I thank you for raising that.

Mr. WAXMAN. Mr. Chairman, with the short time we have, each of us, to ask questions, I have got a lot of other questions. I would like to be able to submit them in writing to the members of the Commission and get a response for the record.

Mr. SHIMKUS [presiding]. Without objection, so ordered.

Mr. WAXMAN. Thank you.

Mr. SHIMKUS. We will now turn hopefully to our last questioner. We have the Honorable Mr. Markey from the Commonwealth of Massachusetts recognized for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

I would begin by saying if Shimkus Bouger, Incorporated is in business in California, all they need to do is wait for the Shimkus bill to pass, and they will have some wonderful new opportunities to price gouge.

First, since the bill fails to impose a temporary return to cost of service rates, they can continue to gouge at any time other than at a Stage 3 emergency in which resources have dipped down to a 7.5 percent reserve.

Second, if they own a QF facility, they just have to get into a contract dispute with the utility, which they have a long-term contract. Then if the utility suspends payments, they can pull out of it and sell into the spot market at a huge profit.

Third, there are some lucrative new opportunities under this bill to expand their price gouging activities over at Shimkus Gouger, Incorporated, and that is what I would like to explore right now.

Commissioner Breathitt, you expressed concerns in your testimony that the proposed clearing house system in Section 101 of the Shimkus bill may eliminate tool that FERC might need to prevent gaming and abuse by declaring that all market prices for foregone purchases are just and reasonable.

Now, we have all become more sensitized to the possibility that market might be gained out in California. Can you walk us through the worst case scenario of how this particular provision of the Shimkus bill could be gained?

Ms. BREATHITT. As I read Section 101, it calls on the Commission to establish a clearing house, which we could do. I said that it may be difficult for us to do that in 30 days, but this provision also deems that these sales, these wholesale megawatts that go back onto the market, that the price of them is automatically deemed just and reasonable rates.

So the tools——

Mr. MARKEY. JNR means?

Ms. BREATHITT. Just and reasonable. I am sorry.

Mr. MARKEY. Okay, okay.

Ms. BREATHITT. The tools that the Commission has at its disposal, such as the tools that we have used in our price mitigation plan, would not be available to us.

Mr. MARKEY. Okay. Commissioner Massey, do you share Commissioner Breathitt's concern about the potential gaming in Section 101 of the Shimkus bill?

Mr. MASSEY. I think she has made a good point. I support the basic thrust of it to make more power available, but I would not support a deeming that all such transactions are just and reasonable.

Mr. MARKEY. Okay. Now, Commissioner Breathitt, you also say that Section 102 of the bill essentially replicates a measure FERC has already taken to allow consumers to sell the portion of their electric load that they are willing to forego using themselves, but you know the provision removes FERC jurisdiction over such transaction and that it requires difficult and burdensome determinations by the FERC.

In light of those problems, don't you think it would be better if we just dropped that provision?

You have already acted administratively, have you not?

Ms. BREATHITT. We have acted administratively on our March 14 order where we have demand measures, and I applaud the demand measures. I am saying this one has components to it that would present problems to me as a regulator.

Mr. MARKEY. Yes. So you would recommend dropping that?

Ms. BREATHITT. No. I think they could be cured.

Mr. MARKEY. Okay, but as it is, it would cause real problems to you?

Ms. BREATHITT. Yes.

Mr. MARKEY. Do you agree with that, Mr. Massey?

Mr. MASSEY. Well, I'm interested in hearing what Linda would say about that, and I perhaps could learn from her. I was inclined to believe it was a pretty good provision.

Mr. MARKEY. Okay. Yes?

Ms. BREATHITT. As I read Section 102, which Section 101 is the wholesale piece for the demand program; 102 is the retail piece. As I read it, the order would remove Commission jurisdiction over the transactions.

Mr. MARKEY. Okay. Mr. Massey?

Mr. MASSEY. Well, if it actually does that, then I think it ought to be amended to insure that the price is just and reasonable. I thought what it was attempting to do is to not to enlarge the Commission's jurisdiction by turning what was a retail sale into a sale for resale.

Mr. MARKEY. Well, she reads it that it removes the Commission's jurisdiction over such transactions. You don't read it that way?

Mr. MASSEY. I think what it is intended to do is to say that the——

Mr. MARKEY. If it did remove the Commission's jurisdiction over such transactions, would you oppose that?

Mr. MASSEY. I would be concerned about that, yes.

Mr. MARKEY. Okay. Good. Let me ask you, Chairman Hébert.

Mr. SHIMKUS. Mr. Markey, we are over a minute, where we still have Mr. Dingell to ask some questions, and we really would like to get to the second panel some time before tomorrow.

Mr. MARKEY. Everyone else got 10 minutes.

Mr. SHIMKUS. Well, that was before I was in the chair, and I——

Mr. MARKEY. I am the only one being held to the 5-minute rule so far today.

Mr. SHIMKUS. I do not think that is true, and if it can be a question that is limited to a minute or so, but I am not going to wield for 10 more minutes as we have got——

Mr. MARKEY. I am not asking——

Mr. SHIMKUS. We have got individuals here that have been waiting since the beginning of this hearing to get to this panel.

Mr. MARKEY. So you are saying you are only going to give Mr. Dingell and me 5 minutes?

Mr. SHIMKUS. No, I am saying I want to yield to the ranking member and it is his time with no members on the majority side——

Mr. MARKEY. But you are saying you are only going to give him 5 minutes as well as me?

Mr. DINGELL. Let the gentleman have his full 10 minutes. I am not here to exceed his time.

Mr. SHIMKUS. The only individual that was given 10 minutes was Ms. Eshoo because she got her 5 minutes consecutively.

Mr. MARKEY. Mr. Shadegg got 10 minutes.

I just have one more question.

Mr. SHIMKUS. Okay.

Mr. BARTON. Would the gentleman yield? I am sorry. I have been out in a meeting with the Corps of Engineers with my district.

Mr. MARKEY. My time has expired.

Mr. BARTON. Well, we will give you additional time. We allowed Congresswoman Eshoo to do a double question because she did her first and second round in a 10-minute period since she had to go do a CNN interview. Everyone else has been given 5 minutes, and generally a very generous 5 minutes.

Mr. MARKEY. Mr. Shadegg got a very generous 5 minutes.

Mr. BARTON. Well, he asked a question that took these Commissioners 5 minutes to answer, his one last question. It was the answer that was——

Mr. MARKEY. Well, okay. I have one of those questions that I would like——

Mr. SHIMKUS. But the problem is you have one of those questions, too.

Mr. MARKEY. Any question you give Mr. Hébert is a 5-minute answer.

Mr. BARTON. I would encourage the person in the Chair to be generous with Congressman Markey, and I will be back within 5 minutes.

Mr. MARKEY. I have one final question.

Mr. SHIMKUS [presiding]. The gentleman is recognized.

Mr. MARKEY. I thank the Chair, and that is to Chairman Hébert because you also expressed concerns about Section 101 taking away FERC's authority to determine whether rates were just, reasonable and not unduly discriminatory or preferential.

Now you say that this is a minor concern, but it seems to me that what is taken away from you is FERC's core power under the Federal Power Act. Isn't that a pretty big deal?

Mr. HÉBERT. It is a big deal, and I do not believe that I said it was a minor concern, and in fact, I would say it is something that should be cleared up, and I would be glad to give technical assistance in doing that.

Mr. MARKEY. So you would not support Section 101 if it in any way affected your powers to determine——

Mr. HÉBERT. I said technically I think it needs to be cleared up as to whether or not we continue to have jurisdiction over rates being just and reasonable, correct.

Mr. MARKEY. So you would oppose any provision that in any way limited your ability to make the determination that rates are just, reasonably, and not duly undiscriminatory?

Mr. HÉBERT. Any provision that could not be adequately corrected, yes.

Mr. MARKEY. Well, you say here in your testimony, not to contradict you because you are contradicting me and saying that I said that you said that it was a minor reservation and you said you did not say that. So I just——

Mr. HÉBERT. I am just trying to give you a short answer.

Mr. MARKEY. But short and accurate if you should because your testimony here, summary of testimony of Curt Hébert, Jr., which you presented to us, you say, "However, I have two minor reservations as to Section 101." I was only reading your minor reservation.

So I did not mean to say anything other than, you know, to bring to your attention your own reservations about the chairman's bill and to then clarify what it would take for you to be able to accept it.

And there I am just trying to pinpoint whether or not this central authority that you have to protect consumers across the country is something that you want this committee tampering with legislatively at this time or do you want that authority to remain intact.

Mr. HÉBERT. I do not want there to be any miscommunication. When I said minor, I meant that it would not take much to change it, but the Commission losing joint and reasonable rate authority is not minor, if that is your question. You are right.

Mr. MARKEY. Okay. Thank you.

Mr. HÉBERT. Yes.

Mr. SHIMKUS. Does the gentleman yield back his time.

Mr. MARKEY. The gentleman yields back.

Mr. SHIMKUS. The Chair recognizes the ranking member from Michigan, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I am going to read this language to you, Section 205, the Federal Power Act. "All rates and charges made, demanded or received by any public utility for or in connection with transmission or sale of electric energy subject to the jurisdiction of the Commission in all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

You are familiar with that, are you not? Mr. Chairman, you are familiar with that, are you not?

Mr. HÉBERT. I am familiar with it.

Mr. DINGELL. Very good. Now, Section 206. "Whatever the Commission after hearing had upon its own motion or upon complaint shall find that any rate, charges, or classification demanded, observed, charged or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission or that any rate, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable" and it says "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and enforced and shall fix the same by order."

Now, is that the law?

Mr. HÉBERT. Yes, sir, it is.

Mr. DINGELL. Now, can you show me anywhere in the Federal Power Act where the Congress has directed the Commission to balance the interest of suppliers against those of consumers, or where in the statute the requirement of just and reasonable rates, prices, terms, and conditions in Section 205 and 206 give FERC latitude to factor in supplier interest? Where?

Mr. HÉBERT. Congress, no, but under case law, we are given flexibility based on——

Mr. DINGELL. Sir, where—please, please——

Mr. HÉBERT. [continuing] facts and a zone of reasonableness.

Mr. DINGELL. Please cite the language and/or the section.

Mr. HÉBERT. By Congress, no.

Mr. DINGELL. Okay. To date, has the Commission initiated investigation into all wholesale prices during the West during all hours? It has not, has it?

Mr. HÉBERT. Have we investigated?

Mr. DINGELL. To date, has the Commission instituted an investigation into all wholesale prices in the West during all hours? The answer to the question is no, is it not?

Mr. HÉBERT. Since I have been Chairman, this Commission has been vigilant as to ferreting out any misbehavior or misconduct or——

Mr. DINGELL. The answer——

Mr. HÉBERT. [continuing] inappropriate market behavior.

Mr. DINGELL. The answer to the question is no. Thank you.

Now, is FERC certain that under present conditions and circumstances Western electricity prices are just and reasonable?

Mr. HÉBERT. Have we said they are just and reasonable?

Mr. DINGELL. Have you had a proceeding to establish that they are just and reasonable and have you so found in compliance with the language of the statute which I have just cited to you?

Mr. HÉBERT. We just issued a 206 investigation into the West, yes, and we have not concluded as we are within a comment period of 10 days, that investigation.

Mr. DINGELL. What are you telling me, that you have or you have not?

Mr. HÉBERT. I have initiated a 206. I have not done anything. This Commission——

Mr. DINGELL. But nothing has been done.

Mr. HÉBERT. We just——

Mr. DINGELL. Now, we had this Western——

Mr. HÉBERT. We just started.

Mr. DINGELL. [continuing] power crisis sine when? It has been going on for what is it, about 11, 12 months?

Mr. HÉBERT. I have been Chairman of this agency for 3 months, sir.

Mr. DINGELL. Okay. This has been going on all during your chairmanship and all during your predecessor's chairmanship; is that right?

Mr. HÉBERT. And we have been vigilant in my chairmanship.

Mr. DINGELL. Now, Mr. Massey, you made an interesting observation in an opinion of yours. You said, "This order opens an extraordinarily narrow 206 investigation for the Western interconnection, and I commend my colleagues for at least going this far, but the approach is too narrow to hold any promise of effective relief."

What were you telling your colleagues on the Commission and what are you telling this committee today about that matter?

Mr. MASSEY. The 206 investigation that was opened only investigates by its terms serious reserve deficiency, prices that are charged during serious reserve deficiencies of 7.5 percent or less, and only transactions of 24 hours or less.

So any transaction for a longer term than 24 hours is off the table. Any transaction regardless of the length of time that occurs outside of the reserve deficiencies is off the table.

The reason that is important is that the refund condition is limited by the scope of the investigation.

Mr. DINGELL. All right. You went on to say as follows: "This agency is statutorily required to insure just and reasonable prices at all times, and the standard in the Federal law is not limited to stage alert hours." Is that correct?

Mr. MASSEY. That is correct.

Mr. DINGELL. Now, Chairman Hébert, I recall to you again 205 and 206, which require you to seek to it that rates are just and reasonable upon your own finding, upon proceedings initiated by you or upon applicants of an injured person. Is that not correct?

Mr. HÉBERT. That is correct.

Mr. DINGELL. Okay. Thank you.

Now, does FERC's April 26 order require power marketers from outside California to abide by the soft price cap? Yes or no?

I believe the order is unclear. Your interpretation would probably assist everybody.

Mr. HÉBERT. The 206 investigation is attempting to mirror what we have done in California which reaches out to marketers as well. So the answer is yes.

Mr. DINGELL. Does it cover all out of State producers or some or none or you do not know? Which?

Mr. HÉBERT. The 206 would cover all generators and producers within the West.

Mr. DINGELL. Within the——

Mr. HÉBERT. Outside of California.

Mr. DINGELL. Do you agree with that, Mr. Massey?

Mr. MASSEY. We may be mixing apples and oranges here. The price mitigation provisions of the order that apply to Stages 1, 2, and 3, as I read them, do not limit the price that may be charged by the out of State generator. It can justify a higher price.

No. 2, the 206 investigation only applies to limited hours and limited reserve conditions. It is extraordinarily narrow.

Mr. DINGELL. Do you disagree with that statement, Mr. Hébert? Yes or no?

Mr. HÉBERT. The 206 investigation, again, attempts through a comment period to mirror, and we are looking forward to hear the comments, what we have done with the mitigation measures in the State of California.

Mr. DINGELL. Do you agree with Mr. Massey's statement or not?

Mr. HÉBERT. No, because I think the Commission is continuing to act vigilantly when it comes to——

Mr. DINGELL. Did he—are you saying that he did not tell us the truth on this matter?

Mr. HÉBERT. You asked me if I agreed with him, sir, and I do not agree with him. I am not speaking to whether or not his integrity is being challenged. I think he believes it to be the truth.

Mr. DINGELL. Now, does the order permit a power marketer to justify prices exceeding the price cap simply by demonstrating that that power marketer had paid an exorbitant price in asking for this cost plus a profit?

Mr. HÉBERT. I did not fully understand your question.

Mr. DINGELL. I will read it again. I have great hopes that the Chairman of the FERC would understand this kind of simple question.

Having said that, does the order permit a power marketer to justify prices exceeding the price cap simply by demonstrating that it paid an exorbitant price and asking for this cost plus a profit?

Mr. HÉBERT. No simply by exhibiting it paid an exorbitant price, no.

Mr. DINGELL. What does that individual then have to do to do that?

Mr. HÉBERT. Well, we are seeking comment on that at this point, and as to what that comment period would bring us, it would bring us probably information as to market input considering NO_X, NO_X cost, credits——

Mr. DINGELL. Let me try to——

Mr. HÉBERT. [continuing] heat ratio, natural gas costs.

Mr. DINGELL. Let me try and simplify.

Mr. HÉBERT. I am just trying to answer the full question since you wanted it answered.

Mr. DINGELL. Well, and I am trying to help you.

Mr. HÉBERT. I know you are. Thank you.

Mr. DINGELL. Are you really telling us that you have not considered this matter and that you intend to address it at some future time?

Mr. HÉBERT. I am not telling you we have not considered it. I am telling you, in fact, this Commission has ordered a 206. We are in a comment period at this point, and that is, in fact, what we are looking forward to, to get comments on 206.

Mr. DINGELL. Mr. Massey, you look like you have something to tell us. What comment do you wish to make?

Mr. MASSEY. The provision that you are talking about, which I construed to allow a marketer to essentially charge any price that it can justify based upon the price that it paid, regardless of how high, is a matter that pertains to the price mitigation provisions in the California spot market.

The 206 investigation by its term specifically excludes that market from the 206 investigation, and that marketer transaction is not at risk, the way I read the order, for a refund.

Mr. DINGELL. Now, Mr. Hébert, what percentage of electricity sold in the California marketplace is sold on the spot market and what percentage is sold on the contract market?

Mr. HÉBERT. We are guessing at this point that about 15 to 20 percent is sold on the spot.

Mr. DINGELL. On the spot or on the contract?

Mr. HÉBERT. On the spot.

Mr. DINGELL. Have you checked this out with the Federal Energy Information Agency?

Mr. HÉBERT. No, I have not.

Mr. DINGELL. You say you are guessing this.

Mr. HÉBERT. Based on my reading for edification purposes of this, I think that is what I recall, 15 to 20 percent.

Mr. DINGELL. Would you be surprised if it were the other way around, if it were 15 percent were sold on the contract market and the balance were sold on the spot market?

Mr. HÉBERT. Yes, I would be surprised because since the December 15 order, which tried to push the California market into the forward markets, I do not believe you would still see that.

Prior to December 15, I think you are probably correct.

Mr. DINGELL. Where are most of the costs in that particular market and the cost increases to consumers?

Mr. HÉBERT. Most costs when they come——

Mr. DINGELL. Are they in the spot market?

Mr. HÉBERT. Most costs when it comes to generation is on fuel.

Mr. DINGELL. Is on fuel, but the cost to the consumer, most of those costs rely in volatility of the spot market or do they rely on the fact that the contract market has gone up?

Mr. HÉBERT. Well, I think we have seen extreme volatility in the spot market, and that is why we have tried to push California and the Western markets toward the forward markets.

Mr. BARTON. This will have to be the gentleman's last question.

Mr. DINGELL. I thank you.

Then that being the case, why have you not initiated a process to assure that all prices of California sold in—rather, all prices on

electrical energy sold in California or sold in the West are not in compliance with the requirements of Section 206 and 205 of the Federal Power Act which I have just read to you?

Mr. HÉBERT. I believe this Commission has, in fact, done that, and through our price mitigation measures as well as the must sell requirement, the bidding requirements, as well as what we are doing with the 206 in the West, I do think this Commission is following forward with 205 and 206, which in fact give this Commission great flexibility when it comes to the justness and reasonableness of rates and how we figure on the justness and reasonableness of those rates.

Mr. DINGELL. Mr. Massey, do you agree?

Mr. MASSEY. All of the forward contract markets are excluded from any order in terms of——

Mr. DINGELL. Including FERC orders under the provisions of the Power Act?

Mr. MASSEY. Not under the provisions of the Power Act. Under the provisions of our order. Our order applies to the California spot markets only, and the investigation applies, as I said, only to transactions that are 24 hours or less. Everything else is excluded.

Mr. DINGELL. And how much of the market is under that 24 hour or less market?

Mr. MASSEY. I am not sure what it is. In the Western interconnection, 24 hours or less during 7 percent reserve deficiencies would probably be a fairly small percentage.

Mr. DINGELL. What do you think about that Mr. Hébert?

Mr. HÉBERT. I think it will be——

Mr. DINGELL. What is the percentage?

Mr. HÉBERT. [continuing] my guess, somewhere around 15 percent, would be my guess, maybe less, because the Western markets have done a much better job than the California market as to moving toward forward markets and not having the dependency on the spot market, thereby inflating the price and giving extreme price volatility to the consumers of the State of California.

That is why we have moved them toward the forward market.

Mr. MASSEY. May I make a comment? The fact that Bonneville is increasing its rates by 250 percent is not because prices have increased in the 24-hour or less market during 7 percent reserves.

Mr. DINGELL. Why?

Mr. MASSEY. It is because they have had to go out into the market and buy power.

Mr. DINGELL. Essentially spot market power; is that not correct?

Mr. MASSEY. Some of it may be spot market. Some of it may be weekly transaction. Some of it may be monthly transaction. Some of it may be longer term transactions.

Mr. DINGELL. But all of these transactions are distorted by the curious nature of a highly volatile and irregular market; is that not correct?

Mr. MASSEY. Precisely.

Mr. DINGELL. Thank you.

Mr. Chairman, I have gone longer than the Chair indicated they wished me to do, and I thank you Mr. BARTON. Well, you are not the only one, Mr. Chairman, who has gone longer, and usually

when you go longer it is worth you going longer. So I do not have a problem with that.

Mr. DINGELL. You are kind, Mr. Chairman. Thank you.

Mr. BARTON. We will give Chairman Hébert a comment, and then we are going to let you folks leave purgatory here.

Mr. HÉBERT. Thank you, Mr. Chairman.

The only thing I had to add Congresswoman Eshoo had some information she wanted as far as to share with her constituents exactly what the Commission has done in the last 90 days in the form of refunds and others. I will make certain we put something together for her, get that to her, and make it available to the entire committee.

Ms. ESHOO. And the answers—may I just for a moment?—the answers to the questions which I posed which were not addressed.

Mr. HÉBERT. I agreed to do that already.

Ms. ESHOO. Thank you.

Mr. BARTON. Well, before I go to the second panel, I want to commend you three Commissioners. You have been short handed in a difficult time. These are not easy issues. There is a disagreement among honorable people about the solutions, and yet you all have worked to try to come up with solutions.

You know, we are having some of the same dilemmas legislatively that you have in a regulatory arena. So I do want to commend all three of you. I hope very soon the President can actually send the nominations of the 2 additional Commissioners so that you will be 5 instead of 3, and you know, we can work together this summer.

We are going to have a second day of hearings Thursday. It is my intention to move to mark-up next week. So any input on legislative language or amendments, there are going to be a number of amendments offered we will get to you and your staff so that we can get your input on the proposed perfections to the bill.

Mr. Chairman, did you want to say something before I go to the next panel?

Mr. HÉBERT. No, but we will be glad to give you any technical support you need, and thank you, and I thank the committee.

Mr. BARTON. Okay. So we are going to excuse the Commissioners, and we are going to call our second panel. So if Mr. John Stout is in the room, and I think I see him, and Mr. Lindy Funkhouser, if you two gentlemen will come forward.

Welcome, gentlemen. Your testimony is in the record in its entirety. We are going to recognize Mr. Funkhouser and then Mr. Stout.

But Congressman Shadegg wishes to introduce to the subcommittee Mr. Funkhouser. So the Chair recognized Mr. Shadegg.

Mr. SHADEGG. Mr. Chairman, thank you very much for this point of personal privilege.

I simply want to welcome to the committee Lindy Funkhouser. Lindy Funkhouser is not just an Arizonan, which might be a good reason for me to introduce him. He is also a personal friend of longstanding.

Many years ago Lindy and I were both attorneys in the Arizona Attorney General's office. We worked closely together. He is the Director of the Arizona Residential Utility Consumer Office, known

as ARUCO now, but that is a job he has held, I guess, since leaving the Attorney General's Office.

And we practiced law together for many years. He is a very, very bright and talented lawyer, as is his wife. Both are personal friends. They do a great service for Arizona, and I just wanted to welcome Lindy to the committee.

So, Lindy, thank you.

Mr. BARTON. We will not hold it against him that you are a friend of his.

Mr. SHADEGG. Thank you. I appreciate that, Mr. Chairman.

Mr. BARTON. But we do welcome you, sir, and we will recognize you for 7 minutes to elaborate on your testimony.

Thank you for coming to the subcommittee.

STATEMENTS OF LINDY FUNKHOUSER, DIRECTOR, ARIZONA RESIDENTIAL UTILITY CONSUMER OFFICE; AND JOHN STOUT, SENIOR VICE PRESIDENT, ASSET COMMERCIALIZATION, RELIANT ENERGY

Mr. FUNKHOUSER. It is my pleasure. Thank you.

Mr. BARTON. You have to turn that little switch on.

Mr. FUNKHOUSER. Mr. Chairman, thank you.

And, Congressman Shadegg, thank you very much for that introduction. I really appreciate it.

I have prepared comments, but given the discussion that I have heard around here, I think it might be helpful to add some State perspective in terms of cost of service regulation.

In Arizona we have cost of service regulation for a number of utilities, and our version of just and reasonable prices is called fair value, but it is basically rate making. In our state, just and reasonable prices are prices that one would expect to receive in a fully competitive market. If we do not have a fully competitive market and we do not have in many industries, we basically look at the cost of service plus a reasonable return on the investment of the utility.

In electric utilities, the reasonable return on investment is by a utility that has the duty to serve the customer. That would be the distribution utility that you would be looking at.

The incentive, the way cost of service works is that the utility has its own generation, hedges its liabilities by using its own generation in the market. Cost of service provides them a reasonable return on the investment. It does not give them the incentive to do it. What really gives them the incentive to do it is the duty to serve.

There is a regulatory sanction that occurs if you do not serve your public, and we are not into really rationing by price there, but they do get a reasonable return on their investment.

But the difference now is that that generation has been separated. It is now out there in the marketplace, and yet the duty to serve is still there for the utility. So the question that was asked, well, why don't we have a bid cap or a buyer's cap, is really hinging on that duty to serve.

If the duty to serve is still there, if we are not willing to ration and we are dealing with an essential service here, the rationing of

that service is not something that we really can do. Then we are left having to buy on the open market.

And once you separate that generation out, trying to come up with a just a reasonable price for an unbundled generation then becomes more problematic because remember, it was done in the sense that you had a monopoly. They had an obligation to serve. That was an incentive to provide it. We are going to give you a reasonable return on that. So don't get made at us if we, you know, require you to do this.

To try to translate that into the market as it stands now is difficult, and I think that is what the FERC is really dealing with. It is how do you do that. How do you deal with an essential service that is important to the public where you have no choice but to buy it, and you have an imbalance of supplies.

Our position, and the comments are in the record, is that if you are going to have this kind of set-up, you really need to be very vigilant with the market. You have got to have market mitigation and enforcement in the market.

When Congressman Shadegg and I were in the Attorney General's Office for a great man, Bob Corbin, we had problems in our markets involving frauds and land frauds and things like that. We prosecuted those kinds of cases. We brought civil actions on those to basically give confidence in our markets.

What we see now is that there is a lack of confidence in the markets, in the California and the Western markets, and from my comments, I want to mention to you what has happened. This has really occurred to Arizona as well.

We have a company that really does not produce its own generation, does not have generation available to it, but is called Citizens Communications Company. It serves the areas of Lake Havasu, Bull Head City, and Nogales. It buys all of its power virtually on the wholesale market, and that company buys it through a bank or purchase power, fuel adjuster bank, and normally the deficit, the bank goes up or down. The deficit does not get more than about $2.6 million.

When the power was purchased on the open market this past summer, starting in about June of last year, by September of 2000 that purchase power deficit went up to $59 million. So there is a spillover into Arizona.

Now, those rates are being held back. There is a dispute between citizens and the other company about whether those are just and reasonable rates. So they have not really translated into rates for the consumers at that point.

I think I make some comments about how in that kind of situation what is in the bill might be somewhat problematic and hopefully there will be some corrections to kind of deal with that, and I would assume with the good faith that really is on both sides of the houses here that that would get resolved or at least addressed.

But it gives you a good example of how California is not just California's problem. It is really an Arizona problem as well and could be a very bad Arizona problem for the retail consumers in that area.

We do not know what is happening to citizens as a result of this fall because we expected that the winter months would not be as

bad as they were because the bargain that is regional is that the Northwest would normally provide power to the South in winter months or in the summer months, and there would be the reverse in the winter months basically to take care of a bargain between the Northwest and California.

That somehow got mixed up in the process. As the generation gets separated, you cannot control it. You cannot control the allocation of the resource. It is just out there.

And once you know that it is just out there and you cannot control it, you do not know and you cannot follow in the markets what is happening. All you know is what you see in the price.

So, yes, there is a price signal that is being sent, but it is one that the public really does not have a lot of confidence in because we do not know how we got there.

The question that was presented about whether we had enough power starting in the summer of last year, I have read studies that say that the WSCC found that there were sufficient supplies to meet reliability criteria at the start of May, and I think it would be worthwhile to check into that data, but I think the WSCC thought that they had enough power.

So we think that there may be something going on. We just do not know exactly what. But the question of, is market power being exercised in some nefarious fashion, I think really is beside the point. The point is that the public is seeing these prices and is going to see them real soon.

And the point is whether they mean to do it or not, whether it is nefarious or not, it may be purely innocent. Consider that possibility. Consider that the possibility is that what is happening here is natural and logical and the result of the markets, and if you need to change the logic, you have got to change the logic, but that is not getting done yet.

That is all I have to say.

[The prepared statement of Lindy Funkhouser follows:]

PREPARED STATEMENT OF LINDY FUNKHOUSER, DIRECTOR, ARIZONA RESIDENTIAL UTILITY CONSUMER OFFICE

I am Lindy Funkhouser, Director of the Arizona Residential Utility Consumer Office, otherwise known as "RUCO." The Arizona Legislature established RUCO in 1983 to study, research and represent the interests of Arizona residential utility consumers. The Director is appointed by the Governor and confirmed by the State Senate. I have been RUCO's Director since December 1999. Arizona has an interest in helping California help itself so long as Arizona residents are not harmed in the process.

RUCO is a long-standing member of the National Association of State Utility Consumer Advocates ("NASUCA"). NASUCA has invited me, as a consumer advocate within the Western Region, to speak to this Subcommittee concerning *The Electricity Emergency Act of 2001 ("Act")*.

I. INTRODUCTION

RUCO has closely followed developments surrounding the California Energy Crisis. The ongoing events in the California wholesale markets are especially troubling because the extraordinarily high prices from those markets are spilling over into neighboring states, including our own. For example, Citizens Communications Company purchases virtually all of its power in the wholesale markets to serve the areas of Lake Havasu City, Mohave County and Nogales. Citizens collects revenues from customers to pay these costs through rates set by the Corporation Commission. From May to September 2000, Citizens reported that it incurred a deficit in excess of $59 million from power supplies purchased on the spot market. Under normal

conditions Citizens would have expected a deficit no greater than $2.6 million. Citizens has submitted to the Corporation Commission a plan to recover the deficit through increased rates over time. The plan might become difficult to implement since Citizens may be incurring additional losses from this winter's price spikes in the Western power markets. Consequently, Citizens wholesale power contract potentially exposes Arizona ratepayers in the Colorado River and Nogales areas to the very high power prices that have persisted from last June through to this day.

Upon an invitation of the Federal Energy Regulatory Commission, directed to interested parties in the Western region, RUCO submitted comments on FERC's proposed *Order Proposing Remedies for California Wholesale Electric Markets* and the *Staff Recommendation on Prospective Market Monitoring and Mitigation for the California Wholesale Electric Power Market* in its docket entitled San Diego Gas & Electric Company, *et al.*, 93 FERC ¶61,121 (2000). I have attached those comments to supplement my testimony today.

II. THE ACT IN PERSPECTIVE

Much of the reaction to "fix" the California Crisis has been caused by a failure to properly design the wholesale and retail markets in the Western Region in the first place. Unfortunately, the proposed solutions fail to directly address this problem and suffer the defect of assuming that a workably competitive market exists. This Act is no exception.

III. SECTIONS 101 AND 102—DEMAND REDUCTION INCENTIVES

Demand reductions and demand responsiveness should be a part of the solution. However, these approaches should not be used as an excuse to sidestep the significant problems with the wholesale and retail market structures in the Western Region. For example, if this legislation allows people to receive the market-clearing price for demand reductions, say from $400 to $350 per MWH, it should not have the effect of pre-approving reasonableness of the implicit market power rents that caused the rates to be as high as $350 per MWH to begin with. Yet this is what the Act seems to do.

Another danger is that generators might gain market power over demand reduction incentives. For example, generators might enter into a sufficient number of demand reduction contracts with large industrial customers to control the demand reduction market. As a result, a relatively small number of participants might gain control over both the demand and supply portions of the market. Again, the Act could lead policy makers into another damage control death spiral unless and until we deal with the fundamental problems of market structure, which have led to the existence of substantial market power.

IV. SECTION 104—PATH 15 TRANSMISSION

Consider a requirement that the transmission investment be found through appropriate study to be "least cost," consistent with reliability and engineering requirements, prior to the commitment of investment funds, and prior to guaranteed cost recovery.

V. SECTION 107—PAYMENT GUARANTEES

This section also suffers from the faulty assumption that the contract price is the result of a workably competitive market. As a result the Act would create a safe haven for contracts that are influenced by unjust and unreasonable prices. Consider whether this section might give a wholesale supplier the ability to shut off power to an all-requirements purchaser like Citizens due to insufficient payment guarantees (e.g., a rate increase order imposed by the State Public Utilities' Commission).

This section might be construed as applying to retail contracts. It also fails to include voluntary efforts to provide supplies, thereby perhaps giving an incentive to withhold supplies for a guaranteed payment.

VI. CONCLUSION

The foregoing testimony is an illustrative, not exhaustive, list of the issues that this body must consider to avoid creating a set of "solutions" that simply exacerbates the problem. The Energy Crisis has become a policy wildfire within the Western Region. Up to now, the tendency to come up with quick fixes has fanned the flames—mainly because these fixes avoid the hard problems of market design and structure. With all due respect, significant thought must be given to prevent this Act from becoming gasoline on the existing fire.

Mr. BARTON. Thank you.

We now go to Mr. John Stout, who is Senior Vice President for Asset Commercialization, Reliant Energy in Houston, Texas.

Welcome to the subcommittee. Your statement is in the record in its entirety, and we recognize you for 7 minutes to elaborate.

STATEMENT OF JOHN STOUT

Mr. STOUT. Thank you, Chairman Barton.

There is a lot of finger pointing at generators as being part of the problem.

Mr. BARTON. Flip the switch if it is not already flipped and pull it up to you so that we can hear you a little bit better.

Mr. STOUT. As I was saying, there is a lot of finger pointing that generators are part of the problem. I am here speaking for Reliant Energy to try and show that we are actually trying to be part of the solution.

And to do that, I would like to offer two examples of what we are trying to do to help California get through the crisis that it is currently in.

Congressman Dingell made a comment a minute ago that Reliant prospered in the spot market. There is some question about that considering the fact that we have not been paid a little bit over $300 million. That has taken out a lot of the prosperity that we might have had.

But I would like to point out that participation in the spot market is not really our first choice. That is a really risky way to make money in this business. We much prefer to sell as much of our capacity as we can get away with on the forward market so that we have price stability and price certainty.

In fact, during the year 2000, we sold over half of our capacity on the forward markets. We continue to do that in the year 20001. What is kind of interesting is when you go back and you look at who bought that power, not one kilowatt hour of all that power that we sold was purchased by any of the California investor owned utilities, and for 2001 to this point in time, they still have not bought any.

Of course, we probably would not sell to them right now because of their credit worthiness problem, but even the Department of Water Resources has not yet purchased one single kilowatt hour of long-term power from us.

We find that interesting because we are trying to offer deals that are not price gouging by any stretch of the imagination, and that brings me to the proposal that Congressman Norwood mentioned in his opening statement that we have had on the statement since last December. It is an offer for base load power for 5 years at 2 cents a kilowatt hour. It is still sitting there.

Now, it has a catch. The catch is you supply the fuel. We do not care where you get it from, but we made this offer in the fashion that we did to point out that one of the most important underlying reasons that the cost of energy in California has escalated drastically is the cost of fuel.

Our cost of natural gas has increased 7.4 times in the last 3 years. It costs us over seven times as much in 2000 as it did in 1998. We made this two cent offer to all three of the investor

owned utilities. We sent a copy to the Governor. We have sent copies to the Department of Water Resources, and we have had discussions with them over it.

It is kind of interesting why they choose at this point not to purchase that power. First of all, one of the ILUs has indicated that there is just too much uncertainty as to whether the CPUC in California would ever approve their recovery of the cost associated with this transaction.

Now we have got a credit problem that makes it almost impossible for us to sell this power to the investor owned utilities, and when DWR negotiated with us over purchase of this power, they were unwilling to provide a standard letter of credit, even though we offered to pay for the letter of credit.

And last but not least, they now say that we really do not need that power. We have got plenty. If we need anything at all, we need power that is not base load. We only need power during the peak periods.

I would like to highlight for just a second a different point of view as to what they are really telling you. I worked in the utility business for 25 years; think of it from the utility perspective, and what they said is exactly what traditional utility buyers would say. I do not need it, so change your offer.

But when you are in a competitive market and you want to get the real maximum bang for the buck, you jump on a deal like that. You would buy that power 24 hours a day, 7 days a week, and then you would turn around and sell the excess.

It just so happens the Pacific Northwest is desperately short of energy this year. They will take power any time, day or night, including off peak power, because when they take that off peak power, that saves scarce hydro resources for on peak use. It is worth premium dollars for the Pacific Northwest for that off peak power.

So in the case of California, they could buy the 24-hour product, and what they do not need for California, they could deliver to the Pacific Northwest, and they could solve two problems at once.

Let me move now to another suggestion that we have for a solution this year, and that is to address the problem of trying to get California past the fact that they are about 4,000 megawatts short this summer. There is absolutely no way to install new generation on the ground in time for this summer's peak, which is only about 60 days away.

In fact, last year, the last week in June was an exceptionally hot period for California. The only solution at this point is to reduce demand, something we call in the business "negawatts" or negative watts.

Typically utilities can only buy negawatts from customers that are within their own control area or their jurisdiction, their own customers. What we have offered is a very simple idea. It simply takes that simple concept of purchasing negawatts and expands it so that they can purchase from anyone in the Western interconnection.

What we are really doing is trying to take a region-wide problem, as Congressman Dingell elaborated earlier, and develop a region-wide solution. We want to establish a negawatt market that works

exactly the same way as megawatts of supply work in any emergency situation in the WSCC, and we believe an idea like that would give us about 5,000 more megawatts that can be available for this summer, perhaps enough to overcome the problems and the shortages that we are going to have in California.

I will not go through the details of exactly how the program works, but I will be happy to answer any questions that you have on it. It basically involves three steps.

You have to bring the product into the market. You have to have a system administrator to dispatch the product, and then you have to have a settlement system to account for the dollars and cents when it is all over.

The biggest hurdle is getting this program implemented in the next 60 days. The good news is we have discovered at least a couple of vendors, perhaps three, who say they can do it. All we need to do is get off first base and say, "Let's go with the program."

There are some problems though. One is a regulatory restriction on the resale of retail power. Most States in the West have rules that prohibit a retail customer from purchasing power at retail and then reselling it in the wholesale market. We have got to overcome that problem.

We have been working with a number of key policymakers in the West, and there is a little bit of push-back on doing that, but one thing that this legislation does do is it tends to get us past that problem by implementing a legislative fix to it.

Picking the administrator of this program is not going to be difficult with at least a couple of vendors, I think, and the cost of this program is really quite minimal. For $250,000, maybe 500,000 on the outside, you can get the base program set up. Each customer that wants to buy into the program can probably be signed up for less than $1,000 a customer, and the per transaction price of this emergency energy would be less than $100 per transaction.

I would like to say that this is not necessarily going to eliminate the problems for this summer. It is a step in the right direction, and one way to look at this program is it is a way of prioritizing the outage. Rather than forcing customers perhaps in California to accept forced blackouts that affect traffic lights, schools, shopping centers, commercial businesses, it gives those customers a chance to let someone else step in their place for them, someone else who can volunteer and say, "I will take the outage for compensation so that you do not have to."

And that concludes my comments.

[The prepared statement of John Stout follows:]

PREPARED STATEMENT OF JOHN STOUT, SENIOR VICE PRESIDENT, ASSET COMMERCIALIZATION, RELIANT ENERGY WHOLESALE GROUP

My name is John Stout and I am Senior Vice President of Asset Commercialization with Reliant Energy, headquartered in Houston, Texas. Our company currently owns and operates nearly 12,000 megawatts of merchant generation in markets throughout the United States, including approximately 4,500 megawatts located in the western United States. We already own plants in California, Nevada, and Arizona and have close to $1.4 billion of new plant investment on the radar screen for the western market. As you already know, the western market is facing a significant energy crisis which is likely to cause significant disruptions within the next few months. Our purpose in providing testimony to you today is to expand on an

idea, presented in Sections 101 and 102 of the Electricity and Emergency Relief Act, which may have a mitigating effect on the expected problems for this summer.

THE PROBLEM

The California Independent System Operator has forecasted California to be nearly 4,000 megawatts short of generation needed to serve peak demand. Some forecasters place the shortage as high as 8,000 megawatts. There is no way to construct new generation equipment in time to meet a shortfall of this magnitude within the next 60 days. The only practical option for bringing supply and demand back in balance is to rely on negawatts. The **negawatt** concept is one of demand curtailment. Such demand curtailment reduces the electricity load on the system, and can thereby avoid blackouts if the load can be reduced by an amount equal to or greater than the shortfall of generation the system is facing. As is obvious, these demand reductions have the same net effect as an increase in generation. Indeed, a blackout is merely a chaotic, and perhaps catastrophic demand reduction.

Utility control areas have well established mechanisms for exchanging megawatts of emergency supply between each other in times of crisis. However, those same utilities can typically purchase **negawatts** only from within their own service territory. No practical mechanism exists for getting someone else's retail customers to interrupt. California has a number of initiatives underway for this summer to produce negawatts of demand curtailment within California. However, insufficient **negawatts** are located within California to cover the expected shortfall.

THE RELIANT PROPOSAL

There is a clear and compelling need to establish a mechanism for allowing **negawatts** of emergency supply to be easily purchased in the same way as megawatts of additional supply. This would enable a deficit area such as California to purchase emergency supply from anywhere within the West. Such a mechanism has three essential elements:

Bidding

Reliant's proposal is to conduct weekly and daily bid auctions, inviting retail loads to interrupt and make available the curtailed amount for assistance in satisfying emergency needs somewhere else in the western interconnection. Load customers will bid a specific price per kilowatt hour for interrupting and the amount of load in megawatts that they are prepared to interrupt. The party administering the program would use these individual customer bids to develop a bid stack of available emergency resources, and to be made available to everyone in the western interconnection as needed.

Dispatch

If a specific system needed help, such as the California ISO, they would notify the program administrator. The program administrator would then verify the least cost set of bids that could be exported, taking into consideration available transmission. Once those bids have been identified, the customers and their host utility control areas would be notified. The customer would then interrupt, and the host utility would turn the curtailed megawatts into an export schedule destined for delivery to the deficit utility. At this point the transaction would look exactly like any other emergency transfer which currently takes place within the West. Transmission scheduling would be done exactly the way it is for any other emergency transaction.

Settlement

The control area receiving assistance would pay for the negawatts dispatched to assist them. The customer who makes the voluntary load curtailment would continue to compensate their retail supplier for their pre-curtailment level of retail purchases. In other words, they would keep the original retail supplier, whether it be the utility or a third party load serving entity, completely whole for the compensation that would have been received had the customer not interrupted. If the customer fails to interrupt the full amount they committed in their bid proposal, they would be responsible for compensating the transmission provider for imbalance charges under the transmission providers approved FERC tariff. Ultimately the curtailing customer would receive as compensation the bid price times the quantity of actual negawatt curtailment minus the retail charges he pays to his retail provider and minus any imbalance payment due to the transmission provider.

HURDLES

The biggest hurdle facing this program is getting it implemented within the next 60 days. There are, however, at least two vendors who have indicated a willingness and capability of accomplishing such. What we now need is for an organization or a government entity to initiate the program.

Although the issue is unsettled as to whether or not this negawatt transaction is a retail or a wholesale transaction, federal legislation could quickly resolve such ambiguity.

Participants in this program may also need exemption from PUCHA.

The primary objection being voiced in opposition to this proposal seems to be the belief that the entity serving the curtailing customer should be entitled to some share of the compensation. This will likely increase the cost to the buyer, but is simple to incorporate into the program, if determined to be appropriate.

The final hurdle is encouraging participation by customers throughout the western region. Reliant Energy has already been in contact with a number of large commercial and industrial customer trade organizations including ELCON. Those organizations state a willingness to provide this function for the benefit of their constituents.

This proposal has been discussed with key policymakers in a number of western states including Arizona, Colorado, Nevada, Oregon, Washington, Utah, Wyoming, and California. It has been presented to the Western Systems Coordinating Council, the organization which manages reliability of the western electrical grid. The idea has also been discussed with a number of key congressional leaders, FERC commissioners, and numerous industry trade organizations. The reaction from all of these parties has generally been from mildly positive to strong support. In talking with vendors it appears that this program could be implemented for under $500,000 with participating curtailing customers paying a fee of less than $1,000 each for initial enrollment and a per transaction fee of under $100 each.

In closing, it might be interesting to note that this program is simply a way of providing an option to customers who would otherwise have almost 100% certainty of facing forced blackouts this summer. This option allows other customers to voluntarily stand in their place and limit the consequences of the outage to those customers best prepared and willing to deal with those consequences. It may not eliminate forced blackouts for all customers but it is clearly a significant step in the right direction.

Mr. BARTON. Thank you.

We have a pending vote or two votes. So what we are actually going to do is try to let each member ask maybe one question, and then the rest will be in writing because I do not see any sense in suspending for 30 minutes and then coming back.

So we are going to start with Congressman Boucher. We will go to Mr. Shimkus and Mr. Shadegg. Then I will wrap it up.

Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman.

I am going to be very brief. Mr. Funkhouser, I would ask your answer to be brief as well, given our time constraint.

You reference in the course of your testimony the Path 15 transmission constraints and have some comments concerning that. Let me ask you to address if you would whether or not you believe the approach that is taken in Chairman Barton's bill to authorize the Western Area Power Administration to issue bonds in an amount in excess of $200 million in order to relieve the Path 15 restraints is the correct approach. Is that what we should be doing or do you have some other suggestion for us?

Would you turn your microphone on?

Mr. FUNKHOUSER. I am sorry.

I think that normally the way resources have been done is as a least cost approach. Of course, when you name the amount that is going to be used for it, sometimes you may get that—everybody may bid in at that amount. So you have got to think about that.

You have got to think about are you going to get what you want, the best bang for your buck.

And maybe an RFP system or a way of doing that might be a way of doing it. I understand that you have to appropriate money for it. So everybody gets to see that.

Mr. BARTON. That was an amount that we were told from informed sources in California that was a reasonable amount, but there is nothing magic about it. That is subject to amendment if it is the will of the subcommittee.

Mr. BOUCHER. But do you support the general approach?

Mr. FUNKHOUSER. Anything to relieve congestion in transmission paths is a good idea.

Mr. BOUCHER. But you do not have an alternative approach for how we do that?

Mr. FUNKHOUSER. I do not have an alternative approach, and I do not know of the actual facts on the ground with Path 15. I know it is a constraint. There may be a lot more about it than I really understand in terms of land use.

Mr. BOUCHER. Thank you, Mr. Funkhouser. Thank you very much.

Mr. BARTON. The Chair would indicate based on conversations we have had privately we are very interested in alternative approaches if the gentleman from Virginia has an alternative approach on that problem.

Mr. Shadegg, if you want to ask one or two quick questions.

Mr. SHADEGG. Briefly, if I could. Mr. Stout, let me begin with you.

What you describe with regard to the negawatt program is, in fact, what you understand Section 101 of this legislation does; is that correct?

Mr. STOUT. That is correct.

Mr. SHADEGG. Okay, and it is your view by enabling that, you are going to allow power plants or the exchange of megawatts throughout the entire Western region, and that is the value of this system?

Mr. STOUT. That is correct.

Mr. SHADEGG. Okay. To be brief, let me ask one last question. There was a great deal of focus on price earlier. Is this a price problem or is this a supply problem?

Mr. Funkhouser, you were charged with protecting residential utility consumers, and you begin by saying what is fair by saying what a fully functional market would product. You would agree, would you not, that there is little value in having a low price if, in fact, the low price will not let you buy the good because there is none of the good to be purchased, wouldn't you?

Mr. FUNKHOUSER. Congressman Shadegg, I would agree that if you are going to set prices in a vacuum, you are just asking for trouble, and normally what we try to do with cost of service regulation is understand the cost of the company, and with the obligation to serve, that makes it kind of easy. It is much more tricky when you are trying to do it here.

When you are dealing with diminishing returns, which I think is what we are dealing with, and the citizens case is the case we ought to think about. At that point you have got to think about

what is your best alternative, and there are not great alternatives, other than to try to set up a well functioning market, one that is properly mitigated, and we think FERC is going in that direction. They just have not gotten there yet.

Mr. SHADEGG. I made the point at the last hearing or when the Commissioners were here that what is a just and reasonable price is difficult to ascertain when there is not, to use your word, obligation to serve. What is just and reasonable price for Morant or any of these other companies where they have no duty to sell electricity into California to begin with?

Thank you, Mr. Chairman.

Mr. BARTON. My question, unfortunately, I would like to ask 3 or 4, but generally, Mr. Funkhouser and Mr. Stout, having a chance to look at the legislation, if we pass it verbatim, will it help or hurt on the West Coast this summer?

Mr. FUNKHOUSER. Mr. Chairman, I think it would hurt.

Mr. BARTON. You think it would hurt if we passed it as is.

Mr. FUNKHOUSER. I think it would hurt if it is passed as is, and I do that with all due respect. I think that basically you are allowing the dysfunctional market to sort of set these prices.

I think that there are some good aspects to the bill that should be pursued. The notion of demand reductions through a clearing house or the like, that could be perhaps—once you set up a market, you have got to think about how it is going to be——

Mr. BARTON. Let me let Mr. Stout answer. I may have a chance to do a follow-up question.

Mr. FUNKHOUSER. Right.

Mr. BARTON. What is your opinion? Would it help or hurt this summer?

Mr. STOUT. My opinion is that it would hurt. It may not be a complete——

Mr. BARTON. That is not the answer.

Mr. STOUT. I am sorry.

Mr. BARTON. I thought both of you all would say it would help.

Mr. STOUT. I'm sorry.

Mr. BARTON. I would not have asked that question if I thought you were going to——

Mr. STOUT. I am sorry. I misspoke. It will help, and the reason I say that——

Mr. BARTON. That is better.

Mr. STOUT. And the reason I say that is that it may not be a complete solution, but it is a step in the right direction. It gets you pointed where you need to be, especially for this summer.

Mr. BARTON. Okay.

Mr. STOUT. If we do not get started in that direction now, it is going to be too late in another 60 days.

Mr. BARTON. All right. Now, Mr. Stout, what could we do to improve the bill, very quickly, and then I am going to let Mr. Funkhouser tell me how to improve it in his opinion. If there is something that is not in the bill, what could we put in the bill or what could we improve that is already in the bill?

Mr. STOUT. The issues that I was hoping to see in the bill are already there. So I really do not have anything to suggest to you.

Mr. BARTON. All right. Mr. Funkhouser, since you said it would hurt, what could we do to improve it so that it would help?

Mr. FUNKHOUSER. Mr. Chairman, I think that the Sections 101 and 102 really depend upon whether you have a functioning market that does set just and reasonable rates either in an open market or through the FERC, and I think the power for that to really work for people is going to depend upon that market, and so something that gives FERC power to still set just and reasonable rates would be an improvement, in my opinion, in Sections 101 and 102.

Mr. BARTON. All right.

Mr. FUNKHOUSER. Now, whether the FERC will actually do that or not is still something to be debated because they have the tricky problem of trying to deal with that separated generation.

Mr. BARTON. All right. Anything else?

Mr. FUNKHOUSER. The payment guarantees is probably fraught with quite a bit of unintended consequences. I mean, I have seen sort of a minute cap on presentations here, and people have found ways to kind of get around that from, you know, different questions and things.

Mr. BARTON. So you do not want people to have to pay for what they use?

Mr. FUNKHOUSER. I just know——

Mr. BARTON. You want the Arizona producers to send power to California and not be paid for it?

Mr. FUNKHOUSER. I think everybody ought to be paid for what is just and reasonable price for things. I think we have got something that is fairly dysfunctional. I just know that with the payment guarantees that are here, take the citizens example. Are we willing to take the political price we are going to get for wholesalers to shut off citizens' utilities because it has not paid its bill yet or do not have a reasonable guarantee of paying that bill, like a Public Utility Commission order? And that does not exist right now.

So you have got to think about what kind of payment are you willing to take, and Commissioner Massey was trying to make the point that we are at a point of diminishing returns where we want to do the right thing, but it has gotten so extreme. It has gotten so far off the bubble.

Something as reasonable sounding as this in that context just does not work.

Mr. BARTON. All right. We are going to conclude today's hearing. We will resume it on Thursday.

We may have written questions for these two panelists. We really do encourage you to look at the bill. If there is specific legislative language that would improve it, we would ask you to forward it to whichever member of the subcommittee you feel most comfortable forwarding it with.

We are in recess until Thursday at 10 a.m.

[Whereupon, at 6:19 p.m., the subcommittee was adjourned, to reconvene at 10 a.m., Thursday, May 3, 2001.]

THE ELECTRICITY EMERGENCY ACT OF 2001

THURSDAY, MAY 3, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENERGY AND AIR QUALITY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2123, Rayburn House Office Building, Hon. Joe Barton (chairman) presiding.

Members present: Representatives Barton, Whitfield, Ganske, Shimkus, Wilson, Shadegg, Fossella, Bryant, Radanovich, Bono, Walden, Sawyer, Wynn, Waxman, Markey, McCarthy, Strickland, Barrett, Luther, and Dingell (ex officio).

Also present: Representatives Eshoo and Harman.

Staff present: Jason Bentley, majority counsel; Joe Stanko, majority counsel; Bob Meyers, majority counsel; Dennis Vasapoli, Fellow; Karine Alemian, professional staff; Peter Kielty, legislative clerk; Andy Black, policy coordinator; Sue Sheridan, minority counsel; Rick Kessler, professional staff; and Alison Taylor, minority counsel.

Mr. BARTON. The subcommittee will come to order. Apparently we have two votes on the House floor. So we are going to go vote, come back probably a little after 9:30. The good news is we have no opening statements, so we will go right to the panels. I know we have a number of witnesses from California and we have worked with Congressman Waxman to make sure that you folks make your planes this afternoon if at all possible.

So we can stand at recess until approximately 9:30 or 9:35.

Mr. WAXMAN. 10:30.

Mr. BARTON. 10:30, yes, I am on Texas time on my watch. So 10:30 or 10:35, that is right.

[Brief recess.]

Mr. BARTON. I want to apologize to the committee and our witnesses. We want to start our, or continue, our hearing on H.R. 1647 the Electricity Emergency Act of 2001. We had a good start on Tuesday. We are not going to allow opening statements, but if Mr. Boucher or Mr. Dingell wanted to say something briefly, I would be certainly honored to recognize them. Does Mr. Dingell wish to make a very brief comment before we begin the hearing?

Mr. DINGELL. Mr. Chairman, no. And I thank you for that courtesy.

Mr. BARTON. Then let us start our panel. See if I can—we have Mr. Hacskaylo, Mr. Hacskaylo, who is the administrator for the Western Power Administration. Mr. Jeff Stier, he is the vice-presi-

dent of Bonneville Power Administration. Mr. William—the Honorable William Keese, who is chairman—he is here, but he is in a different order. Okay, we have changed the order.

Ambassador Richard Sklar, who is senior—excuse me—energy advisor to Governor Davis, and Chairman of the Governor's Generation Implementation Task Force. Then Mr. William Keese, who is chairman of the California Energy Commission. And last but not least, Mr. Michael Kenny, who is the executive officer of the California Air Resources Board.

We are going to start with Mr. Hacskaylo. We will give you 7 minutes. Your statement is in the record in its entirety. We will give each person 7 minutes, then we will start our questions. Welcome to the subcommittee.

STATEMENTS OF MICHAEL S. HACSKAYLO, ADMINISTRATOR, WESTERN AREA POWER AUTHORITY; JEFF STIER, VICE PRESIDENT, BONNEVILLE POWER ADMINISTRATION; RICHARD SKLAR, SENIOR ENERGY ADVISOR TO GOVERNOR DAVIS, CHAIRMAN, GOVERNOR'S GENERATION IMPLEMENTATION TASK FORCE; WILLIAM KEESE, CHAIRMAN, CALIFORNIA ENERGY COMMISSION; AND MICHAEL P. KENNY, EXECUTIVE OFFICER, CALIFORNIA AIR RESOURCES BOARD

Mr. HACSKAYLO. Thank you, Mr. Chairman and members of the subcommittee. I am pleased to be here to testify—thank you. Thank you, Mr. Chairman and members of the subcommittee. I am pleased to be here to testify on the transmission infrastructure in the Western United States from the perspective of the Western Area Power Administration.

As the chairman has indicated, my testimony has been submitted for the record. I will summarize it very briefly that the Western Area Power Administration is an agency within the Department of Energy. We own and operate approximately 17,000 miles of high voltage transmission line in the Western and Midwestern United States.

As a large seller of bulk electricity, electricity generated at Federal dams in the Western United States and as the operator of the system, of the transmission system, we have a considerable presence in the electric utility industry. We provide transmission service over our facilities in a fair and non-discriminatory manner pursuant to our open access tariff.

In cooperation with other regional utilities and power suppliers across the West and the Midwest, we have been centrally involved in the joint planning and construction of high voltage transmission lines and associated infrastructure throughout the industry, or in our service territory. Our contributions to construction projects, including our technical expertise, our multi-State orientation, and the Federal authorities that we have, have helped enhance regional reliability and facilitate the sale and the purchase of power in the wholesale marketplace.

In recent years, construction of new power plants and transmission in the Western United States has not kept pace with increased loads, which are caused primarily by strong economic growth in the region. Western will continue to work with interested

parties to ensure that transmission reliability is maintained at a satisfactory level.

In summary, Western Area Power Administration supports a reliable transmission infrastructure in the Western United States. We stand ready to play an appropriate role in addressing constrained bottlenecks that inhibit transfers of power and threaten reliability. Attached to my testimony are maps of the Western High Voltage Transmission System, the system owned and operated by the Western Area Power Administration.

With indications of the transmission constraints or bottlenecks, you'll note the abbreviation, TOT, T-O-T. That is the technical acronym with regard to the transmission constraints that the industry has studied and that as dollars and planning horizons permit, need to be corrected in time.

With that, Mr. Chairman, that is my statement. I will be pleased to respond to any questions.

[The prepared statement of Michael S. Hacskaylo follows:]

PREPARED STATEMENT OF MICHAEL S. HACSKAYLO, ADMINISTRATOR, WESTERN AREA POWER ADMINISTRATION, U.S. DEPARTMENT OF ENERGY

Chairman Barton and members of the Subcommittee, I appreciate this occasion to testify on the transmission infrastructure in the western United States from the perspective of the Western Area Power Administration (Western).

Western was established pursuant to Section 302 of Public Law 95-91, the Department of Energy Organization Act of 1977. Our mission is to market and deliver reliable, cost-based hydroelectric power and related services. Western serves 647 customers in a 1.3-million-square-mile area in the central and western United States. We operate 16,819 circuit-miles of high-voltage transmission line, 258 substations, and other associated facilities.

As a large seller of bulk electricity and the operator of one of the largest transmission systems in the Nation, Western has a considerable presence in the utility industry. Western provides transmission service over our facilities in a fair and nondiscriminatory manner, pursuant to our open access tariff.

In cooperation with other regional utilities and power suppliers across the West and Mid-West, Western has been centrally involved in the joint planning and construction of high-voltage transmission lines and associated infrastructure throughout our service territory. Western's contributions to construction projects, including our technical expertise, multi-state orientation and Federal authorities, have helped enhance regional reliability and facilitate the sale and purchase of power in the wholesale marketplace.

In recent years, construction of new power plants and transmission in the western United States has not kept pace with increased loads, which are caused primarily by strong economic growth in the region. However, Western will continue to work with interested parties to ensure that transmission reliability is maintained at a satisfactory level.

In summary, Western supports a reliable transmission infrastructure in the western United States, and stands ready to play an appropriate role in addressing constrained bottlenecks that inhibit transfers of power and threaten reliability.

Mr. Chairman, this concludes my statement. If you or any members of the Subcommittee have any questions, I would be pleased to answer them.

Mr. BARTON. Thank you. We are now going to Mr. Stier for 7 minutes. And again, your statement is in the record in its entirety.

STATEMENT OF JEFF STIER

Mr. STIER. Thank you, Mr. Chairman and members of the subcommittee. I am Jeff Stier, and I am the Vice-President for National Relations for the Bonneville Power Administration. As my testimony indicates, I appreciate the opportunity to appear here today.

It also indicates, Mr. Chairman, that the administration has not taken a position on this legislation. I am here to talk about how some of BPA's activities might interact with some of the provisions in your legislation in order to help inform the subcommittee.

The situation that Bonneville is facing in the Northwest is that we are a major supplier of electricity for the region. We supply about 45 percent of the electricity consumed in the four Northwest States and we are in the midst of what could be the driest year in the 72 year historical record.

Current run off forecasts for the Colombia River at the Dalles Dam have us at about the second worst year in the 72 year historical record. And, the way things have been going, there is every reason to believe that this could end up being the worst drought we have seen in the three quarters of a century in the Northwest.

What that means for BPA and for the region, is that we have substantially less generation this year than we would have in a normal year, probably on the order of 4,000 to 5,000 megawatts less generation. This of course has implications for our neighbors to the South, and has reliability implications for the Northwest.

That bears upon one provision in your bill that I will discuss briefly in a moment. The other activity that is very significant is that we have new contracts, new power sales contracts, that take effect on October 1 of this year. And, we are in the midst of setting new power rates for our customers.

We have basically three customer classes. We have public preference utilities, we have investor owned utilities, and we have direct service industries, primarily aluminum smelters.

What we are looking at right now, Mr. Chairman, is a situation where Bonneville is contracted to serve about 11,000 megawatts of load starting in October. And we have about 8,000 megawatts of firm generating resources. What that also means is that we have a potential exposure to these dysfunctional wholesale electric markets of about 3,000 megawatts. We are in a position where we may need to purchase as much as 3,000 megawatts to serve the loads that we have under contract.

Now, if we actually go into the markets that we are seeing today and we purchase that amount of power, we could be looking at a 200 to 300 percent wholesale electric rate increase for our Northwest customers. And since we supply about half, just under half of the electricity used in the region, that would have significant impacts for the region's economy.

We don't consider that an acceptable outcome, and we have put together a strategy endorsed by most of our Northwest senators to minimize that rate increase. Today I am going to discuss that strategy briefly and how section 102 of the legislation might interact with that.

So the three sections I am going to comment on are section 302(a), section 306 and section 102.

Section 302(a) basically provides for certain emergency powers that would maximize generation from the Federal Colombia River Power System upon agreement of the Governors of the Northwest States.

I would just like to point out, Mr. Chairman, as you probably know, but just to make sure that everybody on the subcommittee

is aware of this, we are actually doing that right now. We have undertaken emergency operations consistent with the biological opinions that govern the operation of the hydrosystem. These are biological opinions adopted by the National Marine Fisheries Service and U.S. Fish and Wildlife Service for endangered salmon and resident fish.

We have very clear authorities that we are exercising now to deal with system reliability emergencies. And, what those authorities essentially allow us to do is to curtail certain operations intended to benefit migrating salmon.

This year, because we have had such a dry year, we have exercised this emergency authority a number of times, most recently in the month of April. And, I have every reason to believe, based on the forecast for precipitation in the Colombia Basin, that we will probably be operating this system under those emergency authorities for most of the summer.

What that actually means, in fact, is that we are currently operating the hydrosystem to maximize generation. So, on section 302(a), I think we certainly appreciate the chairman and the subcommittee's concern about maintaining system reliability. We believe we are doing that and have the authority to do that.

We have one specific concern with Section 302(a). It is not clear from the way it is drafted, but it might actually supersede the authorities we now have and that we are now exercising and make them actually more difficult to use in the event of an emergency.

Section 306 would direct the formation of a West-Wide Regional Transmission Organization. The subcommittee knows we have been working with Northwest investor-owned utilities and other Northwest entities for a couple of years now to respond to FERC's order and to put together a regional transmission organization comprised of the Northwest States, Nevada and Utah.

We have filed an initial filing with the Federal Energy Regulatory Commission. The Commission recently essentially approved our filing with some conditions.

On this subject of a West-Wide RTO, I would just like to quote from a letter that Secretary Abraham sent on April 23 to Chairman Hebert of the FERC.

The Secretary wrote, "I am aware that some believe a single RTO in the Western United States is a better solution than the regional approach proposed. The Department supports the development of seamless electricity markets. However, we believe the best way to achieve this goal is to take thoughtful first steps that the region can support."

The Secretary goes on essentially to support our RTO West filing and urged the Commission to consider it and approve it. So, my testimony on this point, Mr. Chairman, is that we in the region believe we need to learn to walk before we can run. We are committed to continued development of RTO West and are responding to the Commission's order on that subject.

Finally, Mr. Chairman, I will discuss Section 102. The centerpiece of our strategy, to minimize the October rate increase is to reduce our exposure to the wholesale electricity markets. One of our best opportunities to do that is to purchase, at modest rates, curtailments of industrial loads, primarily industrial loads of our

direct service industrial customers, which are mostly aluminum smelters.

If fact, we have begun negotiations with our aluminum industry customers. The point of that negotiation strategy is that we would basically pay them to curtail loads, but pay them substantially less than the avoided cost of the market. And that will allow us—along with load reductions we are seeking from our public preference customers and our investor-owned utility customers, to keep the first year rate increase below 100 percent.

Essentially, what section 102 could do is basically undermine that strategy by allowing our industrial customers, primarily direct service industrial customers, to take the power they have under contract and resell it into the wholesale market. Which means that we still have to go into the market and pay hundreds of dollars per megawatt hour, sell it to those customers for perhaps $60 to $50 a megawatt hour. Then they would be able to turn around and resell it into the market for hundreds of dollars a megawatt hour.

It really doesn't accomplish your goal, Mr. Chairman, of making additional power supplies available in the market, and it has significant impacts on our ability to minimize our rate increase. So with that, I would conclude my testimony and invite questioning. Thanks.

[The prepared statement of Jeff Stier follows:]

PREPARED STATEMENT OF JEFF STIER, VICE PRESIDENT, NATIONAL RELATIONS, BONNEVILLE POWER ADMINISTRATION, UNITED STATES DEPARTMENT OF ENERGY

Mr. Chairman, distinguished members of the Subcommittee, my name is Jeff Stier. I am the Vice President for Office of National Relations at the Bonneville Power Administration (Bonneville). We appreciate this opportunity to appear today and we thank the Subcommittee for its attention to the challenges facing the West Coast electricity market.

The Administration does not have a position on H.R. 1647, the Electricity Emergency Act of 2001. My testimony today will focus on providing you and members of the Subcommittee with information on the experiences Bonneville has had on some of the issues addressed in your bill. I hope that this approach will provide the Subcommittee with useful information and context as it deliberates on the specific provisions of the bill.

Mr. Chairman, the Pacific Northwest is facing an energy crisis of unprecedented magnitude. The combination of near-record low streamflows in the Columbia River Basin, extraordinarily high and volatile wholesale electricity prices and an extremely tight West Coast power supply has severely challenged Bonneville's ability to meet its public responsibilities.

In the near-term, the Pacific Northwest drought has depleted our reservoirs. Lake Roosevelt, the reservoir behind the Grand Coulee dam, is now at 20 percent of normal levels for this time of year. In order to reduce electric load and conserve water, Bonneville has purchased or curtailed over 2,800 average megawatts (aMW) of energy at a cost of over $460 million. In addition, we have periodically and temporarily halted operations to assist juvenile salmon in their spring migration through the hydro system. By not spilling water over the dams, we are preserving more water for ensuring our ability to reliably meet electric loads.

The drought is also affecting our ability to manage a longer term problem—the potential of a significant Bonneville rate increase beginning October 1, 2001. Last fall, the power supply problems in California and the resulting price differential between wholesale electricity prices and Bonneville power rates caused Bonneville's customers to increase their purchases from Bonneville in the next rate period—fiscal years 2002-2006. When we finalized our power sale contracts, Bonneville's contractual obligations added up to approximately 11,000 average megawatts (aMW)—about 3,000 aMW more than our available firm resources. Bonneville must, therefore, purchase most of that additional power in a volatile wholesale power market.

The most effective step Bonneville can take to reduce the size of the anticipated rate increase is to decrease our reliance on expensive market purchases until the

wholesale market normalizes. The Bonneville Administrator has asked customers to significantly reduce their demand for power in the upcoming rate period. We are negotiating with our direct-service industrial (DSI) customers to purchase load curtailments and we are asking both our public and investor-owned utility (IOU) customers to reduce demand by up to 10 percent. If all of our major customer groups come forward with the requested load reductions, Bonneville's anticipated rate increase could be less than 100 percent. The alternative is a wholesale electric rate increase of 200 percent or more for the first year.

Reducing Bonneville's dependence on the currently expensive wholesale market is key to managing through the next few years. In addition, Bonneville has learned from California's experience over the last year. The California experience has shown that all costs must be paid to assure creditworthiness and ultimately, electric system reliability. Bonneville's power rates must be sufficient to recover all of its costs and continue to assure Treasury repayment.

Bonneville is working to do its part to help meet long-term electric power challenges. Developers have requested Bonnville to perform generation integration studies for about 27, 000 aMW of new generation in the Pacific Northwest. Bonneville's transmission system represents 75 percent of all high-voltage transmission in the Pacific Northwest. Most of this system is over 30 years old. Increased electric loads, the complexities of wholesale power transactions and new generation make it clear that we must make significant investments in the Northwest system to ensure continued reliability and to address the electric supply/demand imbalance in the region.

We understand that the importance of these issues to your Subcommittee required this hearing to be scheduled on short notice. Given the short notice, the Administration, including Bonneville, has not conducted an interagency review and complete analysis of The Electricity Emergency Relief Act of 2001.

My comments do not attempt to address legal or policy issues arising out of the bill. Instead, I hope that information on Bonneville's experiences with issues addressed within the bill, will help the Subcommittee as it deliberates on the West Coast's near-term electricity problems.

My testimony is limited to providing factual information on Bonneville actions and experiences relating to three sections of the bill. These sections are:

- Section 302(a) and (c), which would authorize Bonneville to maximize electric generation at hydroelectric facilities when a Northwest state has declared an electrical emergency and all 8 Governors of the Pacific Northwest states (Washington, Oregon, Idaho, Montana, Nevada, Wyoming, California, and Utah as defined by the Northwest Power Act) concur.
- Section 306, which would require full participation in a Western-wide regional transmission organization (RTO) upon agreement by at least 10 of 14 Governors within the Western Systems Coordinating Council (WSCC). Federal transmission owners such as Bonneville would be authorized and directed to participate.
- Section 102, which would direct the Federal Energy Regulatory Commission (FERC) to establish a program to allow retail consumers within the WSCC to resell, at market prices, a portion of the electricity they would otherwise be entitled to consume under contract or applicable regulation.

SECTION 302(A) AND (C)

Section 302(a) and (c) envisions temporarily maximizing electric generation on the Federal Columbia River Power System (FCRPS) during power emergencies. Some constraints that limit currently the full operation of the FCRPS for power generation can be temporarily removed when the Bonneville Administrator declares a power emergency.

Constraints come from many sources. The FCRPS is a system of multipurpose projects requiring the system operators (Bonneville, the U.S. Bureau of Reclamation and U.S. Army Corps of Engineers) to balance multiple authorized purposes—including flood control, recreation, transportation, and irrigation in addition to power generation. Additionally, the federal operator considers their obligations under the Columbia River Treaty and their tribal trust responsibilities as they balance these purposes. There are times when meeting one or another purpose in a particular way may reduce power generation.

Another set of constraints comes from the various environmental laws, in particular the Endangered Species Act (ESA) and Clean Water Act. The Federal agencies operate under various ESA biological opinions (final or draft) that prescribe or imply operations that reduce generation of electrical energy. For the FCRPS, this amounts to approximately 1,000 aMW. Examples of these limitations include spill-

ing water over the projects instead of generating power, augmenting flows in the spring, and holding reservoirs at minimum operating pool, among others.

The National Marine Fisheries Service (NMFS) 2000 Biological Opinion (BiOp) actually anticipated that there could be extreme circumstances when the Bonneville Administrator would need to declare a power emergency to temporarily operate the hydropower system outside measures set for fish recovery. The Bonneville Administrator has used the emergency powers under the BiOp several times during this operating year to successfully maximize generation from the FCRPS during times of need. With the cooperation of the Federal agencies, states, and tribes, Bonneville is seeking to reach agreement on alternative operations this spring and summer within the basic parameters of the BiOp.

Bonneville is concerned that section 302 could be read to supersede Bonneville's existing authority, which has adequately allowed Bonneville to maximize generation. The waiver provisions of section 302(c) also raise questions whether, after an emergency is over, there must be additional mitigation or offsetting actions. Finally, we would bring to the Subcommittee's attention that the definition of "Pacific Northwest" in section 302(a) would include 8 states—several of which have not been involved in, and are not conversant with, FCRPS resource issues.

SECTION 306

Bonneville and other transmission owners in the Pacific Northwest have developed an initial proposal to form a Regional Transmission Organization (RTO) called RTO West. Last week, the Federal Energy Regulatory Commission (FERC) accepted the scope and configuration of the Northwest proposal for West RTO. The Pacific Northwest transmission owners (including Avista Corp., Idaho Power Co., Montana Power Co., Nevada Power Co., PacifiCorp, Portland General Electric, Puget Sound Energy, and Sierra Pacific, as well as Bonneville) spent almost two years publicly developing the filing for RTO West in response to FERC's Order 2000. The proposal includes not only all the private transmission owners, but also the federal transmission system.

The RTO West proposal would consolidate operations into a single control area and provide for planning transmission expansion on a regional basis—two critical areas to improve reliability and facilitate open markets. The FERC commended Bonneville and the eight Northwest utilities in RTO West for their "extraordinary collaborative process" and for developing a process that includes both public and private utilities.

FERC also asked that the RTO West filing utilities file a status report for forming a West-wide RTO. It said that the RTO West can serve as an anchor for the ultimate formation of a West-wide RTO. We are concerned that calls providing for a West-wide RTO may inhibit and slow down progress or the formation of RTO West.

Bonneville and the other filing utilities believe that the best way to achieve the balance between a healthy Western electricity market and regional reliability needs—the goal of FERC's Order 2000—is to create strong, regional RTOs and allow them to develop seamless market interfaces. This approach allows regional players to develop systems that take into account regional history and utility practices for solving regional problems consistent with National policy direction. The RTO West proposal does just that—while calling for the development of seams agreements with neighboring RTOs to create the seamless electricity markets sought in Order 2000.

SECTION 102

Section 102 appears to share Bonneville's goal of reducing demand. Currently Bonneville has contracts with its DSI customers and some utility customers to voluntarily curtail power use. In addition, Bonneville is trying to minimize the size of its coming wholesale rate increase by significantly reducing demand, and therefore Bonneville's need to purchase power from the currently expensive wholesale market, in fiscal years 2002 to 2006.

Of any customer class, Bonneville's DSI customers are certainly the most able to curtail load. When power prices skyrocketed, Bonneville paid some of its DSI customers to reduce demand by cutting back operations or temporarily shutting down. Other DSIs had the ability under their contracts with Bonneville to shut down operations and ask Bonneville to remarket federal power purchased from the agency. When the remarketing provisions were included in some DSI contracts in 1996, it was seen as risky for the companies and potentially beneficial to Bonneville in the event wholesale power market prices stayed below the cost of Bonneville's power. As those markets prices began to increase last year it became apparent that the remarketing provision would provide a windfall for the companies. While the companies were earning over a billion dollars in revenues from remarketing federal power,

Bonneville was buying power on the expensive wholesale market to meet demand, which drove up Bonneville's costs overall. Bonneville's contracts with the companies for power sales within the next rate period do not allow remarketing of federal power.

As Bonneville experienced, any plan that does not allow utilities to decrease dependence on the currently expensive wholesale market will increase rates for consumers. At least in Bonneville's case, a plan that allows its customers to reduce their consumption, but not their demand on Bonneville, and to sell power at market rates will result in a few customers profiting immensely and most others paying significantly increased rates.

At this time, Bonneville is headed for wholesale rate increases of 200 percent or more for the first year after October 1, 2001 unless our customers make commitments to reduce energy use. The basic factor behind such a high increase is that the demand for power placed on Bonneville by its customers far exceeds Bonneville's own power resources. To serve this additional power requirement, Bonneville will be forced to buy the power in the wholesale electricity market. The most immediate and direct way to decrease the size of Bonneville's rate increase is quite simply to decrease the amount of power Bonneville has to buy in the market. Currently, almost all of the region's aluminum smelters are shut down. We are offering to pay the companies to continue to curtail their power use by delaying resuming operation for up to two years. We are seeking load curtailments from large customers of our publicly-owned and cooperative customers. Finally, as I stated earlier we are asking both private and public utilities to cut back their energy use by up to 10 percent.

Bonneville believes this strategy to minimize its rate increase by reducing demand will reduce the impact the energy crisis will have on the region's economy. Without overall rate reductions, consumers will see a first year doubling or tripling of Bonneville wholesale power rates that will have severe impacts on the economy.

Adequate authority exists today to reduce load in the short-term to decrease dependence on the currently expensive wholesale market and reduce anticipated rate increases for all customers as illustrated by Bonneville's experiences and our strategy to minimize the rate increase.

Bonneville is concerned that a provision such as Section 102 could create a very unfortunate unintended consequence to any negotiations that Bonneville—or any other utility, for that matter—would pursue in order to reduce loads. Utilities that have been at the vanguard of demand side conservation and other load reduction efforts will lose much of the incentive to continue those efforts if only a select number of their consumers will benefit. In Bonneville's case, this provision could undermine our effort to reduce our potential wholesale rate increase and the negative effects such a rate increase would have on the Northwest's economy.

Finally, we have not completed a thorough legal review of sections 102, however, we are concerned that if those sections apply to load served with power provided by Bonneville, they not only comport with existing contractual requirements, but also existing statutory requirements. Bonneville's power sales are subject to multiple interrelated statutory provisions regarding remarketing and other public purposes. These provisions serve to ensure that power marketed by Bonneville is available at cost to Bonneville's Pacific Northwest customers, and they are part of the Northwest's understanding of their rights and responsibilities with regard to that power. They have informed and guided all of our contracts with our customers.

CONCLUSION

Mr. Chairman, in conclusion, Bonneville and the other utilities in the West Coast electricity market are facing critical challenges. Bonneville is taking aggressive steps to address these challenges, and our experience has provided important lessons. It is my hope that my testimony can give the Subcommittee some examples from these experiences to guide the deliberations on the Electricity Emergency Act of 2001. Your attention and leadership on these issues is certainly critical at this time.

Thank you, Mr. Chairman. I am available to answer any questions you may have about Bonneville's experiences with the West Coast electricity crisis.

Mr. BARTON. We thank you. Congresswoman Eshoo would like to more formally introduce the next witness.

Ms. ESHOO. Mr. Chairman, thank you very much for once again extending the courtesies that you have to me since I am not a member of this subcommittee. I want to welcome all of the members of the panel here today, but it is really a special pleasure to

introduce Ambassador Richard Sklar. He is a great friend and has been for 30 years.

But more importantly, I think he is a great citizen of California. And he has done much for our country in his public service. As the director of Capitol Projects for the city of San Francisco, he reformed the city's Waste Water Program. From 1979 to 1983, he ran the city's Public Utilities Commission.

He later joined the construction firm of O'Brien and Kritzberg where he eventually served as president. In 1997, he was named by President Clinton as Ambassador to the United Nations and he was responsible for efforts to reform the U.N.'s Management Budgetary Financing and Personnel Practices.

That, if anyone, took that one assignment on as their single assignment in life, and retired being successful at that, I think we all stand up and salute. Following his service at the United Nations, he served as President Clinton's Special Representative for Economic Reform and reconstruction in Southeast Europe.

I could go on and on about Dick Sklar, but I think the members of the committee are going to find in him someone that issues the ground truth. He is really an honest agent on behalf of the public. He is a doer. He doesn't allow anything to stand in his way of serving people and serving them well. And he works with everyone.

He is smart. He is funny. He is a great cook. And I think that we, in California, are very grateful that he is been appointed by the Governor to move this situation on. And we look forward to working with him, and I know that my colleagues on the other side of the aisle are going to as well when they hear from him.

So, Mr. Chairman, thank you for allowing me to do this here today, and again, for all the courtesies that you have extended to a full member of the Congress committee and unfortunately, not a member of yours. Thank you.

Mr. BARTON. Thank you. Now that you have done the easy things like reforming the budget at the United Nations, you can go on to more important things like the Governor's generation and implementation task force. The only thing I question about you, sir, is your judgment by willing to take on such unpopular tasks.

But obviously, you are a public servant in the truest sense. We welcome you to the subcommittee. Your testimony is in the record in its entirety, and I would ask that you summarize in 7 minutes.

STATEMENT OF RICHARD SKLAR

Mr. SKLAR. Thank you, sir.

Mr. BARTON. You need to pull that microphone directly in front of you, please.

Mr. SKLAR. I appreciate what Anna said, that that is true I am a great cook. The rest we will let you all make judgments about later on. You are all invited for risotto at my house anytime you want to come.

Actually, I am coming back from 5 years—almost 5 years in the Balkans, where I have been doing—I was drafted by the President from my private sector life in 1996 and did power reconstruction, airports, and tried to move those countries from communism to a market economy.

So maybe this isn't out of line. I was back——

Basically, what Anna didn't say is I have had 35 years in business. The government service has been interspersed. I would like to pick up on what my colleague, Mr. Stier, said. He pointed out, so I don't have to, that this is not a California problem. This is a country-wide problem. It has spread to the Northwest.

Furthermore, it is a worldwide problem. He mentions the aluminum industry which is shut down in the Northwest now. And it was a great blessing for me in Montenegro as I attempted to recapture that industry's aluminum industry from a bunch of Swiss traders headed by someone's name how you all know for other reasons.

It was stolen from them in 1998, and the reason they survived the last 2 years was the worldwide prices of aluminum went through the roof because the Northwest producers were down. So this spreads, this economic impact spreads through the world.

California has a mess now, and it is a self-made mess. The government of California in the period of 1988 to 1993 or 1994 deregulated the electric power industry, and it did it in a terrible way. It was the responsibility of political persons, but also the lobbyists. There were $25 million spent by the utilities, whose lobbyists sat there and did this.

So this is all our mess. That is irrelevant. We are there now, let us get on with it. What did, in effect, they do? In an industry that had been regulated for all of its history because it is a monopoly industry. You can't have multiple wires running down the street. They, in effect, were as a homeowner, took all the locks off the house. They shot the mastiff, and they disarmed the alarm system.

And surprise, people walked in the door and took the jewels out. They shouldn't have been surprised, and now we are dealing with that mess. The fiction of this thing is that California has had its energy demand skyrocket. Now, if you look at the chart to the left, the first one of them, that is not the case.

The peak demand that determines how much we need has essentially been flat since 1997. And in fact, this year is 9 percent below what it was last year. Our demand has not gone up. So what's happened? If you take a look at the second chart, you'll see that a major portion of the supplies suddenly disappeared.

I am a Mechanical Engineer graduate. My dad designed powerhouses all his life, so it is a world I know a little about. Powerhouses have mechanical systems that need repair. There's a thing called scheduled outages. You plan to send your car into the shop to have it greased. Reasonable.

Then there are things called forced outages. Oops, we can't start today. Something's wrong. If you look at the left end of that chart, you'll see that 4,000 megawatts were typical forced outages for all of the history in California, going back the last 20 years.

Two years ago, they jumped to 8,000, and now they have jumped to 12,000. So the utilities somehow found instant problems that they had to fix. And so, while our demand remained constant, the supply dropped. And that is like when you have 20 people on the lifeboat, and there's only enough water for 19, water becomes a scarce commodity and scalping took place.

Now, what are we doing about it? California is doing a significant number of things about it. We are generating new capacity.

One of my jobs, as you described it, is to get 5,000 megawatts of new facilities on line. The Governor has done his part. He is cleared the legislative side away.

Five of the great engineering firms in California have volunteered star project managers to me and we are moving to do that. Conservation is under way. We have dropped—we have dropped the consumption by 9 percent in February, 8 percent in March. So conservation's taking place. But we need your help.

And help for you can be quite easy. This Congress, by statute, mandated that the Federal Energy Regulatory Commission promulgate and assure just and reasonable prices for electricity. And what we need is a transition period, 18 months, 24 months, 2 years, and not only in California, but in the whole Western system, to bring this back in balance while we get our regulatory act cleaned up and undo the mess we made—we made, no one else.

But there's a history of the Congress doing this. The Natural Gas Policy Act in 1978 established a 7-year period to bring the natural gas industry back in balance when there was a fierce shortage, and the Congress deserves credit for that, a 7-year transition period.

Even more important, and one of my favorites, is the famous savings and loan situation that the Congress had to deal with. The Roosevelt era limits on insurance, limits on interest rates and who you could loan to in the S&L industry were abolished by the Congress in the early 80's. And you all know what happened.

The industry nearly went broke. And it only didn't go broke, and the country was safe from an economic banking disaster because the Congress voted $180 billion to bail the industry out. What they really did was ensure that the depositors, ma and pa, wouldn't lose their money. But it occurred because of a political error, a misjudgment.

What we need from you desperately, what we need from you desperately, is to tell the Federal Energy Regulatory Commission to simply do their job on natural gas and electric energy for a short period of time while we get the supply well up above demand so this game playing, this scalping can't go on.

Just an example, sir, you are from Texas, and you know gas and oil. In Texas, down at Houston Ship Channel, natural gas sells for $5.10 for a million BTU units, $5.03 out in West Texas. That gas is delivered to New York City for $.45 more and arrives there costing $5.57. Reasonable.

That same gas shipped westward to California through a pipeline equally long costs—the transportation costs are 21 times as great, $9.68 instead of $.45. Now, that doesn't help the well head producer. Someone is gaining that transportation. And we need your help on those, and we need it short term.

The head of Williams Energy down in Oklahoma, one of the firms profiting from this, as he had said in the last week, he agrees this thing has gone wild and crazy and regulatory transmission and generation restraint is needed. If they say it, and we say it, and the FERC has the job of doing it, we ask that you get that message across to them. Thank you, sir.

[The prepared statement of Richard Sklar follows:]

PREPARED STATEMENT OF RICHARD SKLAR ON BEHALF OF CALIFORNIA GOVERNOR GRAY DAVIS

Mr. Chairman, and members of the Committee, I am pleased to be with you today to represent California Governor Gray Davis. We appreciate the opportunity to share California's concerns about federal action on energy issues.

INTRODUCTION

In the 12 years preceding Governor Davis' Administration, not a single major power plant was built in California. Since he has been in office, California has cut approval times in half, and has licensed 13 major power plants. Eight major power plants are currently under construction. Four new major plants will be on line this summer. Three more by next summer. And ten are in the pipeline for 2003.

The Governor has led an unprecedented effort to speed construction of new power plants in California. We have streamlined the siting process, offered financial incentives for completion of plants by this summer, and cut red tape. The Governor asked me to lead his "Generation Implementation Task Force" to oversee accelerated construction of new power plants. The task force includes project management executives from Bechtel, URS, Fluor Daniel, PBQD (Parsons, Brinkerhoff, Quade and Douglas), and A. Teichert and Sons. Our team will coordinate state permitting, siting, finance, design, and construction efforts to ensure the Governor's goal of producing 15 percent more supply online than demand by 2004.

While the Governor and his team in California are doing everything we can to build new generation in the state as quickly as possible, we continue to ask the federal government to exercise its responsibility to deal with exorbitant electricity prices in the marketplace.

While we appreciate the Committee's attempt to address the California situation, unfortunately, the "Electricity Emergency Relief Act" falls short. The proposal fails even to acknowledge the primary responsibility the federal government has with respect to our situation in the state: the control of unjust and unreasonable wholesale prices. Many of the provisions of the legislation would actually impede California's efforts to improve supply and stabilize prices. The legislation also invites controversy with respect to its environmental provisions, and is weak as it relates to federal conservation efforts.

UPDATE ON CALIFORNIA ENERGY EFFORTS

Generation: We are determined to develop additional energy supplies in an expedited manner to meet this summer's anticipated demand. Towards that end, Governor Davis has twice streamlined the permitting process, cutting the length of the process in half, and in some cases, to 21 days. Our goal is to bring 5,000 megawatts online this summer and a total of 20,000 megawatts by 2004.

In addition to the major new facilities mentioned above, we have approved six peaker plants. Four others are in a 21-day expedited review process, and more are anticipated. Between June and September, we expect to gain an additional 4800 megawatts from major and summer reliability plants, as well as from the maximization of output from existing plants.

Conservation: California has launched a comprehensive $800 million conservation program that includes appliance rebates, programs to increase energy efficiency and decrease peak demand, time-of-use meters, demand responsiveness measures, and a public media campaign. We expect this effort to save over 2,000 megawatts this summer. In addition, we have instituted an innovative rebate program, otherwise known as the "20/20" program, where consumers who reduce energy consumption by 20% this summer get a 20% rebate on their bills. Taken together, these steps represent the most ambitious, aggressive conservation effort ever launched by a single state.

In addition, only a few days ago, 225 cities, counties and special districts throughout California signed conservation agreements with the state. This state-local partnership will play an important role in enhancing the overall conservation campaign in California. As part of this effort, three major cities in Northern California—San Francisco, Oakland and San Jose—have agreed to achieve a uniform energy reduction standard of 15%. With these local governments serving a population of over 2 million this pledge to conserve energy will make a huge difference this summer and beyond.

Although California is the second most energy efficient state in the nation, Governor Davis has called on all Californians to take extra steps to reduce their energy usage by 10%. I am pleased to report that California is responding in a big way. In March, California businesses and consumers reduced energy consumption by

9.2%. Electricity demand went down by 2,967 megawatts compared to last year, exceeding February's 8% savings of 2,578 megawatts.

State government is also playing a big role in reducing consumption. Energy use in state office buildings dropped by an average of 20% during the first two months of this year. As a result of this impressive performance, taxpayers have saved nearly $300,000 in utility bills from December 2000 to February 2001.

There is no question that California's overall conservation efforts are paying off, and we expect to see even more positive results in the months ahead.

Stabilization: California has made significant progress in stabilizing the market by reducing our reliance on the volatile and unpredictable spot market. The State has signed 40 long-term contracts and agreements with energy providers. Together, they provide a total of 629,000,000 megawatt hours in a diversified long-term portfolio over the next ten years. The average price is $79 per megawatt hour for the first five years and $61 per megawatt hour for the second five years. These long-term contracts represent a 75%-80% reduction in overall energy expenditures compared to recent spot market prices.

In addition, we are doing everything possible to revitalize the financial viability of our utilities. Last month, Governor Davis announced an agreement with Southern California Edison to purchase its transmission system in exchange for a series of major long-term commitments by the utility to provide affordable and reliable electricity to its customers. We are currently in the process of finalizing the details of that agreement and expect to begin the implementation process in the near future. At the same time, our discussions with San Diego Gas and Electric are continuing.

WHOLESALE PRICE MITIGATION

It is very disappointing that on the heels of the Federal Energy Regulatory Commission's (FERC) order last week, this Committee also appears unwilling to recognize the federal government's responsibility to stem exorbitant wholesale electricity prices.

With respect to the FERC, we are obviously concerned that the order covers only hours in which the ISO declares an emergency, although the evidence clearly indicates the need to control unjust and unreasonable wholesale prices in all hours. Moreover, in the same order in which they purport to assist California with price mitigation, they mandate a Regional Transmission Organization (RTO) filing in exchange for assistance. FERC shirks its legal responsibility to adequately control unjust and unreasonable prices, and in the same breath conditions any assistance on unrelated actions to advance unrelated FERC goals.

We do not need more games; we need straightforward, definitive action to control wholesale prices.

We are buying electricity at 10 to 20 times what it cost last year. The bulk cost of electricity for the state in 1999 was $7 billion; in 2000 it was $32 billion; and the ISO estimates the cost for this year could rise to $70 billion. Keep in mind, this is occurring even as peak demand has not increased significantly in the past four years.

On the other side of this ledger, we have suppliers earning record profits, some exceeding 1999 levels by several hundred percent. We have the California ISO estimating billions in overcharges between May of 2000 and February of this year. We do not have a functioning market in California. We have wholesale gaming of the system.

Temporary price controls will not undermine efforts to invest in generation. Generation is being added in California at record rates and investment will continue. The Governor has consistently supported cost-of-service based wholesale rates in the West, which exempt new generation, and ensure reasonable profits to suppliers.

The Governor believes either the Feinstein/Smith legislation introduced in the Senate (S. 764) or the Inslee bill (H.R. 1468) supported by a majority of the California Congressional Delegation are excellent models for inclusion in this bill. We urge the committee to include a real price mitigation proposal in its legislation.

PROVISIONS OF CONCERN TO THE STATE

While failing to address the most vexing problem we now face in the state, the draft legislation includes provisions that could very well impede our current efforts to stabilize supplies and prices. Among the more troublesome:

QUALIFYING FACILITIES (QFS)

California depends heavily on QFs; these facilities generate up to 25 percent of the electricity supply for the state. Historically, the QFs have been paid at a higher rate for electricity under their current long-term contracts with the utilities. As a

result of extremely high natural gas prices and the financial instability of the utilities, the QFs are now owed a significant amount of money. The Governor is acutely aware of the importance of the QFs and has been a strong advocate for their interests. In fact today, the Governor will be meeting with executives from a number of QFs to resolve their back debt problems. Since April 1 the QFs are being been paid for the energy they generate under their contracts.

Section 205 of the draft legislation, which would allow the QFs to walk away from their contract obligations, would be extremely disruptive and further destabilize the power contracting market. Thousands of megawatts would be moved from stable contracts into the spot market, which would increase costs to the state dramatically. This is in direct conflict with the Governor's efforts to increase reliance on long-term contracts and stabilize prices. We strongly oppose this provision.

DEMAND MANAGEMENT INCENTIVES

In theory, Section 102 of the bill may sound like a good idea: allow retail customers to sell their unused electricity back to the market as a way to reduce usage. Unfortunately, the proposal is both extremely complicated in implementation, and leaves the door open to further gaming in the electricity market. Moreover, the scheme conflicts with California's already comprehensive demand management initiatives.

As I pointed out earlier, the state has embarked on an extraordinary conservation effort, relying heavily on demand management programs. Our conservation program is working in California and we oppose a federal strategy which would undermine our progress.

ACQUISITION OF TRANSMISSION ASSETS

One of the cornerstones of the Governor's efforts to stabilize the finances of the state's utilities is the purchase of utility-owned transmission lines by the state. In addition to providing cash to the utilities to enable them to regain their financial health, ownership of the transmission facilities will allow the state to move forward expeditiously to modernize and increase transmission capacity on the grid.

However, Section 108 of the bill subjects any transmission assets acquired by the State of California to FERC jurisdiction. Since the sale of the transmission lines is subject to FERC approval, Congress would be unnecessarily injecting itself into a matter that will be extensively investigated during future FERC proceedings before a decision is reached. Moreover, this would be an unprecedented action, since no other state-owned transmission line is FERC jurisdictional.

Section 108 is detrimental to our plans to address the energy crisis in California and we strongly oppose this provision.

ENVIRONMENT AND CONSERVATION

We are concerned that instead of constructive efforts by the Congress to assist the state, the proposed bill will incite controversy with respect to its environmental provisions. We have clearly stated in the past that there is enough flexibility within existing federal clean air regulations to allow the state to do what needs to be done to increase supplies of power. The California energy crisis should not be used as a tool to undermine existing environmental regulations.

We appreciate the Subcommittee's recognition of the need to embark on conservation efforts. However, we believe that the federal government can and should go far beyond what is envisioned in the draft legislation. For example, the 20% reduction standard achieved by California State government ought to be matched by all federal facilities throughout the west. Given the current circumstances, this type of federal effort is necessary, warranted, and as California has shown, achievable.

CLOSING

Governor Gray Davis is working now in California to build energy infrastructure and a viable electricity market. That is the right approach. The Governor, the State Legislature, business and the citizens of California are doing and will continue to do all we can in California to help ourselves.

I am here today to ask you, on behalf of the Governor, to exercise your federal responsibility to assist us in building a functioning market for electricity in the state. The first step in that process is a clear straightforward plan to curb wholesale prices in the West. The stakes to the California economy, the West, and the nation are too high to spend your time at best, nibbling around the edges of a problem, and at worse, complicating our efforts to address this challenge.

Thank you.

Mr. BARTON. Thank you, Ambassador. I thought your testimony was excellent. I do want you to know that I ran for Congress in 1984 on the platform of repealing the Natural Gas Policy Act in 1978. But, you know——

If Anna Eshoo is your friend, you are a good guy. So we now want to go to the chairman of the California Energy Commission, the Honorable Mr. Keese, who has appeared already once before this subcommittee. You are welcome again. And your testimony is in the record. We would ask that you explain it in 7 minutes.

STATEMENT OF WILLIAM J. KEESE

Mr. KEESE. Thank you, Mr. Chairman. I appreciate being invited back here to talk about the bill that we have in front of us, the Electricity Emergency Relief Act. I can tell you that since I was here 5 weeks ago, we have worked tirelessly in California to increase energy supplies, to decrease our energy demand, and to increase energy efficiency to stabilize the California market.

We gave you some targets then. We have not slipped from any of those targets. We are moving forward. We have licensed another baseload power plant. Construction has begun on another baseload power plant. We have approved six peaker plants. We have four other peaker plants under review.

On the conservation side, a couple of weeks ago, the Governor signed a bill allocating $800 million to energy efficiency and conservation. Energy efficient appliances demand responsiveness, real time meters, energy efficiency programs for the schools, and a very strong energy efficiency program for agriculture, a statewide media campaign.

In the stabilization area, as you are probably aware, the Governor has announced an agreement with Southern California Edison. The terms of that call for low cost power to California for 10 years, sale of the transmission lines to California. The agreement, if implemented fully, will keep the utility financially viable, transfer valuable assets to California, and allow California to make a number of necessary transmission upgrades in California.

Finally, I would mentioned that Californians are doing their part. In March, a reduction in usage was 2,967 megawatts, or approximately 9.2 percent. That increase over the 8 percent savings that our citizens gave us in February, it looks like April will come in about the same level.

We do appreciate the Federal Government's assistance in this area, and your bill sets forward some proposals. The Energy Commission that I run does not have jurisdiction over these issues. But we do the analysis on most of the issues in energy facing California, and I would like to deal with transmission conservation, emergency blackouts, hydroelectric power generation, and reachable transmission organizations, which we deal with extensively.

This is a comprehensive bill. It is an ambitious bill. What it doesn't deal with is our major problem, excessively high prices. Many of the proposals are already being implemented in California. And we would like to see that any Federal efforts are coordinated.

Let me mention two things on emergency relief. The first thing that we really need is effective price mitigation to ensure that the wholesale electric prices are just and reasonable. It is not accept-

able that California paid $7 billion 2 years ago in 1999 for energy, and that the projections are that if things are not changed, we could pay $70 billion this year, ten times more for energy than we paid 2 years ago.

Second, you could promote greater conservation energy efficiency. We are very pleased with your proposal that Federal buildings conserve, and President Bush's suggestion that they should conserve. We would urge that instead of conserving only in times of emergency, the conservation should be done day and night.

California government has reduced our energy consumption by 20 percent with just a few basic efforts. We think that that could be a very worthwhile Federal goal. Furthermore, a problem that is dear to our heart is energy efficient air conditioners, air conditioners that really work in a dry climate like the West, although, today's standards, health in a damp climate like the East.

Representative Cunningham has H.R. 778. Had a bill like that been implemented last year, we could save 150 megawatts per year moving forward in California alone, and approximately 100 megawatts in some of the other hot States of the West. I would like to deal with a couple of specific issues if I have time left here.

Transmission constraints study, we think that could be very worthwhile in the long run. California is doing something now. We have to do things immediately. We already have a study that has indicated most of the major things that have to be done in California, and we are on our way.

On Path 15, $220 million is a wonderful number. We would, however, not like to see the Western Area Power Administration move in and site power lines in California. We would suggest that cooperating with some State agency, a cooperative effort to deal with the Path 15 problem, which we have analyzed and we know what we have to do. Now we just need about 18 months of construction, a cooperative effort would be appropriate.

On emergency conservation awareness, we have a major campaign going. We would hope the Federal campaign on emergency conservation would coordinate with the State so that we aren't sending different messages. On blackout, section 202, Electricity Blackouts, again, we are having an exercise jointly with the Federal Government on handling emergencies right now.

We would hope that this provision would call for more coordination with the involved States. Emergency coordination in the West requires coordination of the whole West because you can blow the Western system, as you know, with a toaster in Mexico or a toaster in Canada. You have got to do it all together.

I have already mentioned conservation at the Federal facilities. Daylight savings time is an issue. We have studied, and it indicated that the savings in peak demand could run from 400 to 1,600 megawatts by adjusting daylight savings time. We like your provision. Obviously, there are other policy implications in changing daylight savings time, and that is acceptability to the populous.

On regional transmission organizations, I guess I would concur with one of the earlier witnesses. We are moving forward. It would seem to us that it would be appropriate to leave these regional efforts to the States that are involved. We have—the Northwestern

States have submitted their proposal, and FERC has accepted Phase I. They are moving forward.

In summary, Mr. Chairman, I am pleased to be here. Happy to answer any questions on any of the other provisions that you want.

[The prepared statement of William J. Keese follows:]

PREPARED STATEMENT OF WILLIAM J. KEESE, CHAIRMAN, CALIFORNIA ENERGY COMMISSION

INTRODUCTION

Good morning Mr. Chairman, and members of the Subcommittee. I appreciate the opportunity to testify before you today on behalf of the California Energy Commission (CEC) on the "Electricity Emergency Relief Act."

I am pleased to report that since I last testified before you in March, the State of California has continued to work tirelessly to increase energy supplies, decrease energy demand and increase energy efficiency, and stabilize the California electricity market.

Since March, we approved another baseload power plant and construction has begun on yet another. In addition, we have approved six peaker plants under an expedited process, and four others are under review.

On the conservation side, last month the Governor announced $800 million energy conservation plan, including incentives for energy-efficient appliances, demand responsiveness, real-time meters, energy efficiency programs for schools and agriculture, and a statewide media campaign.

With regard to market stabilization, in April the Governor announced an agreement with Southern California Edison. It provides low-cost regulated power to the state for 10 years and provides for the sale of transmission lines to California, among other things. The agreement keeps the utility financially viable, transfers assets of value to California, and enables the State to make necessary transmission upgrades.

Finally, Californians have shown that they are willing to do their part. In March, consumers reduced their energy usage by 2,967 megawatts. This represents a 9.2 percent savings, exceeding our eight percent savings in February.

Mr. Chairman, Californians would appreciate the federal government's assistance in these efforts. The "Electricity Emergency Relief Act" sets forth some proposals. Although the CEC does not have regulatory jurisdiction over the subjects covered by the legislation, the CEC has been involved in the State's effort to solve many of the concerns the "Electricity Emergency Relief Act" attempts to address, including transmission, conservation, preparation for emergency blackouts, hydroelectric power generation, and regional transmission organizations. Therefore, I will focus my comments on these areas.

SUMMARY

Mr. Chairman, as ambitious as the "Electricity Emergency Relief Act" appears to be, it does not actually provide much in terms of relief to California. Many of the proposals included in the legislation are already being implemented in California. Duplicative federal efforts could be harmful if not carefully coordinated.

The federal government could most meaningfully provide emergency relief to California in two ways. First, it could implement effective price mitigation to ensure that wholesale electricity prices are "just and reasonable." Second, it could promote greater conservation and energy efficiency. We are encouraged by the provision relating to conservation at federal facilities and we urge the Congress and the Administration to go further by emphasizing conservation and energy efficiency as much as it does energy production. Conservation and efficiency measures, such as tax incentives for highly energy efficient air conditioners, can help in an emergency. For example, H.R. 778 by Representative Cunningham could save California up to 150 megawatts and reduce demand in the West as well as early as next summer.

My comments are as follows:

DISCUSSION

Section 103. Transmission Constraints Study

Section 103 requires the Secretary of Energy and the Federal Energy Regulatory Commission to jointly study electric power transmission congestion and report to Congress within 6 months their findings and recommendations to relieve congestion

within various regions of the country and with Canadian and Mexican electric transmission systems. This section does not require coordination with state efforts.

This provision could be helpful from a national perspective in the long-term, but it could potentially conflict with and/or delay the implementation of essential transmission upgrades in California. The State has already identified constraints in California and efforts are underway to address them. In March of this year, the California Public Utilities Commission issued a comprehensive 500-page report that identifies necessary transmission upgrades and includes a timetable for accomplishing them. Priority projects for this summer are underway.

Section 104. Path 15 Transmission Expansion

This section authorizes the Western Area Power Administration (WAPA) to remove the Path 15 constraint and authorizes $220 million in funding therefor.

The State has already taken action to upgrade Path 15. In March, the California Public Utilities Commission ordered PG&E to seek authority to begin the project. However, the State would welcome WAPA's support in a coordinated effort on the Path 15 upgrade that is already underway.

Section 201. Emergency Conservation Awareness

This section requires the Secretary of Energy to conduct an emergency awareness campaign to promote conservation in areas where shortages are anticipated in consultation and coordination with affected States.

California has already launched an extensive public awareness campaign. This section could be helpful if the federal and State campaigns are coordinated to eliminate the possibility of conflicting messages.

Section 202. Preparation for Electricity Blackouts

Section 202 directs the Secretary of Energy, in consultation with the Federal Emergency Management Agency, to make preparations to handle emergency situations caused by blackouts. However, it does not require the Secretary to consult with or coordinate with affected states.

In California, we have already embarked on an extensive effort to handle emergency blackout situations. Therefore, we would want the federal government to be required to coordinate its preparations with the State to minimize the confusion and duplication of effort that could arise from separate endeavors.

Section 203. Conservation at Federal Facilities

This section requires federal agencies to implement conservation measures during electricity emergencies to reduce consumption by at least ten percent.

While we would support efforts to ensure that the federal government is a responsible electricity consumer, we would recommend the federal government conserve and practice energy efficiency throughout the western region, not simply in those states with declared emergencies. Moreover, we would urge the federal government to follow California government's lead in saving 20% during electricity emergencies.

Section 204. Daylight Savings Time

Section 204 authorizes the legislatures of California, Nevada, Oregon, or Washington to adjust the standard time in their respective states if necessary to help alleviate an electricity crisis.

The CEC has analyzed this proposal and believes it would be helpful in saving anywhere from 400 to 1600 megawatts on daily peak electricity demand depending on the time of year and weather conditions.

Section 301. Hydroelectric Power License Conditions

This section permits increased generation at licensed hydroelectric facilities to assist in a declared electricity emergency regardless of any adverse effects to natural resources.

The Federal Energy Regulatory Commission (FERC) has estimated that as many as twelve licenses could be modified to provide an additional 25 megawatts of electricity. However, there could be substantial and unwarranted costs in terms of damage to California's valuable natural resources, including water quality, adjacent land uses, and threatened and endangered species.

Section 306. Regional Transmission Organization in Western Region

This section would require the FERC to establish a single regional transmission organization (RTO) for the West if petitioned by ten or more western governors.

The establishment of a single RTO for the West is not the answer to this summer's electricity challenges. Moreover, California and other western states do not currently favor this one-size-fits-all approach. Instead, many states have applied to the FERC for approval of separate, smaller RTOs within the western region. We be-

lieve the merits and form of an RTO are better left to these regional efforts and that a mandate from the federal government to form a single RTO is not helpful.

CONCLUSION

Mr. Chairman, this concludes my comments on the legislation. We hope to work together with you to resolve our concerns for the benefit of the people of California, the West, and the nation. We look forward to your cooperation in this endeavor. Again, I would like to thank you for the opportunity to provide input to the Subcommittee. I'd be pleased to answer any questions.

Mr. BARTON. We thank you, Chairman. We now go to Mr. Michael Kenny, who is the executive officer of the California Resources Board. Your testimony is in the record. We would recognize you for 7 minutes to elaborate.

STATEMENT OF MICHAEL P. KENNY

Mr. KENNY. Thank you, Mr. Chairman and members of the subcommittee for the opportunity to testify.

Mr. BARTON. Be sure the microphone is on and close to you. Yes, sir.

Mr. KENNY. There are really two key points I would like to emphasize. First is that air quality laws are not interfering with California's ability to bring new generation on line and to run existing power plants at maximum capacity.

Second, existing Federal and State regulations, along with Governor Davis' recent executive orders, provide the needed flexibility to allow for a maximum output of electrical power while at the same time protecting public health.

For these reasons, we believe that the air quality related sections of the draft legislation are not necessary. The legislation includes two provisions related to air quality, NO_X preconstruction requirements for new generation facilities, section 303, and the emergency generation section 305.

Section 303 allows the U.S. Environmental Protection Agency upon the request of any State to weigh the requirements of section 111 of the Clean Air Act pertaining to the oxide nitrogen under the State Implementation Plan.

Section 303's problematic for several reasons.

As I previously mentioned, California already has the necessary flexibility in law to allow it to address these issues. Existing Federal and State laws provide adequate relief on a source specific basis. In contrast, section 303 goes well beyond the measured case by case approach.

The waiver authority in the draft bill is very broad and does not provide opportunity for public comment. In addition, the bill would waive all preconstruction requirements for NO_X in both attainment and non-attainment areas as well as the installation of SCR technology.

Furthermore, the waiver applies to all new generation facilities in the State and does not allow for consideration on a case by case basis where unique local factors must be weighed. Additionally, waivers authorized under section 303 can have the effect of increasing emissions in downwind areas, thereby degrading the air quality in those areas.

Finally, the language would wave all offsets and mitigation fees. Section 305 addressees emergency generation, specifically the bill

directs EPA to establish and expedite a process for considering and approving State Implementation Plan amendments.

Section 305 authorizes States to submit SIP amendments to allow NO_X emissions to be waived for existing natural gas fired power plants. It also allows States to file SIP amendments to waive requirements for generators that generate power for their own consumption, most likely, back up diesel generators.

Similar to section 303, this particular provision is extraordinarily broad and greatly exceeds California's approach. Although waivers under section 305 would be limited to a period of 6 months during a 2-year electricity emergency, there is nothing to prevent EPA from renewing a waiver within this 2 year window.

In addition, there is no provision for mitigation fees under section 305 which would seriously restrict the ability of local air districts to achieve offsetting emission reductions from other nearby sources. The bottom line is that waiving emission limits under section 305 is not necessary.

California has been working closely with facility operators on a case by case basis to enable generators to increase their hours of operation in order to meet heavy periods of demand. In conclusion, the Air Resources Board is continuing its efforts to ensure that California can bring new facilities on line as quickly as possible while still protecting public health and mitigating any adverse effects of increased electrical output.

This is being done within the confines of existing law as recently reflected by Governor Davis' executive orders. We are clearly demonstrating that California can build more power plants, cut red tape, and continue to protect the environment. The flexibility contained within Federal and State air quality laws has enabled the regulatory system to work well.

Importantly, the bulk of these decisions can be handled at the local level thereby ensuring greater collaboration and coordination between stakeholder and decisionmakers. For these reasons, any continued legislative effort to significantly alter this well established process by creating new authorities to waive emission limits and other requirements is unnecessary. Thank you, Mr. Chairman and members of the subcommittee.

[The prepared statement of Michael P. Kenny follows:]

PREPARED STATEMENT OF MICHAEL P. KENNY, EXECUTIVE OFFICER, CALIFORNIA AIR RESOURCES BOARD

INTRODUCTION

Thank you, Mr. Chairman and members of the Subcommittee. My name is Michael Kenny, and I serve as Executive Officer of the California Air Resources Board (ARB). I appreciate this opportunity to comment on the air quality-related provisions contained within the "Electricity Emergency Act of 2001" (H.R. 1647).

The bill before you seeks to provide temporary relief from various emissions limits and other requirements for newly constructed power plants as well as existing facilities.

I will elaborate on the air quality provisions of the bill in more detail shortly. However, let me emphasize two key points at the outset. First, air quality laws are not interfering with California's ability to bring new generation on line and run existing power plants at maximum capacity. Second, existing federal and state regulations, along with Governor Davis' recent Executive Orders, provide the needed flexibility to allow for maximum output of electrical power while at the same time protecting public health. For these reasons, we believe that the air quality-related sections of the legislation are unnecessary.

AIR QUALITY PROVISIONS: OVERVIEW AND DISCUSSION

The "Electricity Emergency Relief Act" includes two provisions related to air quality: NO_X preconstruction requirements for new generation facilities (Section 303), and emergency generation (Section 305).

Section 303 allows the U.S. Environmental Protection Agency (EPA), upon the request of any state, to waive the requirements of Section 111 of the Clean Air Act pertaining to oxides of nitrogen under the state implementation plan. This waiver could be granted for a one-year period during a declared electricity emergency and would apply to new electric generating facilities located in that state.

Section 303 is problematic for several reasons. As I previously mentioned, California already has the flexibility to ensure that air quality requirements do not hamper our ability to secure new generation sources. In addition, existing federal and state laws provide adequate relief on a source-specific basis. For example, ARB, working in concert with local air districts, has taken specific actions to allow certain facilities to delay the installation of pollution control equipment, otherwise known as selective catalytic reduction (SCR), for up to one year. These source-specific administrative orders are authorized under California state law (California Health and Safety Code § 42451) as well as the Clean Air Act (§ 113).

In contrast, Section 303 goes well beyond this measured approach. The waiver authority in the bill is very broad and does not provide any opportunities for public comment. In addition, the bill would waive all preconstruction requirements for NO_X in both attainment and nonattainment areas as well as the installation of SCR technology. Furthermore, the waiver applies to all new generation facilities in the state and does not allow for consideration on a case-by-case basis, where unique local factors can be weighed. Finally, the language would waive all offsets and mitigation fees, which is problematic from an air quality standpoint.

Mr. Chairman, the existing framework of California's environmental regulations provide the flexibility to secure new generation facilities in an expedited manner while at the same time maintaining our commitment to air quality. In addition, as a result of the joint efforts of local air districts, ARB and the California Energy Commission, along with the willingness of EPA and other federal agencies to collaborate in a cooperative manner, needed electrical generation has not been interrupted. As such, Section 303 is unnecessary.

Section 305 addresses emergency generation. Specifically, the bill directs EPA to establish an expedited process for considering and approving state implementation plan (SIP) amendments. Section 305 authorizes states to submit SIP amendments to allow NO_X emissions limits to be waived for existing natural gas-fired power plants. It also allows states to file SIP amendments to waive requirements for generators that generate power for their own consumption, most likely back-up diesel generators.

Similar to Section 303, this particular provision is unnecessarily broad and greatly exceeds California's approach, which is resulting in obtaining maximum generating capacity. Although waivers under Section 305 would be limited to a period of six months during a two-year electricity emergency, there is nothing to prevent EPA from renewing a waiver within this two-year window. In addition, there is no provision for mitigation fees under Section 305, which would seriously restrict the ability of local air districts to achieve offsetting emissions reductions from other nearby sources.

Section 305 allows EPA to approve a SIP amendment if the Administrator determines that the amendment meets Clean Air Act requirements and will not increase net emissions. Such a determination would be highly arbitrary in nature. It will be very difficult, if not impossible, to verify the emissions impacts of blanket waivers authorized under this provision. Moreover, without any specified enforcement authority, this requirement is virtually meaningless.

The bottom line is that waiving emissions limits under Section 305 is not necessary. California has been working closely with facility operators on a case-by-case basis to enable generators to increase their hours of operation in order to meet heavy periods of demand. For those owners who wish to expand hours of operation, mitigation fees are typically collected from facility owners in order to reduce emissions from other sources. In other cases, local air districts have coordinated efforts with owners to install air pollution controls, which in turn eliminates or greatly reduces the need for hourly limitations. Regardless of the circumstances, these matters have been and will continue to be successfully handled on an administrative basis at the local level.

CONCLUSION

The Air Resources Board is continuing its efforts to ensure that California can bring new facilities on line as quickly as possible. This is being done within the confines of existing law, as recently expanded by Governor Davis' Executive Orders. We are clearly demonstrating that California can build more power plants, cut red tape, and continue to protect the environment.

The flexibility contained within federal and state air quality laws has enabled the regulatory system to work well. Importantly, the bulk of these decisions can be handled at the local level, thereby ensuring greater collaboration and coordination between stakeholders and decision-makers. For these reasons, any continued federal legislative effort to significantly alter this well-established process by creating new authorities to waive emissions limits and other requirements is unnecessary.

Thank you, Mr. Chairman, for the opportunity to testify this morning.

Mr. BARTON. Thank you, Mr. Kenny. At the suggestion, which I totally support, of the ranking minority member, Mr. Boucher, we are going to limit to one round of questions so that we can expedite the hearing in the second panel. But we are going to do 7 minutes, and it will be a long 7 minutes. It will be a very permissive 7 minutes, so that we can try to—try to get this hearing in today since it is a get away day.

I have a general observation that I am going to start my—did Mr. Waxman have a comment on that?

Mr. WAXMAN. You are the chairman, and I know you and Mr. Boucher discussed this, but this is an important panel, and I hope you will be liberal enough, even though you are going to give one round——

Mr. BARTON. I hate for you to use that word with me, Mr. Waxman.

In this case, I understand the connotation, so——

Mr. WAXMAN. Because there are questions that many of us want to ask them, and we have had two rounds with other witnesses——

Mr. BARTON. I understand.

Mr. WAXMAN. [continuing] which amounted to 10 minutes. So if—with your understanding that the 7 minutes may be extended if some members are in the middle of a——

Mr. BARTON. And I was also going to——

Mr. WAXMAN. Generous might be a better word.

Mr. BARTON. It is going to be generous, and also, I am going to ask that these witnesses make themselves available by phone and perhaps even in consultation if they're going to stay in Washington. Or some of us may actually—I am planning on going to California next week, perhaps. So it is important, and this is the real deal.

I mean, so I understand that. But Congressman Boucher and I don't want to be the only ones here at 7 o'clock tonight while everybody else has asked their questions and then jetted away to wherever you are going for the weekend.

Mr. WAXMAN. As a former chairman of a subcommittee, it is the price for your power.

Mr. BARTON. Right, yes. Well, it is a price that Mr. Boucher and I are unwilling to pay today. So we are going to try to expedite this. And we will start the clock now.

My first observation is we were sincerely interested in doing anything at the Federal level legislative that actually helps. I think there's agreement on both sides of the aisle that this is not a time for political gainsmanship. So we appreciate the forthrightness of your written testimony and your oral testimony.

My first question, and it is a general question, I am a little bit bemused though, because a number of you have indicated this is unnecessary and that is unnecessary. And I understand that. But we have really strived to make sure that we are not federally preemptive in mandating these things.

We are trying to give the State, or States, as much discretion as possible. So I don't see that it is necessarily bad to put some of this stuff into legislative language as long as we make it permissive and not—not that it has to be done.

So for example, Mr.—is it Stier or Stier? Stier, okay. Mr. Stier, the referendum for the Western State RTO would require 10 of the 14 Governors to approve it. So five Governors voting no means it doesn't happen. So what's—what's the problem with that?

I know you are trying to do it now, but all we are trying to do is create discussion and get the States to work together. If they don't want to do it, they don't have to do it. What's the problem with that?

Mr. STIER. Well, I understand where you are going Mr. Chairman. I guess from our perspective, we do have a very involved effort under way and we would be concerned if there were the possibility that, people working on the Northwest RTO might be pulled off to deal with, broader concerns to start developing a West-Wide RTO.

As a Federal agency, we are not, strictly speaking, under FERC jurisdiction. But, we are voluntarily in compliance with Department policy, complying with FERC Order 2000. That said, however, there is a considerable amount of angst in the Pacific Northwest about Bonneville's participation in a Northwest RTO.

The politics are very delicate here. A West-Wide RTO, frankly, is not a popular proposition in the Northwest at this point in time. And we feel we need to do everything we can just to develop and maintain the support that we need just to move forward with——

Mr. BARTON. But I mean, that is exactly my point.

Mr. STIER. Well, I——

Mr. BARTON. We didn't mandate it. If I were the typical Congressman, not from the Northwest, I would have just put it in the bill and said, "We are going to do it." And then if the votes were there to keep it from being done, the votes would be there. But we have done just the opposite. We have just said it is an idea that is worth exploring. And we want the elected representatives of the 14 States to look at it. That is all.

Mr. STIER. Well, I appreciate that deference to the Northwest region.

Mr. BARTON. Yes, let me—I want to go to Mr. Hacskaylo and Mr. Keese. Path 15—if we were to change the language in the pending bill where it says, "WAPA is authorized to expand WAPA's transmission system to remove the Path 15 constraint," and then add, comma, "by working with the State of California on the sitting," would that be acceptable to Mr. Keese and would that be acceptable to Mr. Hacskaylo?

Because we are not trying to tell WAPA that they can site it wherever they want. I am told that Path 15 is actually Path 15, and everybody knows where it is. So I just assumed that the sitting was a done deal. But if there's a concern that the WAPA people are

going to tell the State of California where to put Path 15, then we will certainly amend the bill.

Mr. Keese and Mr. Hacskaylo, do you all want to comment on that?

Mr. HACSKAYLO. Western Area Power Administration's history is that we don't tell the State what to do. In the past in California, we have worked closely with the California Energy Commission with regard to the construction of the California Oregon Transmission Project, for example.

With regard to the interconnections, both in place now and planned, for natural gas fired power plants interconnecting with our system in California, working together on the environmental impact statement, environmental impact review process, we have worked cooperatively with whomever is involved in a project, whether it is a State commission, whether it is local folks, neighboring utilities.

That is how we get the job done. And we would continue to do so whatever the resolution is of Path 15, with whatever players are involved. You can't do this by yourself, Mr. Chairman.

Mr. BARTON. Right. So, Mr. Keese, or Chairman Keese, if we were to be a little more explicit about the sitting authority, would that satisfy your concern on section 104?

Mr. KEESE. Mr. Chairman, I think in formal discussion we might get there. Let me mention that Mr. Pope, Jim Pope, who testified at your previous hearing in his capacity in Silicon Valley and wearing his hat as TANC Chairman, the Transmission Agency of Northern California, indicated that TANC and the Western were working together on a proposal.

Since our last hearing, the Public Utilities Commission in California has ordered PG&E to expedite the cure of Path 15—has ordered them to do it. So we have—we had an initiative that was underway between the Transmission Agency of Northern California and Western. Now we have PG&E ordered to do it.

I think there needs to be a little coordination in those efforts. One of the—it is extremely important that it be done. It is important that it be done expeditiously. The Federal money is probably welcome——

Mr. BARTON. Probably welcome?

Mr. KEESE. [continuing] considering——

Mr. BARTON. We will take it back, you know.

Mr. KEESE. No, considering the condition of PG&E, but I think coordination of these efforts would be great and it would be a worthwhile discussion.

Mr. BARTON. Of course, it will be paid back through transmission fees.

Mr. KEESE. Understand that.

Mr. BARTON. It is a loan. Well, can we count on——

Mr. KEESE. Well, PG&E's not about to loan it, I don't think.

Mr. BARTON. Can we count on the State agency's work with WAPA to—whatever we need to do to fine tune this section?

Mr. KEESE. We will have the people——

Mr. BARTON. Now, Mr. Keese, I want you to give me the latest and greatest, and hopefully, the most honest assessment of how

much additional baseload generation is really going to be on line in California this summer.

And maybe Mr. Sklar can help on this. I know you testified that you all have got grand plans to put 5,000 megawatts on line by July, but my staff says that ain't going to happen. So tell us honestly what is going to happen by July in terms of additional generational capacity in California, either on of you.

Mr. SKLAR. Mr. Chairman, you are absolutely right. We are not going to have 5,000 megawatts of new generating capacity on by July. If all goes well—and my guys have been at this thing for 3 days now, we will probably have in the mid 4,500 by September—late September, early October.

Mr. BARTON. What about this summer, though? That is——

Mr. SKLAR. It is going to be a problem in that—my guess is we will be in the 2,600 number by mid-July.

Mr. BARTON. 2,600 number by mid-July.

Mr. SKLAR. Our problems occur in May and June, our most acute problems. That is why I said the short term solution is to get some of these so—these forced outages, the so called surprise shutdowns eliminated and brought back to normal levels, because otherwise, we are not going to be able to have that additional capacity.

There are 155 projects, generation projects in the loop that our people are now putting onto critical path schedules. But my guess is we will be dealing with the 800, 900 level by mid-June, the 2,600 of a couple nice things happen by mid-July, and then 4,500 by mid-September or late September. That is best case.

Mr. BARTON. Okay. My time has expired. My last question, and this may be Mr. Keese or it may be the Ambassador, which—who is doing the negotiations with the qualifying facilities on behalf of the State of California. And I would like to know, again, how much generation capacity would be available if everybody that was owed money as a QF had been paid? What is that Delta? And what are the discussions? How close are we to getting everybody paid so that they can generate power this summer?

Mr. SKLAR. I think there are two parts. I think we are close to getting everybody back on line to generate. And I hope in about 8 or 10 days to be able to say to you all of them are back on line. That doesn't mean they'll all be paid for past money.

We are working on a plan that'll ensure that they will not be negatively impacted by contracts that cause them to sell power for less than they can make it for because the of the Delta natural gas prices.

The solution is dealing with that Delta, and I hope a week from today or a week from tomorrow, to tell you that that problem is over and all the QF capacity that is possible comes back on.

Mr. BARTON. And how much would that be?

Mr. SKLAR. It is geared around 4,000, but it goes as high as 8,000 from time to time. A lot depends on the co-generation and what industry's doing.

Mr. BARTON. Well, if—if you solve the QF problem, and we have got a section in here that I, you know, there's been a lot of concern expressed that it is an abrogation of contract section, which it is not intended to be. And we are going to work to fine tune that.

But if you have got all the QF power back on line, is that enough to prevent blackouts in California this summer?

Mr. SKLAR. It is a piece of the problem. The forced outages, the QF back on line, the generation capacity we are talking about with the conservation that seems to be coming, the answer is marginally yes.

Mr. BARTON. Marginally yes?

Mr. SKLAR. Marginally, yes. I will be clear that I told my partners in my daytime business, my real life, that a mediation won't affect us. I said, "Yes, take a look. You are looking 12 stories down to the street of San Francisco. I would suggest you get motel rooms with windows that open that are on the street level if you want to do mediation this summer surely."

So I am not willing to bet, but we have got to get the QF back on line. We have got to reduce the forced outages to a reasonable number. We have got to get the new generation. We have got to do the conservation. With all of those, we have got a shot at it, but I would not bet on it.

Mr. BARTON. Well, I consider the QF section one of the most important sections in the bill in the ability to actually reduce the amount of blackouts this summer.

Mr. KEESE. Mr. Barton, we believe that only 1,500 megawatts of the QF are off to date. They have been being paid since April 1. Almost all of them are back. There are a number, as the Ambassador mentioned, who are paying for gas that they—at $15 that is $5. And that makes it uneconomic for them to produce.

Mr. BARTON. We understand that.

Mr. KEESE. We hope that that will be taken care of within the next week. Then the only ones that will be out will be those that are out for maintenance.

Mr. BARTON. We are very supportive of whatever we can do to support those negotiations.

Mr. SKLAR. Let me—it was Mr. Stier that said there's a problem with this. This section allows the QF folks to break their contracts and go off and go into the spot market and that is what terrifies us.

He pointed out that what you would do is you would have someone who buys, that has a contract forcing them to buy electricity at $200/$250 a megawatt, sell it to them at $60, and then they resell it at $250, a double hit for the aluminum producer and a double whammy for the public agency.

I think we should just deal with the QF equity problem and make them whole. I don't think we should release them from their contracts.

Mr. BARTON. Well, we are not—we don't release them from their contract. I mean, we allow them to suspend it if they haven't been paid. But once they have been paid, their contract resumes. And if you—but it is irrelevant because you folks have said you are going to solve the problem in the next week, so we look forward to you solving the problem, and then it is peace and light and we don't have to deal with it.

Mr. SKLAR. We will let you know.

Mr. BARTON. Okay. Mr. Boucher?

Mr. BOUCHER. Well, thank you, Mr. Chairman. And I want to extend a welcome to our witnesses this morning, and thank you for sharing with us your views on this very pressing situation. The Federal Government has a responsibility to make sure that wholesale prices for electricity are just and reasonable.

And the Federal Energy Regulatory Commission is charged with the responsibility to carry that mission forward. It has had a number of opportunities during the course of the last 6 months to address this matter in a positive fashion, that in my opinion, it has failed to do that.

And so as I indicated on Tuesday of this week, I have reluctantly concluded that the Congress does need to act in order to provide some near term protection to California with regard to wholesale prices for electricity. And I entirely share the chairman's view that if we can find a way to act that does provide that near term help that we should do so.

I would like to ask our California witnesses this morning, Mr. Sklar and Mr. Keese, Mr. Kenny, if you could take a moment to evaluate the order that was issued last week by the Federal Energy Regulatory Commission, and tell this subcommittee whether that order meets the test of providing the near term relief that California urgently needs to assure that wholesale prices are just and reasonable.

Mr. Sklar, would you like to begin?

Mr. SKLAR. Let me simply read the dissenting vote by Commissioner Massey. "This agency is statutorily required to ensure just and reasonable prices at all times, and the standard and Federal law is not limited to alert hours." That is why he voted against it. That is all that has to be done. He is absolutely right.

This does not solve the problem. The utility's next gaming rule would be to keep us just below the Stage 1 alert so that are an unlimited prices rather than cross over where they move into slightly limited prices. The ruling is totally ineffective. It is useless.

The Wall Street Journal, another bastion of liberal opinion, said that this will do nothing to help California. And it is not California. It helps all of us this summer. The ruling was ineffective. It was a compromise that set out to get a horse to run this Saturday in Louisville and they ended up with a camel.

Mr. BOUCHER. What you have addressed is one of the provisions that Commissioner Massey noted in his testimony the other day, and that is that the only time that the price mitigation feature applies is when the reserve margins are 7.5 percent of what's required or less.

There are other features that he also mentioned, but let me get you to comment on these, and tell us if you would to what extent they are a significant problem. Another thing that he mentioned is the fact that the only time price mitigation applies is when the transaction in question is for a duration of 24 hours or less. And that there may be transactions that have a longer duration.

In fact, he predicted there would be significant numbers of transactions of a longer duration to which it would be appropriate to apply price mitigation to ensure that overall prices are just and reasonable. To what extent do you think that provision is problematic?

Mr. SKLAR. Mr. Boucher, the—there are a number of ways that the proposal, which was put forward, can be gained. You have just mentioned one. The other is that it is pegged on the highest price, the highest, the most expensive unit. And therefore, it is going to be extremely important that somebody keep a most expensive unit on, and it brings everybody's price up.

We, even at peak in past years, no matter what we paid during the day—if we paid $400 or $500 or $600 of the day, we still paid $50 at night. And now we are not seeing that. We are seeing $200 and $300 at night.

So it is not just at peak that the problem is occurring. It is appearing across the board. And we just don't think that the proposal closes all the loopholes that would allow those prices to continue to be charged.

Mr. BOUCHER. When Commissioner Massey testified, he indicated disagreement with the order on some of the specific grounds that you have indicated, the fact that it would only apply at times when reserved margins are 7.5 percent or less.

He indicated that he objected to the order because it only applies to transactions that are for 24 hours or less. He also strongly objected to the conditioning of any relief at all to the willingness of California and its ISO and its investor owned utilities to file a plan with the FERC to join a Western interconnect RTO.

And those were the main things he mentioned. What he did not talk about in his testimony before this committee or even to any significant extent in his dissenting opinion, was the actual standard that the FERC applied, which is the cost of the least efficient generator that is dispatched at that point in time.

You have referenced that, Mr. Keese, and let me ask you directly. Suppose that this subcommittee were to consider an approach that eliminated the objective features that I have just mentioned, which are the ones that Commissioner Massey mentioned. But leave in place the basic standard that the FERC employed, which is the cost of the least efficient generator at that point in time.

What would you think about an approach that employed that methodology, Ambassador Sklar?

Mr. SKLAR. Ninety-five percent of the way there, but the game can still be played. We cannot have people who are efficient, costing their product at prices related to the least efficient. I guarantee you some mothballed facility will come on the line and they'd make sure that that was the last element to get us with water for everybody and the lifeboat and that is what we would all pay.

Mr. BOUCHER. Well, would there be any way to guard against that? I mean, is there some way to draft the approach that that could eliminate that possibility?

Mr. SKLAR. One of the things I have learned is to stand aside when I am not expert enough. I would defer to Massey and his crew and our regulatory people. Yes, there is. Massey said the solution is to require generators to bid their cost in all hours. That is, I think, the answer how that language would be. I am not smart enough to tell you.

Mr. BOUCHER. All right. Mr. Keese?

Mr. KEESE. We have hesitated to draw out the details. We believe something has got to be done, but we have tried not to con-

strain what it must be done. The approach that you have just heard is one of them.

I believe somebody talked about cost plus $25 profit. That has been floated. There are a number of ways——

Mr. BOUCHER. We have some practical problems with an approach like that, let me candidly say. We are hoping that we can find a way that we can address this problem in a manner that is achievable. And perhaps using the road map that Commissioner Massey laid before us offers a possible path.

Mr. KEESE. I think more negotiations need to take place.

Mr. BOUCHER. All right. Mr. Sklar?

Mr. SKLAR. A number of the generators have signed long term contracts with the State averaging about $70 odd which is still 2.5 times what we used to pay 1½ years ago. And coming down to $60 odd 5 and 10 years out.

Perhaps the answer would be a regulation that caps the sale price at those numbers which is double what everyone was selling for 2 years ago, and doubled what the generators thought they were going to get in revenue when they bought the plants from PG&E and SouthernCal Edison under California's terrible law.

They bought the plants on the basis that they were going to get $31. They were going to get $69 long term and now they're charging $500 and $600 and $700. And remember that those plants were plants that the people partially paid for over the years under the regulated thing.

The amortization of those plants was part of our rate base for all the years before they were sold. So they sold our plants at a discount to guys who are now exploiting it. Something's wrong.

Mr. BOUCHER. Well, we agree that something's wrong. And our mission is to do our best to try to fix it. We thank you for your contributions this morning, and we will be having further discussions with you. Thank you, Mr. Chairman. My time has expired.

Mr. BARTON. The gentleman from Oregon, Mr. Walden, is recognized for 7 minutes.

Mr. WALDEN. Thank you very much, Mr. Chairman. I appreciate your work on this legislation. Mr. Stier, if I could go to you. I just want to make sure I understand Bonneville Power Administration's position, and I realize you are not specifically taking one on the legislation overall.

But as I heard it, you basically feel that section 102 is not necessary for BPA to conduct its business.

Mr. STIER. Mr. Walden, I think I probably took a somewhat stronger position than that. As we read it, section 102 could make it very difficult if not impossible for us to implement our strategy to minimize the rate increase that comes in October by allowing customers of Bonneville, in particular the direct service industries, to take power that they have under contract and resell it into the wholesale market.

So, it would not allow us to reduce our exposure to the wholesale market, which is the cornerstone of our rate mitigation strategy.

Mr. WALDEN. I want to go to Mr. Keese now at this point. I believe you testified before our subcommittee, I think you said 5 weeks ago.

Mr. KEESE. Right.

Mr. WALDEN. And wasn't it your testimony then in response to my question, that of my colleague, Ms. Bono, that California would have adequate supplies to meet demand this summer?

Mr. KEESE. Congressman, no I do not recall saying that. What I had indicated was that all the projections, and I believe I showed a number of 4,966 megawatts or something, was our shortfall that we were using our best efforts to achieve 5,000 megawatts of generation by the end of the summer and that we had a very active program to achieve 5,000 megawatts of conservation.

As you have heard from the Ambassador, the earliest we are going to get any generation on is July 1.

Mr. WALDEN. Right.

Mr. KEESE. We are vulnerable in May and June. If we are going to peak toward that 5,000, I would compare the 4,500 looks pretty good right now. It obviously was a stretch to reach 5,000. On the conservation program, the legislature was a little late in giving that to us. We would lost some time——

Mr. WALDEN. Right.

Mr. KEESE. [continuing] but we are moving forward.

Mr. WALDEN. Okay. I guess at some point I will go back and get the transcript, because I remember following up on response to Ms. Bono and then I pointed out that, you know, the Northwest was not going to have a surplus. Indeed, we were in a draught where we would normally sell power to you, we wouldn't. And I was left with the opinion that indicated it would still meet demands. So I will stand corrected. I will go back and look.

I guess, we hear a lot about the need for price caps, wholesale price caps. But as I was listening to some of the testimony just now, your comments back to my colleague from Virginia, it sounded like nobody was really sure what that should be, how you set that cap in a market other than it ought to be just and reasonable.

Mr. KEESE. And a law of fair profit.

Mr. WALDEN. But it is my understanding your commission hasn't figured that out, what that ought to be. You haven't come forward with a proposal for what a wholesale cap ought to look like.

Mr. KEESE. We have not—we have not in recent times.

Mr. WALDEN. All right.

Mr. KEESE. The answer, I would say, price caps have been denounced and the standard price cap is probably not something we are going to see. On the other hand, to have paid $7 billion for California's energy in 1999, and looking at paying $70 billion is—do you accept that?

Mr. WALDEN. I understand.

Mr. KEESE. Is that acceptable? I don't think it is acceptable. It is going to be paid either by the taxpayers or by the rate payers.

Mr. WALDEN. Right. And I will also say, Mr. Keese, that California probably wouldn't have taken most of the steps that it has now taken that you are suggesting have occurred to reduce consumption, bring these others on line, if prices has always been capped, would it?

Mr. KEESE. That is correct.

Mr. WALDEN. All right. So what we are trying to do is get between here and there, and get to a point where the price is reason-

able. And I concur, and Ambassador, we are sure getting pegged in the Northwest. I appreciate your comments.

What we are trying to do here with this legislation is figure out how to help California and how to help the West. And it seems like every time we put something forward, just about everyone on the panel says, "No, we don't need that. That doesn't affect us." And we always get back to just price caps.

And is that really your analysis other than maybe these PURPA provisions that virtually none of this is necessary to ease the problem in the West?

Mr. KEESE. In my testimony, I indicated that I believe the daylight savings time is a viable proposal. I believe that the Path 15 activities have coordinated with the States is viable. I believe in the long term transmission planning if coordinated——

Mr. WALDEN. Right.

Mr. KEESE. [continuing] with the West and the States is a very worthwhile effort. There are——

Mr. WALDEN. Mr. Ambassador, can we go to you?

Mr. SKLAR. I think that there are several things. I think there are—the attempt here I think is an honorable one and a noble one and one that we really appreciate. And I think in each of the areas you have addressed, we can work with you to fine tune it with our colleagues in the generating area and the transmission area to make it work.

The thing is moving so fast that a Polaroid picture you took 5 weeks ago has changed, for example, with these qualified facilities.

Mr. WALDEN. Right.

Mr. SKLAR. We can work with you with each and every provision to make incremental differences, but the two things that will make a difference this summer are to get those forced outages reduced to the traditional level, and to get a reasonable price on the electricity.

I can't say what that is except that a number of folks in the industry have said we will sign contracts whether we get $69 or $70, and I think that is the range that one would be talking about.

Mr. WALDEN. Do you—well, let me go to the other members here. WAPA representative, do you—is this going to make a difference for you?

Mr. HACSKAYLO. That is really not my area of expertise and I don't know.

Mr. WALDEN. All right.

Mr. HACSKAYLO. I do know that Western is working with the California Independent System Operator at the State agencies, the other utilities, to keep the lights on. And I think all of us are cooperating very well in that effort.

Mr. WALDEN. Mr. Ambassador, let us go back to you. You talk about how to stop the forced outages. What is your proposal to accomplish that? Are we to order producers not to have breakdowns, or I mean, and I realize there could well be some manipulation in the market, too.

Mr. SKLAR. Tough to do with legislation.

Mr. WALDEN. How do we get there?

Mr. SKLAR. It is tough to walk into some guy's powerhouse and tell the Master Mechanic that his bearing doesn't need greasing.

Mr. WALDEN. Right.

Mr. SKLAR. I think though——

Mr. WALDEN. Although some of us are getting greased on the other end right now, I will tell you.

Mr. SKLAR. Exactly. I believe, though—I believe, though, that if the generators understood that they can be pigs but not hogs, that they could find a way to reduce the forced outages to the historical level. There's no reason from a technical standpoint why after years of running at 4,000 all of a sudden the last 2 years coincident with the new legislation and the door being opened, it jumps to 8,000 and 12,000.

I think conversations between leadership from the administrations both at the Federal level and all the State levels and all the of the legislative bodies, that can be—it is a persuasive thing. You could run an investigation. The investigation might give you an answer long after the summer's over and we do no good.

Mr. WALDEN. And FERC is doing that as I understand it.

Mr. SKLAR. They're looking at it, but it is very—as an engineer, it is very tough.

Mr. WALDEN. Well, I guess that is what I am struggling with is how do we legislate that here if you can't tell me as an engineer and somebody on the ground, somebody who is been to the Balkans to straighten out their problem. How are we supposed to do that?

Mr. SKLAR. I think that there I could order army troops in to repair generators. It is not so simple here. And take the——

Mr. WALDEN. Democracy's different.

Mr. SKLAR. I think what we have to do is on the forced outages, we have to have a conversation, a walk in the woods between those of influence in this government. And again, I agree with the chairman, this is not a political issue. This is a people issue. And the suppliers.

And then I think FERC can act throughout the Western interconnected. It is not just our problem to deal with the short term transition from this very narrow balance between supply and demand to a situation where we get supply well above demand so we don't have this and we can get regulation out of the way. None of us want long term caps. We are talking about a very short period of time.

And also, we are not talking about any cap at all for anyone who brings new facilities on line. Everyone says if you do this, no one will build facilities. We want clearly no control on the new facilities that come on line.

Mr. WALDEN. Do you think that could open the door, though, to more manipulation in the market by put the new ones on and have mechanical problems in the old ones?

Mr. SKLAR. Well, Commissioner Massey suggested to me that the old facilities would be ordered—would be ordered to supply all that they can deliver, not to play games with it. He said that could be part of a FERC order.

Mr. WALDEN. Thank you. I have exceeded my time. Thank you, Mr. Chairman.

Mr. BARTON. Thank you. We now go to the distinguished gentleman from Michigan, Mr. Dingell, for 7 minutes.

Mr. DINGELL. Mr. Chairman, I want to thank you for recognition. I want to express my great respect and affection for you. My questions may not be friendly, but I hope you'll understand that this does not reflect any lack of respect or affection for you. Gentlemen, these questions are all——

Mr. BARTON. I hope you are not going to question me. I hope you question the panel.

Mr. DINGELL. No, no, no. I do intend to question the panel, Mr. Chairman.

Gentlemen, I have some questions which I hope will be—can be done in a yes or no fashion. Mr. Stier, in your written testimony, you said, "A plan that allows its customers to reduce their consumption but not their demand on Bonneville to sell the market rates will result in a few customers profiting immensely, and most others paying significantly increased rates." Yes or no?

Mr. STIER. Yes, sir.

Mr. DINGELL. All right. Now, would that preclude a situation where, let us say, a DSI, Direct Service Industry customer, could shut down his plant—let us say a big aluminum plant, unnamed—could shut itself down because the aluminum prices were low, insist that you deliver them their full quota, resell it. Are they in any way under section 102 precluded from doing that?

Mr. STIER. No.

Mr. DINGELL. Is there anyplace else in the bill that they are precluded from doing that?

Mr. STIER. Not that I am aware.

Mr. DINGELL. Now, the practical consequences of this is that the price of electricity would be significantly raised by this event. Is that not so?

Mr. STIER. I am not sure about that.

Mr. DINGELL. Raised above contract, would it not?

Mr. STIER. All I can say is that it clearly creates an opportunity that would not otherwise exist for some of our customers to take power under contract and make a significant amount of money reselling it.

Mr. DINGELL. Mr. Sklar, you are nodding yes. Do you want to comment on that?

Mr. SKLAR. Just simply the answer is yes. Your answer is correct.

Mr. DINGELL. Would you tell that to Mr. Stier? I think it will be helpful.

Now, can you tell me that—it should be noted that the DSIs buy power from you at cost to Bonneville. And they would then be able to sell it at market price. What would the markup of that be? Could you tell us, gentlemen, either Mr. Sklar or Mr. Stier?

Mr. STIER. Well, generally into the Western interconnected market, I assume. There would be——

Mr. DINGELL. Could it be double? Triple?

Mr. STIER. Oh, I see what you are saying. Well, it could be as much as—well, as a rough estimate, I mean, it could be 4 or 5 times the price they paid.

Mr. DINGELL. What do they pay you?

Mr. STIER. Well, it is hard to say. It'll depend on what rate we set. I mentioned some numbers earlier that we could conceivably

be buying power at $250 a megawatt hour, reselling it to our customers for—well—that decision has not been made.

But it could be, let us say for the sake of argument, if we had a 250 percent rate increase, it could be about $60 per megawatt hour.

Mr. BARTON. Would the gentleman from Michigan yield?

Mr. DINGELL. I would be glad to yield to you, Mr. Chairman.

Mr. BARTON. Could you—I mean, this is all about long term contracts that Bonneville entered into with large industrial users, primarily the aluminum manufacturers. Is it proprietary what the price is in those long term contracts?

Mr. STIER. The price we sell at, sir?

Mr. BARTON. Yes, sir.

Mr. STIER. No.

Mr. BARTON. Could you tell us what that price is if they were to take the power?

Mr. STIER. Well, as I mentioned in my testimony, we are in the process right now of setting rates for those new contracts. So, the rates have not been set. That is a big unknown at this point because how high the rates are will depend very much on how much electricity we have to purchase in the wholesale markets to serve the loads we have under contract.

Mr. BARTON. But I think, would it be fair to say that looking at it from a national perspective, historically those are some of the lowest rates in the country?

Mr. STIER. Historically, the Northwest has had the lowest rates in the country, I believe. Yes, sir.

Mr. BARTON. Okay.

Mr. DINGELL. Now would I be fair in coming to a hard conclusion that these provisions in 102 would not significantly adversely affect electric prices and supply in the West? Mr. Stier and then Mr. Sklar.

Mr. STIER. Well, I can speak to the Northwest, sir, and just say that as I said in my testimony, that this provision would probably frustrate our attempt to minimize the rate increase that we are going to be putting in place in October.

Mr. DINGELL. Mr. Sklar?

Mr. SKLAR. It seems to me that if you have someone that can buy electricity at $30 or $40 or $50 and sell it to us in California for $500, that is a fierce profit and an increase in overall cost across the country.

Mr. DINGELL. You are not telling us you don't support that position are you? Are you telling us that you don't support that provision?

Mr. SKLAR. No, I certainly would not.

Mr. DINGELL. Now, gentlemen. Under current laws, the Bonneville Administrator has authority to operate BPA's hydrosystem outside of environmental protection under certain circumstances for fish and recovery and other matters. Is that not so, Mr. Stier?

Mr. STIER. Well, under provisions in the biological opinions that govern hydro-operations, we have the ability to declare a power system emergency under certain circumstances and operate the system accordingly.

Mr. DINGELL. And you—within that, you have been operating this to maximize your production, have you not?

Mr. STIER. At times, over the course of this calendar year, yes sir. And at this present time, yes.

Mr. DINGELL. Do you need additional authorities to do that?

Mr. STIER. We don't believe that we do.

Mr. DINGELL. All right. Now, under 302 of the legislation, "Once maximum generation is authorized, the authorization serves to waive any Federal law, plan, rule, order or court order issued pursuant to a Federal law that could constitute a restriction or constraint," which I note is undefined, "on operation of any facility," again undefined, "within the administrative jurisdiction," again undefined, "of the Bonneville Power Administration or the Bureau of Reclamation wherever located."

Section 302 prohibits judicial review of these waivers. Is that not so?

Mr. STIER. That is what I read in the bill, yes sir.

Mr. DINGELL. Okay. Now, first of all, do you know how many facilities would be covered?

Mr. STIER. Well, we sell the output from 29 Federal projects.

Mr. DINGELL. Does anybody know what the word facility means or what it would cover or how many there are? Do you?

Mr. STIER. Well Mr. Dingell, I am a former auto mechanic. I don't have a training in law.

Mr. DINGELL. Okay. Well, I just want to know—I want to understand what I am voting on if this thing comes up. Now, let us go to the next point. The waivers apply to the operation of any facility. Well, we have addressed that.

Now, in addition to electric—hydroelectric projects, BPA markets power from one nuclear plant, would that nuclear plant be covered as a "facility?"

Mr. STIER. I couldn't say for certain, sir.

Mr. DINGELL. Could you say that it is not covered?

Mr. STIER. Certainly not.

Mr. DINGELL. Could you tell me that the law is relative to nuclear safety and safe operation of nuclear facilities would not be waived by that provision?

Mr. STIER. I am out of my depth.

Mr. DINGELL. I beg your pardon?

Mr. STIER. I am somewhat out of my depth on this line of questioning, Mr. Dingell.

Mr. DINGELL. Well——

Mr. STIER. I couldn't tell you for sure one way or the other.

Mr. DINGELL. But you'd be worried, would you not?

Mr. STIER. Excuse me?

Mr. DINGELL. But you'd be worried, would you not?

Mr. STIER. I am sorry, would you repeat the question?

Mr. DINGELL. You'd be worried that that nuclear facility and other nuclear facilities might become exempt from Federal nuclear safety requirements, is that not right? You can't sit there and tell me that that would not be the case.

Mr. STIER. Well, I am living 2,500 miles from the Northwest, sir, so I am not sure how much I would be worried.

Mr. DINGELL. Well, I would be 2,500 miles from there and I do have a modest concern. Those mushroom clouds have a way of moving around the world.

Now, could Section 302 override the Glen Canyon Protection Act governing the operations of Glen Canyon Dam? Yes or no? If you want to answer it, sir, please.

Mr. SKLAR. With regard to the Grand Canyon Protection Act in Glen Canyon, which is operated by the Bureau of Reclamation, it could be read to do that, yes sir.

Mr. DINGELL. It could be read to do that. And whatever finding was made would not be subject to judicial review?

Mr. SKLAR. Based on the language of the bill, yes sir.

Mr. DINGELL. All right. Can section 202 be viewed as overriding delivery obligations in the Bureau of Reclamation?

Mr. SKLAR. I do not know.

Mr. DINGELL. Can you tell me it would not?

Mr. SKLAR. I cannot do that.

Mr. DINGELL. Okay. Now, if it overrides the question of safety in a nuclear plant and you have a nuclear event, if it overrides the questions relative to delivery of water, which you are required to do, you then and the Federal Government would then achieve a Tucker Act obligation and be responsible in damages for that event, would we not?

Mr. SKLAR. I do not know.

Mr. DINGELL. Could you tell me that would not be the case?

Mr. SKLAR. No, sir. I cannot say that.

Mr. DINGELL. Okay. Now, with regard to Indian treaties, does this statute, either you or Mr. Stier, does this override Indian treaties with regard to fisheries?

Mr. SKLAR. I do not know.

Mr. DINGELL. Can you tell me it does not?

Mr. SKLAR. No, sir.

Mr. DINGELL. And if that occurred, the Tucker Act would impose upon the Federal Government a liability, again, for failure to carry out its responsibilities, is that not so?

Mr. SKLAR. I do not know.

Mr. DINGELL. But you can't tell me that is not true?

Mr. SKLAR. That is correct.

Mr. DINGELL. Now, could section 302 authorize overriding of the unanimous Fish Act and all provisions for protection of salmon and the same thing with regard to the Northwest Public Power Act. You, sir, or Mr. Stier? Can either of you tell me, gentlemen?

Mr. STIER. Not definitely, Mr. Dingell. But as it is written, as I think you are pointing out very broadly, it could very well do so.

Mr. DINGELL. Could do so. And if it did so, you could then either operate or be forced to operate in a way which could virtually terminate this year's salmon runs, is that not so?

Mr. STIER. Well, I think that would really depend on the duration of the power system emergency that is contemplated in this section. As I said earlier, we are currently operating the system pursuant to an emergency order under the biological opinion.

Mr. DINGELL. You could not exclude that statement, though, can you? You cannot tell me that would not happen, particularly in

view of the fact that the salmon are at the lowest level in history out there in the Pacific Northwest?

Mr. STIER. I could not tell you that that would not be the case.

Mr. DINGELL. All right. Mr. Chairman, I have a number of other questions. You have been very gracious to me. I will terminate. I will send a letter down there which I would ask unanimous consent be inserted in the record.

Gentlemen, this will be easy for you because they will all be yes or no answers. And I know it will facilitate the keeping of the records of the committee. So I ask unanimous consent that that be done. And I know, gentlemen, that you will cooperate fully. Thank you.

Mr. BARTON. Without objection, so ordered.

I want to assure the ranking member from Michigan that his line of questioning, if there's a concern that somehow we are going to give Bonneville extra territorial jurisdiction, we will certainly clarify that so that there's no—there's absolutely no ambiguity about the authority of Bonneville Power Administration outside of their territory. If that is a concern, we can certainly solve that.

Some of the other issues are more subject to debate, but we can handle that one. Now, I want to ask a question based on what Congressman Dingell just brought up on this section 102 issue. And I want the Ambassador to listen to this.

You know, it looks to me like, if you look at section 102, it is really who is going to sell the surplus power? Do you let the person who has got the contract to use it if they can't use it? Or, do you let Bonneville?

Now, let us assume that peak demand in California this summer is $200 a megawatt hour. Do you really think that Bonneville is going to sell below $200 if we do it their way versus if we let their customer? I mean, if the market price for peak demand is $200 a megawatt hour in California, do you really think that your friends at Bonneville are going to cut you a deal at $70 when the market is $200 as opposed to Kaiser Aluminum, just to pull a name out of the air?

Mr. SKLAR. No.

Mr. BARTON. Okay. That is what I thought.

Mr. STIER. Well, Mr. Chairman, could I just add something there? The basic problem we have is that we don't have the power to sell in the first place. We are 3,000 megawatts deficit in terms of our load serving obligations.

So, we are in a situation where if we cannot reach curtailment agreements with our direct service industrial customers, which we are working on right now, we will have to go into the market and purchase the power at market prices to sell to them at much lower prices. That is our problem. We don't have the power to sell.

Mr. BARTON. I understand that. But there is—there is the—what we are trying to do under this section is have somebody not use power that they could use. I mean, that is the intent. And we are—the only real difference of opinion is who we allow to market that.

And your position is let Bonneville have the ultimate decision, and the bill as it is currently drafted, let your contractual customer have the option. But I understand your dilemma.

The gentlelady from New Mexico is recognized for 7 minutes.

Ms. WILSON. Thank you, Mr. Chairman.

Mr. Stier, you expressed in your testimony some concern over Section 206 which requires mandatory participation in a Western RTO if 11 or 14 Governors request it. Could you describe for me where we are in the regional efforts to—and what efforts are moving forward on regional—on RTOs, and how this legislation would impact other efforts now under way?

Mr. STIER. Well, we have made a Stage 1 filing at the Federal Energy Regulatory Commission with our investor-owned utility filing partners. The FERC recently and largely approved with some conditions that filing. So, they have approved our governing structure and the scope of the RTO.

We are planning to go back to the FERC, I believe, late this summer with a Stage 2 filing that would include basically the rest of the package, the tariffs and so on, for the RTO.

Ms. WILSON. What area do the—I am asking really a more general question not specific to Bonneville.

Mr. STIER. Okay.

Ms. WILSON. What is the state of play in the West on the formation of RTOs? How many will there be? How does this impact that progress under way?

Mr. STIER. Well, we have a Southwestern RTO, Desert Star. I am not really well acquainted with the degree of progress they have made in putting this together. We will have the Northwest RTO, called RTO West and we will have California whose is currently the transmission system managed by the ISO. So that is basically the Western interconnection as I understand it.

Ms. WILSON. And in the Northwest RTO, how many States are involved in that?

Mr. STIER. We have utilities from Oregon, Washington, Montana, Idaho, Nevada, Utah, Wyoming and California.

Ms. WILSON. So under this legislation, 11 Western Governors, 11 of the 14 could force the other States into a regional transmission system whether they wanted to or not? Is that the—is that how you read this?

Mr. STIER. I think there were 14 Governors potentially involved, and I believe it required 10 of them to vote to basically approve a West-Wide RTO. And so, conceivably I suppose, at least from the Northwest perspective, the Northwest could oppose such a move but be basically overruled.

Ms. WILSON. Chairman Keese, do you have any comment or concern about that from your perspective on the Western RTO?

Mr. KEESE. I would echo a comment that was made about the political nature of this having participating in this now for 4 full years. In the West, we started with the Western system coordinating counsel, which is two Canadian provinces, Mexico and the 13 Western States.

And we had a number of regional transmission associations, which is how they plan the transmission. We had a—we had three different regional—it has taken us 4 years to—it has taken the industry 4 years to move those into one entity.

It—we saw the failure of the first Southwestern RTO. We saw the failure of the first Northwestern RTO. Now the Northwest has

gotten together, and I believe there may be eight States involved in putting that one together.

This is a very delicate issue being negotiated as the traditional utilities who ran these entities are handing over a share of their responsibility, or in some cases, all of it, to independent directors. It is a very delicate thing being negotiated with FERC.

And another organization that we haven't discussed yet, the NARC, the North American Reliability Counsel which is now being transformed into an independently run organization called Narrow. That this is so political that I don't know whether you can write it into a bill and impose it on jurisdictions, each of which are trying to preserve their own sovereignty.

And that is the States of the West, that is the Canadian provinces who make us dot the I's and cross the T's.

Ms. WILSON. So it is your view that even if we put this into law, that it would be impossible to implement it in a practical way?

Mr. KEESE. I have experts on my staff who have worked on this for 4 years. I couldn't conceive that we could sit down and write it for you.

Ms. WILSON. Ambassador Sklar, you have mentioned in your testimony that this is not just a California problem, that it is a regional, national and international problem. And you also mentioned something about how quickly things are changing, that the situation changes weekly with respect to the prospects for energy for this summer in particular.

Is it your assessment—I have asked this question before, but it may have changed in the last 6 weeks since I asked it. Is it your assessment on—that the potential for blackouts this summer extends beyond the State of California?

Mr. KEESE. Yes.

Ms. WILSON. Where do you think it will impact?

Mr. KEESE. New York is deeply concerned. They're concerned in Illinois, Wisconsin and Minnesota. And then depending on willingness to pay the price, clearly in the Northwest.

This is just from reading the national press. It does not require many scientific delving. But the New York is most desperately concerned. They are putting diesel generators on line.

Ms. WILSON. I am really more concerned about the impact of California to the rest of us who happen to be on the same grid. Chairman Keese, do you have anything to add to that?

Mr. KEESE. I would add, as I believe I testified 5 weeks ago, that on the Department of Energy, the DOE's list of States that were vulnerable to these problems 1 year ago, California was not on the top ten.

Ms. WILSON. Yes.

Mr. KEESE. It was cool in the rest of the country. It happened in California. Yes, it could likely happen other places. Now, if we have the problem in California, I am afraid it is likely to spread to the West. If that is your question, yes it could easily spread.

Ms. WILSON. How does that happen? I mean, how—when you say that if it happens in California that it is likely to spread to the rest of the West? I know that things are too dry up in the Northwest, but I am not an engineer. I am not even an auto mechanic. And

I would like to know, New Mexico supplies power to California. It would be really nice if you all would pay your bills, by the way.

Mr. KEESE. Historically, New Mexico, Arizona and other places have supplied power to California, and the Northwest has supplied power to California. New Mexico and Arizona and Nevada are growing faster than we are and starting to self-consume.

So we can't get it. But that is driving—that is driving the price up and that is making shortages occur, as people scramble to buy the short resources. And when that sorts out, I am not sure it is going to just short out with shortages in California.

Ms. WILSON. Mr. Stier, you talk about Bonneville Power being overcommitted and I assume by that you mean you have contracts to provide customers with more power than you produce. How did you get yourself into that situation? Are you playing the markets?

Mr. STIER. Well, for the Northwest as a whole, we have known for at least a couple of years that the region is facing some deficits in terms of generation. Bonneville looked increasingly valuable as a power provider. And so, virtually every megawatt of electric load in the region that had any legal or moral claim on Bonneville came back to us when we were in the process of signing contracts.

So, a year ago, when we were looking at the market and looking at the loads that we would likely have to serve, it seemed reasonable to believe we could go into the market, purchase the additional power at the cost that was reasonable and close enough to the cost of our underlying basis so that we would be able to serve that extra load without really having much of a rate increase.

But of course, last summer and then particularly with the run up in the markets this winter, obviously proved those assumptions very wrong.

Ms. WILSON. Why would you——

Mr. BARTON. The gentlelady's time has expired, but the Chair has been very generous with allowing additional questions. But perhaps one more and then——

Ms. WILSON. This is my final question. I apologize. Thank you, Mr. Chairman.

Why would you sign a contract to provide power if you were overcommitted? I mean, you know how much you generate. Why would you—why would you sign a contract for something you couldn't sell?

Mr. STIER. Well in part because Bonneville has load serving obligations under law. So for example, public agency customers in the Pacific Northwest are our preference customers, and we are legally obliged to serve their net requirements. So, there's a calculation that is done for what their net requirement actually is. I won't go into that, but basically, they bring their loads to us, and we are obliged to serve them. We also have legal obligations to provide benefits to residential customers of the investor owned utilities. So that created part of our problem, if you will.

And finally, although we have no ongoing legal obligation to serve our direct service industrial customers, the aluminum smelters, these are very important factors in some of the rural economies in our region. They are very, very important employers in many small communities.

And we felt at the time these decisions were made that we would be able to serve about half of their total regional load. So, we went ahead and signed those contracts.

Ms. WILSON. Thank you, Mr. Chairman.

Mr. BARTON. The gentlewoman's time is expired. The gentleman from California, Mr. Waxman, is recognized for his questions.

Mr. WAXMAN. Thank you very much, Mr. Chairman. This morning I received a letter from Governor Gray Davis, the Governor of the State of California. And this letter discusses the legislation that is before us, and I am going to read part of that letter into the record.

First, the Governor described what California is trying to do on its own to address this energy crisis. The Governor writes that California is urgently trying to increase the supply. He points out that 13 major new power plants have been licensed for construction. And he says that by the end of 2003, when ten of these plants are completed, California would have no more supply—will have more supply than demand.

But to help cope with the short term energy crisis between now and 2003, the Governor says that California has launched an extensive program of energy conservation. The State government has already cut consumption by 20 percent of the State as a whole has cut consumption by nearly 10 percent.

But these measures and others which are being put into place, they are the only things that California can do. And they're simply not enough. California needs relief from the electricity price gouging and skyrocketing wholesale energy prices. As the Governor points out, this is not a problem that California can't address.

It is the Federal Government, not California, that has exclusive jurisdiction over wholesale energy costs. Let me read from the Governor's letter, "With all our accidents in California, it is a travesty that on the one issue over which the Federal Government has exclusive jurisdiction, wholesale energy prices, it has utterly failed to discharge its responsibility. While the Federal Energy Regulatory Commission found California's rates to be unjust and unreasonable and its market to be dysfunctional, it has completely failed to order an appropriate remedy."

The Governor then says that because FERC is refusing to act, Congress must act. "Based on this, I would ask the committee to reverse these failures in the legislation. Before, you should mandate FERC to immediately order the refund of these overcharges. Moreover, you should require FERC to impose meaningful cost plus pricing on a 24 hour basis."

I am in complete agreement with the Governor on this point. What is happening in California is an outrage. Our State is being pillaged by out of State generators who are taking advantage of the energy crisis and raking in enormous profits. So clearly, Congress must act. The Governor concludes his letter by addressing the specifics of the legislation before us, and he talks about other provisions in the bill, some of which he says he thinks will hurt, not help, the State of California.

And he singles out the QF provision. He also talks about the section 102 and the parts that he thinks will inhibit the State's ability to acquire transmission lines in California. I am going to ask unan-

imous consent that the Governor's full letter be made part of the record.

Mr. BARTON. Without objection.

[The letter follows:]

STATE CAPITOL
SACRAMENTO, CALIFORNIA
May 3, 2001

The Honorable HENRY A. WAXMAN
U.S. House of Representatives
Washington D.C. 20515

DEAR REPRESENTATIVE WAXMAN: I am writing to express my appreciation for your efforts to educate your colleagues on the steps we are taking in California to solve our energy problems and to express my concern that the "Electricity Emergency Relief Act" does not meaningfully address California's energy problems on the federal level.

As you know, under deregulation, the surest way for California to solve its energy problem is to build more power plants. In the 12 years prior to my Administration, not a single major power plant was built in California. Since I have been in office, my administration has licensed 13 major power plants. Eight major power plants are currently under construction. Four new major plants will be on-line this summer with three more by next summer. In addition, under expedited review processes, we have licensed 6 peaker plants adding over 400 megawatts on-line this summer.

Ten plants are in the pipeline for 2003. We believe that by the end of 2003 we will have slightly more power on-line than our projected demands will require. By the end of 2004, we will be well on our way to the 15% margin of supply over demand that Federal Reserve Chair Alan Greenspan and others say is necessary for deregulation to work. California is doing all in its power to increase supply.

On conservation, California is already the second most electricity efficient state in the country. Nonetheless, we are implementing the most aggressive conservation effort ever undertaken by a single state, all targeted at reducing demand this summer by at least 10 percent. I signed into law an $800 million conservation incentive program including rebates, tax credits and other incentives. In addition, we are launching my 20/20 rebate program for the four hottest months of summer, under which every Californian will receive a 20% reward if they save 20% over their consumption last year. We also are implementing aggressive demand reduction programs and a high profile public media and outreach campaign.

I am happy to report that already—before these programs are in place—Californians have risen to the challenge and conserved 9% over last year for the months of March and April. The state government has reduced its own usage by 20% and we would encourage the federal government to match this effort.

With all our actions in California, it is a travesty that on the one issue over which the federal government has exclusive jurisdiction—wholesale energy prices—it has utterly failed to discharge its responsibility. In 1999, California investor-owned utilities and its municipal power authorities paid roughly $7 billion for electricity. In 2000, the cost rose to $32 billion according to California ISO figures. In 2001, the cost may well go higher still. While the Federal Energy Regulatory Commission found California's rates to be unjust and unreasonable and its market to be "dysfunctional," it has completely failed to order an appropriate remedy. The California ISO has submitted a complaint with evidence that California has been overcharged by over $6 billion from May 2000 to March 2001.

Based on this, I would ask the Committee to reverse these failures in the legislation before it. You should mandate the FERC to immediately order the refund of these overcharges. Moreover, you should require the FERC to impose meaningful cost-plus pricing on a 24 hour basis for all states whose demand exceeds supply for the next 24 months.

Many of the provisions in this bill, while well intentioned, actually impede California's efforts to increase supply and stabilize prices. For example, the provision which would permit qualifying facilities (QFs) to walk away from their contracts would force us to buy on the volatile spot market resulting in considerably higher prices. I am meeting with executives from the QFs today to resolve their debt problem administratively. Another provision would inhibit the state's ability to acquire transmission lines in California. The bill also would create a redundant program that would conflict with California's innovative demand-reduction programs and create extensive new opportunities for gaming.

The legislation before you falls short in virtually every way to address issues that should be addressed on the federal level like wholesale price controls. The bill fails

to adequately address conservation and it complicates our efforts in California to solve this problem. I appreciate your efforts to address these glaring deficiencies and to work to craft legislation that would truly assist California and the West with the current electricity crisis. Please let me know what I can do to assist.

Sincerely,

GRAY DAVIS
Governor

Mr. WAXMAN. Ambassador Sklar, let me ask you the bottom line question. Is what we have here before us in California a mess because the Governor and the legislature, not the present Governor, but the Governor of the legislature—not even all the legislature that is still now—but at one point, adopted a deregulation plan.

It is a flawed law. It resulted in a dysfunctional system. And it is allowed gaming by these energy suppliers to take place. And that what we have is a situation as a result of that, and that is the major issue that Congress should address?

Mr. SKLAR. On the last issue, I would say yes. On the others, I say absolutely yes. There is no questions that the door, as I said, the door was open my defective legislation that was adopted in a bipartisan basis with legislature in one party's hand, with Governorship in the other. And the generators walked through this giant gap in the industry.

Mr. WAXMAN. So these prices that we are paying in California and others are going to start paying as well, cannot be justified under any sense except we have allowed this kind of gaming to take place as a result of the dysfunctional law—were it not for the law and the dysfunctional market in California.

Mr. SKLAR. I would conclude that, and I think the best evidence is the appearance in the Wall Street community of these companies who are reporting 200 and 300 percent increases in their profits. They're proud about it. They're going to their shareholders.

They're going to the investment community and saying, "Pump up our stock, do IPOs, because we are making these phenomenal profits that could only come from this opportunity." The prices in the rest of their markets haven't increased.

Mr. WAXMAN. That is the issue that some of us have said must be addressed. But that is the one issue this bill does not address. How important is it that we address this wholesale price issue? And one of my colleagues asked, how can we do it? Well, isn't one way to do it to say that we will have a reasonable way to do it is the cost of service plus profit?

Mr. SKLAR. I think that the reasonable and just and the cost of service plus profit is something that the technicians at FERC could work out in about an hour and a half if they were instructed to do so. And anything that you can do, Congress can do, to make them act in the way they're supposed to act under the law, would get us over this problem.

If we dealt with the price question, we would also deal with the availability question, because the only reason, in my view, that the forced outages are occurring is to give the price this chance to float to the sky. If you put a lid on the price temporarily until supply other than theirs could take over, we would solve both availability and affordability by putting a reasonable and just price limitation during this transition period.

Mr. WAXMAN. Well, that is an interesting point because over and over again we have heard people say that if you put a limit on the wholesale cost, that will discourage more production. You think it will encourage more supply.

Mr. SKLAR. Well, it will encourage more supply from the already existing facilities that are sitting idle today. There is a plant in Southern California that can come back on line in July and August, and the State's prepared to give them accelerated permitting, but the company doesn't want to bring it back on line unless they can have the right to sell prices without restriction. And we can't do that.

They're holding the plant out, and they're happy to hold it out, and so are their fellow co-generators because it keeps the supply down.

Mr. WAXMAN. I was struck by your presentation where you talk about the peak demand in California has not gone up. That what we are seeing are shortages because supplies are being withheld.

Mr. SKLAR. That is my belief, sir.

Mr. WAXMAN. Okay. Now——

Mr. DINGELL. Would the gentleman yield to me for just a quick question?

Mr. WAXMAN. Well, I only have a very limited time and that may be expired. So let me get to other points because we only have this one round. And then if the Chair would allow the——

Mr. BARTON. We will give the gentleman additional time if he wishes to yield.

Mr. WAXMAN. Let me yield to the gentleman——

Mr. DINGELL. And I do thank the gentleman kindly.

Mr. Sklar and Mr. Stier, just yes or no to this. Under the law as it now is and under the constitution, Federal Government cannot impose retroactive price constraints on electric utility sales, i.e. to make whole California customers of electric power. But the FERC could do so under a proceeding to establish just and reasonable prices going back under the same power they would use to address problems like pancaking and matters of that kind. Is that not so?

Mr. SKLAR. I believe you are correct, sir.

Mr. DINGELL. Mr. Stier, is that true?

Mr. STIER. I really don't know, Mr. Dingell.

Mr. DINGELL. Mr. Hacskaylo?

Mr. HACSKAYLO. I don't know, sir.

Mr. DINGELL. Okay. I am going to thank the gentleman.

Mr. WAXMAN. I am going to come back to some other points in this bill because the main thing we need done this bill doesn't address, and that is controls on these wholesale prices. But the bill does do other things that are troubling in ways a number of environmental laws.

We have a loophole in this bill that waives important Clean Air Act requirements as well as requirements under the Clean Water Act, Endangered Species Act, the National Park Service Organic Act and a list of other laws.

Ambassador Sklar, there's a section 107 to this bill and it illustrates these anti-environment provisions. Section 107 creates a super mandate directing the Department of Energy to establish

transmission facilities on any Federal lands where necessary or appropriate. This provision makes every acre of Federal land available for electricity transmission lines.

Should Congress grant this kind of dramatic new authority to the Department of Energy?

Mr. SKLAR. My colleagues are clearly more familiar with environmental law, but truly as a layperson, I see no need for that. It doesn't help us out of our box.

Mr. WAXMAN. Mr. Kenny, your testimony as I understand it, is that there are no clean air regulations or the law itself in the way for California to deal with this electricity problem. Is that accurate?

Mr. KENNY. That is correct.

Mr. WAXMAN. Yet the bill weakens some of these provisions. And I want to ask you specifically about section 303 and 305 in the legislation. These provisions relax requirements of the Clean Air Act. Do you believe that California needs waivers from the Clean Air Act to cope with the energy crisis, or does existing law provide sufficient flexibility to address the problems we are facing in California?

Mr. KENNY. In the case of both section 303 and section 305, existing law does provide sufficient flexibility.

Mr. WAXMAN. 303 allows EPA upon the request of any State, to waive requirements of section 111 of the Clean Air Act related to oxides and nitrogen, and the preconstruction requirements relating to oxides of nitrogen under the State of limitation plan. Has the State of California requested this relief?

Mr. KENNY. No, we have not.

Mr. WAXMAN. This provision would allow a blanket waiver within the State instead of looking at each facility on a case by case basis. Is this sound public policy?

Mr. KENNY. It should be done on a case by case basis.

Mr. WAXMAN. This provision also waives the requirement to obtain offsets. Is this something that California has done and is this sound public policy?

Mr. KENNY. California has not waived the offset requirement.

Mr. WAXMAN. And you don't think it is necessary?

Mr. KENNY. I don't think it would be sound public policy.

Mr. WAXMAN. I am sorry I am not going to be able to at this point, because I want to complete my questioning on this issue. Let us talk about section 305 for a moment. This section creates an expedited State Implementation Plan amendment process, the goal of which is to approve SIP amendments that allow waivers of admissions, limitations during energy emergencies.

Is this something the State is requesting?

Mr. KENNY. No, it is not.

Mr. WAXMAN. It appears to apply on a statewide basis, rather than identifying a constraint in a particular generation unit. This provision just lets old units escape NO_X emissions limits once a waiver is granted. Is this a good idea?

Mr. KENNY. No, it is not.

Mr. WAXMAN. And as I understand it, when the generating unit has come up against emissions limit in California, the State has allowed the unit to continue to generate in times of need. In some

cases, the State has worked with the generator to install controls so that an hourly limits on operation are no longer necessary.

In other cases, the State has assessed mitigation fees in getting reductions to make up for any additional emissions. Section 305 would also waive mitigation fees. Is that helpful to the State?

Mr. KENNY. No, it would not be.

Mr. WAXMAN. One last question——

Mr. BARTON. Would the gentleman yield before his last question?

Mr. WAXMAN. Certainly.

Mr. BARTON. Is there anything that the Congressman is asking about that this legislation would require the great State of California to do? If you don't think it is a good idea, you don't have to do it.

Mr. KENNY. The difficulty with it, Mr. Chairman, is that it also basically essentially intrudes upon the time elements that are currently being pursued in the State of California.

Mr. BARTON. How is that?

Mr. KENNY. In this context of section 305, we were looking at essentially SIP amendments. SIP amendments can take time, and there's absolutely a better course to essentially pursue the existing regulatory and statutory structure.

Mr. BARTON. But you do understand that this is permissive and if this is the worst thing that has ever been hoisted on the Golden State, that you just can say no?

Mr. KENNY. The difficulty, though again, is that it would introduce confusion into the situation. I mean——

Mr. BARTON. And there's no confusion in California right now? Okay. The gentleman from California had one more question.

Mr. WAXMAN. I do want to say that we are trying to get a bill that is going to help California, and it seems to me that some of these provisions try to fix a problem we don't know exist. In fact, we don't have any indication that they do exist. But the one problem we do know that does exist, we need the Federal Government to act this bill has a big gap because that section is missing.

But I want to ask about section 102. And that directs FERC to establish and manage a market that would allow retail consumers of electricity, including individual households, to sell energy that they don't consume. While this proposal might have some merit in theory, actually putting it into effect would be incredibly complex.

Furthermore, the program would encourage customers to speculate on the spot market and conflict with California's own demand reduction programs. Mr. Sklar or Mr. Keese, can you tell me if you think section 102 would help California, or is it going to cause a problem for us?

Mr. KEESE. Mr. Waxman, the issue of price mitigation through demand management is being faced by all of the States of the West. I happened to see a letter in the last 2 days, I believe, from Washington Idaho, indicating that in the respective States, I believe one had eight different demand management programs under way and another had ten.

In California, we have a series of demand management initiatives taking place at the Public Utilities Commission, at our ISO and through our utilities. So this is—the idea of a demand management initiative is excellent. How you would coordinate one Federal

program among the many States that have from 5 to 10 different independent programs in the same area causes us some concern.

Mr. WAXMAN. So the States are trying to get this in replace of the State programs, a Federal one run by FERC, and dislocates all the State efforts?

Mr. KEESE. It could.

Mr. WAXMAN. It could.

Now, Mr. Chairman, I want to yield to Mr. Dingell because he asked me to. And I know you have been very generous in your time, but I do think that——

Mr. DINGELL. I do thank—he is been most courteous. The waiver lasts forever given on these matters. Is that correct?

Mr. KENNY. Yes it could. Basically, the provision is essentially for a limited timeframe, but there is no limitation on the number of times that a waiver could be granted.

Mr. DINGELL. So if I were to be the—if I were to get a waiver, the waiver would be for a 2-year emergency which could last forever. So the Clean Air Amendments that the gentleman from California cares about or the Endangered Species or the Fish and Wildlife Coordination Act or the salmon or the Northwest Public Power statute, all of these matters, the waiver would be for good in all, as opposed to having 2 year limitations. Is that right?

Mr. KENNY. Correct.

Mr. DINGELL. Thank you. And I thank the gentleman for his patience.

Mr. WAXMAN. Thank you very much. Thank you, Mr. Chairman.

Mr. BARTON. Just to set the record straight, the Clean Air provisions are definitely limited waivers to 2 year periods. I mean, it is explicit. And if there's a concern about other sections of the pending bill on the time period for the waiver, those could certainly be corrected.

So we are not trying to give—in fact, we are trying to do just the opposite. We are trying to keep the lights on in California, and if it helps to give some of this permissiveness to do that, we are willing to do it. If there is a reason—I mean, we can certainly change the language to address the concerns of the committee on this issue. But we are not trying to get around the Clean Air Act on a permanent basis or back door it, or anything like that.

Mr. DINGELL. Would the gentleman yield?

Mr. BARTON. I would be happy to.

Mr. DINGELL. I am not charging the gentlemen with any misbehavior or any lack of propriety in his conduct. I am sure that this is probably addressed. But I want to identify it. And so let me just say this. A request is made under the waiver provisions for changing the SIP, State Implementation Plan.

This change is given. The change then is in effect because then the SIP is changed. There's no provision for making that be a temporary change in the State of limitation plan, is there?

Mr. KENNY. Correct.

Mr. DINGELL. So the result of that is that that is a permanent change in the State Implementation Plan of the State in question?

Mr. BARTON. That is incorrect. On page 20 of the pending bill, line 16 through 18 says, "No such temporary waiver may remain in effect for a period longer than 6 consecutive months."

Mr. KENNY. Mr. Chairman, the concern we had was that essentially, although it talks about a 2-year limitation on the waiver, it does not prevent that 2 year period from being extended for any indefinite period of time.

Mr. BARTON. Well, we can fix that.

Mr. WAXMAN. Mr. Chairman, could you yield to me on this point? It just seems to me that if the intentions are to help California with our problem, but we don't think this is a problem where we need this part of the legislation that is before us, you are fixing a problem that doesn't need to be fixed.

It is not a—what really strikes us is helping us where we don't need the help. What we want is to be helped where we really do need help.

Mr. BARTON. We understand that. And that is the whole reason we do legislative hearings. I mean, you know, you put something out there. We let bright people look at it, they give us input, and bright Congressmen like yourself and Mr. Dingell give even more input, that is all a good thing, not a bad thing. At the end of the day, we will either decide that we take this out, we fine tune it, or maybe we replace it with something that is even better. So——

Mr. WAXMAN. Mr. Chairman, I didn't say that with any——

Mr. BARTON. Oh, I know, I know.

Mr. WAXMAN. [continuing] the highest regard that I have for you. I am only commenting on the provision.

Mr. BARTON. And I want Chairman Tauzin—the full committee is not here, but he has been explicit to me as we draft this bill that he has absolutely no intention to permanently suspend or in any way to allow anybody that is selling power in California to get around the Clean Air Act.

He has been explicit. In fact, he is gone—he wants to make sure that any waivers given have to be made up. That when all is said and done, when the emergency's over, that the emissions go down. So his instructions to me have been just the opposite of at least some of the implications of some of the questions.

Mr. WAXMAN. Well, that is comforting for me to hear that, and let us continue to look at this language and raise issues together in light of the record.

Mr. BARTON. Okay. The Chair would recognize the gentlelady from California, Congresswoman Bono for 7 minutes.

Ms. BONO. Thank you, Mr. Chairman. It is a pleasure to have the panelists here today. And Ambassador Sklar, welcome. I look forward to your risotto 1 day as well.

I want to commend the Governor for beginning a dialog with the Congressional delegation that he did about 2 weeks ago and bringing us into the loop and thank him for his time and his leadership on the issue.

And I especially want to commend the chairman for his leadership and his responsiveness and willingness to work with all of us from California and the committee as a whole on this issue. And I have never seen somebody so willing at all times to hear our thoughts and input and guidance. So I thank you, Mr. Chairman.

My first question is actually about a State bill, and it is to Ambassador Sklar and Chairman Keese, if you could. It is a bill that was offered by Senator Baton, and it specifically addressed people

who live in regions where I come from where we are already over 100 degrees and anticipate to very shortly be up 115 or so.

And his bill specifically exempts regions that are over 105 from rolling blackouts. And I am wondering if you could comment on that bill if you are familiar with it, or just the thought of that.

Mr. KEESE. The issue of rolling blackouts is a tremendous problem for California. Currently, the rules exempt hospitals, government officials, police stations, fire stations. The result of that, because of the districts in which they set in the peripheral, people are immune from blackouts.

As I understand it, more than 50 percent of the areas in Edison, more than 50 percent of the areas in PG&E, and more than 60 percent of the areas in San Diego are already exempt. That is without taking into consideration whether there should be exemptions for oil refineries, nursing homes or other areas.

So we already have a situation where the blackouts, if they have to take place, will take place in under half of the areas in California. At the Energy Commission, we have suggested in the strongest terms to the Public Utilities Commission that oil refineries must be exempted.

Oil refineries, if they go down unexpected for an hour, will not come back up for days and——

Ms. BONO. Gentleman, I am sorry. Would you please note specifically regions over 105. Yes, for oil refineries in an area of 105, I am talking about——

Mr. KEESE. If you are asking about the specific bill, I am not familiar with the bill. I know the——

Ms. BONO. How about the concept then?

Mr. KEESE. The Energy Commission has not commented on that. A rolling blackout of 1½ hours should be able to be absorbed in a residential air conditioning situation. The rolling blackout is 1½ hours and then they move on to somebody else and let you turn back on your air conditioner.

Ms. BONO. Ambassador?

Mr. SKLAR. I think there's no question that discomfort will occur and difficulty will occur. And in certain of those areas, individuals will have difficulty getting up and down a multi-story building. That is, as Keese has said, 1½ hours is something that is tolerable. It is painful. It is difficult. It is uncomfortable.

Ms. BONO. Will you both come down when it is a 127 degrees and tell me that when you are there? I mean, that is—have you experienced 127 degrees without air conditioning for an hour?

Mr. SKLAR. No, but I have experienced -7° without heat for 3 days in Sarajevo. And I have met people who have walked 17 floors carrying water 4 times a day.

Ms. BONO. I am sorry, sir. I don't mean to sound at all disrespectful. I have the utmost respect for you. I am really trying to shed—bring some——

Mr. SKLAR. It is tough. It'll be very—there are people who are most concerned who would be at health risk when they're in that excessive heat for an extended period of time. Our job is to make sure it doesn't happen anywhere. And we can do that. We can do that.

I am not, as I told the chairman, I am not totally hopeful for the summer, but we can do it if we all get together around getting the stuff that is available sitting out there ready to go back on line and get these new ones out.

Ms. BONO. So it would be safe to say neither of you believe this bill is at all necessary then?

Mr. SKLAR. No, I don't. I think that things in this bill——

Ms. BONO. I am sorry. I am talking about Senator Baton's bill in California exempting areas from 105 degrees.

Mr. SKLAR. I cannot talk about her bill because I don't know it that well. I do understand there would be pain, but I think there's pain across the board and we are going to have to share it. We are all in this together.

Ms. BONO. Thank you. And Chairman Keese, last time you were here, you let me know that two power plants were coming on line in Northern California.

Mr. KEESE. On July 1 and a representative of Calpine is on the next panel, and I am sure would be prepared to answer——

Ms. BONO. Well, if you could answer for me though, where all four of the power plants are coming on line. You said four coming on, and I am just curious where they are.

Mr. KEESE. California Southern is in Yellow County. I forget the name of the other one. It is in Pittsburgh. Sunrise, I believe, is in Kern County, and we are hopeful of one—a repowering in Huntington Beach. And there's a series of peakers, one at San Francisco airport.

Ms. BONO. So specifically, Southern California is seeing some work done to—okay, thank you.

I think that is the end of my questioning, Mr. Chairman. Thank you. I yield back.

Mr. BARTON. Thank you, Mrs. Bono. We will go on to our next speaker, who would be Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. Just by way of commentary, 30 years ago, Ambassador Sklar and I and several others regularly cooked meals for ten or so couples. He was a remarkable cook then and has gotten better. I will match my risotto against yours any day.

Let me—while Representative Eshoo was here, she had hoped to ask you a question regarding a term that you used and I would ask you to enlarge upon that. The term that you used was scalping. Could you expand upon that for us please?

Mr. SKLAR. Yes. I said scalping. If I had been the diplomat that I am supposed to be I might have said demand based pricing. When you are—when you want a ticket to a 49'er opening game and someone is selling them outside the stadium, that is scalping and the government ought to stay out of the business. And you buy a ticket you don't buy a ticket. You watch it on television. You don't go, that is okay.

The next level up, I rode on an airplane last night and my ticket cost 10 times what it cost the person sitting next to me, and that is also okay, because there was a grandmother who bought 2 weeks in advance staying over Saturday, and that type of demand based pricing is Okay.

Then we can go to the other extreme on this and you can talk about your 8 year-old child who needs a kidney. And should you let John Paul Getty buy the kidney for his 65-year old drunken companion who will destroy another kidney just because they have more money? And the answer to that kind of scalping is clearly no.

What we have here in my view in this electric power market is something closer to the kidney situation than the football ticket being sold outside the game and I think that is where government has got to step in. Government has stepped in on the organ replacement thing and said you can't buy your way to the head of the line.

I think the same thing is going to happen here. That was the reason for the remark.

Mr. SAWYER. At one point in your testimony, you suggested that FERC, who had over the weekend, implement what you referred to as cost plus a reasonable profit pricing mechanism. It sounds to me like you are talking about returning to 85 years of rate of return universal service regulation with all of the policy and precedent and practice that went into that century's worth of experience. Is that effectively what you are talking about?

Mr. SKLAR. I think if we wanted to, we could go back to the elaborate calculation and get there. But I think we are talking about only a transition period and a reasonable and just number could be identified fairly quickly.

I suggested off hand before that since in our case, the State of California and the energy producers have agreed upon some prices in a long term contract, and ones we can live with, twice what they were before, but something we can live with through this period, that they could quickly adopt that as the standard.

Maybe wiser heads than mine, and they're a lot of them at FERC and the State PUC and within the industry, could find a better formula. But this does not require a full cost analysis. There was this cost analysis, and the PUC in California regulated these plants up until several years ago, and we were looking at $30 and $40 per megawatt prices. So we could find a number fairly quickly.

Mr. SAWYER. Chairman Keese, would you likely confer with that or would you have difficulty with that conclusion?

Mr. KEESE. Something like that is absolutely necessary.

Mr. SAWYER. Let me by way of summary, we have been through a great deal of discussion here. There are three questions I would like you to answer. Pick one, two or three, and summarize as we just go down the line.

What in this bill do we absolutely need? What in this bill should we absolutely remove? And what in this bill is not in this bill that we ought to have? Mr. Hacskaylo?

Mr. HACSKAYLO. Thank you, sir. The administration has not yet taken a position on the bill. So I am not able to answer your three questions.

Mr. SAWYER. Mr. Stier?

Mr. STIER. I think prudence would dictate I give you the same response.

Mr. SAWYER. Ambassador Sklar?

Mr. SKLAR. Congressman sir, you know I am never constrained by the boundaries around me. But I will only answer three, and

that is the thing we talked about. The key, the heart of this all, is to bring regulation to the wholesale prices for a transition period so we can get supply up demand on a permanent basis.

With regard to the other two questions, I will defer to my colleagues.

Mr. SAWYER. Chairman Keese?

Mr. KEESE. I would venture that the most important aspects are the conservation awareness and the assistance in transmission, both planing and construction, that if done cooperatively on a State basis, would be appropriate.

As I said, I am not sure that I would pick the RTOs as the worst—I just believe that it is such—it is so much political dynamite, it is just not worth answering into that area.

Mr. SAWYER. What is not in the bill that ought to be?

Mr. KEESE. We need to attack the unconscionable prices.

Mr. SAWYER. Thank you. Mr. Kenny?

Mr. KENNY. I would limit myself to section 303 and 305, and basically would argue that they were unnecessary. Existing law provides the mechanism by which we can address the issues.

Mr. SAWYER. Is there anything not in the bill that we ought to have in there?

Mr. KENNY. I would defer to my colleagues.

Mr. SAWYER. Thank you, Mr. Chairman.

Mr. BARTON. You are welcome. Thank you, Mr. Sawyer. Next up is Mr. Shadegg who is not here. Mr. Shimkus?

Mr. SHIMKUS. A lot of people confuse me with Mr. Shadegg so—I don't know if that is a complement or a complaint or something I am going to have to go seek cosmetic surgery for that. It is great to have you all here——

Mr. BARTON. Your time has just been restricted.

Mr. SHIMKUS. As long as I get half the time that my friend, Mr. Waxman, had I think I will have plenty of time to get all my questions asked.

Mr. Keese, on the QF provision of the proposed bill, you made a statement and I just want to briefly follow up on it and then I will go on to the other questions. That the 15 megawatts remaining doesn't really justify moving the QF portion of this bill. Is that correct?

Mr. KEESE. What I had indicated was we had an acute problem in the QFs because they weren't paid since November.

Mr. SHIMKUS. Okay, so with 15—I am not going to debate. You had mentioned 15 megawatts—all the other QFs should be on line. There's 15 megawatts. Wouldn't that justify moving this bill just to get those 15 megawatts——

Mr. KEESE. 1,500, Congressman.

Mr. SHIMKUS. 1,500? That is even better. So that is even better. If—so don't you think just hat alone, adding to the supply with the crisis that is coming would justify movement of this bill?

Mr. KEESE. It absolutely would.

Mr. SHIMKUS. One megawatt translates into how many homes?

Mr. KEESE. A thousand.

Mr. SHIMKUS. Were we not going to have them all back on within the next week, which I believe we will have? So you think this 1,500 deficit of QF facilities that will all be on line next week?

Mr. KEESE. The projection of the ISO is that 90 percent of them will on by June 1. I believe the——

Mr. SHIMKUS. The crisis by the Governor started. We are concerned about what date, May 1. Is that correct?

Mr. KEESE. Yes, I would like to see them on today.

Mr. SHIMKUS. I would respectfully submit that we ought to move this bill, if solely for the purpose of ensuring that if there is any QF generating facilities that is off line because of this, that that justifies movement, at least for that portion of it.

I want to move to another question. Mr. Stier——

Mr. KEESE. If the bill suggested that a QF that is not getting paid on forward going basis, could breech its contract and leave, that that would be acceptable because they are being paid. So if that is your concern, that on a forward going basis, they're not going to be paid——

Mr. SHIMKUS. So you agree really with the bill on that provision?

Mr. KEESE. That is what the bill provision said.

Mr. SHIMKUS. Great, thank you very much. Let us move. Mr. Stier, I have a question. And I am a big supporter of government operated utilities, co-ops, communities. But I have a question that is probably appropriate to Mr. Richardson, but since you are on this panel, I want to also raise it to you.

Recently, the Los Angeles Times published an article of the week after PG&E declared bankruptcy entitled, "Public Entities Helped Hike Energy Crisis Records Show." The article indicates and I quote, "A recent study singles out three government run agencies as consistently trying to inflate prices. They are Los Angeles Department of Water and Power, the federally owned Bonneville Power Administration of the Pacific Northwest and the trading arm of Canada's BC Hydro in British Colombia.

Like a number of privately owned generators, these three producers offer power at a range of high prices and sometimes in large amounts, when the State was most desperate. They also helped saddle California's three largest utilities with billions of dollars of debt, leading one Pacific Gas and Electric to seek bankruptcy protection." My question is, are the privately owned wholesale generators, which the FERC regulates, being held to a higher standard in regards to allegations of market manipulation than non-FERC regulated entities?

Mr. SKLAR. Congressman, first of all, we categorically deny the conclusions of the California ISO study that are cited in that newspaper article. It relies on a fundamentally flawed methodology. We disagree with their analysis. We have met—our staff has met with Terry Winter, the Director of the ISO and his staff to discuss this and to compare data.

My understanding is the outcome of that meeting was that Mr. Winter essentially agreed with us. And we anticipate a letter from the ISO correcting the record sometime fairly soon. I would also add, sir, that Bonneville has consistently bid into the California market well below the market claim prices.

And in fact, we have acted as a moderating effect on the California market, first. Second, we tend to be no more than, on average, between one and 2 percent of the entire markets, so we are hardly in a position to manipulate that market. Third, we buy as

much power in the market just about as we sell, certainly during the course of last summer that was the case.

We have absolutely no institutional interest in maintaining high market prices because it is killing us. And finally, I would say that we have letters from the California Governor. We have a letter from Mr. Winter, the Director of the ISO, and we have a letter from Senator Feinstein, all thanking Bonneville for the part that we have played consistently throughout the last year in helping to keep the lights on in California.

Mr. SHIMKUS. Two of—two out of three individuals you talked about have had interest in positions as far as the market that they supply and demand basic equations of energy. And I will leave that as it may.

Mr. Keese, 4 of the 5 generating facilities that are coming on line as you were responding to Mrs. Bono, what kind of a fuel are they going to use?

Mr. KEESE. All of them are natural gas fired.

Mr. SHIMKUS. Shocking. I don't know why. The ten of the 12 facilities that the Governor of the great State of California has mentioned that should be on line by 2003, what are the fuel—what is the fuel that they'll be using to generate power?

Mr. KEESE. Natural gas.

Mr. SHIMKUS. Shocking. I can't believe it. What is one of the major problems of the high prices of California currently? Is the price of natural gas a major component in the high energy crisis as California?

Mr. KEESE. The answer would be yes if it were the $5 being paid at Henry Hub in Louisiana. The answer is yes in spades because of the $15 being paid at the California border.

Mr. SHIMKUS. I appreciate your comments. In a national energy policy, a diversified fuel portfolio is critical. We cannot solely rely on natural gas to generate power in this country without extreme price hikes that we are going to continue to see.

And the Governor of the State of California is not helping ease the price problem by continuing to rely on one commodity to generate power. Basic economics demand choice in competition for fuel use.

I am going to ask one more question, if I may, Mr. Chairman, and move on. I want to ask—let me go to the Ambassador, because I really have enjoyed his testimony. And that is respectful; I really do. I think you are bringing a good outlook. What does capping wholesale rates do to the basic supply and demand equation of energy production?

Mr. SKLAR. The one thing it would do in terms of the availability, as I said before, is reduce that forced outages, the units that are being held offline, that if there was no incentive to hold them offline as a price rise trigger would come back on and deal with availability.

Long-term, as I said, I am absolutely committed to an open market, and any new facility that comes online, including those you are talking about, which are private investments, be exempted from any kind of even a temporary cap. It would trigger, in my view, the immediate availability of 3,000 to 5,000 or 6,000 megawatts that is sitting idle needlessly at the moment.

Mr. SHIMKUS. And I respect that answer. I may fundamentally disagree, based upon basic economic principles that says if you cap wholesale rates, that does not encourage conservation, and it doesn't encourage investment.

Mr. SKLAR. I agree with you that the higher the price, the more you will conserve. I have cut my consumption to my house to—I am going to be one of those people to get a 20 percent discount. I am going to be putting in wind, solar, and photovoltaic at my place in Napa, but——

Mr. SHIMKUS. Let me ask a question: Would you have done that if the Governor had not lifted the cap on retail rates?

Mr. SKLAR. No. I had an electric car in 1973. I am a bit of a nut, so I am not really the one to ask as to whether you would make these investments. In terms of—I agree with you completely that the higher prices will generate consumption, but, man, we are already there. The prices are going to rise, as our colleague here from the Northwest said, 100, 200 percent. People don't need more of an incentive. When your bill jumps from $70 to $440, you don't need to have it at $888 to give you the message.

Mr. SHIMKUS. But you will see conservation, and you will see capital flow for production.

Mr. SKLAR. As I suggested, I am not suggesting any restriction on the new investment.

Mr. SHIMKUS. I understand. I understand.

Mr. SKLAR. I want those guys to come on. And by the way, in regard to your previous question, I agree with you on balanced fuel flow. I am even, although an environmentalist, very sympathetic to intelligent nuclear power. But the reason these plants are coming on natural gas is not because the Governor of California decided. These are private investors who said, "This is what we want to do." And I think we should allow them to make those decisions. They made the decision on natural gas, because that is what they can get online, and that is what they can sell. These were all private investor decisions, not——

Mr. SHIMKUS. Does the NO_X limits prohibit coal?

Mr. SKLAR. Well, I think getting—my father, as I said earlier, designed power houses, coal-fired for all of a life when I was a kid. If we had to wait to get coal-fired facilities on, we would be talking 4, 5, and 6 years.

Mr. SHIMKUS. But we are talking till 2002 as——

Mr. SKLAR. Well, I think that there may well be coal-fired facilities being built to supply power to California but not stuff for July.

Mr. SHIMKUS. No, only in other States that are importing power. California, I doubt, will allow a coal-fired plant.

I yield back my time. Thank you, Mr. Chairman.

Mr. BARTON. Thank you, Mr. Shimkus. Next up is Mr. Wynn.

Mr. WYNN. Thank you, Mr. Chairman. Members of the panel, thank you very much for your appearance here today. I apologize for being late. As a Marylander, I am not as intimately involved or familiar with some of these issues, so I hope you will be bear with me if my questions are a bit redundant.

In Governor Davis' letter, he said that there was evidence of overcharging to the tune of, I believe it is, $6 billion, $6 million dollars—$6 billion between May of 2000, March of 2001. And he want-

ed FERC to mandate a refund. Are you at liberty to discuss the evidence that supports this charge?

Mr. KEESE. That figure, Congressman, was given to us by the Independent System Operator, the ISO. So I——

Mr. WYNN. Were you privy to the documentation to support that? I think that——

Mr. KEESE. No, we are not. The ISO has kept quite a bit of the information regarding their process independent. I do not believe that they have given us the full documentation of that.

Mr. WYNN. Do you have confidence in the allegation that is being made, the complaint that is being made, in that the Governor relies on it to say that the legislation should mandate the rebate? I think this is again a pretty serious matter.

Mr. KEESE. I believe the ISO has filed at FERC to get that refund and has asked FERC to refund it.

Mr. WYNN. All right.

Mr. KEESE. And I would imagine that they are sending some information to FERC to document it. I would imagine they are going to have to document it. I am just not familiar with it.

Mr. WYNN. Okay. Ambassador Sklar, are you in a position to comment on that?

Mr. SKLAR. I cannot sir, I am sorry.

Mr. WYNN. Okay. The Governor also says that FERC ought to impose a cost-plus pricing system on a 24-hour basis for States with excessive demand. Is it clear that FERC doesn't have the authority to do that now?

Mr. SKLAR. FERC has the authority to do it. They have chosen not to. They absolutely have the authority to do a 7-day a week, 24-hour just and reasonable. That is what the Congress mandated them to do. They are just failing to do what you told them to do.

Mr. WYNN. Okay. So they are already mandated to do it. They are already authorized to do it. Why does this bill change that? I mean does it in fact put us in the business of micromanaging FERC? I mean what are we saying if we are saying, "Do what you are already authorized to do"?

Mr. SKLAR. I don't know if it requires a bill, but I think maybe sitting here in front of you ought to be the people from FERC having you ask them, "Why aren't you doing what we told you to do, what the law demands that you do?" That, I think, would be the step I might take.

Mr. WYNN. I think at a prior hearing that actually was raised. And it seems to me, my recollection is, the response was, "Well, we found a dysfunctional system, but we didn't find gouging," which then poses the question if they actually looked at the question and didn't come to the conclusion that the Governor did, is the bill the answer to that problem?

Mr. SKLAR. This bill is not an answer to that problem. That is why we have said that the one glaring hole in it is the—since the FERC won't act, the Congress may have to act to do what the Government is obligated to do when you have a critical commodity in a demand-driven market and you have scalpers out there.

Mr. WYNN. So, basically, you are saying—your recommendation is that we impose price controls.

Mr. SKLAR. My recommendation is that we put all the pressure on FERC we can, because they will act faster than the Congress. But if the FERC doesn't act, I think Congress has an obligation to step in and do what the Federal Government's role is in this particular critical commodity area for the limited time it will take to get supply over demand and have a market. We do not have a market now. We do not have a market. We have 20 people in a life boat. We have a guy that has got all the water, and he has got enough for 18, and he is bidding who you throw over the side or who will pay him the most for the water. It is not the same as selling tickets to a ball game.

Mr. WYNN. I appreciated that analogy. I thought it was very good.

You made an argument, you have made it twice now, and I still haven't caught it, so I am going to ask you to indulge me. And that was whether wholesale price caps would address the problem and lead to more production. And if you would kind of walk me through again how that would work, because it is kind of contrary to the economic theory that we have come to kind of rely on.

Mr. SKLAR. If I can, it is contrary to conventional economic theory, but we have an unusual situation here. I agree that if we cap the prices, we will not get investment. But I am saying don't cap the prices on new investment. But in this case we have a particular kind of withholding.

Mr. WYNN. Can I just interject?

Mr. SKLAR. Yes.

Mr. WYNN. If you cap the return that they can get, aren't you in fact inhibiting the new investment? I mean why do I invest if I can't get the return?

Mr. SKLAR. What we are proposing has never been a cap on new investment. We are talking about capping the prices on plants that have been out there for 30 and 40 years, that were paid for, in large part, by the ratepayers during regulated time. And as this graph shows, "Surprise." In the last 2 years, this was the figure that goes back for years. Four thousand megawatts went out, because something broke in a system that was statistically valid over that period of time.

And all of a sudden a window opens up because of this dumb law we put in place, and they have breakdowns that go through the roof and rise to 8,000 and rise to 12,000 and rise to 14,000 megawatts out. I am suggesting that if we put the cap back on the incentive to have all of this stuff, "broken down by surprise at once," we will disappear and we will get over this hump.

Mr. WYNN. Okay. Thank you very much. I think that——

Mr. BARTON. May I have that request again, please? Include it in the record? No objection? Okay. All right.

Mr. SKLAR. Mr. Chairman, we will get you documentation and some details. This is hardly the prettiest picture on this, but we will get information on this forced outage for you, for the record.

Mr. WYNN. You seem to be saying, by putting kind of these breakdowns in quotation marks, that this is illegal conduct. Is it in fact illegal under current law or is it just merely unethical?

Mr. SKLAR. Well, I am an engineer and not a lawyer, and I say, I have four children—no lawyers, no investment bankers, no drug addicts—so I don't make legal judgments.

But as an engineer, I would say it is statistically anomaly. How is that for being diplomatic.

Mr. WYNN. You are an excellent witness, sir.

One final question: The Governor's letter also refers to this legislation increasing the gaming of the system. Can you comment on that, or any of the other panelists?

Mr. KEESE. We suggested that a number of the—while the specifics of the bill seem to allow limitations, that a number of them, as were referred to earlier, the fact that you could go over the price cap if you had something that was more than 24 hours. A contract that was more than 24 hours would not be subject to the limitation. The ability to bring on units that are extremely high priced, because there are old units that cost a lot of money to run. And if they run and set the price, then everyone gets it no matter how efficient they are.

So it troubles—it would not trouble us if old units were running at $100. When old units—and charging $100. When old units are running and charging $500 or $600, and that is what you are going to bring the market up to, that troubles us.

Mr. DINGELL. Would the gentleman yield on that point?

Mr. WYNN. Yes. I would be happy to yield.

Mr. DINGELL. I have heard it said that one of the orders issued by FERC permits those old facilities to be brought online and to then become the basis under which prices are fixed for the entire system. A, is that true?

Mr. KEESE. Yes.

Mr. DINGELL. B, what is the result of that in terms of price to everybody else? Because that not only affects the price of that incremental addition of electricity to the system, but it also tends to cause an upward adjustment in the cost of all other electricity feeding into the system. Is that correct?

Mr. KEESE. Yes.

Mr. DINGELL. Last question——

Mr. KEESE. And only during emergencies.

Mr. DINGELL. And only during emergencies.

Mr. KEESE. There is no limit if we are not into emergencies.

Mr. DINGELL. All right. Now let me ask then this question: What is the practical effect of that on the consuming public and in terms of the price, which the consuming public are paid?

Mr. SKLAR. The consuming public pays more, and the profits flowing into the hands of all the generators, not only the high-priced guy but everybody——

Mr. DINGELL. Everybody raises their prices up to this level.

Mr. SKLAR. It is a crazy system here, and I am not sure I understand it, Mr. Chairman. High price sets everybody's price. You bid in $200, but some guy bids $600; they pay you $600.

Mr. DINGELL. Everybody gets $600.

Mr. SKLAR. Everybody gets $600. Everybody gets the high price.

Mr. DINGELL. Under this very strange system. Now, this is one of the orders that FERC has come forward with, is it not? This is their soft price cap; am I correct on that?

Mr. KEESE. This is their cap at the current time.

Mr. DINGELL. It looks like FERC has been very generous with everybody else's money. And I thank the gentleman for yielding.

Mr. WYNN. Certainly. And, Mr. Chairman, I will yield back the balance of my time, if I have any.

Mr. DINGELL. Albert, thank you.

Mr. BARTON. Thank you. A couple of questions maybe the California representatives can help answer this question for me. Right now the wholesale price in California is, what, about three times over the retail rate that they are getting it for, as I understand it, and more, as the Ambassador notes. When is there—is there a date time certain in the future at which time wholesale prices will go below retail prices?

Mr. KEESE. Hopefully. Hopefully, but we don't know when that is going to be. The wholesale prices are 10 times—I'm sorry 5, 6, 7 times current retail prices. The hope is that with the higher retail prices, we will eventually get a reasonable market, and there will be a surplus of retail over wholesale to pay some of the back debt. States talking about issuing $12 billion worth of bonds. The only way to pay those bonds back is if the price for wholesale comes down, and the retail prices stays up for many, many years. My grandchildren are going to be paying for this mess.

Mr. BARTON. There is, at this time, no date certain when those prices are going to drop below retail, is there?

Mr. KEESE. The date certain that FERC acts.

Mr. BARTON. On the issue of price increases, maybe you can help clarify this for me, because I have got a concern as to whether or not the rate increases that were finally put into effect are going to achieve the necessary conservation in order to help us get through this summer without blackouts. And I was told that it might not, that the fact that retail rates are at 130 percent above baseline in residential areas and they are therefore not of the sort that is going to enable us to achieve the kind of conservation we are going to need this summer. And I am not a fan of rate increases, but this is an unpleasant scenario. This is something we have to deal with and live with.

Mr. KEESE. The elements of how we get out of this involve bringing a new generation on, which we have discussed, and conservation. There is an absolute limit as to how much you are going to stop using electricity. Now, if we gave the business community extremely high rates so they all shut down, we could get there. But we could get just a limited amount through conservation. It is extremely important that we get it. It is important that the message be sent.

The PUC raised the rates one cent over our—let us call our base about a dime—they raised it a penny, and they have not raised it another three. They are, I believe, in hearings this week deciding how they are going to allocate that among the different categories with rates to start showing up in the bills around June 1. It will have an impact.

I, frankly, believe that the natural gas prices, which have been passed through, are having an impact on people now. They are seeing this much higher bill, and a lot of them get one bill for their gas and electricity, and so I believe that we are starting to get the

consciousness of the people. As I mentioned earlier, we had an 8 percent reduction in demand by the consumer in February; we had a 9.2 percent reduction in March. We think April is going to come right in in that area. So we are already getting something approaching 10 percent conservation among the public at large. That is an extremely good number.

Mr. BARTON. I want to go back to when things started to first unravel in California about a year ago, because I know that the Governor, who has since mentioned that—I believe has mentioned that rates should have been increased a long time ago. And there are some that believe that rate increases should have been into effect in some manner before the Fed ever had—or before the State of California should ever have gone to FERC for caps.

And I would like to address Mr.—is it Hacskaylo?

Mr. HACSKAYLO. Hacskaylo.

Mr. BARTON. Hacskaylo—who represents, of course, the Western region. And representing that Western region, what was your response to—what would be your response to, or reaction to the Governor requesting caps for California's energy when he adamantly refused to raise retail rates at the same time that hydroelectricity was being drained from the Western region and retail rates were going up everywhere else?

Mr. HACSKAYLO. I am not at all qualified to comment on that point. I would note that for the project from which western markets power northern California, we just raised our rates close to 60 percent to cover these increased costs.

Mr. BARTON. Well, actually, I wouldn't mind you commenting, if you would. I mean don't you think it is representing that region, it is a little unrealistic for the Governor to be saying, "I will not raise retail rates, but by the way, cap my wholesale rates."

Mr. HACSKAYLO. I have no comment, sir.

Mr. BARTON. Back when this whole thing happened, because I was thinking when this whole thing exploded I might support caps for one reason only, and that was to drive the wholesale rates back down under the retail rates. And I am wondering why, if the scenario was that if rates were raised a little bit sooner, that we would have the ability to negotiate some long-term contracts where we could kind of see the light at the end of the tunnel and forecast where wholesale rates would be below retail rates.

How come that didn't happen? I mean what was the—and, frankly, I understand that caps weren't even necessary to do that if retail rates were raised immediately. And the Governor had—weren't able to negotiate those kinds of contracts. As it is right now, I understand he is negotiating contracts that are three times more than the retail rates.

Mr. KEESE. Two or three times more than historic retail rates. I would like to do a little switch here and suggest that the importance is that the consumer see the prices for what they are consuming. And that doesn't necessarily mean a rate increase. That means time of use pricing. And the Governor has endorsed time of use metering, and he put a significant amount of money in his conservation bill for time of use metering.

What we would like to do is have people move from using—although this is not—I will use the example, we would like to have

people do their washing and drying at 11 o'clock at night rather than at 3 o'clock in the afternoon. The proposal we have is only for commercial——

Mr. BARTON. That is fine. I guess what I am saying is that, you know, I am a real believer that caps are a moot point now, because the opportunity was squandered early on in this issue. And caps or no, if rates had been raised right after the Governor had perceived that there was a problem there, that he would have created the scenario where he could have negotiated long-term contracts that would have locked in wholesale prices below retail prices, and we wouldn't be even in this mess right now. Do you agree with that?

Mr. KEESE. In hindsight, it would have been very nice if we had done that. That was one of the mistakes of our restructuring in California, that we did not——

Mr. BARTON. No, that was a mistake in the management of this issue after the restructuring had occurred. Had the SoCal Edison and PG&E been forced to negotiate long-term contracts before that law went into effect, we wouldn't be here right now. But there was still that opportunity once this crisis hit a year ago to be able to keep this thing from even hemorrhaging today. So that was a missed opportunity.

Can you tell me whether or not market caps right now would have any effect, if they were imposed, on driving that wholesale rate below the retail rate?

Mr. SKLAR. Certainly. Certainly. If the market price was capped even at that $69, $70 long-term contract price, that is below retail price. Bill, the retail price is around 10 or 11 cents now.

Mr. KEESE. 14 cents.

Mr. SKLAR. Fourteen now. With the new three-cent price raise, it is going to 14 cents. So, yes, it would be below immediately, and we would have a situation where the retail price would be sufficient to pay for today's purchases and start to pay back some of the money that was incurred as excess cost in this past period and pay for the new investment in transmission lines that are needed.

Mr. BARTON. I am afraid I disagree, unfortunately. I don't agree with you that caps are going to have anything to do at this point in time to drive those rates down. Because the scenario that we are in now is demand management until more supply comes on. That is the only choice that we have right now.

Mr. SKLAR. Well, if FERC said to Duke Power, "Your price is $69," that is all they could charge, and that would establish the wholesale price.

Mr. BARTON. But it still won't drive it down below the retail rate.

Mr. SKLAR. $69——

Mr. BARTON. That is still more than——

Mr. SKLAR. That is 6.9 cents versus 14 cents. It is half the retail price. The retail price has been raised to 14 cents.

Mr. WAXMAN. Would the gentleman yield to me?

Mr. BARTON. Not at this time. My next question is——

Mr. WAXMAN. Before you leave that point, could we get one clarification?

Mr. BARTON. Yes, go ahead.

Mr. WAXMAN. Because what I am missing is are we just talking about the price or are we going to talk about supply being affected, which would help in terms of the difference between the wholesale price and the retail price. I think your question was whether——

Mr. BARTON. Taking back my time, my point is is that we have failed to even address the continuing hemorrhaging of the problem right now, and I am of the belief that caps are not going to affect that, that we have squandered the opportunity that should have come up a year ago. We wouldn't be in this position in the first place. And now we are forced into a demand management problem until supply increases. And that is the point that I wanted to make.

I do have one other question before we move on, and that is in my district there is a lot of businesses that can't afford 1½ hours power down. It is not that they can be out for 1½ hours and flip the switch and be on and producing. It is going to cause some devastating expenses to these people. And they are out there getting their generators, preparing for their own coverage so that they can keep their lights on during this time.

And I guess I would ask Mr. Kenny, if you would comment, what is going to be the response of the State of California when these people are operating their generators? Will there be cease and desist orders that come as a result of that and/or fines and penalties when people do this? Or are we positioned so that we can keep the lights on in this manner without penalty?

Mr. KENNY. We do think it is important to keep the lights on and keep providing power. And so what is basically occurring in the State right now is that if there is going to be a blackout, we are basically willing to allow diesel generators to run in order to supply power. And we have actually tried to make that as widely publicized as possible. We do not want those diesel generators, however, to run when we have other alternative powers available.

Mr. BARTON. Right. Right. It would sort of be like a stage three emergency or something like that.

Mr. KENNY. It is when we have a blackout. I mean it is appropriate at that point in time.

Mr. BARTON. Assessments as far as fines and penalties anticipated?

Mr. KENNY. If in fact someone is running a diesel generator during a blackout, there is no fine or penalty.

Mr. BARTON. Okay. One final question: What is being done right now by the State to maximize the output of the qualified facilities? Right now, as I understand it, there is a name plate capacity that is given to them, but there is also a contract capacity, and there is a probably a 5 percent difference. Can you——

Mr. SKLAR. We talked earlier about getting all the qualified facilities back online by dealing with the delta, the difference in fuel rates. The second thing we are going to talk about doing, and we have to do it with the utilities and the qualified facilities, is, as you suggest, if you have the capability of producing this much but your contract is only two-thirds of the way up here, how do we get the rest online? Well, the utilities, to date, have been refusing to take it except for free.

So we are going to be meeting in very short order with the utilities and the qualified facilities folks and saying, "If they can produce the extra, you must take it from them at the same price as your contract price."

Your point is a good one, and it is No. 2 on our QF list of things to do. We want to get, first, everyone online, and then we are going to go to see how we can stretch not only qualified facilities but all the plants up to their maximum capacity. That is something the bill could help with.

Mr. BARTON. And can you do that currently under PURPA right now?

Mr. SKLAR. Yes, we could do it now.

Mr. BARTON. Okay.

Mr. SKLAR. We can do it, but I think any muscle that you give us in the area would be useful. I think we can work with you on how that might be done.

Mr. BARTON. Okay.

Mr. SKLAR. Let me mention something else. Since I was——

Mr. BARTON. Ambassador, just 1 second, though. Is there any correlation with the fact that you were Ambassador in Sarajevo and now you are consulting on energy in California?

Mr. SKLAR. Let me tell you, I was in Tirana, Albania last December, and the lights went out, as they do every night in Tirana. And we were having a drink with this AP reporter, and I was laughing about it. And he said, "What are you laughing about? It is happening back in your home town." Well, I had been out there and not paying a lot of attention, so I didn't know a lot about it, and then I discovered that in fact it was so.

And because I was out there—I am not in the line of the Indian maiden with the 40 arms pointing for blame. But I think it is pointless to go back and say who should have done what and when. It is a mess, and we have got to deal with it now. And I think it is important—I have been back in this country now for only 20 days, and 15 of them involved in this thing. I didn't know that was going to happen when I got off the airplane.

The State is producing new generating capacity. We told you that, we gave you the numbers, the chairman asked about it. I have got a graph, Mr. Chairman, that will look at that 4,600 to show you what the numbers are and when they are going to come on, I will leave with you.

The State is doing conservation. The State is undertaking to deal with rate increases. There is going to be phenomenal rate increases. And as Bill said, I get a bill from PG&E. Our electric bills have not gone up because of this retail cap, but my natural gas bill jumped so dramatically that I shut the heat down.

The PUC is just implementing the rate increases. The first one, I think, went in in January or so, a little one. But the natural gas one has got all of our attention, and when the electric one hits in the next month or 2, we will pay attention. It is very difficult in the business to conserve if you want to keep your large ship line going or your machine shop going. So the consumers are going to take a big hit.

But the State, in my view, in my 12 days back in America after these years over in that place there, is doing the right stuff—gen-

eration, expediting permits, conservation, rate increases. But the one hole in the thing is the hole through which our generator friends are continuing to walk through at a time of trouble.

Mr. BARTON. And I will say, in response to that, it is—I don't like—you know, hindsight is always 20/20, but when the Administration is constantly coming under fire, or what I perceive as the blame of this issue trying to be transferred to the Administration, I think it is important to point the mismanagement of this issue, which has led to a lot of concern about whether this problem will be solved in the first place. So I say that in closing and yield back my time.

Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman. You know, back in law school, when I was starting, my father worked for the Hood and Mill Company. I did not understand many of the concepts, to be honest with you. And so many of the students were children of lawyers, and they seemed so easily—it seemed so easy for them to adapt. And then about 6 weeks into the first year of torts, we ran across a concept I could understand.

Here is the patient. He has stomach problems. It is 1969. They cut the patient open, and there inside is a towel. And the towel says, "United States Army." And the doctor says, "Did you ever have a problem," and he said, "Yes, I had my appendix out in 1944 when I was in the Army." And so our law professor said, "Well, we have a concept that covers something like that, and it is called res ipsa loquitur, the thing speaks for itself." You don't have to be an expert. Everyone understands that the Army had engaged in malpractice.

Now, when prices go up 3 percent or 5 percent or 9 percent or 10 percent, you can argue market forces are at play, and we can bring in brilliant economists to sit and debate what the macro or microeconomic vagaries might have been in that marketplace. However, when the price of electricity goes from $7 billion, a 4.8 percent increase in demand, $27 billion and perhaps upwards to $50 billion or $60 billion or $70 billion for the exact same product over a 2-year period, res ipsa loquitur.

There is malpractice. There is something fundamentally wrong. The ordinary consumer is now an expert. You don't need to be this incredible economic genius. So something is wrong, and as a result you can apply the tourniquet to stop the bleeding in order to protect the patient at that point in time.

Obviously, the FERC is not going to do that. The FERC is still waiting for price signals to work. It hasn't rained in a year. We are going to send price signals to God; hope he responds. Rain more up there in the Bonneville Power Authority. Rain. So you have basically human beings ignoring reality. You have got a screwed up State statute. It doesn't work. It will be a textbook case for the rest of our lives, taught in every business school in our country, around the world. Countries will study California for having the most screwed up electricity marketplace in history. What were they thinking.

Now, who should get punished there? Obviously, not the consumer. And definitely, in my opinion, not the environment. The environment didn't do anything wrong. They are not guilty. But you

can't allow a windfall to be garnered by these electrical generating companies, because God didn't have enough rain or the State of California produced the most upside down, backwards, never to be repeated law. That is not right.

So in sections 301 and 302 of the Barton bill, it gives power generation the first priority at Federal and non-Federal hydropower facilities nationwide, overriding other considerations such as water delivery, flood control, navigation, protection of fish and wildlife or recreation.

Now, Mr. Keese and Ambassador Sklar, isn't it true that section 301 would potentially amend all 1,016 hydropower licenses issued under the Federal Power Act nationwide to allow for 2-year waivers of any requirement during an undefined electric supply generating or system reliability emergency?

Mr. SKLAR. As a non-lawyer, that is how I read it.

Mr. MARKEY. Thank you. That is the kind of analysis we are looking for here.

Mr. Keese?

Mr. KEESE. I would concur.

Mr. MARKEY. You would concur. Thank you. Now, isn't it also true that under section 301 of the Barton bill, based on a request by a Governor, hyrdropower facilities would be able to operate in violation of the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act or any other requirement contained in the license for a 2-year period? Do you want to go first this time, Mr. Keese?

Mr. KEESE. Yes.

Mr. MARKEY. Yes. Now do you think that we need to be waiving all of our Nation's environmental and other laws all across the country to address California's current energy problems?

Mr. SKLAR. No.

Mr. MARKEY. Mr. Keese?

Mr. KEESE. No.

Mr. MARKEY. No.

Mr. SKLAR. We don't even have to waive them in California on this hydroelectric issue.

Mr. MARKEY. But should the bill allow the Governor of Massachusetts to waive the laws benefiting people in Massachusetts? Do we need an emergency law to give that power to the Governor of Massachusetts? Ambassador?

Mr. SKLAR. I don't think so.

Mr. MARKEY. Okay. Thank you.

Mr. BARTON. Would the gentleman yield?

Mr. MARKEY. I will be glad to yield.

Mr. BARTON. Obviously, you are not going to be—the one member we don't give additional time to——

Mr. MARKEY. People are averaging 15 minutes here.

Mr. BARTON. Yes, I understand.

Mr. MARKEY. I am in pretty good shape still.

Mr. BARTON. But you understand that the Governor has to declare an emergency, the facilities have to be in that State, and it can't be for longer than a 2-year period. It is not, as you have so eloquently put it, a waiver of all the environmental protections in the whole country. You have got to have a state of emergency de-

clared, and then the Governor can do it in the State in which those facilities are located, and then only for a 2-year period. So there are—it is not quite as draconian as my distinguished friend from Massachusetts was not implying but alluding to.

Mr. MARKEY. Well, we have a new Governor in Massachusetts, so if she decided to declare an emergency, that would be within her power. Then it would last for 2 years. And then at the end of those 2 years, she could again declare an emergency and extend for another 2 years. And there would be no check upon her except her own conscience under this statute. So not to say that I don't respect Governors, but we passed these laws in this committee, obviously, because we felt that there were national environmental issues that we had to deal with that the States were not dealing with. And we needed a national policy.

So if we are going to talk just about California, that is one thing. But your language, obviously, is much too broad, and the first thing that I would suggest is that we amend it just so we narrow it down to the State that has the problem. And then we will determine whether or not the environment had anything to do with that State to begin with, which I think thus far the overwhelming evidence has been that it does not.

Now, Mr. Hacskaylo, do you agree with that conclusion?

Mr. HACSKAYLO. As a lawyer, I am not sure that I do.

Mr. MARKEY. As a lawyer, okay. So we might come back to you again.

Mr. Stier, does the Bonneville Power Authority believe that the broad exemptions that would be afforded to it and to the Bureau of Reclamation from any, quote—here is what the law will say—"Federal law, plan, rule or order, including any court order issued before the date of enactment that applies to the operation of any Bonneville or Bureau of Reclamation facility, are necessary." Should we drop this provision?

Mr. STIER. Mr. Markey, I don't really have a position on whether or not provisions should be dropped. And, just to sort of put in a good word for Mr. Barton here, I think he is——

Mr. MARKEY. You state in your testimony the provision is not necessary.

Mr. STIER. Well, as I said in my testimony, we are basically doing what this provision would allow us to do in the absence of the provision.

Mr. BARTON. Did I hear him say he was trying to put in a good word for me?

Mr. STIER. Yes, I was about to do that, sir, yes. I mean I wanted to say——

Mr. BARTON. Well, speak.

Mr. STIER. It is forthcoming.

Mr. MARKEY. Mr. Stier, here is what your testimony says. Your testimony says, "Bonneville is concerned that section 302 could be read to supersede Bonneville's existing authority, which has adequately allowed Bonneville to maximize generation." Now, if it can be potentially read to supersede your authority, do you want us to delete the language or do you want us to leave it in?

Mr. STIER. Well, I think, minimally, to address that concern, the language could conceivably be amended simply to make it clear that it does not supersede authorities we currently have.

Mr. MARKEY. Okay. So you don't want your authority curtailed in any way. Is that what you are saying?

Mr. STIER. Well, Mr. Markey, we are in a situation in the Northwest right now where, unfortunately, because of the drought, we are currently forced to operate the hydro system to meet Northwest electric reliability needs. And that means that at least for a temporary period of time we are going to be suspending or limiting operations intended to aid endangered salmon in their downstream migration. It is not a situation we are pleased about, but at the same time we do face a genuine reliability problem, and that is where I was going to put in a good word for Mr. Barton. He shares our concern about maintaining system reliability.

Mr. MARKEY. Let me move on. I will go with your written testimony.

Does the experience in California suggest that FERC should adopt more stringent criteria for granting market-based rate authority? Ambassador?

Mr. SKLAR. FERC has all the authority and direction from this Congress that it needs. It needs to just be held to live up to the job you gave it to do.

Mr. MARKEY. So you think it is a failure to use the authority, which is the problem in this case.

Mr. SKLAR. Yes.

Mr. MARKEY. Okay. Now, in the absence—when you have demonstrable evidence that a Federal agency is not using authority which it has in order to solve a problem which is demonstrable, then the question comes back to the Congress: Should we be more prescriptive in what we direct agencies to do?

So here is my question to you: Should we consider amending the Barton bill to require market-based rates to be conditioned upon a requirement that jurisdictional sellers commit 80 percent of their biddable resources, including external purchases, to a portfolio of fixed, long-term, bilateral contracts of 1 year or more? Wouldn't that help take contracts out of this volatile spot market, which is now basically swamping this electricity marketplace?

Mr. SKLAR. A lot of words, very precise and very prescriptive, and so I would hate to react and say absolutely—the sense that I get of what you are saying seems to make sense to make the objective. As a citizen, not knowing how the Congress and the law and the agencies interrelate, it seems to me crazy that a basic prescription that tells them to do something needs to be detailed and micromanaged. I hope that that wouldn't be necessary, but if they don't move, maybe that is what is needed.

Mr. MARKEY. Res ipsa loquitur, Ambassador, okay? The FERC is not doing its job. You would hope, but it is hope against reality at this point.

Shouldn't be market-based rates be further conditioned upon an undertaking by jurisdictional companies that they will not withhold energy or capacity from the market except for valid operating or business reasons and upon the further condition that such sales be made subject to refund?

Mr. SKLAR. I heard that paraphrased here, that intent expressed by Commissioner Massey, whom I have great respect for and knows much more about this world, so I would agree with him and you on that, yes.

Mr. MARKEY. Okay. And can I ask one final question, Mr. Chairman?

Mr. BARTON. Final question.

Mr. MARKEY. Thank you. Now, if FERC were to so condition market-based rates and if we had a situation where 20 percent or more of the power was being sold in the spot market, FERC could mandate that only those sellers who bid at cost or who were authorized to charge market-based rates would be allowed to set the market clearing price. Do you think that might help?

Mr. SKLAR. It sounds like it would. It sounds like it would. It says, "If you don't play in the base game, you can't come and just ride and eat the cherries off the top of the cake." As my mother said, "Eat your spinach, and we will give you the chocolate cake."

Mr. MARKEY. Okay. And are circuit breakers needed so that when reserves drop below levels that are needed to maintain reserve requirements, spot market prices should be capped by FERC?

Mr. SKLAR. That is getting beyond me. Bill?

Mr. KEESE. The question, does that apply at all times or just when the reserve margin drops?

Mr. MARKEY. When the reserve market drops below levels needed to maintain——

Mr. KEESE. That would be another method——

Mr. MARKEY. [continuing] the reserve requirements.

Mr. KEESE. That would be another method of reducing the unconscionable rates.

Mr. MARKEY. Okay. Thank you. Thank you, Mr. Chairman.

Mr. BARTON. Thank the gentleman from Massachusetts. Those were good questions there at the end. I can't quite say the same on some of the earlier ones, but the end ones were very good.

The gentleman from New York is in attendance, and we are so honored to have his presence. He is one of the most distinguished members of the subcommittee. Would he care to ask questions or is he here merely to observe?

Mr. FOSSELLA. I have no questions. You have been doing a wonderful job, Mr. Chairman, as have so many other members of this panel.

Mr. BARTON. We are delighted to have you, and——

Mr. FOSSELLA. I reserve the right to ask the question at a later time, though. Thank you.

Mr. BARTON. I understand. The gentlelady from Missouri then would be recognized for 7 minutes for questions.

Ms. MCCARTHY. This is for Mr. Hacskaylo. Section 104 of the Barton bill authorizes your agency to expand its transmission system to reduce the constraint along the Path 15. And I would just like your thinking on this, because doesn't WAPA already have authority to expand its transmission system? And isn't what you really need an appropriation of money from the Congress, not an authorization?

Mr. HACSKAYLO. If the decision is made that the Path 15 is the solution for this problem, we believe that we have the authoriza-

tion to do so under existing law. But we would working with other utilities, other entities to make this happen. And an appropriation of dollars would certainly be a means to accomplish this.

Ms. MCCARTHY. But if we order, by statute, your agency to address this matter, wouldn't that mean no private or State entity could undertake a separate effort to address the problem?

Mr. HACSKAYLO. I don't think so; no, ma'am.

Ms. MCCARTHY. Well, I think that is something we probably need to explore a little bit more on this subcommittee to make sure that we are not in an attempt to do something that will help end up hurting other efforts. And I would welcome some thoughts from your staff in that regard.

You have got the authority to expand your transmission along Path 15. Have your friends on the Appropriations Committee given you any money to do that?

Mr. HACSKAYLO. Not as of yet; no, ma'am.

Ms. MCCARTHY. So I guess my question is, if we order you to build it but we fail to provide you the appropriation money necessary for you to do it, what have we accomplished?

Mr. HACSKAYLO. The committee has highlighted the critical issue of resolving the Path 15 constriction right now. And as my colleagues from California already have stated, we are all working together to find a way to solve this, whether it is Western, whether it is investor-owned utilities, whether it is publicly owned entities, working with the State of California and others, our collective goal is to take care of this bottleneck as quickly as we can.

Ms. MCCARTHY. I am still waiting for an answer on how we get the appropriations money that you need.

Mr. HACSKAYLO. It would be a matter of working with the Appropriations Committee then.

Ms. MCCARTHY. Yes, it would be. And whose responsibility would that be?

Mr. HACSKAYLO. That is something which Western certainly would have to work with the Administration on.

Ms. MCCARTHY. Excellent. Thank you very much. Thank you, Mr. Chairman.

Mr. BARTON. We have a miracle. A member gave back time? Is the gentlelady from Missouri through with her questions? If she is, then we will recognize the gentlelady from California.

Ms. MCCARTHY. I am sorry, Mr. Chairman.

Mr. BARTON. Are you through?

Ms. MCCARTHY. Well, you know, I am still a little bit frustrated, and I failed to yield back the balance of my time like I am supposed to do. So——

Mr. BARTON. I am not complaining now.

Ms. MCCARTHY. I am just frustrated, because if we require you to do this and you don't get the appropriation, we are worse off, because who is going to invest?

Mr. HACSKAYLO. That is a very fair statement on your part; yes, ma'am.

Ms. MCCARTHY. Well, can you answer it?

Mr. BARTON. I would point out part of the answer would be there are 52 Members of Congress and in the House from the great State of California. If we authorize it, it will be appropriated, because

one of those Members is a subcommittee chairman of the Appropriations Subcommittee, the Honorable Jerry Lewis. So I don't think that is going to be a problem.

Ms. MCCARTHY. Well, it hasn't been appropriated to date, and we have had expectations prior to these hearings that it would happen. So I guess I was seeking some reassurance since it hadn't happened that, Mr. Chairman——

Mr. BARTON. Well, we are trying to find a way to help make it happen, and we will work with the gentlelady from Missouri and the distinguished members that represent the government of California here, the State, to do it, whatever is the best way.

Ms. MCCARTHY. My point is, if we don't get that done, we are going to be worse off, and we will be creating harm rather than good. And that is why I raised the issue, and I appreciate it very much your forthright input on that. But it is one of the reasons I remain a little cautious about proceeding down this path of legislation without the assurance that whatever we do will work.

So I do yield back the balance of my time now, Mr. Chairman. Thank you very much.

Mr. BARTON. All right. Thank the gentlelady. Now, seeing no other members of the subcommittee present, we would yield to the gentlelady from California, Congressman Eshoo, of the full committee, for 7 minutes.

Ms. ESHOO. Thank you, Mr. Chairman, again. I always want to thank you for the courtesies that you have extended, and thank you to the panel. And I think that my introduction of Ambassador Sklar, everyone in the room would now agree, was a pretty accurate and good one. He has been terrific, and we are very proud of the work that you have done.

I want to address two things, or point out two things and see what I can extract from both Ambassador Sklar and the panel. Earlier this week, this same subcommittee had a hearing. I was here for all of it. Many of the members were. It was very long. It was with the three FERC Commissioners. And I think that if I were to draw two strong observations out of that hearing on Tuesday, they would be the following: No. 1, that California, obviously, has a mess on our hands, but greater than that, that she has really helped to create this, because she hasn't really helped build and place online any kind of generation. In fact, some of the environmental laws have brought some of that about, and that really for the last 8, 10, 12 years, we really haven't done a darn thing.

The record shows differently. It is so amazing to me how perceptions can then get feet or legs on them, and they not only get up and creep but they walk and then they run. This is a runaway perception, in my view, because it is counter to what the facts are. So I would like, at least for the record, and maybe for members on both sides of the aisle to open their minds and their ears to this, what the real record is in terms of California licensing major new plants, what is under construction, and what is online for this year.

The other notion that I would like Ambassador Sklar and if anyone would like to, to chime in is the following: In this discussion of cost-of-service based rates, you have kind of an equal sign at the end of it. Even the Chairman of the FERC said, "You know, these are the nay-sayers that are on this." I don't need to carry anyone's

briefcase or portfolio on believing in markets, in competition, in free trade, and all of that. My record is 100 percent clear on that.

But I think that we need to go beyond what the political shorthand has become on this and what if we did include a section in this bill relative to cost-of-service based rates? Ambassador Sklar, you said 35 years you have been in the private sector. What is it that you would instruct us to do, comments that you would make about cost-of-service based rates that this is not something that is essentially what we think of in total price controls. Does it allow for profits? How long does it need to be? Erase in some of my colleagues' minds, if you can, you are pretty persuasive, the criticism that has been leveled not only by the Administration but many others about this approach of cost-of-service based rates.

And I also want to add, for the record, that my colleague from California, Mr. Radanovich, said that we are blaming this on the Bush Administration. That is nonsense. If anybody tries to blame this on the Bush Administration, they don't have any credibility. Why? They didn't create it. What we are doing is crying out for leadership at the Federal level to partner with us. So if my idea is not the best one, let us take a look at some others.

So I am going to go to Ambassador Sklar first to comment on and maybe answer some of the things that I just pointed out. And thank you again, Mr. Chairman; I appreciate it.

Mr. SKLAR. Congressman Eshoo, as always, puts out a long list of challenges, but let me try and walk down them as best I can remember them. California screwed up in this legislation. True. There were almost no plants built for a 10- or 12-year period. True. They were not built because of environmental reasons. Wrong. They were not built, and I was in private industry most of this time and most of the utility executives and construction industry people, who I am very tight with, would agree with me that they were not built because the environment was so uncertain as to what the market was going to be in the early that they didn't want to take a chance and invest.

People invest when there is some level of surety. And all through the eighties there was no indication that the man was going to rise. There were a number of engineering and construction disasters. PG&E built Diablo Canyon not once, not twice, but three times. They built it once, and they screwed up at three times the cost. They then had to retrofit, and then they discovered there was an earthquake fault under it. The same thing was true with one of the other nuclear facilities.

The utility companies during this period rejected and fought the inclusion of environmentally sound alternate energy into their system. They said they didn't want it, because the prices these people were charging them for solar and wind power were too high, and so they denied that. But the main reason that no one came along and invested was they saw that there was no certainty about profit. Profit is what it is about.

Then the California legislature and Governor and the utility lobbyists start developing this deregulation thing, and no one will do anything during that 5- or 6-year period, because they don't know what is going to come out the end. If they knew what was coming

out the end, they still wouldn't have done it, because it was so crazy.

So nothing was built. A serious problem, but it wasn't the environment. It was an economic environment and the political mucking around with this world. And we have to build, and we are building.

With respect to the costing, I came out of a world where I saw my first car when I was 17 and I went to college by washing dishes and on scholarship. And America has been very good to me, because I played in the free enterprise system. I built four businesses and made enough money so I can do crazy things like I am doing now.

And I am a fierce believer, as fierce as Anna or more so, and therefore I would prefer to see no price constraints or Government regulation. But I do think we have a situation here that is, as Congressman Markey said, not the making of the consumer and not the fault of the environment, and we shouldn't make either of them pay the price. Or even more important, industry and commerce that keeps us going. We cannot destroy the economy of this country because of a rigid ideology.

What we have got to do is do a temporary solution. You don't put a tourniquet on and leave it on or you will end up with gangrene. But we have to put some rational constraint on prices for a short period of time while we build a true market, and we can have one. And I think we need to do it. And I think we need to do it the way we talked about before, by either having FERC do it, working with FERC to do it or mandating in obsessive detail that FERC get on with this right away.

If we do it, we will get the two things we want. We will have availability and affordability, and we will build a market economy where buyers and sellers can meet in a true market. And to do that in this industry it is my clear understanding that supply has got to be 5 to 10 to 15 percent above demand so you don't get into the lifeboat, shortage of water situation.

So looking backward, blame game, no one wins, but I think we do have to realize that, as I said at the beginning, demand has been constant. Our supply has been artificially reduced. None of the normal building that would have taken place has taken place, and we need breathing space, and that is something you can give us.

I would add one other thing that has come up and talked about this morning. New York City, we mentioned, is going to have a problem. Their problem is not generation. There is power in New England to get to them, but they have a transmission choke, and transmission is a national problem. And I think we all have to work together, whether it is WAPA, whether it is a State agency, whether it is the private utilities, rationalize our transmission situation so that we have a system that works for all of us. And as we have an interstate highway system, we have a system that permits electricity be moved around, because the electrons don't have any idea where the border is between New York and Pennsylvania anymore than they did between Serbia and Bosnia.

So give us the regulation for this short period. Do it in a way that is more intelligently than I could lay out off the cuff now, but

we can work it out; do it quickly so we get through this summer; and then let us get into a market in 2003 or 2004 where the world is open.

Ms. ESHOO. Thank you. Thank you, Mr. Chairman.

Mr. BARTON. Thank you. I see no other members that haven't had at least one opportunity. I have a series of questions, but I am going to trust you gentlemen that if we submit them in writing that you will give us answers in writing in the next 3 to 4 days. Will you promise me that so I can spare us a little time?

I do want to thank you, and I encourage you to work with members on both sides of the aisle and the subcommittee on things that you would like to see perfected, things you would like to see dropped out, and obviously things you would like to see added.

So we are going to release this panel and call the second panel.

When I looked up, my first thought was what is the President sitting out in the audience for? It is amazing.

We do want to welcome the second panel. We have Mr. Alan Richardson, who is a reasonable facsimile of the President of the United States, with us. He is actually the president of the American Public Power Association. We have Mr. Kevin Lynch, who is the vice president for PacifiCorp, Portland, Oregon. We have Mr. Alex Makler or Makler?

Mr. MAKLER. Makler.

Mr. BARTON. Makler, who is counsel to Calpine Corporation, from Pleasanton, California. We have Mr. Ken Colburn, who is the director of the New Hampshire Air Resource Division, New Hampshire Department of Environmental Services. And we have Mr. David Hawkins, who is the program director of the Natural Resources Defense Council.

We are going to start with Mr. Richardson. We will put all of your statements in the record in their entirety. I am going to ask that you summarize them. We are going to try to do yours in 5 minutes, and if you need a little more time, we will give you a little more time. Let us go to 5 on this one.

STATEMENTS OF ALAN H. RICHARDSON, PRESIDENT AND CEO, AMERICAN PUBLIC POWER ASSOCIATION; KEVIN A. LYNCH, VICE PRESIDENT, PACIFICORP; ALEXANDRE MAKLER, COUNSEL, CALPINE CORPORATION, WESTERN REGION OFFICE; KEN COLBURN, DIRECTOR, NEW HAMPSHIRE AIR RESOURCE DIVISION, NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, ON BEHALF OF STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS; AND DAVID G. HAWKINS, PROGRAM DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL

Mr. RICHARDSON. Thank you, Mr. Chairman. Actually, the President and I are twins separated at birth, but we thought it would be better for both of our careers if we didn't acknowledge that.

We are at a point at this hearing where I think just about everything has been said, but not all of us had a chance to say it, and I will say what I have to say as briefly as possible.

I appreciate the opportunity to appear here before you today. Our first and most significant concern with the legislation is not what it contains, but what it does not contain, and that is a firm direc-

tive to the Federal Energy Regulatory Commission to enforce the law and insist on just and reasonable rates in the wholesale markets. And I had some additional comments on this, but I don't think I can improve on the comments of Ambassador Sklar in his very eloquent discussion of this problem and what is needed to be done.

I have members in the Pacific Northwest, in Utah and other States, and in California who are suffering because they are exorbitant wholesale prices to meet loads that they have an obligation to meet. The just and reasonable rate standard was imposed, was adopted to protect those kinds of transactions. It is not working, and FERC needs to enforce the law.

Second, we are concerned about the provisions in section 102 of the legislation. Our concerns are a little different than most of those that have been expressed earlier. This would give retail customers an opportunity to forego service and sell electricity in the open market. The fact of the matter is these customers do not have a property right in the electricity that they presumably could sell. They are entitled to purchase what they need from their power supplier, and the power supplier is required to meet their demand. And if the customers don't use the power that could be available from the supplier, then the supplier, and not the customer, owns that power. This is a retail relationship between the customers and their power suppliers. It is a matter of State and local responsibility, and we do not think it is appropriate for FERC to enter into this equation.

Third, we are concerned about the provisions relating to the formation of the Western-wide Regional Transmission Organization. It is not that we don't support regional transmission organizations or a more aggressive role from the Federal Energy Regulatory Commission, but the way that this is structured and the multitude of issues that would need to be addressed in Federal legislation on regional transmission organizations seems to us to suggest that this is an issue that should be addressed in more comprehensive electricity legislation, not in the context of emergency legislation.

Fourth, we do not believe the legislation should impose FERC jurisdiction over the transmission facilities that might be purchased from California's investor-owned utilities by the State of California. FERC has the authority under the Federal Power Act to condition any such asset transferred to the State of California to protect its legitimate interest in the wholesale transmission grid.

Fifth, it is not clear that emergency waivers of various environmental laws are necessary to address the supply crisis. We believe we can maintain progress in achieving environmental goals while addressing the need for additional generating capacity, conservation, and the market structure issues that are the root causes of this crisis.

Moreover, we believe that current statutes and relevant regulatory agencies have sufficient flexibility and discretion to meet changing circumstances.

Finally, there are provisions of the legislation that could be beneficial. These include provisions that authorize the Western Area Power Administration to upgrade Path 15, provisions relating to daylight savings time, changes at the discretion of the States, the

provisions relating to increased awareness of the need for conservation and emergency reduction of energy consumption at Federal facilities, although it was recently announced that Secretary Abraham was undertaking steps in this direction, and the provision authorizing the Secretary of Energy to authorize, under certain conditions, Federal facilities to generate electricity for self-consumption and sales to the State.

It is not clear that these will provide immediate relief to the current situation. In our view, it would be prudent to move expeditiously and examine these proposals and perhaps others, but it is not apparent that these rise to the level of emergency responses to address the immediate crisis.

Mr. Chairman, that concludes my remarks. Thank you for the opportunity to testify.

[The prepared statement of Alan G. Richardson follows:]

PREPARED STATEMENT OF ALAN H. RICHARDSON, PRESIDENT AND CEO, AMERICAN PUBLIC POWER ASSOCIATION

Mr. Chairman and members of the subcommittee, I am Alan Richardson, President and CEO of the American Public Power Association. Thank you for this opportunity to appear before you today. APPA represents the interests of more than 2000 publicly owned electric utility systems across the country. APPA member utilities include state public power agencies and municipal electric utilities that serve some of the nation's largest cities. However, the vast majority of these publicly owned electric utilities serve small and medium-sized communities in 49 states, all but Hawaii. In fact, 75 percent of our members are located in cities with populations of 10,000 people or less. Approximately 15 percent of all electric sales to ultimate customers are made by publicly owned electric utilities, but we have only 12.1 percent of the nation's installed capacity, and from this generate approximately 11.6 percent of the total generation. Publicly owned utilities across the country, including throughout the western states, are net power purchasers.

During debates on AB 1890, California's restructuring law, members of the public power community fought for and retained local control over their energy choices in the competitive market. Our customers have already made the choice as to whom should supply them with electricity, and through the local political process, they have the opportunity to reaffirm that decision or modify it.

This concept of local control has significant, practical implications. For example, public power retained its obligation to plan for and serve the electricity needs of our consumer-owners. It has never been public power's belief that competition relieved us of our responsibility to ensure that our customers had sufficient electric supply at stable prices. As a consequence, municipal utilities retained their power plants dedicated to serve native load customers, and they engaged in long-range planning to satisfy demands that exceeded their own generation resources. This is in direct contrast to the investor-owned utilities in California who, because of regulatory orders and business decisions, sold a high percentage of their generation assets and declined to build new generation over the last several years. Public power also did not transfer away rights to use regional transmission facilities, built at great expense, to deliver electricity from other parts of the Western region to their customers. This gave public power utilities further ability to mitigate market risk for their customer-owners.

From our perspective, there are two crises facing public power systems (and indeed all electric consumers) in California and other Western states. There is a financial crisis caused by excessively high unjust and unreasonable wholesale electric power costs, as well as a crisis caused by the imbalance between supply and demand. The supply crisis cannot be solved quickly although strong energy conservation and demand side programs can help. The necessary investments and market improvements will need some time to take hold, but positive steps are currently underway throughout California and the West.

The most pressing need for APPA members in California and other Western states is the financial crisis caused by these excessive wholesale rates. The municipal utilities in Seattle and Tacoma have spent hundreds of millions of dollars for wholesale power to keep the lights on in their communities. Wholesale power costs are ten times or more what they were just a year or so ago. The same situation

confronts municipal utilities in Utah, and other western states. These purchasers of wholesale power are precisely the entities Congress sought to protect from excessive, unjust and unreasonable wholesale electric rates when it enacted the Federal Power Act in 1935. Today, they are not receiving the protection they deserve, and their citizens and their local economies are suffering as a result. The same, of course, is true for many publicly owned utilities in California. I have highlighted non-California public power systems only to make the point that this is a problem that plagues public power systems throughout the western states.

APPA believes that, above all else, the Federal Energy Regulatory Commission (FERC) has the ability and the responsibility to tackle the financial crisis head on. Simply put, FERC should enforce the law on just and reasonable rates. Legislation should not be necessary to address this problem.

Strong action by FERC will help focus attention on the extremely serious problem of excessive wholesale electric rates and the social and economic repercussions that have already occurred and will only get worse if this problem is not addressed adequately and quickly. FERC has already found that wholesale electricity prices in California have been *unjust and unreasonable.* It has both the authority and the responsibility to address this situation.

Just last week FERC decided to institute some cost controls and investigate regional power prices. This is a positive step toward beginning to stabilize costs in California during power alerts. However, excessive wholesale power costs in California are not confined to times when a power alert is in effect. According to a California ISO spokesperson, 30 percent of wholesale energy costs, amounting to $6.8 billion over the past year, could be attributed to the exercise of market power. About 80 percent of these additional costs were tied to non-emergency hours. (See *Platts Electric Power Daily,* April 27, 2001, page 6.) A solution that deals only with emergency hours is, in fact, not a real solution. As I have mentioned already, excessive wholesale prices are not unique to California. FERC's action did not adequately and fully address excessive wholesale costs throughout the West, which means public power systems in Washington, Oregon, Utah and other Western states that have an absolute responsibility to provide electricity to their consumers will continue to be forced to purchase wholesale power at extremely high prices.

Publicly owned utilities have had to significantly raise rates because the wholesale "market" is not a competitive and free market and is simply incapable of producing rates that are just and reasonable. This is why publicly owned utilities and all consumers throughout the West would benefit from a return to cost-based rates for a limited period of time until some degree of stability returns to the market. We believe it is within FERC's current authority to see that the entire Western region return to cost-based rates as soon as possible.

Many consumer-owned utilities in California are net purchasers of wholesale power and buy a significant amount of power from the spot market in California. That is why our utilities remain open to the vagaries of the current dysfunctional market. For example, after 10 years of no rate increases, the Sacramento Municipal Utility District (SMUD) has recently proposed a rate increase of 22 percent on average as a result of the exorbitant price of wholesale electricity in California. And while SMUD and its ratepayers are suffering from flaws in the California market, the situation would have been much worse had they not retained the crucial element of local control after the passage of AB 1890.

Municipal utilities in California are on record in support of cost-based rates; they have stated publicly that they would voluntarily adhere to cost-based rates should they be required of FERC-jurisdictional utilities. Immediate action is needed in the West to prevent a catastrophic breakdown in energy markets this summer, and price stabilization measures are an appropriate response. But sanity can be restored to Western energy markets without undermining the charge of public power that is local control.

APPA comments on H.R. 1647

We would now like to address several specific provisions that are contained in H. R. 1647. We believe many of the provisions could be helpful, in the intermediate or long run, and are the kind of actions appropriate for the federal government to take. Many of these provisions will not have an immediate effect and it isn't clear that emergency legislation is necessary. On the other hand, the longer legislative action is delayed, the longer it will be before action can begin on solutions that can help consumers in California and the other western states.

Section 104, would authorize the Western Area Power Administration to expand its transmission system to remove the existing Path 15 transmission constraint in Northern California. Witnesses from both Los Angeles Department of Water and Power and Silicon Valley Power in Santa Clara told this subcommittee in a hearing

several weeks ago that this action could be beneficial. (Indeed, the fact that WAPA's services and federal funds can be used as an instrument to help address the crisis is a powerful example of how valuable the Federal power marketing administrations can be in terms of the overall structure of the nation's electric utility industry. I hope this fact isn't ignored if or when proposals to eliminate the Federal power marketing administrations surfaces once again on the Congressional agenda.) Obviously, recovery of funds authorized should be the responsibility of users of the facilities financed and not become an obligation for other WAPA customers. Further, legislative authorization for such funds is not a prerequisite to a direct appropriation of funds for this purpose. Emergency legislation, therefore, is not absolutely necessary to move forward with this proposal.

Other helpful provisions include:

- Section 106 establishing federal corridors for transmission upgrades;
- Sections 201 and 203 relating to increased awareness of the need for conservation and emergency reduction of energy consumption at federal facilities;
- Section 304 allowing the Secretary of Energy to authorize, under certain conditions, federal facilities to generate electricity for self-consumption or sales to the State.

There are several provisions, however, that are of significant concern to public power. Section 102 is especially problematic and should be removed from the bill. Most utilities have interruptible and curtailable programs under which customers pay lower rates and in return give their supplier the right to interrupt service when supplies are tight. Further, most customers are not "entitled" to electricity they do not consume. Utilities have an obligation to meet the load demand of customers, whatever that may be. If an industrial customer reduces its load due to a layoff, plant closure, or for any other reason, the utility sells the customer less power and receives less revenue. Very few customers are committed to pay for power they do not need or take, unless they have a specific contract to that effect. (Such a contract would give them a property right, which of course, they could then transfer. But, as noted, this is the exception, not the rule. In the absence of such a property right, they really have nothing to sell.) On the other hand, if the customer installs new equipment or increases its load, the utility is obligated to serve that increased demand. Utilities manage these fluctuations through their planning process and the diversity of their customer base. If customers don't use the power that could be available from their power supplier, the power supplier, not the customer, owns that power and can decide how to dispose of that property (i.e. the electrons.) Finally, this section would inject the FERC into retail rate and service issues that are the sole jurisdiction of state and local authorities.

In addition, Section 102 would grant the Direct Service Industries (DSIs) served by the Bonneville Power Administration (BPA) the right to remarket BPA power, a change that would only exacerbate the crisis. The new contract term for the DSIs begins October 1, 2001 and the new contracts do not allow the remarketing of BPA power. BPA does not have enough power to meet its contractual obligations and must purchase power at extremely high prices on the wholesale market. This provision would allow those customers to purchase power from BPA at rates well below the cost of BPA's wholesale purchases and re-sell that power for exorbitant prices. This windfall for a few companies would come at the expense of other customers in the Northwest and the regional economy. This section also inappropriately puts Congress in the position of unilaterally renegotiating these contracts and relieving the DSIs of their contractual obligations.

Section 108, which would allow the FERC to have full jurisdiction over transmission facilities purchased by the State of California, should also be deleted. As the subcommittee knows, FERC has only limited jurisdiction over transmission facilities owned by state and local governments. The exemption from FERC jurisdiction is contained in the Federal Power Act, and exists because these state and local governmental entities are effectively regulated at the state and local level. Historically, such facilities have been operated in the public interest, and the owners have no history of discrimination or anti-competitive behavior. There is no reason to believe these facilities would be operated any differently in the future. At least it is premature to assume problems will arise if California purchases these transmission assets. At worst, this provision could become another obstacle for California as it tries to fashion solutions to this crisis. In addition, it seems arbitrary and inappropriate to single out transmission facilities in California for such unprecedented treatment. Moreover, there are many similar issues regarding regulatory oversight and jurisdiction of transmission facilities that have been part of the debate on legislation to restructure the electricity industry. These issues should not be addressed on a piecemeal basis, but rather in the context of comprehensive legislation that establishes effective wholesale competition throughout the nation. Finally, and per-

haps most important, if California proceeds to acquire transmission assets of FERC-jurisdictional public utilities, FERC approval of the transfer of such assets is mandatory under the Federal Power Act. FERC is certainly capable of fashioning conditions that must be met in the event of a transfer to the state of California that would protect its legitimate interests in managing the interstate transmission grid.

Section 306, regarding mandatory participation by all transmission owners in a Western regional transmission organization if supported by 10 or more of the 14 governors in states that are, in whole or in part, within the Western Systems Coordinating Council region, is not something that can provide a near term or even an intermediate term solution to the energy crisis in the west.

The process of reaching agreement of 10 or more governors in this region would take several months under the best of circumstances. This would be followed by a FERC hearing and order, a process that will take several more months. Following that, a large and diverse group of publicly, privately, cooperatively and federally owned utilities would need to act to implement the FERC order to create the new regional organization. This would be another lengthy process. Even assuming no court challenges or other actions to delay the creation of such a regional RTO, it is inconceivable that such an institution could be created within less than three years. By then, we all hope, some sanity will have returned to the western electricity wholesale market place. Finally, after this flurry of activity, the RTO may disappear three years after it is established.

APPA has been and remains a proponent of properly configured regional transmission organizations, as well as expanded authority for FERC to order the creation of such institutions. At the same time, we have expressed our concerns over proposals that would force non-jurisdictional publicly owned utilities into RTOs with little or no regard for their unique financing, governance and operational characteristics. Both of these goals can be accommodated, but the vehicle to do so should not be emergency legislation rushed through Congress to deal with what we all hope will be a crisis of limited duration.

Because section 306 could not, under any reasonable set of circumstances, provide a near term remedy to the emergency situation in the west, we strongly recommend that it be deleted from the bill and considered instead in the context of a broader, comprehensive electric utility restructuring measure.

Lastly, APPA does not believe it is necessary to amend federal statutes regarding air quality policy, or regulatory implementation of such policy, in order to address problems in the western electricity market. We believe that we can maintain progress in achieving environmental goals while addressing the need for additional generating capacity, conservation, and the market structure issues that are the root causes of the crisis. Moreover, we believe that the current statutes and relevant regulatory agencies have sufficient flexibility and discretion to meet changing circumstances.

Conclusions

In conclusion, APPA believes the single most effective step that could be taken by the federal government to help alleviate the electricity crisis in the West this summer would be for the FERC to immediately withdraw its approval for market based rates in the Western States Coordinating Council and to impose a temporary cost-based rate structure that is consistent with the Federal Power Act's requirement that rates be just and reasonable. Cost-based rates that provide a reasonable return on investment (perhaps even a return somewhat higher than historic levels) should not be an impediment to investment in new generation facilities. Such cost-based rates should not be referred to as "price caps" but should instead be regarded as "profit caps" that restrain excessive profits that are being extracted from consumers for whom electricity is not a luxury but a necessity and who, due to that necessity, will pay whatever they must.

As noted, some provisions of the pending legislation could help California and other Western states deal with the supply crisis over the coming months, although it seems unlikely that many if any of these can do much to address the problem before the end of this summer. Therefore, from our perspective, it would be appropriate to move some legislative proposals expeditiously, but it does not seem imperative to move them on an emergency basis.

I should add a final caveat to this testimony. APPA's members have specifically addressed the issue of cost-based rates in dysfunctional wholesale markets, and have called on FERC to faithfully execute the law with respect to enforcing the mandate for just and reasonable wholesale electric rates. APPA's members have also addressed the issue of meeting both energy supply and environmental requirements. We believe they can be addressed simultaneously in ways that do not compromise the environment while ensuring adequate supplies of energy. Other aspects of this

legislation, obviously, have not been carefully reviewed, and my comments are based on prior policies on these issues.

However, a few APPA members, in California and elsewhere, have taken the time to review H.R. 1647, and have provided their comments directly to you, Mr. Chairman, or have offered their comments and recommendations directly to their own Representatives. I am attaching to this testimony copies of the letters that have been sent, and hope to have the opportunity to add to the hearing record other comments that we might receive over the course of the next few days.

Again, Mr. Chairman, thank you for the opportunity to participate in this hearing.

April 26, 2001
GM01-142

Honorable JOE BARTON
U.S. House of Representatives
Chair, House Energy and Commerce
Subcommittee on Energy and Air Quality
2264 Rayburn House Office Building
Washington, D.C. 20515

RE: Draft Energy Legislation Regarding Energy Crisis

DEAR CONGRESSMAN BARTON; The Sacramento Municipal Utility District regrets that we must oppose specific provisions in your draft energy legislation that seeks to extend Federal Energy Regulatory Commission (FERC) jurisdiction over consumer-owned utilities. Interfering with the local control which is inherent to municipal utilities will do nothing to alleviate current stresses in the Western market and could make a bad situation much worse.

As the outlook for Western energy markets grows increasingly grim, the issue of a return to cost based rates within the Western System Coordinating Council (WSCC) has gained significant public attention. Opponents of rate stabilization measures argue that such measures would be ineffective because a large part of the market—which is made up of consumer-owned utilities—would be exempt. The fact is that publicly owned utilities have always been vertically integrated—providing generation, transmission and distribution services to their consumer/owners. Even after the passage of A.B. 1890, SMUD and other municipal utilities in California retained the obligation to serve, which means SMUD has continued to build and/or purchase power to meet the needs of our customers. Only a small percentage of the excess reserves are sold in the spot market, despite claims to the contrary.

SMUD, like many consumer-owned utilities in California, is a net purchaser of wholesale power and buys a significant amount of power from the spot market in California. After 10 years of no rate increases, the District has proposed a rate increase of 19 percent on average as a result of the exorbitant price of wholesale electricity in California. And while SMUD and its ratepayers are suffering from flaws in the California market, our situation would have been much worse had we been not retained the crucial element of local control over our utilities after the passage of A.B. 1890. Subjecting municipal utilities to FERC jurisdiction at this point is not good for California, the West or the nation.

SMUD and most of the municipal utilities in California are on record in support of cost-based rates and the District has stated that it would voluntarily adhere to cost based rates should they be required of FERC-jurisdictional utilities. SMUD cannot, however, support any legislative efforts that would force municipal utilities to forfeit the element of local control to FERC. We do not believe our consumers will be better served by having SUMD regulated by FERC when FERC, in our view, has failed to act on its existing authority in Western markets to ensure just and reasonable power rates and to prevent market manipulations that result in price gouging.

Immediate action is needed in the West to prevent a catastrophic breakdown in energy markets this summer, and price stabilization measures are an appropriate response. But sanity can be restored to Western energy markets without undermining the charge of public power that is local control. We appreciate your efforts to find short-term legislative solutions to our current crisis, but urge you to oppose any efforts to extend FERC jurisdiction over municipal utilities.

Thank you for your time and consideration of this important issue.

Sincerely,

JAN SCHORI
General Manager

May 1, 2001

The Honorable THOMAS M. BARRETT
U.S. House of Representatives
1214 Longworth House Office Bldg.
Washington, DC 20515

RE: The Electricity Emergency Act

DEAR REPRESENTATIVE BARRETT: WPPI has reviewed the Electricity Emergency Act (the Act) drafted by Congressman Barton of Texas. We understand that a subcommittee hearing has been scheduled this week and a mark-up is possible. The Act appears to be aimed primarily at mitigating the electricity crisis occurring in California and other parts of the west.

WPPI believes Sections 102 (Price Mitigation in Western Market Through Demand Management Incentives) and 101 (Demand Management Agreements Clearinghouse) of the Act do not represent good public policy and should be stricken. We urge you to oppose these Sections. We do not take a position at this point on the other provisions of the Act.

While Section 102 would apply only for a limited period of years in the west, it would set an unfortunate precedent. The provision would allow a retail electric customer, presumably an industrial customer, to sell into the market at a market price a portion of its "electric load" that it is willing to forego, but is "entitled" to consume under contract or applicable regulation. The thought apparently is that the industry would reduce its consumption and then sell the associated power into the market at a very high market price. One difficulty with this provision is that except in very rare instances, retail electric customers are not "entitled" to electric energy that they do not consume. Utilities, including WPPI's members, have an obligation to provide service to retail customers at whatever their loads turn out to be. If a customer reduces its load due to a layoff, a strike, or for other reasons, the utility will sell the customer less power and receive less revenue. Very few customers are committed to pay for power that they do not need or take. Conversely, when a customer installs new equipment and increases its load, the utility is generally obligated to supply that increased load at average cost. Utilities absorb and manage the risk of fluctuating customer loads through the diversity of their customer base. This diversity is taken account of in the planning process. Most utilities also have interruptible and curtailable programs where they will pay customers for the right to interrupt during high price periods. Section 102 is simply not consistent with these pervasive arrangements. It would inject Congress and the FERC into retail rate and service issues that are clearly within the states' traditional jurisdiction, in a way that could shift costs dramatically and unfairly.

The proposed provision clearly should not apply to any customer that does not have a "take-or-pay obligation" for a specific amount of power on at least an annual basis, regardless of whether or not it needs the electricity. A customer that reduces its load without such a take-or-pay obligation has no entitlement to sell. The proposed provision would transfer the benefit of selling at a high market price from the utility and its customers as a whole to the single industrial customer and deprive other customers of the utility of the benefit of load reductions through diversity and traditional interruptible and curtailable programs. Finally, the provision would give a Congressional stamp of approval to market-based pricing in a highly constrained market without effective competition.

Section 102 is not only unwise, it is unnecessary since state regulators may adopt similar programs at any time, making sure those programs are consistent with other related retail rate and service programs and fair to all customers.

We also question whether Section 101 of the Act is necessary. This provision would facilitate wholesale purchasers foregoing purchases they are entitled to make and selling the power back to the utility. We know of no reason why a wholesale customer cannot negotiate a saleback today under existing law, assuming it has a take-or-pay obligation to buy, so it has something to sell. For instance, WPPI negotiated a deferral of a purchase in 2000 to 2001 at the request of one of its suppliers. The result benefited both parties. Subsection (b) of this Section allows the Commission to bless any price paid for foregone purchases as just and reasonable in advance. This seems unwise, given the market power that has been exercised in the west by generators. Also, there is a clear opportunity for gaming where a wholesale purchaser is affiliated with the seller.

We do not express an opinion on the efficacy of the other parts of the Act. It seems very clear that wholesale prices in the west for the last year have been by no stretch of imagination "just and reasonable" under the Federal Power Act, given the number of hours where prices have dramatically exceeded cost. Congress should tell the FERC in no uncertain terms to enforce the Federal Power Act.

Thank you for your attention.
Very truly yours,

ROY THILLY

cc: Deborah Sliz, Morgan Meguire LLC (by fax)
Joe Nipper, American Public Power Association (by fax)
David Benforado, Municipal Electric Utilities of Wisconsin
WPPI Members: Algoma, Black River Falls, Boscobel, Cedarburg, Columbus, Cuba City, Eagle River, Florence, Hartford, Hustisford, Jefferson, Kaukauna, Lake Mills, Lodi, Menasha, Muscoda, New Holstein, New London, New Richmond, Oconomowoc, Oconto Falls, Reedsburg, River Falls, Slinger, Sturgeon Bay, Sun Prairie, Two Rivers, Waterloo, Waunakee, Waupun, Westby and Whitehall

May 1, 2001

The Honorable JOE BARTON
Chairman
Subcommittee on Energy and Clean Air
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Re: Electricity Emergency Relief Act

DEAR CHAIRMAN BARTON: I am writing on behalf of the Public Power Council (PPC), the regional trade association representing the consumer-owned utility customers of Bonneville Power Administration (BPA), to express our opposition to granting the Direct Service Industries (DSIs) the right to remarket BPA power. We appreciate your efforts to respond to the current western energy crisis; but we believe remarketing rights for the DSIs will only exacerbate the current crisis.

Under current contracts, several DSIs—select aluminum and chemical companies in the Pacific Northwest—currently have the ability to remarket power that they purchase from BPA. These companies have shut down their operations and made roughly $2 billion in profits from these remarketing efforts. At least one company, Kaiser, resisted efforts to share the profits with their idled workers and has not used the money to modernize the plant or finance dedicated power resources.

The new BPA contract term begins October 1, 2001. While the DSIs have the contractual right to purchase power during the next contract term, *those contracts do not allow for remarketing of BPA power.*

BPA does not have sufficient resources to meet its contractual obligations and must purchase power in the skyrocketing wholesale power market—at prices above $200/mwh. If the DSIs secure remarketing rights, they will be purchasing power from BPA at well below the cost of those market purchases (about $40/mwh), and reselling the power for exorbitant profits.

I urge you to consider the following:

- Remarketing rights for the DSIs would provide a huge windfall profit that comes at the expense of other Northwest ratepayers and the regional economy. The remainder of BPA's customers will bear the cost of BPA's purchases—estimated at $1.5 billion—and will suffer rate increases of 250% that will devastate the Northwest economy—with more than 60,000 direct jobs at risk.
- Granting the DSIs remarketing rights runs counter to the intent of the provision in your legislation. Due to the cost of power (even at a "blended" BPA rate of $40/mwh), it is anticipated that the DSIs cannot economically operate come October 1, 2001. Thus, rather than "conserving" electricity through reduced industrial demand, remarketing rights for the DSIs will necessitate BPA market purchases that would not occur otherwise and would "churn" the wholesale market, driving prices up further.
- The DSIs do not currently have the right to remarket power. They signed take-or-pay contracts and Congress should not unilaterally renegotiate those contracts and relieve them of their obligations.

We ask you delete the DSIs from any remarketing provision in your legislation.
Sincerely,

C. CLARK LEONE
Manager

cc: Members, Subcommittee on Energy and Clean Air
Northwest Congressional Delegation

Mr. BARTON. Thank you, sir. We now go to Mr. Lynch, and again, your statement is in the record. We would ask you summarize it in 5 minutes.

STATEMENT OF KEVIN A. LYNCH

Mr. LYNCH. Thank you, Mr. Chairman, members of the subcommittee. My name is Kevin Lynch. I am vice president of Government Affairs for PacifiCorp. I guess I am here to represent or to describe some of the issues involving or affecting a western but not a major California utility, so let me give a brief thumbnail of my company.

We serve about 1.5 million customers in six States across the West. We have about 7,000 megawatts of generation capacity spread across nine States in the West. Most of what our customers need, we generate ourselves. We are in the market for a little bit of power, particularly at peak times, but it is a dynamic business, and we don't have everything we need. Sometimes we have a little bit more than we need. We also have about 15,000 miles of transmission across the Western United States. So we are a pretty big company with a pretty broad reach across the 13-State WSCC region.

We have been doing a lot lately to try to deal with the problem that is not just facing California but really is facing all of the States and all of the customers where we do business. By the end of this year, we expect to have about 900 megawatts of new generation online. Some of that was initiated prior to the price spikes of a year ago, or that began a year ago, but a lot of it—about half of it hasn't. We are moving very quickly. We are expecting to get some of it on this summer, more of it on by the end of the year. Primarily it is both gas and wind in terms of its fuel source.

We are doing an awful lot of conservation projects. We have something called the Demand Exchange, which is an Internet-based auction system whereby a large customer can bid to curtail a load on a given day at a particular price that we put up on the Internet. And if they do that, we pay them that amount. They shut down their load, and generally the amount is less than what the market bears, so everybody ends up in an economically advantaged situation.

We are buying back expected load from irrigators this summer. We are paying them up to 15 cents a kilowatt hour not to plant and irrigate, which in some particularly weak agricultural commodity markets is also a win-win. We have something called the 20/20 Program, which the members from California are somewhat familiar with, which means a reduction of 20 percent in consumption at a residence compared with the same month in the prior year will knock 20 percent off the rest of your bill.

And we have distributed over 400,000 compact fluorescent light bulbs to our 400,000 residential customers in Oregon alone in the last 2 months. We have also been leading the region in the development of the RTO West. That was referenced in the testimony of the witness from the Bonneville Power Administration, working in cooperation with them. So there is a lot that we are doing, and we are already doing it under current law and with the cooperation of the Governors of the States in which we do business and the State regulatory commissions.

There are some things that the Federal Government and this committee have a role in doing, and so I want to take a minute or 2 and speak to a couple of provisions of the bill. I lump the bill into

three different areas: Needing to address conservation, needing to address supply and pricing, and needing to address transmission. Demand management and demand curtailment is the most important thing we can do in the short-term. I think everybody acknowledges that, and there are a lot of things in this bill that are very good and make a positive contribution to tempering demand in the West and hope that the other controversies notwithstanding around this bill that you might see a way to getting those things done as quickly as possible.

We have a little bit of trouble with section 102 of the bill, the sellback, if you will, by the retail customers. And, actually, Mr. Richardson did a very nice job of describing a number of the same concerns that we have. We don't really feel that the customers have an ownership stake in that power. And what we are trying to do with them right now with the current tariffs and the current demand curtailment projects that we have ongoing is to actually get them to use less, rather than to sell it somewhere else. We are having some success, and we would be concerned that if section 102 were implemented, that it would serve as an impediment to that. There are a number of other reasons that we would have trouble with that provision; they are in my written statement.

I think we would support the giving WAPA the authority to upgrade Path 15. Somebody has to do it, and the sooner it can be done the better off we all will be. With respect to transmission, we think that the notion of doing a quick study to determine what needs to be done is a very good idea. The western Governors are convening a meeting next week, and I would encourage you to keep a close eye on that. If we can identify quickly the paths and the new investments that need to be made, the sooner we can get the regional grid up to the standards that it needs to be at.

Finally, in the last couple of seconds of my time, I will just mildly dip my toe in the water on the issue of price caps. I don't envy the position that you are in, just as you probably don't envy the position that we as a business are in in the West right now. We are not a utility that is opposed to the imposition of cost-based price caps. It is very difficult to implement. We would be happy to give you some suggestions on perhaps how to structure it, but it is not something that is very easily done.

So with that, I will stop. Thank you.

[The prepared statement of Kevin A. Lynch follows:]

PREPARED STATEMENT OF KEVIN A. LYNCH, PACIFICORP

Mr. Chairman and members of the Subcommittee, I am Kevin Lynch, Vice President of Government Affairs for PacifiCorp. My company provides retail electric service to 1.5 million customers in six western states[1]. We generate over 7,000 megawatts of electricity from coal, hydro, gas, wind and geothermal sources located in nine western states[2] and we own and operate approximately 15,000 miles of transmission lines in the region as well.

We commend you and this Subcommittee for the time and effort invested in examining the western power crisis and considering opportunities to improve the situation.

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[1] PacifiCorp's retail customers are in the States of Utah, Oregon, Wyoming, Washington, Idaho, and Calfornia.

[2] PacifiCorp generating facilities are located in each of the six states in which the company has retail electric customers plus Arizona, Colorado, and Montana.

The western region contains a highly interconnected grid that has spawned a regionwide wholesale power market. Tight generating supplies, below normal levels of precipitation, and an increasingly congested transmission system threaten the stability of not only California, but the entire region. The western electric market is not functioning well under these conditions. Wholesale power prices have increased by an order of magnitude. Our customers—industrial, commercial, and residential—and others in the region need relief.

RECENT ACTIONS TAKEN BY PACIFICORP:

Before addressing elements of the Chairman's legislation, the Electricity Emergency Relief Act, I want to take a minute to describe some steps PacifiCorp has taken to alleviate the current supply/demand imbalance. PacifiCorp has a supply portfolio of generating plants and long-term contracts to meet most of its customers' requirements; we buy in the wholesale market, however, to meet peak demand and to compensate for unexpected generation shortfalls precipitated by unplanned thermal plant outages and low water conditions.

In the face of possible physical shortages of electricity supply as well as a continuation of the volatile wholesale western energy market that began to explode last spring, the company last December began to take aggressive steps to temper demand and enhance supply. We sought and have received the cooperation of the Governors of the five states in which we have a major presence (Utah, Oregon, Wyoming, Washington, and Idaho). We have done the following:

* Added nearly 250 megawatts of new generation through joint efforts with industrial customers to access unused generation resources at their facilities;
* Initiated an internet-based voluntary demand reduction auction called "Demand Exchange" whereby large industrial customers may choose to curtail load temporarily for a price that is economically advantageous to them and our retail customers as well;
* Began development of more than 425 megawatts of gas and wind generation, which will come on line by the end of calendar year 2001;
* Filed new tariffs in most of our states to pay irrigation-dependent farmers up to 15 cents per kilowatt-hour if they do not plant and irrigate their crops this year; and,
* Sought state approval of our so-called 20/20 program wherein customers who reduce their summer consumption by 20 percent or more compared with last year will receive a discount of 20 percent off their bills.
* In Oregon, we also have provided more than 400,000 Compact Fluorescent Light bulbs to those among our approximately 350,000 residential customers who have participated in a CFL give-away program—a response rate greater than 50 percent.

All told, these initiatives should either temper demand or increase supply in an amount equal to approximately 10 percent of our regulated demand. In addition, our merchant affiliate PacifiCorp Power Marketing will bring 700 megawatts of new generation resources into the market this year, beginning with the 500 megawatt Klamath cogeneration facility in Oregon in July.

The initiatives I just mentioned have come either under existing state regulation or have been stimulated through changes in state law. The responsiveness of state regulatory commissions to proposals such as the demand exchange, and the efforts of state legislatures and Governors to date to streamline generation siting laws to expedite new supply have been commendable.

COMMENTS ON SHORT-TERM LEGISLATIVE OPTIONS:

There are, however, steps the Congress and federal executive agencies can take to alleviate this crisis as well. Mr. Chairman, we commend you for identifying possible short-term actions in this regard. My comments on the legislation are grouped according to the following three policy areas: conservation, transmission, and generation/pricing.

Conservation: We agree that conservation and demand reductions are the most-effective short-term response to the problem. Creating a demand-management clearinghouse, raising public awareness of pending energy emergencies, and increasing conservation at federal facilities are all commendable measures.

We also have given a lot of thought to sec. 102 of the bill as a means of using market forces to temper demand. We believe there are problems and inequities with the approach contemplated in the bill. From the perspectives of both power delivery and accounting it would difficult at best to make this provision workable across the 13-state WSCC region in a short time frame.

This measure would also make it difficult for utilities lacking sufficient generation to meet native load to work with large consumers to reduce their requirements—and consequently reduce the supply and upward price pressure on the smaller consumers of power-short utilities.

The greatest opportunity to take advantage of sec. 102 will fall to large consumers. By letting these consumers remarket unused power on their own, sec. 102 provides no appreciable benefit to retail residential customers while creating a potential windfall for large users. This seems unfair in light of the fact that customers of all classes and size have a stake in the embedded generation of regulated utilities. Finally, sec. 102 if enacted would tend to create employment dislocations in states with low-cost electricity as industrial consumers curtail operations to pursue financial benefits from remarketing power. This is a significant concern that was voiced by several of the region's Governors at the special meeting on the western power supply situation held by the FERC in Boise, Idaho, last month.

An alternative model to achieve the same end would to encourage utilities to establish demand exchanges similar to that which PacifiCorp established last year. Under this model, customers large and small share in the benefit of decisions by large users to reduce demand because the price at which industrial customers' demand is bought down is less than the market price the utility would otherwise have to pay to meet overall load requirements. It is worth noting that PacifiCorp created and implemented the Demand Exchange from a standing start within four weeks' time, including state obtaining regulatory approvals.

Transmission: We also appreciate the opportunity to comment on the transmission provisions in the bill. It has become evident to many in the west that the region needs significant investments in the grid; that such investments should have a regional focus as a modernized grid will bring benefits to customers across the region; and that the means of paying for this expansion generally should be regionalized to the extent there are grid-wide benefits as well. On the other hand, failure to upgrade the grid will only increase already-existing congestion, render wholesale markets less efficient, and result in suboptimal generation siting decisions.

We support sec. 103 which calls for a FERC-DOE transmission constraints study and recommend the Department and Commission consult with the region's major transmission owners and the Western Governors' Association in completing this project.

In conjunction with this study, we believe much of the groundwork for identifying transmission corridors on federal lands has already been done in the Western Utility Corridor study. The sec. 103 study and the enhanced DOE role for transmission projects on federal lands in sec. 106 are important. The studies called for in the respective sections should be linked. The subcommittee might wish to take sec. 106 a step further by streamlining the decisionmaking process for siting transmission facilities on federal lands, including giving FERC a substantial role in the process.

With respect to the provisions addressing California transmission assets, PacifiCorp fully supports sec. 108, continuing FERC jurisdiction over the investor-owned utilities' transmission assets should they be sold to the state. And, given the urgency of making improvements to Path 15, PacifiCorp believes authorizing WAPA to undertake the project may be the most timely way to proceed. PacifiCorp asks the legislation be clarified to make Path 15 FERC jurisdictional irrespective of ownership.

Finally, the company generally supports the intent of the provision aimed at creating a west-wide regional transmission organization. We support getting to that end incrementally and over time, however, on the belief that attempting to form a single west-wide RTO too rapidly may undermine the smaller RTO initiatives. As you know, last week the FERC approved the initial filing of RTO West which will cover parts of eight of the 13 states in the region.

RTO West has been established with the active, constructive involvement of the Bonneville Power Administration. BPA management deserves credit for the leadership they have shown in this effort. The Subcommittee may wish to clarify the authority of the PMAs to participate in RTOs. In addition, the Subcommittee should take the step of ensuring all transmission owners are FERC jurisdictional.

Generation and Pricing: In the area of generation and pricing, we have several comments. We support sec. 107 that would require assurances of payment in full for power sales ordered to be made by the Secretary or others. We remain troubled at the use of the emergency authority in California last December in the absence of either a known price for such deliveries or the assurance of payment. This amendment would address at least one aspect of this problem on a going-forward basis.

Similarly, the company views with interest sec. 205, allowing QFs that have not been paid to sell their power to other entities. We believe this provision should be

clarified such that "persons" or "parties" to which the QF might make an alternative sale are defined such that QFs would not gain the ability through federal law to sell their output to retail consumers in states that do not have laws permitting retail customer choice.

Given the integrated nature of the western grid, we are concerned about a recent proposal to have the California Independent System Operator seize electricity in cases of anticipated shortage. This power, if exercised, would have an adverse effect on the ability of utilities elsewhere in the region to provide reliable service to its customers. It may impair the ability of utilities to deliver power for which they have already contracted and will be relying on to meet their obligations. The Subcommittee might wish to consider a provision making it clear that actions such as those proposed by the California Independent System Operator to seize electricity that is being shipped under contract to an out-of-state purchaser in order to meet in-state generation requirements are not permitted under the Federal Power Act.

Mr. Chairman, PacifiCorp appreciates that your bill identifies opportunities for adding generating capacity for the region in the short term. We would like to work with you and other members of this subcommittee to achieve this goal.

Finally, we wish to submit some comments on the debate and action to date over imposition of price caps and other market-mitigation strategies in the west. PacifiCorp has been a supporter of price caps for the WSCC markets for several months, in recognition of the failure of the markets themselves to deliver just and reasonable wholesale rates.

We arrived at this position reluctantly last December. We believe markets will ultimately deliver better prices and more efficient, reliable service to customers. In the short term, however, it appears the markets and the market rules in place are failing to meet the test of just and reasonable rates required by the Federal Power Act.

Shaping a price-regulation mechanism, however, is difficult as the labors of the FERC and numerous members of Congress attest. We are concerned about the FERC's recent order which limits both the geographic and market-condition scope of the price limits.

Looking at Congress' work in this area, we are concerned about legislation limiting the scope of such price limits to those market participants who are now fully FERC-jurisdictional.

Should it be the will of this subcommittee to provide the FERC with additional authority or prescriptions to regulate western wholesale electric markets, we would ask you to shape a policy around the following principles:

- market regulation should be imposed consistently around the WSCC so that market volatility is not simply exported from one part of the region to another;
- the imposition of wholesale price mitigation should be made consistently among market participants so that selected market participants are not financially advantaged;
- regulated price limits should be devised in a manner that is mindful of production costs so that generators are not discouraged from producing and developers of new resources are not discouraged from investing; and,
- these limits should be temporary in nature with an established sunset date. At the same time, the mitigation should be of sufficient duration to address the seasonal diversity that characterizes the interconnected western power grid.

Mr. Chairman and members of the Subcommittee, this concludes my prepared remarks. Thank you for the opportunity to testify. I would be pleased to respond to any questions you may have.

Mr. BARTON. Thank you, Mr. Lynch. We now go to Mr. Makler, and your statement is in the record. If you could summarize in 5 minutes.

STATEMENT OF ALEXANDRE MAKLER

Mr. MAKLER. Thank you, Mr. Chairman. My name is Alex Makler. I am in-house counsel for Calpine Corporation. I am based in California. Calpine Corporation is an independent power producer. It is a developer. We currently have 32,000 megawatts in operation, construction or in announced development.

In California, we wear many hats. First, we are a California business; second, we own and operate over 600 megawatts of QF capacity; third, we are an owner and operator of a geothermal facil-

ity, which we purchased from PG&E as a result of divestiture, and fourth, we are the largest developer in the State of California and the Western region. We have 1,500 megawatts coming online this summer in California and the West, and we have announced development for an additional 3,500 megawatts.

Calpine is also a member of the Electric Power Supply Association, EPSA, and I am also expressing—representing them today with respect to the provisions in the bill that address the QF issues.

As everybody here is quite aware, California is experiencing a severe energy crisis. Even with new capacity coming online this summer, it has been estimated that there will be at least a shortfall of almost 5,000 megawatts during periods of peak demand. The economic consequences of this crisis are staggering. Not only high spot prices putting a tremendous burden on the State coffers, but the economic effects of potential blackouts would be significant, virtually causing the growth in the California economy to come to a halt, according to a recent study prepared by McKenzie and Company. For these reasons, it is important that every megawatt of generating capacity operate and produce as many megawatt hours as possible.

Unfortunately, the prolonged energy crisis has turned into a qualifying facility crisis. Qualifying facilities represent approximately 9,700 megawatts of generating capacity, roughly 4,250 megawatts, which are renewable generators, such as geothermal or wind, and 5,400 megawatts are generated from natural gas using third generation units. These are among the newest, most efficient, cleanest and most reliable units in the California system.

QFs roughly represent between 20 to 30 percent of the generating capacity in the State of California. The QFs in Edison's territory have not been paid for deliveries made From November 1 through the end of March. The QFs and PG&E service area were only partially paid and ultimately not paid at all from December 1 through April 6, 2001, the date PG&E declared bankruptcy. Both utilities together owe their respective QF counterparties approximately $2 billion in past receivables.

As a result of this non-payment, many QFs have defaulted on their financing and/or trade accounts and have no credit to purchase the requisite fuel or to operate or to conduct necessary repairs. The CPUC has ordered the utilities to commence paying the QFs beginning in April. The utilities, however, are currently disputing this order.

With the significant number of QFs not operating due to nonpayment, the PUC virtually assured that even those QFs that have the credit capacity and had been operating despite not being paid would either not operate or significantly reduce operation due to a change in the price formula for energy payments under the existing contracts. So at this time, when California needs every available megawatt, the CPUC took a dramatic and, in our view, unlawful action that further reduced available capacity in California.

According to the California Independent System Operator in a press release dated April 25, 2001, 3,000 megawatts of QF capacity were offline. As mentioned previously, this is only part of the story

since many of the QFs are not offline, but are operating at reduced levels.

As many of you may be aware, there are currently in excess of 20 lawsuits filed against Edison. Many QFs in Edison's territory have sought and have received declaratory judgments from California State courts permitting suspension or termination of the QF contracts, as a result of breach by non-payment by SCE. Prior to their declaring bankruptcy, similar suits have been filed against PG&E seeking similar relief. These suits have been stayed under bankruptcy law. Even though many QFs have lawfully obtained the right to suspend or likely will have such right, they have difficulty working with the utilities to receive the necessary interconnection services. Even those generators that have been interconnected to the grid for as many as 20 years and despite lawfully suspending or terminating their contracts, the utilities have made it very hard, and continue to block access to the grid and other creditworthy buyers.

Therefore, section 205 of the proposed legislation provides a necessary means of removing false impediments and assuring that those QFs that have lawfully suspended or terminated their QF contracts may deliver much needed power to the grid.

Another aspect concerning interconnection that I hope this subcommittee will consider is allowing generators to deliver excess capacity over contract capacity to the grid using these existing facilities. Currently, Calpine has an incremental 20 megawatts of generating capacity that is not under contract that it is able to sell to—that it would like to sell to third parties. However, PG&E is unwilling to purchase this excess capacity due to their financial circumstances. Allowing QFs to sell excess capacity under existing interconnection facilities will not only put more megawatts on the grid but encourage the development of more capacity.

Finally, I would like to conclude by saying that suspension or termination of the QF contracts is the last and final resort. We honor our contractual commitments; however, in light of the non-payment of approximately $2 billion and the continuing financial precariousness of the utilities and the PUC decision that makes it uneconomic for us to continue to run, our final resort may be necessary to make sure that every megawatt stays online at a time when it is desperately needed.

Thank you very much.

[The prepared statement of Alexandre Makler follows:]

PREPARED STATEMENT OF ALEXANDRE MAKLER, ASSOCIATE COUNSEL, CALPINE CORPORATON

Mr. Chairman, members of the Subcommittee, thank you very much for the opportunity to testify today about the proposed Electricity Emergency Relief Act and issues impeding the full operation of the Qualifying Facilities (QFs) in California. I applaud your effort to provide real solutions to the current energy crisis in California.

By way of introduction, I am in-house counsel to Calpine Corporation. Calpine is the leading independent power producer in the U.S. and the largest producer of geothermal energy in the U.S. Calpine has over 32,000 megawatts (MW) of electric generating capacity either in existing operation, under construction, or announced for development, in 28 states and Canada. In California, Calpine has approximately 600 MWs of QF generating capacity, with approximately 470 MWs of gas-fired cogeneration and 130 MWs of geothermal generation. Calpine is also a member of the Electric Power Supply Association (EPSA), the leading industry association representing

electric generators throughout the United States, and my testimony represents the views of EPSA members as well.

As you are all aware, California is currently experiencing a major energy crisis. With a significant supply and demand imbalance, which is exacerbated by drought in the Pacific Northwest, California needs to make sure that every MW of generating capacity is available this summer to avoid significant blackouts and the catastrophic effect that such blackouts would have on the citizens of the state and its economy. In a recent study prepared by the Bay Area Economic Forum, rolling blackouts this summer could have a disastrous impact of unparalleled proportions on California's economy, resulting in a full 1% reduction in the state's economic growth.[1]

Secretary of Energy Abraham testified before the United States Senate in March that California will have peak demand of 61,125 MWs, and a maximum supply of 56,169 MWs—a shortfall of almost 5,000 MWs. Using these figures, Secretary Abraham reported the projections of various analysts that California will be confronted with between 20 and 200 hours of blackouts this summer.[2] The implications of these predictions must not be understated. Assuming each blackout lasts 4 hours, using the higher end of Secretary Abraham's ranges, California could be subject to blackouts every working day from mid June through at least late August.

The situation will be made worse if the QF generating capacity located in the state is also not available. There are approximately 600 individual QF facilities producing nearly 9,700 MWs of generating capacity under long-term contracts with California's three investor owned utilities. Long-term contracts are of either twenty or thirty years duration and generally have seven to twenty years remaining on their terms. The QF capacity represents 20% to 30% of the total generating capacity needed to serve the electricity demand in the state. The QFs represent the newest, cleanest, and most efficient generating capacity in California. Of the approximately 9,700 MW, roughly 4,250 MWs are generated from renewable generating facilities (including geothermal, wind, small hydro, biomass and solar units) and 5,400 MWs are generated from natural gas using cogeneration units.

The cogeneration units not only generate electricity to deliver to California consumers, but they provide electric energy and thermal energy products, including steam, to their host businesses. Such host businesses are involved in food processing, oil refining, cardboard box making, hospitals, among other enterprises. In fact some of these enterprises are so dependent on the energy produced by their QF unit, that a threat to the economic viability of the QF, is a threat to the viability of the host as well. Indeed, recently one refinery operation had to declare bankruptcy because its QF has been unable to operate due to non-payment of monies owed to the QF by Pacific Gas and Electric Company.[3]

Currently, according to the California Independent System Operator's press release of April 25, 2001, "3,000 megawatts of generation from the state's qualifying facilities (QFs) [are] unavailable due to continuing financial concerns." The reasons for the non-operation or reduced operation of the QFs are two-fold: first, lack of credit and second, a pricing methodology currently imposed by the California Public Utilities Commission (CPUC) that makes it uneconomic for many gas-fired QFs to operate for a significant portion of the time, if at all.

Mr. Chairman and members of the Subcommittee, I want to be clear about something very important in this debate. Calpine and the other QFs in California want to operate our units under the terms of our contracts. Most of these units have been operating for over twelve years providing Californians with clean and reliable sources of power. Our commitment to the California market is evidenced by the fact that the QFs continued to operate even while the total non-payment by Southern California Edison Company (SCE) and Pacific Gas & Electric Company (PG&E) grew to nearly $2 billion. While we fully support the Subcommittee's effort to insure that all of the QF capacity will be online and supplying California with power this summer, we see this alternative as a last resort that we hope will not be necessary. Calpine and the other California QFs stand by their contractual commitments and hope that the California utilities will do the same.

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[1] *See* Bay Area Economic Forum, *The Bay Area—A Knowledge Economy Needs Power: A Report on California's Energy Crisis and Its Impact on the Bay Area Economy,* at 34 (Apr. 2001).

[2] Panel I of a hearing on Electric Energy Rates and Energy Issues before the Senate Energy and Natural Resources Committee, 107th Cong. (2001), slip op. 10, March 15, 2001.

[3] Jason Leopold, "Calif Oil Refiner Files For Bankruptcy Due To Pwr Crisis", Dow Jones Energy Service, April 25, 2001, WESTLAW, Dow Jones File (reporting that Golden Bear Oil Specialties Inc., which operates an oil refinery, filed for Chapter 11 bankruptcy due, in part, to the shutdown of United American Energy, a QF that supplied it with 90 percent of its power resources).

The QFs that have contracts with either SCE or PG&E are owed a significant amount of money for deliveries of energy made but not paid for by the utilities. While SCE and PG&E, under order by the CPUC, have made payments for deliveries in April, no payment of overdue amounts has been recovered. Until compelled by the CPUC to commence payment in April, SCE had not paid QFs for deliveries for the months of November, December, January, February and March. The total amount that SCE owes QFs, which SCE had contracted to purchase power from, is approximately $900 million. Similarly, PG&E owes its QF counterparties approximately one billion dollars for deliveries made in the months of December through April 6, when it declared bankruptcy. Calpine QFs are owed $267 million for past energy sales to PG&E. Meanwhile, whether in bankruptcy or not, both SCE and PG&E retain a significant amount of cash reserves. PG&E recently declared that it has $2.6 billion in cash. As a result of delivering energy but not being paid, many of the QFs have exhausted their own cash reserves and available credit. Even if they wanted to operate, they simply do not have the financial capability to purchase the natural gas necessary to operate their facilities.

In addition to the lack of financial capacity to purchase fuel, under the recent decision by the CPUC regarding the determination of the energy pricing methodology, it is uneconomic for many QFs to operate during a substantial period of time. As background, these contracts were developed by the CPUC to provide a stable and long-term basis for the state of California to receive efficient, clean and renewable energy resources and for the project developers to be able to access the financial markets to finance the development of the facilities.[4] Many of these contracts have been in place since the early 1980's. Under the contracts, a QFs is paid a capacity payment, which it earns by operating during certain peak periods, and an energy payment for the delivery of the electricity itself. Pursuant to the Public Utilities Regulatory Policies Act of 1978 (PURPA)[5], the amount that a QF is paid must be equivalent to the avoided cost of the utility, which "...means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility..., such utility would generate itself or purchase from another source."[6]

The amount and the terms of the capacity payments are for the most part set forth in the individual contracts and therefore are a matter of private contract law between the utilities and the QFs. The energy payment, however, is calculated using a formula that is based upon a system heat rate multiplied by a gas index price with an operating and maintenance adder. A heat rate is a factor which represents the efficiency of converting fuel into electricity. For illustrative purposes, presume that the heat rate is 10 and the price of gas is $8 for the requisite unit, if you multiply the heat rate by the fuel price you would then have the price per megawatt hour of electricity, which in this case would be $80. This is basically how the energy payment is calculated for the QFs.

Pursuant to a March 27, 2001 decision[7], the CPUC made sweeping changes to the energy payment formula that had been in place for the past five years. Not only does Calpine believe that this decision is in violation of PURPA and the CPUC's own rate-making requirements[8], but that, in the face of a severe supply/demand imbalance, it results in poor public policy since it effectively limits the amount of QF generating capacity that is on line.

First, the CPUC replaced the indices of gas prices at the California-Arizona border which have been used to set energy payment rates since 1996 (Topock Indices) with indices of gas prices at the California-Oregon border plus the cost of intrastate transportation through the PG&E system (Malin Indices). By replacing the Topock Indices with the Malin Indices and basing energy payment rate determinations 100% on gas purchases from Malin, the CPUC ignores the realities of the California gas market and the utilities' true avoided costs. As there is insufficient gas available from Malin to serve the state's gas-fired electric generation needs, generators

[4] The CPUC determined, "standard offers based on long-run avoided costs are long-term contract commitments. We would rather err on the side of trying to have QF capacity steadily come on line over time, than on that of ultimately risking a critical capacity shortage because we did not take reasonable steps to afford an opportunity for QF power, particularly long-term capacity, to be steadily developed...[D]eveloping QF power means California will be better able to meet its power needs from within its borders, and the State's resources will be more fully and efficiently used. *Re Pacific Gas and Electric Company,* 12 CPUC2d 604, 611 (1983).

[5] (16 U.S.C.A. §§824a-3, *et seq.*)

[6] 18 C.F.R. §§292.101(b)(6) (2000).

[7] CPUC Decision 01-03-067 (March 27, 2001).

[8] Calpine has filed seeking relief before the Federal Energy Regulatory Commission regarding the legality of the decision. Petition of Calpine Corporation for an Enforcement Action and/or Declaratory Order and Request for Expedited Treatment (April 27, 2001).

throughout the state do not, and can not, rely 100% on Malin gas purchases. Indeed, the price of gas physically and financially available to a generator in PG&E's service territory for the month of April was approximately $9.64/MMBtu.[9] Using the Malin Indices plus the transportation adder set forth in the decision, the price of gas used in calculating the energy payment rate for April 2001 was $7.70/MMBtu. This resulted in a $1.94/MMBtu shortfall between what a gas-fired QF in PG&E's service territory pays for its incremental fuel and the costs that the QF may recover for such incremental fuel purchases. This disparity increases for QFs located in southern California, since prices for natural gas that is actually available is more dependent on higher prices based on delivery from Topock.

The best "evidence" that the CPUC could marshal to support the change from the Topock Indices to the Malin Indicies is that the "Malin indices have closely approximated what Edison believes the price of gas would be in an undistorted Topock market."[10] Again, PURPA mandates that avoided costs are to reflect the actual costs which the QF purchase allows the utility to avoid. Further, common sense dictates that in order for the QFs to operate, the price that they receive for the delivery of energy should be based upon what the actual cost of gas is, rather than beliefs or wishes regarding what the price should be given certain hypotheticals. Because gas prices at Malin currently are significantly lower than prices at Topock, basing the energy payment rate on the Malin Indices, even accounting for intrastate transportation costs, results in payments to QFs far below the utilities' full avoided costs and at levels where it is uneconomic for many QFs to run at their full capability. As a result, even if the QF has the financial capability to purchase gas, it often makes no sense to do so since such QF would not be adequately compensated for the energy that it produces.

Second, the CPUC modified the factor used to calculate energy payment rates for Edison such that the revised Edison formula employs an artificially low heat rate, thereby reducing the energy payments rates Edison pays to its QF suppliers even further below its "full avoided costs" as required by PURPA. Conspicuous by its absence is any finding by the CPUC that the energy payment rates yielded by the PG&E, Edison and SDG&E formulas, as modified by the decision, accurately reflect the utilities' full avoided costs. Further, despite the current energy crisis, caused in large part by a lack of supply in the California market, the CPUC did not consider how its decision would affect the ability of the QFs, particularly the gas-fired QFs, to operate.

The decision represents poor public policy on the part of the CPUC. The energy payment rate-setting methodology that the CPUC imposed through the decision resulted in the following reductions to energy payments for QFs in April 2001: for QFs under contract with PG&E—a 22% reduction; for QFs under contract with SCE—a 44% reduction; and for QFs under contract with San Diego Gas & Electric Company (SDG&E)—a 34% reduction. In comments to the CPUC, SDG&E noted that the decision effectively prevented 151 MWs of QF generation from operating in its service area—representing 6% of SDG&E's peaking demand.[11]

This is particularly troubling when the wholesale price of electricity is much higher than the price that the QFs would have been paid even prior to the decision. The energy payment rates for QFs for January and February 2001 were substantially lower than the wholesale rates that FERC found to be just and reasonable for the same periods. Specifically, whereas FERC found $272/MWh to be just and reasonable for January deliveries, the QFs under contract with SCE were paid at a rate for January of $161/MWh, the QFs under contract with PG&E were paid at a rate of $176/MWh, and the QFs under contract with SDG&E were paid at a rate of $171/MWh. February's figures show an even greater discrepancy. Compared to the $430/MWh rate found by FERC to be just and reasonable, SCE's rate was only $138/MWh, PG&E's rate was $134/MWh, and SDG&E's rate was $136/MWh. In fact, it has been calculated that SCE saved more than $800 million through its purchases from QFs under the pricing methodology in place before the decision as compared to market-based purchases in 2000.[12] Not only does this beg the question of what the appropriate avoided cost should be as determined pursuant to PURPA, but it illustrates the fundamental value of these contracts to California consumers.

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[9] "Gas Daily Price Guide", April 2001 Monthly Index, *Financial Times Energy*.

[10] Decision 01-03-067, at 20 (emphasis added).

[11] *Comments of San Diego Gas & Electric Company on Alternative Gas Indices for Use in Calculating Short-Run Avoided Costs* in CPUC Proceeding R.99-11-022, filed April 10, 2001 ("SDG&E Comments") at 3

[12] Application of the California Cogeneration Council for Rehearing of Decision 01-03-067 and Request for Oral Argument, p. 13 (April 27, 2001).

Faced with no immediate means of recovering substantial amounts owed to them for deliveries made (since November for QFs with contracts with SCE and December for QFs with contracts with PG&E), and a new pricing formula that makes it uneconomic for many QFs to operate, many QFs have sought or are seeking either temporary or permanent relief from their performance obligations under their existing contracts. In SCE's service area, it is reported that there are currently in excess of 20 separate lawsuits to seek termination, suspension and/or recovery of past due amounts. Prior to PG&E declaring bankruptcy on April 6, 2001, a number of similar lawsuits had been filed or were in the process of being prepared. Currently, QFs are praying for relief before the bankruptcy court: asking the judge either to order a date certain by which PG&E would assume or reject the contracts or to permit contract suspension in the interim.

An action by the utilities which has compounded the problem, and which the proposed legislation addresses specifically, is that when a QF has either suspended or terminated its performance under the existing contracts due to non-payment by the utilities, the utilities effectively prevent the QFs from delivering the electricity that they generate to the transmission grid and other buyers. The right to deliver such power is unambiguously provided for not only in the Federal Power Act, but also under the utility open access transmission tariffs. Further, since the QFs are already interconnected to the transmission grid—all the necessary equipment and system supports are in place and have been for some time—there is no physical reason that would prevent the utilities or the California Independent System Operator from allowing the QFs to deliver its electricity to the transmission grid and other creditworthy purchasers. Therefore, Section 205(d) of the proposed Electricity Emergency Relief Act, which provides "[w]here a qualifying facility exercises its rights under this section, the electric utility party to the power purchase contract shall maintain interconnection services unimpeded and without interruption," addresses a very real and important impediment faced by QFs who are trying to deliver electricity to the transmission grid.

I hope the Subcommittee will consider another aspect of trying to ensure that consumers receive the full benefit of existing QF generation that is under long-term contracts with utilities. This is the fact that even under normal circumstances, existing contracts effectively prevent the QFs from selling power in excess of the specified contract quantity to other parties. Under the existing contracts, the utilities have no obligation to take energy in excess of the contract capacity. Further, since the QFs have no independent ability to deliver this additional energy to third parties, the QFs are entirely dependent on the utilities to purchase such additional energy. In Calpine's case, currently there is an incremental twenty MWs of generating capacity in excess of the contract capacity. Ironically, as a result of their financial instability during this energy crisis, PG&E has refused to purchase any energy associated with this excess capacity. As a result, California consumers are being deprived of this additional capacity for no other reason than our contracts do not permit us to deliver excess energy to third parties. Since a megawatt is roughly enough electricity to power 1,000 homes, this impediment potentially affects 20,000 households. Therefore, in order permit existing excess capacity to get to market, and to encourage facility improvements by QFs, I suggest that Section 205(d) be broadened to cover not only QFs exercising their rights under Section 205 with respect to existing contractual obligations, but to permit QFs to deliver capacity in excess of that contracted for to third parties using the interconnection facilities and services that are already in place.

As California businesses, the QFs know the importance of keeping the lights on and the devastating effects that blackouts would have on the citizens and economy of California. Despite not being paid for as many as five months, the QFs in California have done their best to stay on line and to deliver electricity to our fellow citizens. However, even the largest and financially strongest among us have our financial limits, particularly when it comes to being paid on a basis that is unlawful and has no basis in reality. Calpine and EPSA applaud and support the work of this Subcommittee in developing the Electricity Emergency Relief Act. Calpine believes that the right to suspend provided for in Section 205 is a necessary alternative, but fundamentally a last resort. When the QF contracts are administered pursuant to the requirements of PURPA, as they have been for the last twenty years in California, and the utilities make payments as required thereunder, the QFs provide a stable and efficient source of electricity on terms that significantly help to shield consumers from the volatility of the energy markets. Unfortunately, as a result of non-payment and unlawful changes to the price-setting methodology, the consumers of California are being deprived of this important asset when they need it most.

Finally, I want to briefly address the issue of environmental permitting. While your bill has several provisions that could temporarily suspend or limit air emission requirements during emergencies, there is an additional problem in siting new generation. The state and federal environmental permitting process for siting new generation can be extremely time-consuming and, in some instances, duplicative. We believe that the federal government could improve its own multi-agency process, through coordination and streamlining, in a way that would expedite the siting of new clean generation without compromising environmental protection in any way. We will be providing the Subcommittee with some specific suggestions shortly, but I wanted to at least bring this issue to your attention as one that you may also want to consider addressing in this legislation.

Thank you very much for your time and efforts regarding this important issue.

Ms. BONO [presiding]. Thank you. Mr. Colburn, you are recognized for 5 minutes.

STATEMENT OF KEN COLBURN

Mr. COLBURN. Thank you, Madame Chairman and members of the subcommittee. Like members of your first panel, some of them anyway, I, too, am a non-lawyer so I can speak unencumbered by the thought process.

Some argue that I live in the same fashion by residing in the State of New Hampshire, which has the highest average electric rates in the country. I do know enough, though, to request that my testimony be amended. It starts with, "Good morning."

I am here today on behalf of STAPA and ALAPCO, which are the two national associations of State and local air quality officials, the members of which have primary responsibility under the Clean Air Act for implementing our Nation's air pollution control laws and regulations. Thank you for this opportunity to testify on H.R. 1647.

We appreciate and commend your efforts to address California's energy crisis and the potential for such emergencies to arise elsewhere. After examining this issue carefully, we have concluded, however, that the Clean Air Act and related air quality regulations are not responsible for the energy shortages in California. These requirements did not interfere with the permitting and construction of new power generation or the operation of existing units.

With construction and new generation, in fact, now surging throughout the country, even in heavily regulated ozone non-attainment areas, it is clear that the energy problems that have reached crisis proportions in California, and which may arise in other areas of the country, are not attributable to air pollution control limitations. In California, for example, it is apparent that many factors are responsible, such as the approach taken to utility deregulation, increasing electricity demand during a period of strong economic growth, inadequate transmission capacity, inadequate capability to perceive and respond to demand, and substantially reduced energy conservation in the initial years of deregulation. In the context of an aging power generation and transmission infrastructure, these factors created a situation where peak power demands exceeded the available supply.

In our written statement, we highlight two States, California and Connecticut, in which existing Federal and State authority has been successfully used to address energy crises. In California, the State allows temporary delays in stringent NO_X control requirements for some new generators, but places a cap of 25 parts per million of NO_X, nitrogen oxides. and requires sources to comply

with a 5 parts per million cap no later than 1 year after a waiver is granted. For existing sources, the State allows for temporary increases in emissions associated with increased generation provided the sources pay mitigation fees.

STAPA and ALAPCO believe firmly that Governors must be allowed the broadest discretion possible to respond quickly and effectively to emergencies within their respective jurisdictions. Existing Federal and State authority can be used to resolve energy issues in a way that provides maximum flexibility to Governors to tailor solutions to their own unique needs. The air quality-related provisions contained in H.R. 1647, are premised on the notion that air pollution control requirements are causing emergencies. Such requirements are not responsible for the problem, however, and therefore the tools provided in H.R. 1647 will not materially help States in addressing electricity emergencies. Further, we are concerned that these provisions could unintentionally exacerbate air quality problems, including interstate transport of air pollution.

Our written testimony identifies our concerns with the air quality related provisions of the bill. I would like to just highlight two of these concerns now. Under section 303, new generation of sources could be built without any NO_X controls and could remain uncontrolled for up to a year without offsetting their excess emissions or paying for any mitigation fees. The resulting increased emissions could not only exacerbate air quality problems in downwind areas, it could also jeopardize the ability of States and localities to meet their air quality goals and could even increase their obligations under the Clean Air Act. Overall costs are also likely to be higher.

Under section 305(d), any type of generator operating on any type of fuel, no matter how dirty, could be allowed a waiver of all air pollution control requirements, even those unrelated to power generation for all air contaminants, including toxic air contaminants. While net increases in air pollution are prohibited, there is the potential for adverse consequences in the form of localized air quality impacts and then, of course, transported to air pollution as well. It is also not clear how some pollutants, such as toxics and particulate matter could be offset in as much as there is no trading program for those pollutants at this time.

In summary, the Clean Air Act and related air pollution control programs are not responsible for the electricity crisis occurring in California. Accordingly, the air quality-related tools in H.R. 1647 will not help States address electricity emergencies. Further, we are concerned that these provisions could unintentionally exacerbate air quality problems, including interstate transport of air pollution. Finally, existing Federal and State authority already provides States with broad flexibility to act quickly in a time of crisis and to take timely and appropriate action best suited to their particular energy needs.

Once again, we commend you for your interest in this important issue and thank you for the opportunity to testify.

[The prepared statement of Ken Colburn follows:]

PREPARED STATEMENT OF KEN COLBURN, DIRECTOR, NEW HAMPSHIRE DIVISION OF AIR RESOURCES ON BEHALF OF THE STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS AND THE ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS

Good morning, Mr. Chairman and members of the Subcommittee. I am Ken Colburn, Director of New Hampshire's Division of Air Resources, and I am testifying today on behalf of the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO). Thank you for this opportunity to provide you with our thoughts regarding H.R. 1647, the "Electricity Emergency Relief Act."

STAPPA and ALAPCO are the national associations representing air quality officials in 54 states and territories and over 165 major metropolitan areas throughout the country. The members of STAPPA and ALAPCO have primary responsibility under the Clean Air Act for implementing our nation's air pollution control laws and regulations. Accordingly, we are especially interested in the air quality-related provisions contained in the "Electricity Emergency Relief Act" and we would like to offer our perspectives on this legislation and the circumstances leading up to it. Our message, in brief, is that we do not believe the air quality-related provisions of this legislation are warranted.

STAPPA and ALAPCO appreciate the Subcommittee's concern over California's electricity emergency and the potential for such emergencies to arise elsewhere around the country, and we commend your efforts to explore means that will allow states to prevent and, when necessary, respond to such emergencies. We share this concern and, for that reason, have examined this issue to determine whether or not the Clean Air Act might have played a role in causing electricity shortages. We have concluded with confidence that the Clean Air Act and related air pollution control programs and requirements bear no responsibility for the electricity shortage facing California. In fact, it is clear that neither the Clean Air Act nor related programs and requirements are interfering with the permitting and construction of ample new power generation in California or other parts of the country or the operation of existing electric generation units. Quite to the contrary, it is evident that under the current Clean Air Act and existing state and federal authorities, construction of new electricity generation capacity is currently thriving.

Although California had not constructed a new, major power plant in approximately two decades, during the past two years, the California Energy Commission (CEC) has approved 13 power plant projects with a capacity totaling 8,400 megawatts (MW); six of these are currently under construction. Moreover, the CEC is considering 15 additional projects with a capacity of 6,700 MW, and is expecting 12 more projects comprising 8,000 MW to be filed this year. Finally, the state is expecting to bring an additional 2,000 MW of peaking projects on line this summer.

Nine Central states have also witnessed a recent boon in power generation. These states, including Nebraska, Iowa, Minnesota, Kansas, Missouri, Arkansas, Louisiana, Texas and Oklahoma, have recently constructed and/or permitted over 70,000 MW. This includes over 36,000 MW in Texas and 15,000 MW in Louisiana.

In New England, permits have been issued for more than 7,000 MW of new combined-cycle gas turbine capacity, a substantial portion of which is already under construction.— This total represents an approximate 25-percent expansion of New England's existing capacity base. Meanwhile, according to the most recent power plant inventory data collected by the federal Energy Information Administration, self-reported industry plans for future capacity additions are even more ambitious, totaling nearly 12,000 MW in New England, 4,000 MW in New York and 14,000 MW in the Pennsylvania-New Jersey-Maryland power-pool area.

Other regions of the country are reporting similar growth trends in electricity generation.

With new generation now surging throughout the country, even in heavily regulated ozone nonattainment areas, it is clear that the energy problems that have reached crisis proportions in California, and may also arise in other areas of the country, are not attributable to air pollution control limitations. In California, for example, it is apparent that many factors are responsible, such as the approach taken to utility deregulation, increasing electricity demand during a period of strong economic growth, inadequate transmission capacity, insufficient capability to perceive and respond to fluctuating demand, and substantially reduced energy conservation. In the context of an aging power generation and transmission infrastructure, these factors have created a situation where peak power demands exceed the available supply.

The energy crisis has put to the test statutory provisions designed by Congress expressly for the purpose of addressing such emergency situations. We congratulate

you and your colleagues in the 101st Congress for including such effective provisions under Section 110(f) of the Clean Air Act Amendments of 1990. As has been successfully demonstrated in California, notwithstanding the cause of the energy shortage, existing federal provisions, combined with existing state authorities, provide Governors across the country with tremendous flexibility to act swiftly in a time of crisis to take timely and appropriate action best suited to each state's particular needs.

Through a series of administrative orders, California is able to allow temporary delays in the toughest NO_X control requirements (Lowest Achievable Emissions Rate) for new generation sources, but during the delay places a cap of 25 parts per million (ppm) on emissions; such delays are granted with the express understanding that sources will comply with a 5-ppm emissions limit no later than one year after a waiver is granted. For existing central generation sources, the state allows for temporary increases in emissions associated with increased generation by sources with emissions limits that cap hours of operation, provided the sources pay mitigation fees to the local area in which the emissions increases occur. These fees are intended to be used to reduce NO_X from sources that would not otherwise be controlled. These provisions are authorized by state law (California Health and Safety Code Section 42451) and federal law (Clean Air Act Section 113).

Likewise, other states have also demonstrated that emergency capacity shortages can be successfully addressed by using existing authorities. In Connecticut, for example, over 3,000 MW of nuclear capacity were affected in April 1996 by a Nuclear Regulatory Commission decision that nuclear units could not operate until safety concerns were addressed. This generation, which represented half of Connecticut's in-state capacity, was precluded from operating for over a year—a period that included two summer seasons, which are periods of peak demand in the Northeast. However, replacement capacity was generated through several measures, including quickly bringing in new generation, signing up utility customers to generate their own power and increasing energy conservation efforts (which represented approximately 300 MW around New England on peak days). Although the Connecticut Assembly approved emergency legislation to allow the state's Department of Environmental Protection to waive the 30- to 60-day public comment period for permit issuance, no other environmental requirements were suspended.

STAPPA and ALAPCO firmly believe that Governors must be allowed the broadest discretion possible to respond quickly and effectively to emergencies within their respective jurisdictions. The above examples illustrate that existing federal and state authorities can be used to resolve energy issues in a way that provides maximum flexibility to Governors to tailor solutions to their own unique needs. The air quality-related provisions contained in the "Electricity Emergency Relief Act" are premised on the notion that air pollution control requirements are causing electricity emergencies. However, as we have established, such requirements are not responsible for the problem and, therefore, the tools provided in this bill will not help states address electricity emergencies. Further, we are concerned that these provisions could, unintentionally, exacerbate air quality problems, including interstate transport of air pollution. Accordingly, we offer the following comments on Sections 303 and 305 of the legislation.

With respect to Section 303, which addresses "NO_X Preconstruction Requirements for New Generation," STAPPA and ALAPCO offer the following observations. First, this section of the bill would allow waivers of all preconstruction and New Source Performance Standards (NSPS) requirements for new generation sources for up to one year, thus not only allowing these sources to operate with no pollution controls, but to do so without offsetting excess emissions or paying any mitigation fees. Second, it does not require compliance with waived requirements until the waiver expires, irrespective of whether or not that amount of time is necessary. Third, it postpones the determination of what pollution control limits will ultimately be required until after the waiver expires, which could lead to decisions that are less effective in terms of pollution control, cost and rate recovery. Fourth, allowing new generation sources in an area experiencing an electricity emergency to go totally uncontrolled for up to one year (and to allow the granting of such waivers to take place for a period of up to two years) poses significant issues related to transported air pollution. The increased emissions could not only exacerbate air quality and public health problems in downwind areas, they could also jeopardize the ability of states and localities to meet their clean air goals, including attainment and maintenance of health-based air quality standards and the protection of pristine "Class I" areas. Increased emissions could also lead to the imposition of economic development sanctions under the federal Clean Air Act or force areas to impose additional control requirements on sources within the downwind area in order to mitigate the additional pollution coming from upwind.

With respect to Section 305, which addresses "Emergency Generation," STAPPA and ALAPCO offer the following observations. Section 305(c), which addresses "NO_X Waiver Authority for Natural Gas-Fired Generation," would allow waivers of all NO_X emission limits for affected sources. Although the bill prohibits sources from disconnecting or ceasing use of emission control devices, it does not preclude relaxation of air pollution emission limits, nor does it preclude sources from increasing emissions by "throttling back" on their control devices. In addition, it appears that although waivers may not extend for more than six consecutive months during a two-year electricity emergency, nothing would preclude the granting of multiple waivers to a particular source, with one-month breaks between each.

Section 305(d), which applies to "Emergency Generation for Private Use," is even more problematic in that it would apply to any type of generator operating on any type of fuel, no matter how dirty. Under this subsection, waivers of all air pollution control requirements (even those unrelated to power generation) are allowed for all air pollutants, including toxic air pollutants. While net increases in air pollution are prohibited, the required offsets may occur anywhere in an undefined "air quality region"; this raises serious concerns regarding the potential for localized air quality impacts, as well as concerns related to transported pollution. In addition, as in Section 305(c), although disconnecting or ceasing use of emission control devices is not allowed, emission limits can be relaxed or sources can "throttle back" on the control devices. Further, unlike Section 303 and Section 305(c), applicability of this subsection is not limited to a two-year period; it also appears that a source may be able to obtain multiple, successive six-month waivers. Neither Section 305(c) nor 305(d) calls for the payment of any mitigation fees by sources taking advantage of the opportunity for waivers.

In summary, the Clean Air Act and related air pollution control programs are not responsible for the electricity crisis occurring in California. Accordingly, the air quality-related tools in the "Electricity Emergency Relief Act" will not help states address electricity emergencies. Further, we are concerned that these provisions could, unintentionally, exacerbate air quality problems, including interstate transport of air pollution. Finally, existing federal and state authorities already provide states with broad flexibility to act quickly in a time of crisis and take timely and appropriate action best suited to their particular energy needs.

Once again, we commend you for your interest in this extremely important issue and thank you for providing us with this opportunity to testify. I would be happy to answer any questions at this time.

Ms. BONO. Thank you. Mr. Hawkins, 5 minutes.

STATEMENT OF DAVID G. HAWKINS

Mr. HAWKINS. Thank you, Madam Chairman. Let me start by encouraging the subcommittee members to keep in mind that there are two shortages in California and other States. In the last couple years, there has been a shortage in electricity. In the last 30 years, there has been a persistent shortage in another essential commodity—clean air. Whole generations of children have grown up in California and other States breathing air that is unhealthy for them, that they have been told is unhealthy for them, that their parents have been told is unhealthy for them. And in addressing the more recent shortage of electricity, it is critical that we not ignore this other persistent shortage which has affected the lives of tens of millions of people and continues to do so.

Second, let me state my agreement with what other witnesses have said, that environmental rules have not caused problems in California, and they are not impeding solutions to those problems. As other witnesses have pointed out, the claims that environmental rules were somehow responsible for the failure to construct power plants in California has been thoroughly disproved. Market conditions led to the lack of filing applications until recently. The applications that have been filed most recently, they have been processed promptly, and they continue to be processed promptly.

Nor do the rules impede solutions to the problem. Permits are being considered on an accelerated basis and existing facilities that approach their emission limits—by the way, emission limits that they, themselves, asked for—are being given compliance procedures which allow them to continue operating but continue to be responsible for the obligations that they agreed to undertake.

And, finally, energy efficiency investments, which have been prompted by environmental concerns in California, have really made this situation in California a lot less bad than it otherwise would have been. Five thousand megawatts of savings, resulting in $3 billion of savings to consumers, have been created by the energy efficiency investments that California was wise enough to undertake. That is one thing they did right.

Sweeping aside environmental protections for air, water, parks, wilderness areas as the Electric Emergency Relief Act would do, won't solve electricity problems in California or other States. What it would do is create threats of harm to public health, damage to fish and wildlife, hazards to property owners affected by hydroelectric facilities, conflicts with treaties and other laws, and allow construction of industrial transmission lines across any Federal lands, apparently including parks, wildnerness areas, monuments, and wildlife refuges.

As an example, consider section 305 of the bill, which allows EPA to approve permanent, new authorization in State air pollution plans for waiver of all NO_X emission limits from gas-fired power plants. While the waivers themselves are limited to 2 years, the amendments to the State programs are permanent until amended or revoked by some later act. On those permanent waivers, authorities are granted in the abstract.

The provision says that EPA is supposed to evaluate whether a net increase will occur. Well, as a practical matter, that would be impossible, because the authority that would be granted under this section would extend for years into the future.

Moreover, under the provision in this section, even if the State plan or EPA clearly violated the law by designing and approving waiver provisions that went much broader than section 305 authorizes, there is no remedy for citizens that might be harmed by this illegal action, for section 305(f) bars citizen suits. It denies the authority to a judge to stop illegal waiver programs no matter how egregious they violate the language of the bill and no matter how large a threat to public health they may present.

What about the argument that the bill only authorizes Governors to waive requirements and why shouldn't we trust them? Well, let me ask the question whether this would be a sufficient argument if waivers of other important rights of citizens were involved, such as the right to vote, equal protection under the law, due process, job discrimination, workplace safety, for example? The laws that are waived under this bill are important health and environmental protection laws. They have been developed over a period of 30 years or more, and the public deserves more than just a slogan of "Trust the Governors" before these safeguards are swept away.

In concluding, let me state what I think the concern would be about just giving this authority to Governors. In essence, it would create a blame-shifting dynamic. Electric generators and other elec-

tric suppliers would publicly call for these waivers to be issued so that they could say to the public when the blackouts occur, "Well, we did what we could. We asked the Governor to do something about it." The Governor, in turn, will say, "If blackouts are likely to occur, I don't want to be in a situation where someone can say, 'Well, they occurred because you didn't grant those waivers.'" So there would be a tendency to avoid blame and grant waivers where they are not really necessary, creating much more pollution and not really solving the problem.

With cries of crisis and emergency in the air—indeed, emergency is in the title of the bill—why should you or we be confident that Governors will enjoy the luxury of a calm and cooperative process to consider demands for waivers under these laws? Thank you.

[The prepared statement of David G. Hawkins follows:]

PREPARED STATEMENT OF DAVID G. HAWKINS, DIRECTOR, AIR & ENERGY PROGRAMS, NATURAL RESOURCES DEFENSE COUNCIL

Mr. Chairman, members of the Subcommittee, thank you for your invitation to testify on behalf of NRDC, the Natural Resources Defense Council, regarding "The Electricity Emergency Relief Act." NRDC is a nonprofit citizen organization dedicated to environmental protection, with more than 400,000 members nationwide. Since 1970, NRDC has followed closely the implementation of the Clean Air Act and other environmental laws and has sought to promote actions under the law that carry out Congress' policy decisions to protect public health and the environment from harm caused by pollution.

While the scope of this legislation is national, many of its measures are plainly directed at electricity disruptions experienced in recent months by the State of California. But let us not forget that there are two critical needs in short supply in California—electricity and clean air. The California Air Resources Board (CARB) tells us that over 90 percent of the state's population breathes unhealthy air during some part of the year. (www.arb.ca.gov/aqd/aqtrends/trends39.htm). Most areas of the State do not meet federal and state ambient air quality standards for ozone and particulate matter. In order to meet electricity shortfalls, California businesses have resorted increasingly to very dirty diesel generators that have exacerbated already unhealthy air quality. According to estimates from CARB, a typical uncontrolled one-megawatt (MW) diesel generator operated only during periods of peak demand (250 hours per year) would result in a 50% increase in cancer risk due to diesel exhaust exposures for nearby residents. (Attachment to Feb. 21, 2001 Letter from Michael P. Kenny, Executive Officer, CARB, to CA Air Pollution Control Officers.) This increased health risk is particularly alarming in light of the fact that there are approximately 11,000 emergency diesel generators in California. Incredibly no one seems to have a handle on where these generators are located, how frequently they are operated, and what the health consequences may be for the public if large numbers of these generators are run.

Turning to the proposed "Electricity Emergency Relief Act," our view is that Congress should have presented to it strong documented information that specific environmental measures are interfering with provision of adequate electricity generation and supply, before changes to critical health and environmental protection laws are formulated. It would not be responsible to sweep away important environmental and health protections simply because one can imagine a problem in the future. With all due respect to the Subcommittee, the provisions of the proposed bill are sweeping, unjustified, and disproportionate to any demonstrated need for the exemptions contained in the bill.

I will focus the bulk of my attention on the sections of the bill that provide for the weakening of existing requirements under the Clean Air Act—Section 303 and Section 305. These sections are aimed squarely at providing regulatory relief from protections against nitrogen oxides (NO_X) pollution, a precursor to two major pollution problems: ground-level ozone or smog pollution; and fine particle or soot pollution. Sections 303 and 305 authorize dramatic increases in air pollution and resulting harms to public health.[1] In section II of this testimony, I provide comments on

[1] As EPA and independent researchers have long recognized, "[t]here is a wide range of ozone-induced health effects, including decreased lung function (primarily in children active outdoors), increased respiratory symptoms (particularly in highly sensitive individuals), increased hospital

most of the other sections of the legislation. Finally, in section III, I offer a few brief recommendations for steps that Congress could take to address electricity and air pollution concerns constructively, as well as measures to inform and protect the public with respect to the dangerous levels of pollution from dirty diesel generators that will be occurring in parts of this country in anticipation of electricity shortfalls this summer. For more comprehensive recommendations about constructive and environmentally sound energy policies, I refer interested parties to the February 2001 NRDC report entitled "A Responsible Energy Policy for the 21st Century." (www.nrdc.org/air/energy/rep/repinx.asp)

I. THE LEGISLATION'S AIR POLLUTION MEASURES

Section 303: NO_X Preconstruction Requirements for New Generation

First and foremost, we are not aware of testimony or other evidence in the record before this Subcommittee demonstrating that the Clean Air Act's preconstruction requirements (PSD, NSR, and minor NSR) or new source performance standards (under section 111 of the Act) have impeded construction or operation of new electric generation units. To the contrary, Dr. Alan Lloyd, Chairman of the California Air Resources Board (CARB) has testified before this Subcommittee that environmental laws do not pose a barrier to California's ability to bring new electricity generation on line. (Lloyd, March 22, 2001 Testimony.) Providing EPA's perspective, EPA Administrator Whitman has also observed publicly that clean air regulations have not hampered the ability of California utilities to provide power. (CNN Crossfire interview, February 26, 2001; Roll Call interview, April 23, 2001). Accordingly, we see no factual need or justification for the weakening of the Clean Air Act reflected in Section 303.

Let me now address many of the specific flaws and harmful consequences of Section 303, set against the backdrop of the Clean Air Act programs that this section would authorize to be overridden. The 1970 Act's principal tool for improved pollution control for new and modified stationary sources of air pollution was the New Source Performance Standard (NSPS), a national, categorical requirement based on very good, but not the best, pollution minimizing practices. In 1977, when the Act was amended, Congress adopted the new source review (NSR) and prevention of significant deterioration (PSD) programs to strengthen efforts to minimize emissions and air quality impacts from new and modified sources.[2]

In the 1977 Amendments Congress expanded both the scope and the rigor of the requirements for improved performance from new and modified sources. Coverage would no longer be limited to the categories for which EPA had adopted NSPS requirements; rather all new and modified sources above certain pollution tonnage thresholds would be required to minimize their emissions. Second, the level of the performance requirement would not be tied to often out-of-date NSPS; rather case-by-case determinations of current best performance would be required. Third, covered sources locating in clean areas as well as dirty areas would have to pass ambient impact tests to prevent a worsening of air quality.

In 1990, Congress again increased its emphasis on pollution prevention from new and modified sources, reducing the size thresholds for coverage in badly polluted areas.

Under the NSR permitting program, permits for new sources or modifications must contain two safeguards. First, the permit emission limits must reflect the current best performing controls, which require pollution reductions that might range from 70-98%. Second, in "nonattainment areas"—those with unhealthy air that fail to meet ambient air quality standards—permits must also fully offset a facility's pollution (that remaining after application of best performing controls), and must do so at higher offset ratios, in order to achieve a net air quality *benefit*. Thus, the Clean Air Act requires ozone pollution offsets ranging from 1.1:1 up to 1.5:1, depending upon how dirty an area's air quality is. Moreover, the NSR program requires additional protective measures including air quality impact analyses to demonstrate that new pollution increases will not cause or contribute to a violation of ambient air quality standards or PSD increments; analyses to protect air quality in national parks and wilderness areas; and evaluations to protect visibility. Finally,

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admissions and emergency room visits for respiratory causes (among children and adults with pre-existing respiratory disease such as asthma), increased inflammation of the lung, and possible long-term damage to the lungs." 63 Fed. Reg. 57356 (Oct. 27, 1998). A host of new health studies, along with a review of this research by EPA, conclude that fine particle pollution is an even greater public health threat than previously realized and is the basis for strong links to thousands of premature deaths each year. See Andrew C. Revkin, "Tiny Bits of Soot Tied to Illness," The New York Times, April 21, 2001.

[2] For simplicity, for this testimony I will refer to these programs generally as NSR.

new or modified sources of pollution that increase pollution at levels below the coverage of the major NSR program will often still be required to obtain preconstruction permits to control pollution growth under the Act's minor NSR program.

Section 303 would sweep away all of the important protections of these programs for up to one year with respect to nitrogen oxides (NO_X) pollution from "new electric generation units," if a governor declares an "electricity emergency." A facility would be given leave to construct and operate any size and number of generation units without any pollution control equipment or any obligation to limit its pollution; without offsetting its increased pollution in the country's dirtiest areas; and without performing any analysis to determine that public health, national parks, visibility, and the natural environment are protected. As I discuss below, the purported solution for electricity emergencies put forward by Section 303 is not one well designed for either the nature of electricity shortages or the planning, permitting, and construction of electricity generation units. And as I discuss next, the adverse consequences for public health and the environment wrought by Section 303 would be significant.

Section 303 would authorize operation of any size electric generation unit for up to one year with absolutely no pollution control equipment. It is essential to put some real numbers on the magnitude of this weakening of current Clean Air Act requirements. Consider the case of an electric utility boiler rated at 215 MW undergoing permitting in the South Coast air basin in California today. Burning natural gas, the boiler would emit 2.25 lbs NO_X/MW-hr without a pollution control device, which translates to 11,610 lbs/day of NO_X emissions. With a pollution control device required by NSR permitting, typically selective catalytic reduction (SCR) reducing emissions by 95.8%, the boiler would emit 488 lbs/day of NO_X emissions. On the realistic assumption that this boiler would operate at an annual capacity of 70%, the annual NO_X emissions allowed by operation of this boiler without pollution control equipment would be 2,966,355 lbs of NO_X (1,483 tons of NO_X). Thus, with Section 303's one-year waiver, this legislation would allow 2,841,671 lbs (1,421 tons) of NO_X pollution in excess of what would otherwise be allowed by the Clean Air Act's best performance control requirement today from a single 215 MW utility boiler.

To provide additional context to these figures, consider existing pollution loadings in Los Angeles, the South Coast Air Quality Management District (AQMD). Based upon 1999 production levels, power plants in the South Coast air basin emitted an annual total of 5,512 tons of NO_X pollution, out of a total of 20,914 tons of NO_X from all RECLAIM facilities.[3] Recall that our single 215 MW utility boiler allowed to operate without pollution controls by Section 303 would emit 1,483 tons of NO_X at a 70% annual capacity—an increase of about 25% from all electric generation sources, due to one new and dirty unit receiving a waiver under the bill.

The availability and potential adverse consequences of Section 303's allowance for waiver of NO_X pollution controls are breathtaking. There are many utility boilers in the size category of our 215 MW utility boiler, some smaller but others significantly larger, being constructed or about to operate just in southern California today. Vice President Cheney claims that 1,300 to 1,900 new power plants will be needed during the next 20 years in order to meet the nation's electricity demands, according to a front-page story in the Washington Post this week—all of these new plants could operate uncontrolled for a year in any state where the governor had declared an electricity emergency. Last, but certainly not least, in the dirtiest areas of the country—where health threats are greatest—Section 303 would eliminate the requirement that sources offset their NO_X pollution increases and provide a net air quality benefit to breathers.

In the example above, the emission rate for the uncontrolled gas-fired boiler in question was 2.25 lbs NO_X/MW-hr. But it is worth noting that even this represents the low end of the scale for gas-fired utility boilers, according to figures provided by CARB. Their figures indicate that uncontrolled gas-fired power plants emit anywhere from 2 to 4 lbs NO_X/MW-hr. Coal and diesel generation units emit at even higher levels:

Generation Unit	Lbs NO_X/MW-hr
Existing Diesel Standby Emergency Generators	25 to 30
Diesel Engine with Best Available Control	7
Uncontrolled Coal-Fired Power Plant	6
New Natural Gas-Fired Power Plant	2 to 4

[3] RECLAIM is the acronym for an emissions trading program called the Regional Clean Air Incentives Market.

Generation Unit	Lbs NO_X/MW-hr
New Natural Gas Peaking Turbines	0.1 to 0.8
Typical Mix of Existing Gas-Fired CA Power Plants	0.5
Well-Controlled Older Gas-Fired CA Power Plant	0.1 to 0.15
New Combined Cycle Gas-Fired CA Power Plant	0.05

Source: Attachment to Feb. 21, 2001 Letter from Michael P. Kenny, Executive Officer, CARB, to CA Air Pollution Control Officers.

The potentially significant adverse consequences from Section 303 are compounded by the lack of any demonstrated need for Congressional intervention. We are unaware of instances in which the determinative factor behind an electricity generator's decision whether to site a new power plant is dictated by the inability to meet pollution control limits upon startup. It has not been demonstrated to our knowledge that installation of pollution control equipment is the bottleneck or even a significant contributing factor toward delays in bringing new electric generation capacity on line.

Additionally, because the bill requires new electric generation units nonetheless to meet section 111 and preconstruction requirements relating to NO_X at the end of one year, sources and permitting authorities still will be compelled to undertake permitting review for NO_X and installation of associated pollution control equipment well in advance of that (maximum) one year deadline. Indeed, it will be most sensible for the rational plant operator to construct pollution control equipment for NO_X at the same time they are constructing their new electric generation units and installing other pollution controls. The lower capital costs of constructing new units equipped with control devices versus retrofitting existing units later likely would lead sources to construct pollution control equipment for NO_X in a single capital construction process. The planning and construction of new power plants occur over several years and the costs and efforts associated with NO_X pollution control equipment are a very small part of the overall capital costs associated with construction of a modern power plant.

At the same time, it will be most rational—and environmentally sound—for plant operators and permitting authorities to undertake preconstruction review of NO_X emissions from new power plants before a plant is constructed, as one step in the overall planning for the project. The rational business values certainty and the NSR program provides that certainty by establishing the expected best performance controls and other conditions before polluting units are constructed. Section 303 could actually increase the uncertainty associated with a power plant's environmental obligations, by forestalling awareness and assurances over what pollution control equipment may be required pursuant to regulatory review and whether public comments need to be taken into consideration, until well after a power plant has begun operations.

Because of the capital costs and rational planning considerations noted above that are associated with installation of pollution control equipment, plant operators are likely to value the greater certainty of preconstruction review anyway, and not find much advantage in Section 303's sweeping exemptions. Even if they do seek such relief, however, the mentioned economic considerations are still likely to drive them to install pollution control equipment as part of a new plant's original construction cycle. Accordingly, one of two negative outcomes will be predictable, with one far more likely, if Section 303's waivers are invoked.

First, plant owners will resist strenuously any subsequent regulatory determination that the pollution control equipment they have already installed does not represent best performing controls. Permitting authorities will be under tremendous pressure to rubber stamp the acceptability of that control equipment. Citizen comments, especially meritorious objections, will be disregarded in the face of significant sunk capital costs and the facility's economic arguments. Best performing controls will be replaced by "what we have is good enough." The Act's air quality impacts analysis will be turned on its head, because it will ask what the impacts of new construction have been, rather than how best to mitigate adverse impacts in advance of construction. In practice, Section 303's substitution of post construction review for preconstruction review will poison the integrity, the fairness, and the outcomes of environmental reviews.

The alternative outcome is one in which the legally proper pollution control determination is reached following a fair environmental review opportunity, and a plant operator may be told to rip out already-installed control equipment This is not a realistic prospect. The result would be the permanent operation of a new source at higher pollution levels than are technically and economically justifiable, to the detriment of breathers and perhaps other sources in the area that will have to make up the difference.

Another result of Section 303 will be to authorize new sources that have built NO_X pollution control equipment, simply not to operate that equipment for up to one year. The practical result will be to authorize enormous excess emissions of NO_X pollution, while contributing nothing to the supply of electricity. The bill creates a perverse incentive to delay NO_X preconstruction permitting, as well as the installation and operation of NO_X pollution control equipment, even though (1) we are unaware of any evidence that preconstruction permitting generally, and NO_X permitting specifically, have impeded new electric generation units; (2) preconstruction permitting for other pollutants will be occurring anyway; (3) new units will be installing and operating pollution control equipment to control those other pollutants upon start-up; (4) sources must have even NO_X pollution control equipment in place and tested well in advance of the one-year waiver deadline.

Finally, while we oppose adoption of Section 303 in its entirety, we do offer the following drafting critique. The section leaves "electricity emergency" undefined, in contrast to Section 305's definition for a "high electricity emergency day." As a result, the term "electricity emergency" will be subject to manipulation and abuse, and the bill provides no guidelines to prevent such abuse. This indeterminacy could require rulemaking by EPA to further delineate an acceptable emergency, which rulemaking would further delay applicability of the bill's measures. Or, the lack of definition may result in wildly different standards for an "emergency" based upon decisions by different Governors. Competing generators in adjoining states could be subject to dramatically different pollution control requirements depending on their Governors' definitions.

One additional comment is worth making. The residents of many communities do not welcome new energy facilities with open arms—in part because of concerns over what the new facility may do to their quality of life and health of their loved ones. One wonders how the provisions of this bill will help this situation. By telling community residents that the facility may operate uncontrolled for NO_X for a year, regardless of their wishes or needs, the bill would likely invite additional controversy and delay, contrary to the intentions of its authors.

Section 305: NO_X Waiver Authority for Natural Gas-Fired Generation

Some oppose temporary caps on wholesale electricity prices on the basis that this would interfere with free markets and represent a disincentive for the generation of new electricity capacity. I do not join that debate here. It is worth pointing out, however, just how much this legislation would provide an altogether different but no less harmful disincentive, and interfere with another type of market—the California air pollution trading market called RECLAIM (Regional Clean Air Incentives Market). Section 305's NO_X waivers would let utility polluters renege on the bargain that was struck with the affected public when the RECLAIM trading program was formed, and interfere with this market—as well as with health needs—as much as any price cap would. And the bill's allowance for NO_X waivers provides even greater disincentive to the installation of pollution control equipment. If the polluters know that politicians will bail them out with NO_X waivers necessitated by the polluters' lack of business and environmental planning, they will not take the necessary steps to control their pollution. In fact we already know this from recent experience with the RECLAIM program.

Let me sketch the background of today's rules. In the mid 1990's, California industry persuaded South Coast air officials to establish an air pollution trading program called RECLAIM as a substitute for the traditional, proven regulatory system. NRDC testified at the time, before state officials and the predecessor subcommittee to this Subcommittee in the Congress, that structural flaws in the program were likely to jeopardize its prospects for achieving near-term and long-term air quality goals. These criticisms proved all too prescient.

The subsequent history of RECLAIM provides a number of revealing lessons about the failings of this particular pollution trading approach, and the practical and political dynamics surrounding pollution control programs:

- poorly considered calls for a "flexible" pollution trading program can be used to escape effective regulatory programs and subvert environmental objectives;
- an initial credit allocation design structure with inflated baselines—resulting from an overallocation of pollution credits—will ensure that meaningful pollution reductions will not occur for many years;
- the availability of cheap pollution credits, resulting from initial overallocations, will create a disincentive for industry to reduce emissions through pollution controls and develop better pollution control technologies—two benefits that are often used as environmental selling points for pollution trading;

- pollution trading programs covering providers of important social goods like electricity are especially susceptible to disruption when pollution credit prices increase in response to credit scarcity;
- having escaped meaningful regulation through traditional means, and enjoyed the flexibility and higher pollution levels allowed by the trading program, participating polluters can and will seek to escape the need to reduce pollution levels through political appeals to change the rules of the game.

A pollution control official familiar with RECLAIM offers this assessment in a recent Los Angeles Times article: "For seven years, the program did absolutely nothing,... Businesses got used to cheap credits. Nobody did what they were supposed to do: responsible planning." (Gary Polakovic, "Innovative Smog Plan Makes Little Progress," Los Angeles Times, April 17, 2001).

In a White Paper examining NO_X RECLAIM trading credit prices, the South Coast Air Quality Management District (AQMD) reports that "[d]uring the early years of the RECLAIM program, [credits] could be obtained at a very low price. Therefore, many RECLAIM operators relied on purchasing credits rather than making investments in air pollution control equipment." (South Coast AQMD, White Paper on Stabilization of NO_X RTC Prices (Jan. 11, 2001), at 4-5). As mentioned above, this dynamic resulted in large part from the initial allocations of credits to polluters at levels substantially higher than their actual emissions at the time. For example, power plants in the RECLAIM program were allocated 9,401 tons of NO_X credits when the program began in 1994, even though actual NO_X emissions in 1994 from power plants were 5,306 tons. *Id.* at 10, Table 2.1. In addition, it is our understanding that few RECLAIM power plants installed pollution controls, and in fact some RECLAIM participants are reported to have *cancelled* pending orders for pollution control equipment once the RECLAIM program was formed.

The story of RECLAIM is instructive because it reveals one root cause of how we got to a place where some are calling for the relaxation of environmental protections in California: the fact is that electric generating businesses failed to conduct responsible environmental planning and install required pollution control equipment. Some of these businesses now are resorting to political appeals to relieve themselves from the consequences of their own inaction and irresponsibility. This may be a desirable deal for polluters but it is not an acceptable outcome for breathers. Good policy requires that the pollution control obligations sought by industry not be discarded based on claims of a conflict between emergency supply needs and public health. In appropriate circumstances, authorities can and have fashioned remedies that allow the continued operation of needed electric generators while incorporating compliance provisions that minimize excess pollution and avoid rewarding firms that failed to meet their obligations under the RECLAIM program. There is no justification for Congress to intervene with exemptions that would undermine compliance incentives and cast doubt on the reliability of future trading programs.

Consider also the potential consequences of this NO_X waiver authority for an important regional pollution transport program—EPA's so-called "NO_X SIP Call." This Clean Air Act rule requires 22 states in the Midwest and Southeast, along with the District of Columbia, to develop State implementation plan (SIP) measures to prohibit NO_X emissions—a precursor to smog—for purposes of reducing NO_X and ozone transport to the eastern half of the United States. Some of the upwind states whose pollution exacerbates pollution levels in the downwind eastern states have fought the NO_X SIP Call rule all the way to the Supreme Court and continued to delay development and implementation of the NO_X control measures. Section 305 confers upon these same upwind states the authority to do away with these NO_X pollution limits for power plants on high electricity emergency days.

Subsection 305(c) proposes to authorize the Governor to request and the Administrator to authorize a temporary waiver of NO_X emission limitations in effect under a SIP for natural gas-fired electric power generation. Let me note that the existing Clean Air Act, section 110(f), contains a provision where the Governor and the President can respond to genuine energy emergency situations. I am familiar with the use of this authority in the 1970s. It was used carefully and effectively. I am not aware of any facts that suggest a need to broaden this provision to address legitimate emergencies today.

Section 305(d): Emergency Generation for Private Use

Subsection 305(d) allows a Governor to waive any SIP requirement on high electricity emergency days for "any type of electric energy generation, using any type of fuel available." This provision would thereby authorize non-essential commercial operations to run the dirtiest generators, operating with diesel fuel or residual oil, to exceed pollution control limits on the very days when pollution levels are likely to be their worst due to higher temperatures when the soup of smog is thickest.

Harkening back to CARB's figures, existing diesel standby emergency generators emit between 7 (with add-on controls) and 25-30 (no add-on controls) lbs of NO_X /MW-hr, while new combined cycle gas units emit 0.05 lbs of NO_X/MW-hr and small distributed generation natural gas turbines (microturbines) emit between 0.2 to .5 lbs of NO_X/MW-hr. In other words, the diesel generators that could be run under this provision emit between 20 to 100 times more pollution than the dirtiest natural gas microturbine.[4]

Subsection 305(d) extends far more broadly than Section 303, by covering all air pollutants (and not just NO_X), by being available to all persons with electric energy generation units, and by authorizing exemptions from "any otherwise applicable requirements of the plan that would have the effect or (sic) prohibiting or limiting the operation by any person or entity or class or category thereof in such State." An extreme but available reading of this authority would allow *any* SIP requirement applicable to a person operating electric energy generation to be waived if compliance with that law would impede the source's operation. One of two apparent constraints on a person's ability to pollute and violate is the condition that a source may not disconnect or cease using pollution control devices. The second general constraint is the "net emissions" test contained in Subsection 305(e), but as we shall see, this provides less of a constraint than one might think, and all constraints are rendered somewhat ineffectual by Subsection 305(f), the prohibition on stays or injunctions.

Section 305(e): Effect on Air Quality

Subsection 305(e) provides that the Administrator may approve a SIP amendment allowing waiver of SIP requirements (under subsections (c) or (d)) only if she determines that the amendment "will not increase the net emissions of any air pollutant in any affected air quality region and that the amendment otherwise meets the requirements of the Clean Air Act." Unfortunately, neither of these directionally sound constraints on EPA's authority is particularly clear and it is easy to anticipate that they will not achieve their well-intentioned objectives. Moreover, as discussed in our comments below on Subsection 305(f), these conditions are significantly if not fatally compromised as a legal and practical matter—the bill makes illusory the effectiveness of these conditions by prohibiting stays or injunctions even if the Administrator acts in direct violation of Section 305.

With respect to the first condition on the Administrator's authority to approve SIP amendments under Subsection 305(e), an earlier draft version of this legislation provided that net emissions increases resulting from approvals of SIP amendments should not occur "during any period." Inexplicably and regrettably, this qualifier has been omitted from the most recent version of the bill made available for our review. The more protective meaning of the present language of Subsection 305(e), which we hope is the intended meaning, is that net pollution levels may not be higher at any time after Subsection 305(d) or 305(e) waivers are granted than they were before such waivers. In other words, sufficient offsetting emissions decreases must be secured, accurate quantifiable, and enforceable under the Act before waivers authorizing emissions increases may proceed. This approach is consistent with the analogous Clean Air Act nonattainment NSR requirement mentioned earlier to obtain offsetting emissions reductions by the time a source is to commence operation and emit pollution. See 42 U.S.C. §7503(a)(1)(A). In the absence of more specific legislative language clarifying that emissions increases may not be authorized before offsetting emissions reductions have been obtained, with the integrity and enforceability of those offsets ensured, it is our unfortunate experience with implementation of the Clean Air Act that the bill's present language will not achieve this desired outcome.

The condition that net pollution levels not increase in "any affected air quality region" appears to reflect a productive recognition that air pollution does not respect jurisdictional boundaries, but the bill unfortunately does not define the scope of such regions. EPA's NO_X SIP Call rulemaking, discussed earlier, rightly recognized that NO_X and ozone pollution transport can occur at great distances across many states.

In addition to these complex issues of interpretation, Subsection 305(f) would destroy any intended protection by prohibiting effective judicial remedies for violations of the Clean Air Act by EPA or a state concerning approval of a SIP amendment carrying out Section 305's waivers. Even if a judge did find EPA or a State to be in violation with this section or associated Clean Air Act requirements, the court would be powerless to protect citizens or the environment, or to uphold the law.

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[4] In addition, particulate matter (PM) emissions from diesel engines are significantly higher than emissions from turbines or boilers fueled with natural gas. For example, a typical diesel emergency generator emits close to 3 lbs of PM/MW-hr with the cleanest units achieving 0.4 lbs/MW-hr; whereas a natural gas microturbine emits approximately 0.09 lbs/MW-hr.

II. COMMENTS ON OTHER SECTIONS OF THE LEGISLATION

Section 102: Price Mitigation in Western Market Through Demand Management Incentives

This section of the bill represents a well-intentioned but ill-considered intervention in wholesale markets. Utilities and grid operators throughout the West already are implementing programs to reward demand management. FERC has been generally favorable toward such initiatives. This bill compels FERC to give "any electric consumer" the right "to sell at market prices" any load reduction it can make available, as long as the consumer is selling power that it "is entitled to consume under contract or applicable regulation." The potential for free ridership should be obvious; this provision creates an entitlement for any temporarily (or permanently) idle facility to earn windfall profits even if its load reduction is related exclusively to the business cycle. Compare, as a clearly superior alternative, voluntary arrangements already negotiated between the Bonneville Power Administration and aluminum industry customers, which ensure a sharing of load reduction payments with system needs, synchronize the load reductions with system needs, and avoid paying anywhere close to the full "market price" in return for load curtailment.

Finally, Section 102 creates a huge new financial incentive to run dirty on-site "emergency" diesel generators. Operating such a generator would result in "foregone electric load" that could then be resold at "market prices," which almost certainly would be far above any retail tariff otherwise applicable to the owner of the diesel generator. We have addressed elsewhere in these comments the significant adverse public health consequences arising from increased utilization of dirty diesel generators, including alarming increases in risks from cancer.

Section 106: Federal Transmission Corridors

This section would give the Secretary of Energy the authority and mandate to establish electric power transmission corridors across national parks, national forests, wildlife refuges and other federal lands, when such corridors are "necessary or appropriate..." It would also make the Department of Energy (DOE) the lead agency for purposes of review under the National Environmental Policy Act (NEPA). Although Section 106 provides for consultation between the Energy Secretary and the federal land management agencies, it would grant the Secretary an unprecedented degree of authority over the nation's federal public lands and the diverse natural, cultural, archeological and other resources that they harbor. In fact, it appears that the bill would override existing statutory protections that apply to congressionally-designated wilderness areas, national parks and national wildlife refuges as well as substantially erode procedural and other protections applicable to national forests and public lands managed by the Bureau of Land Management. In one stroke, it would reverse 130 years of congressional history aimed at protecting nationally significant special places. And, by putting DOE in charge of NEPA review, despite its lack of experience as a land and resource manager, rather than the resource agencies with authority and expertise, this section virtually guarantees that the wilderness, plant, fish, wildlife and other resources of these lands will be subordinated to any transmission corridors the Energy Secretary wants established, regardless of the lands' sensitivity or importance. Even the habitat and other needs of species listed under the Endangered Species Act have not been exempted. Finally, the grant of authority to the Secretary is so broad as to be essentially unreviewable.

Section 107: Guarantee of Payment Required for Certain Emergency Power Sales

This provision places an additional constraint on the capacity of courts and agencies to order sellers of electricity and natural gas to provide products under emergency conditions. In effect, this provision would give more leverage to sellers of electricity and natural gas in the midst of the most runaway sellers' market in history. If Congress wants to pick sides here, the least deserving parties should not be the beneficiaries.

Sections 201-202: Emergency Conservation Awareness; Preparation for Electricity Blackouts

California and other Western states already are conducting public information campaigns on energy efficiency and electric energy blackouts. If the federal government is going to get involved here, at minimum its agents should be directed to consult and coordinate with their state counterparts.

Section 205: PURPA Contracts

We are sympathetic with the goals of this section, but skeptical that federal law can direct parties to "suspend contracts" without creating potentially successful legal claims by adversely affected parties.

Section 301: Hydroelectric Power License Conditions

The Endangered Species Act provides for a process by which endangered species may be exempted from the statute's protections by the convening of an extraordinary committee of 10 federal Cabinet-level officials that has come to be known as the "God Squad." Section 302 of the draft bill effectively confers upon a single State's Governor and a hydroelectric facility licensee plenary authority to cause unbounded harm to any endangered species, ecosystem, water body, fish population, or other value protected by the laws and regulations governing hydroelectric power licenses. This section would effectively abrogate any due process requirements and all applicable environmental laws affecting non-federal hydropower regulation including the Clean Water Act, Endangered Species Act, Federal Power Act, and National Environmental Policy Act.

Section 302 merely requires from licensees "notice" to FERC and "consultation with" resource agencies; it does not require, however, that licensees comply with or heed any FERC or resource agency concerns. Moreover, while abandonment of the protections and operational restrictions in licenses is triggered by a request from the Governor, this request comes only in the form of a request to permit increased generation pursuant to a standard article. It is left to the *licensee,* whether private or public, to determine which of its minimum flow requirements or operational requirements it wishes to modify or suspend. In effect, Section 302 confers upon private or public licensees the extraordinary authority to choose whether they feel like complying with the Clean Water Act, the Endangered Species Act, or any other federal law that informs the content of their licenses. Section 302 grants licensees exclusive authority to amend operational requirements and restrictions affecting the environment, endangered species, federal trust responsibilities, water rights, water quality, fisheries management, and recreation. The provision takes away from responsible public officials the specific authority and ability to protect public health and natural resources in a manner most suited to the circumstances, and turns over to licensees, for up to two years, exclusive decisionmaking authority over how public health and public resources should be weighed against the facility's economic self-interest. Finally, this section exacerbates all potentially harmful consequences through retrospective application to previously issued licenses as well as future licenses.

Section 302 imposes no constraints upon the harms that will arise from licensees operating outside of other laws, for a period lasting up to two years. The bill also suggests no constraint upon a licensee's or Governor's ability to renew a temporary modification or suspension for periods of up to two years at a time indefinitely, immediately after a previous period has expired.

Like other parts of this bill, this section does not define an electric supply, generating, or system reliability "emergency," so the concept remains inherently vague and indeterminate; invocation of Section 303 will be subject to unavoidable political manipulation, predictable abuse, and the promotion of licensee operations over all other public values and informed agency responsibilities. Moreover, the bill creates the prospect of protections and policies instituted in the Endangered Species Act, Clean Water Act, and other affected federal statutes being over ridden by a patchwork of different conceptions of "emergency" invoked by State governors. Like the unbounded harms authorized by 2-year modifications or suspensions of license requirements, Section 302 imposes no constraints upon the ability to invoke emergencies indiscriminately based on opposition to a given operational restriction.

Section 302: Federal Hydropower Generation

We understand that other conservation organizations will be submitting detailed criticisms and objections about the breathtaking waivers under this section and its revealing elimination of judicial review. It is worth pointing out for now that the largest single obstacle to "maximum electric generation at hydroelectric facilities operated by the Bureau [of Reclamation]" is irrigated agriculture throughout the Pacific Northwest, much of it heavily subsidized from other sources. For a definitive analysis, see F. Frederick (ed.), SCARCE WATER AND INSTITUTIONAL CHANGE (Resources for the Future, 1986), pp. 25-66 (analysis of "competition between irrigation and hydropower in the Pacific Northwest"). Regionwide, 9 million acres of irrigated agriculture consumes gigantic quantities of water that otherwise would flow through turbines. If the supporters of this legislation truly intend to authorize the suspension of irrigated agriculture throughout the region during "emergencies", this should be explained and debated. If the bill's sponsors intend to visit the negative impacts of "maximum generation" solely upon the quality of the natural environment and public health, we call for explanation and a healthy public debate. Given the suspension of judicial review that closes Section 302, foreclosing compliance with the law, appeal to neutral entities, and prevention of later harms, large constituencies will have a lively interest in these explanations.

III. POSITIVE STEPS FOR CONGRESSIONAL ACTION

There are a number of helpful steps that this Subcommittee and Congress could take to respond to the energy problems we are facing today. Let me highlight only a few ideas. The quickest and cleanest way to avoid brownouts is to use electricity more efficiently. Congress can help speed the needed investments to accomplish this objective. One example of positive bipartisan legislation that will address both electricity and air pollution concerns is H.R. 778 and S.207, the "Energy Efficient Building Incentives Act," introduced by Representatives Cunningham (R-CA) and Markey (D-MA) and Senators Smith (R-NH) and Feinstein (D-CA), respectively. H.R. 778/ S. 207 provides federal tax incentives for energy efficiency improvements in new and existing buildings. The incentives will be available in tax years 2002—2007. The bill offers credits of $750 to $2,000 for houses, and deductions of $2.25 per square foot for commercial buildings. Tax credits or deductions are also provided for purchases of qualifying residential space heating, space cooling, and water heating equipment, and for solar hot water heaters and photovoltaics.

H.R. 778/ S. 207 is supported by a diverse coalition of environmental organizations, utilities, business interests, and state and local jurisdictions. This legislation offers multiple benefits including enhanced electric reliability, pollution reduction, and reduced energy bills for end users, as well as providing incentives for dramatic reductions in energy use in buildings. For example, the legislation provides a solution to electric demand and reliability issues with the ability to deliver real energy savings and reductions in peak demand as soon as 2001, with savings of over 30 GW peak by 2011. The legislation will also provide significant reductions in power plant emissions, dramatically improving air quality. It will reduce overall air pollution by 3% in 2010, increasing over time—the equivalent to taking 20% of the cars off America's roads.

Second, in light of the increasing reliance upon dirty diesel generators in California and elsewhere, and the prospect for further reliance during the summer months, (and possibly beyond this year). Congress can and should take immediate steps to fund and direct EPA to establish a monitoring network to determine the air quality and public health impacts from the proliferation of these generators. Congress should also direct EPA to determine the availability of cleaner diesel generators, microturbines, and other cleaner electricity sources for locales in need of immediate electricity generation. By actions like these, this Subcommittee could take steps that actually would help address the dual needs of energy and health and environmental protection. Actions like these would be applauded by communities rather than provoking controversy and threatening health and ecosystems as the provisions of the draft bill would do.

Ms. BONO. Thank you. I am going to recognize myself for 7 minutes. I am in a very unique position here as a chairman in the freshman spot, and I am going to take advantage of the opportunity to be the first one to go. Usually when you are the freshman you forget how difficult it is to be unique, so now we will get to find out.

But my first question is actually for Mr. Makler, and this was something that was talked a great deal on the last panel. I know you sat through the entire thing. But I understand that some of the QFs have generated capacity currently available that is in excess of amount contracted to the utilities, but that they are unable to make this additional capacity available to the California market. Why is this, and what can be done to correct the situation?

Mr. MAKLER. Thank you, Madam Chairwoman. The contracts specify a certain contract capacity, and when a generating unit has the capacity to generate in excess of that contract capacity, we have no legal means of either having the utilities purchase that excess capacity or delivering that excess capacity to the grid, to a third party buyer. There is no physical reason why we would not be able to do so. There is existing interconnection facilities. There is existing interconnection services in place.

Ms. BONO. And how much capacity are you talking about?

Mr. MAKLER. For Calpine, currently we have in excess of 20 additional megawatts. The other aspect of this is that we believe that by permitting the QFs to deliver this excess capacity, this could encourage additional refinements on existing generation, and our operations people have told me that we think that we could get another 50 megawatts of generating capacity available by the end of the summer for——

Mr. BARTON. Would the gentlelady yield just for an elaboration on that?

Ms. BONO. Yes, of course. Thank you.

Mr. BARTON. Do you have any information about in totality other QFs in California? You have approximately 70 megawatts. Do you have a broader data point for others like yourself?

Mr. MAKLER. I am sorry, I do not. I could confer with the different trade organizations and ask them to get back to you.

Mr. BARTON. That would be helpful. Thanks.

Ms. BONO. Mr. Makler, also, so if Congress were to let you suspend your contractual obligation to serve the State investor-owned utilities at avoided cost, where would you most likely to turn to market and sell your power, and under what terms and conditions?

Mr. MAKLER. Well, again, we think of suspension as a last resort, Congresswoman. We are California businesses. We work and we develop power plants in California. We are very committed to make sure that as much power is getting to California consumers as possible. Calpine has entered into long-term contracts with the municipal utility districts, with the irrigation districts. We have entered into very substantial contracts with the State.

Basically, the issue for us is two-fold: One, is finding a creditworthy buyer so that we know that we are going to get paid on a going forward basis, and the second is to receive a price with which we can recover our costs. And currently, we are faced with a dilemma of both issues. One is that we haven't been paid for past deliveries, and second, under the recent PUC decision, we often are unable to operate for economic reasons.

Ms. BONO. In its March—also, Mr. Makler, thank you also for coming by my office yesterday. This is sort of a continuation, I guess, of that dialog. But in its March 2001 order, the FERC required that all additional output from cogents and small QFs be sold exclusively via negotiated bilateral contracts at market-based rates. The testimony indicates that your existing contracts with the IOUs effectively prevent you from selling excess power to other parties. Please explain this inconsistency.

Mr. MAKLER. We have private contractual relationships with the IOUs, and I am not clear on the FERC order that would have ordered us to sell at market-based rates. The QF contracts are long-term contracts that were entered into under PURPA, and that they were contracts that were put in place back in the mid-1980's. Basically, we sell to the utility. They are our counterparty and essentially our only buyer except for our cogeneration hosts.

Ms. BONO. Thank you. I am going to yield back my time and recognize the ranking member, Mr. Boucher, for 7 minutes.

Mr. BOUCHER. Thank you very much, Madam Chairman. I want to thank this panel for its helpful testimony this afternoon. Each

of the witnesses has enlightened us, and I appreciate the time that you have taken to do that.

Let me see if we can develop some consensus among the witnesses on the key points that are before us today. Would we all agree that the Federal clean air requirements have not contributed to the current problems California is facing? Can we all agree with that? Any dissent? That is unanimous.

Second, would there be complete agreement that the clean air waiver authority that is contained in the bill that is now before this subcommittee is therefore unnecessary and would not be helpful in resolving the California problems? Is there agreement with that principle. Anyone disagree? Okay. We will ask each one individually.

Mr. RICHARDSON. Yes, Mr. Boucher.

Mr. LYNCH. Mr. Boucher, it would not affect any of the projects that we have ongoing for development.

Mr. BOUCHER. All right.

Mr. MAKLER. That is true of Calpine as well. We operate within existing environmental laws.

Mr. BOUCHER. All right. Mr. Colburn?

Mr. COLBURN. Yes, Mr. Boucher.

Mr. HAWKINS. Yes to both questions, Mr. Boucher.

Mr. BOUCHER. Good. Do we all agree that there should be meaningful control of wholesale prices so as to ensure that they are just and reasonable? And to the extent that they are not, that there be meaningful price mitigation. Mr. Richardson?

Mr. RICHARDSON. Absolutely.

Mr. BOUCHER. Mr. Lynch?

Mr. LYNCH. Yes, sir.

Mr. BOUCHER. Mr. Makler?

Mr. MAKLER. Yes.

Mr. BOUCHER. Mr. Colburn?

Mr. COLBURN. As a citizen, yes.

Mr. BOUCHER. All right.

Mr. HAWKINS. Also as a citizen, yes.

Mr. BOUCHER. All right. Thank you. And can we all agree that in the most recent order that was issued by the Federal Energy Regulatory Commission that effective assurance of just and reasonable prices on the wholesale market has not been provided? Mr. Richardson?

Mr. RICHARDSON. Yes.

Mr. MAKLER. Yes.

Mr. LYNCH. Unsure.

Mr. BOUCHER. All right. Mr. Colburn?

Mr. COLBURN. Again, as a citizen, I believe so.

Mr. BOUCHER. All right. Mr. Hawkins?

Mr. HAWKINS. I agree with Ambassador Sklar's point that it will encourage the bringing on of inefficient generators to set the high price. So my answer would be to your question, yes.

Mr. BOUCHER. All right. Those are really all the questions that I have. These are the key matters that we are considering. And, again, I want to thank this panel for being with us. And in the interest of time, Madam Chairman, I yield back.

Ms. BONO. Thank you. Chairman Barton, 7 minutes or whatever you say.

Mr. BARTON. Seven minutes would be sufficient.

Ms. BONO. Seventy, it is fine, whatever you say.

Mr. BARTON. The longer these things go, the more—the shorter the question periods become, I think.

Well, I was very interested in Congressman Boucher's questions. I don't quite share the same confidence that the answers are quite as they appear to be. I am going to ask the questions a little bit differently but the same way, same intent.

Under current State and Federal air quality regulations in existence, if your answers to Congressman Boucher were absolutely, 100 percent, without qualification correct, then what you are saying is that there are absolutely no limitation on power generation because of any standards currently in existence in the State of California; that all the peaking units and all the base-load units that are out there can operate without restrictions. That is not what the record has shown in our previous hearings.

I will admit that the Clean Air Act has not caused the problem, but we have had testimony, both on the record and in private meetings, that there are a lot of the units that are restricted in terms of hours of operation because of emission limitations. Is that testimony all incorrect?

Mr. RICHARDSON. Mr. Chairman, yes/no answers tend to hide the distinctions. There are limitations in terms of operation, but there is, in my view, and in the information that I get from my members in California, sufficient flexibility to deal with those without additional waivers in the law.

Mr. BARTON. I am sorry?

Mr. RICHARDSON. There is sufficient flexibility under both the Federal laws as well as State and local air quality requirements to deal with the issues.

Mr. BARTON. Well, let us talk about that flexibility a little bit, because under the Clean Air Act any citizen can bring a suit if they think that this flexibility has been abused; isn't that correct?

Mr. RICHARDSON. Mr. Chairman, I am not an expert on the Clean Air Act. I am simply reporting to you what I have known from my——

Mr. BARTON. We will have to ask—let us ask Mr. Hawkins.

Mr. RICHARDSON. Mr. Hawkins can certainly——

Mr. BARTON. We certainly—he may not agree with my point of view, but he is an expert. Can't a citizen bring a lawsuit right now, under the Clean Air Act, if they think that State or Federal people are violating the Clean Air Act?

Mr. HAWKINS. Citizen suits are allowed against emitters if they are violating emission limitations and if there is not a diligent enforcement of the rules by the Federal or State authorities.

Mr. BARTON. I don't claim that I am an expert on the Clean Air Act, so I want to put that on the record before I ask this question. But where in section 304 of the Clean Air Act does this diligent prosecution requirement exist, Mr. Hawkins?

Mr. HAWKINS. The provision is that if you are—if a State is enforcing the provision, then citizens can intervene in Federal courts, but they aren't permitted to bring their own separate right of ac-

tion. What I would say more specifically about this question of citizen suit enforcement is that the State of California is trying to structure a compliance program, which will allow the operations of these facilities and will allow an incentive to minimize emissions and will retain obligations, both to install control technology and to reduce emissions. The citizens in California are concerned about two things, as I said. They are concerned about the electricity shortage; they are also concerned about clean air. So they are understandably going to watch these issues. But to my knowledge, citizen suits have not been filed against the actions. These are going to be case by case——

Mr. BARTON. And we share that. We are not aware of any citizen suits either that have been filed. So we are not claiming there has been a rush to the courthouse.

Mr. HAWKINS. Right. I think the concern, Mr. Chairman, if I understand it correctly, is what if a citizen suit is filed? I would say two things about that. First, the prospect of citizen enforcement of the Clean Air Act is healthy, because it creates an interest on all parties to come up with maximally protected safeguards. Why is that good? It is good because it minimizes the chance that any citizen will actually be motivated to try to go to court because they will feel that the officials are addressing this in a reasonable fashion.

Second, it addresses—it provides a basis for a judge, an independent judge, to make a determination on what is in the interest in the particular factual circumstances before him or her of the citizens of California.

Mr. BARTON. We understand that. I want to go to Mr. Colburn who is here representing some of these folks that enforce these regulations. And what Mr. Hawkins just said I tend to agree with. I mean it kind of goes to the heart of the problem. But what we are trying to do is get to this enforcement discretion by the EPA and the States. And as I understand the Clean Air Act, it does not allow a major source to operate without best available control technology or layer NO_X controls.

So if a State like California were to allow a source to delay the installation of this type of technology at a new power plant under so-called enforcement discretion, that determination would not prevent a citizen from taking that decision to court. So then you would get into a situation where a judge might agree with what California was doing; it might not agree with what California was doing.

So we—at least I—I won't speak for the entire subcommittee, because so far we haven't had any votes on this—we thought because it is an emergency situation, that it was appropriate to allow the suspension of these suits for the time period that the emergency was in effect.

And the Governor is elected by the entire State. He is not operating in a vacuum. I mean he is not going to—or his designees or her designees are not going to just cavalierly ignore all the checks and balances that have been built up over the 30 years. So what would your comments be on this particular provisions, Mr. Colburn?

Mr. COLBURN. Mr. Chairman, I see a lot of merit in what you are suggesting. It is certainly not an impossible path that those set of facts could eventuate. And regulatory agencies often have mixed emotions about citizen suits, because they can often steal the agenda from more pressing air quality issues. On the other hand, they do bring the benefits that Mr. Hawkins just suggested.

I think in the case of California and BACT LAER, lowest achievable emission rate and best achievable control technology—which, by the way, applies in New Hampshire and many Northeastern States as well—that one might look at it in the sense of what if a new source came and simply began operating? Then what one would do is institute an enforcement action. And the enforcement action would lead hopefully to a settlement wherein that source would be required to take some actions to reduce their emissions and probably also pay some fees which hopefully would be used for mitigation.

That is essentially what California is doing now. They are doing it on a case-by-case basis. It doesn't last any longer than the individual source requires. They don't pay anymore than their duration should represent. So I think it is a reasonable solution. It is done through enforcement discretion. Where citizens would bring a suit, I would hope that a judge would look at that and say, "What would a reasonable man do?" And we think that the California Air Resources Board did that and would throw the suit out.

Mr. BARTON. Well, I think—I mean I have been to California a lot in the last 1½ years, and I am very impressed that the citizens of California understand the direness of the problem, and I don't think they have abused any of the intention of the current act. All this provision is attempting to do is to provide some indemnification so that, at least for the emergency period, the State of California could, or any other State could, declare an emergency, could make some of these discretionary decisions with confidence that they wouldn't be in violation. That is all. But I understand the sensitivity.

I have one last question, and then I will yield back.

I want to ask Mr. Richardson, under current law, the municipals, they are allowed—if they are a customer of one of the Federal Power Administration agencies, the municipals are allowed to resell their power; isn't that correct? If they have contractual agreements, they can resell. They don't have to get specific permission. This is a section 102 question.

Mr. RICHARDSON. If the question is as customers of, for example, Bonneville Power Administration, can the municipal utilities or public utility districts purchase power from Bonneville and resell that power, the answer to that question is no. There are contractual provisions that require——

Mr. BARTON. The answer is no?

Mr. RICHARDSON. [continuing] that the benefits—the answer is no—the benefits of that low-cost power remain with the preference customers that receive it. Now, if they are purchasing—if they have other generation of their own or if they have other sources of power——

Mr. BARTON. Well, I understand that part of it.

Mr. RICHARDSON. [continuing] Yes, they can. But as far as being a funnel for Federal preference power to launder that in order to sell it into the market at higher rates, no, they cannot do that.

Mr. BARTON. Well, then I have been misinformed, because I was told a municipal could, whereas a private sector customer could not.

Mr. RICHARDSON. No, the benefits of the Federal power remain with the preference customers.

Mr. BARTON. Yield back the balance of my time, which has expired.

Ms. BONO. Thank you. Now the Chair would like to recognize the ranking member of the full committee, Mr. Dingell, for 7 minutes.

Mr. DINGELL. Mr. Hawkins and Mr. Colburn, the chairman has explained that his intention to allow a State to decide whether it wants to exercise its options under section 303 or 305 of the bill. Can you explain why this construction might concern you, particularly with regard to a Governor waiving requirements within his State, which may adversely affect the adjacent down river States?

Mr. HAWKINS. Yes, Mr. Dingell. The problem, as I said, is that there can be a dynamic which will cause the Governor to feel that he or she has no political option other than to exercise these waivers in order to protect himself or herself against failures, against claims that the Governor has failed to take action necessary to prevent brownouts.

In addition, the interstate transport problem you mentioned is another big problem. We have been struggling for the last decade to get regional pollution programs in place in the Eastern half of the United States. There are some Governors that have been resisting that. They have been resisting it to the extent of bringing their own citizen suits to try to prevent EPA from carrying that program out.

Mr. DINGELL. So at this point, any Governor could exercise this power; it is not limited to the Governor of California?

Mr. HAWKINS. That is correct.

Mr. DINGELL. For example, a Governor of a Midwestern State could exercise this power to the detriment of a State in the Northeast; is that right?

Mr. HAWKINS. That is correct.

Mr. DINGELL. And a Governor, let us say, in Wisconsin or Illinois or Indiana could get to the detriment of the Western part of the State of Michigan; is that right?

Mr. HAWKINS. That is correct.

Mr. DINGELL. All right. Mr. Colburn, do you have a comment on that?

Mr. COLBURN. Yes, I do, Mr. Dingell. Thank you for the question, and I want to applaud the committee for endeavoring to provide permissiveness in this case. The Congress did in many other respects, such as the use of oxygen nitrogen gasoline.

I would echo Mr. Hawkins' comments relative to the opening of the door and the blame shifting. I think that there is a real likelihood that that will happen, and ultimately it becomes a race to the bottom and greater emissions result.

Let me give an example. In the New England power pool area in 1996-1997, we were faced with a situation where because of

nukes going down we lost about 15 percent of the pool's capacity. Under this construction, the first request would have been a call to the Governor's office saying, "Please grant us a waiver." Under our existing emissions budgets, the first call came to Air Regulators, and we said we weren't going to roll over, and the sources would need to provide makeup credits. They did so, they found so, they added conservation, and the problem was averted before any brownouts or blackouts occurred.

Mr. DINGELL. My concern is very specific, and that is with regard to the downriver or downwind transport. I am also concerned about another thing, which I find difficult. Inside the State because of the requirement that the State fix its State Implementation Plan, I would like for you and Mr. Hawkins to define to us what the situation would be with regard to the SIP.

First, I would like to observe, and you may agree or disagree with this, but as I read the bill, the waiver is for 6 months but the change—rather the emergency is for 6 months, but the waiver is forever; is that right?

Mr. HAWKINS. The amendment to the State program is forever; the waiver is for 6 months. The emergency is for 2 years, but both the emergency and the waiver appear to be renewable infinitely.

Mr. DINGELL. Okay. Now, do you agree with that, Mr. Colburn?

Mr. COLBURN. I do. I do, Mr. Dingell.

Mr. DINGELL. Now, the next question is, what does this do to other requirements of the Clean Air Act? For example, a State has filed its State Implementation Plan. Waivers of parts of the State Implementation Plan are given. The State then can be out of compliance with its State Implementation Plan. Is that not so, yes or no?

Mr. COLBURN. It would be my understanding that it would be out of compliance with the other provisions of the SIP, though I am sure that they are both——

Mr. DINGELL. So the working of one part could create non-compliance in other parts, because then, let us say, NO_X, could shoot up; is that right?

Mr. COLBURN. Yes.

Mr. DINGELL. All right. Now, we would then find ourselves in a situation where there would be no relief for the States. State could be in compliance, could be then subject to sanctions because of this waiver, unless we address that provision in the Clean Air Act; is that right?

Mr. COLBURN. Congressman, you are quite right, and there is the additional complexity that I am sure the bill—the intention of the bill was that those issues would be dealt with by the State to alleviate the in-State problems. However——

Mr. DINGELL. The State can't do that.

Mr. COLBURN. [continuing] they can submit another SIP submittal to reverse the earlier submittal, and then when EPA——

Mr. DINGELL. But the SIP has got to give the required clean air compliance under the statute.

Mr. COLBURN. Has to reach the target, that is correct. But, Congressman, the second point that you already raised is that of transport. And whatever an upwind State does, an upwind State Gov-

ernor's flexibility, implemented in the SIP or not, becomes a downwind State Governor's——

Mr. DINGELL. Problem.

Mr. COLBURN. [continuing] constraint.

Mr. DINGELL. Yes.

Mr. COLBURN. Reducing his options or her options, and it is a particular problematic time now as we contemplate what will be ozone designations under the 8-hour standard, what will be designations under——

Mr. DINGELL. I apologize, Mr. Colburn, but my time is limited, and I don't mean to be——

Mr. COLBURN. I am sorry.

Mr. DINGELL. [continuing] discourteous, but I have got a lot. Under section 106, the following officials are given power to veto the—are the following officials given the power to veto the Secretary of Energy's description of electric power transmission corridor: Director of Park Service, Fish and Wildlife Service, Director of the Secretary of the Interior, Secretary of Air Force, Secretary of Defense or any other Federal official? Mr. Hawkins?

Mr. HAWKINS. The answer is no to all of those. None of those officials is given power to veto the Secretary of Energy's designation of a transmission corridor in Federal lands.

Mr. DINGELL. All right. Now, any of the requirements with regard to the size, shape, placement of these transmission corridors, do any of them remain intact under the provisions of this legislation?

Mr. HAWKINS. The bill contains no constraint on the scope of the transmission corridors or the duration.

Mr. DINGELL. The size of the corridor?

Mr. HAWKINS. No constraints on the size, the width or the duration.

Mr. DINGELL. So you have got a 6-month emergency, and the corridor becomes a permanent resolution, right?

Mr. HAWKINS. Actually, this authority is not triggered by any emergency. This is just authorized upon enactment of the legislation.

Mr. DINGELL. Now, these could go across, then, Arlington National Cemetery?

Mr. HAWKINS. Yes.

Mr. DINGELL. They could go across the Grand Canyon?

Mr. HAWKINS. Yes.

Mr. DINGELL. Any unit of the National Park?

Mr. HAWKINS. Yes.

Mr. DINGELL. Any refuge in the Refuge System?

Mr. HAWKINS. Yes.

Mr. DINGELL. The Mall?

Mr. HAWKINS. Yes. Not a private mall but the Mall in Washington.

Mr. DINGELL. The Mall in Washington.

Mr. BARTON. Would the gentleman yield?

Mr. DINGELL. I would be glad to yield to my friend——

Mr. BARTON. I mean I am flattered that the distinguished ranking member is actually reading the bill; that is progress.

And I don't mean that facetiously.

Mr. DINGELL. When the gentleman introduces a bill and the hearing is scheduled, I always read it first——

Mr. BARTON. I understand.

Mr. DINGELL. [continuing] because the gentleman would be amazed what I find.

Mr. BARTON. Does anybody here think that we need to build a transmission line across Arlington Cemetery or it is even technically possible to build a transmission line across the Grand Canyon? I mean those are obviously—the gentleman from Michigan is making a very valid point that we are actually trying to give a Federal agency lead authority in trying to look at these transmission problems, at least on Federal land. But the examples, while they highlight the controversial nature of this section, none of those will be under serious consideration, does anybody think?

Mr. HAWKINS. I would only comment that I think Mr. Dingell's questions are pointing up the fact that this section, like other sections, is extremely broadly drafted. It grants extremely broad powers, and those broad powers can be abused.

Mr. BARTON. And everyone who has testified on the need for a national electricity grid has pointed out that transmission is one of the things that must be addressed. I will grant the gentleman from Michigan's major point, that we do need to think about this.

Mr. DINGELL. I want to thank the gentleman. Just an observation: I have always found that Federal bureaucrats, at times, have a way of abusing the high trust that has been placed in them, particularly where precious public lands are concerned—national parks, refuges, and things of that kind. And I would just note that this legislation suspends in many of its parts almost every one of the Federal conservation and environmental statutes. And that even includes provisions relative to nuclear safety with regard to nuclear power facilities, which we saw out in Bonneville.

Now, Mr. Colburn and Mr. Hawkins, do you want to comment on that. Am I right or wrong in that thesis?

Mr. COLBURN. I believe you are referring to section 302, which does——

Mr. DINGELL. That is correct.

Mr. COLBURN. [continuing] talk about any facility. I don't know what the inventory is at the Bureau of Reclamation and the Bonneville Power——

Mr. DINGELL. There is a nuclear facility out there. And my question earlier to another witness was, does that suspend the provisions of all of the statutes relative to nuclear safety and the regulations that DOE has relative to those matters?

Mr. COLBURN. The language in the bill suspends any prohibition on operation that might be authorized by this waiver. And it also says there shall be no judicial review of the order.

Mr. DINGELL. That is correct. And so where does a person who might feel affronted by that go to seek to prevent, let us say, a suspension of a rule or regulation relative to the operation of a nuclear power facility or an invasion of Arlington Cemetery?

Mr. COLBURN. Maybe they go to Albania.

Mr. LYNCH. Mr. Dingell, with respect to the nuclear plant, if I might take a minute, I am not a great expert on the Bonneville Power Administration, but my understanding of the plant to which

you refer is that it is actually owned by the Washington Public Power Supply System.

Mr. DINGELL. True, but they have an agreement, and they operate in concert with Bonneville, do they not?

Mr. LYNCH. Yes. They do——

Mr. DINGELL. And their power is marketed through Bonneville, is it not?

Mr. LYNCH. It is, correct.

Mr. DINGELL. And, you see, I asked this morning——

Mr. LYNCH. Yes, you did.

Mr. DINGELL. [continuing] whether or not that fell under this particular provision. Nobody knows. And I am not prepared to tell you it does or does not fall under the prohibition. All I want to do is have somebody like you who are appearing now as an expert to tell me whether or not this is the case.

Mr. LYNCH. Mr. Dingell, I will get you an answer as to whether it is under administrative jurisdiction of the administrator, as the language in the bill suggests. I think it is not.

Mr. DINGELL. Now, your company operates a facility under lease, don't you?

Mr. LYNCH. I am sorry, sir?

Mr. DINGELL. From the Bureau of Reclamation.

Ms. BONO. Can we make this the last question, excuse me.

Mr. DINGELL. All right.

Ms. BONO. Thank you.

Mr. LYNCH. We operate some hydro projects that are under the jurisdiction of the Bureau, correct.

Mr. DINGELL. Have you looked to see whether this waiver benefits your company?

Mr. LYNCH. No, sir.

Mr. DINGELL. Would you do that?

Mr. LYNCH. I will be happy to do that.

Mr. DINGELL. That would be useful.

Madam Chairman, I have a unanimous consent request that I be permitted to submit certain questions to the panel here for inclusion in the record.

Ms. BONO. Without objection.

Mr. DINGELL. And Madam Chairman, I have also a request—I have sent a couple letters to the Administration about this legislation, asking a number of questions. I have not yet gotten a reply, which I must say distresses me mightily. But I would like to insert the letters asking the questions into the record and would ask that then if a response comes from the Administration, that that also be inserted in the record.

Ms. BONO. Without objection.

[The information referred to follows:]

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ONE HUNDRED SEVENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

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DAVID V. MARVENTANO, STAFF DIRECTOR

May 1, 2001

The Honorable Christine Todd Whitman
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Whitman:

On April 13, 2001, I wrote to you requesting your comments on draft legislation which was distributed to members of the Subcommittee on Energy and Air Quality by Chairman Joe Barton. To date, I have not received a response from you.

It is critical that you provide Congress with guidance on legislation affecting matters within the jurisdiction of the Environmental Protection Agency. There are numerous provisions of this proposal which would substantially affect laws and matters which are clearly within the purview of your Agency. Therefore, I am enclosing a copy of my original letter and once again seeking your comments on Mr. Barton's legislative proposal, including answers to the specific question I asked in that letter. Please also find enclosed the most recent draft of Mr. Barton's legislation to which you should address your analysis.

Chairman Barton has stated that a markup of this legislation may occur as early as May 8, 2001. Since you found it necessary to decline a request to testify at hearings to be held this week on the enclosed proposal, your timely response to my letter is of critical importance. As such, I would appreciate having your response as soon as possible, but no later than Friday, May 4, 2001.

In the event that time constraints preclude you from providing a detailed analysis of the attached legislation, you may fulfill my request with a brief response stating either your support or opposition to Mr. Barton's proposal.

Should you have any questions regarding this request, please contact me or have your staff contact Alison Taylor of the Committee on Energy and Commerce Democratic staff, at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Enclosures

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

[illegible] FLORIDA
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U.S. House of Representatives
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DAVID V. MARVENTANO, STAFF DIRECTOR

April 13, 2001

The Honorable Christine Todd Whitman
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW.
Washington, D.C. 20460

Dear Administrator Whitman:

I am writing to request your comment on the attached draft legislation, which was distributed to members of the Subcommittee on Energy and Air Quality by Subcommittee Chairman Joe Barton. The draft is described as an "Electricity Emergency Act," which Mr. Barton has indicated could be scheduled for markup by the subcommittee as early as the week of April 23, 2001.

I have heard little from the witnesses who have testified before the Subcommittee on Energy and Air Quality indicating that the Federal Clean Air Act, or Federal environmental legislation generally, is contributing to the severe problems facing electricity markets in California and other Western States. To the contrary, the Subcommittee has received testimony from the California Air Resources Board and others indicating that the Clean Air Act is not contributing to the problem, and that changes to the Federal law or regulatory regime could be hurtful to the situation. In addition, I note your comment on CNN's Crossfire on February 26, 2001:

> "I asked our people to go back and to give me the environmental clean air regulations . . . that were hampering the ability of the utilities in California to provide power and we couldn't find any."

Nevertheless, the attached draft legislation contains provisions that may effectively alter the Environmental Protection Agency's current authorities, temporarily or otherwise. In order to assist the members of the Subcommittee in evaluating Chairman Barton's draft bill, I would appreciate your comments on this proposed legislation. While you need not comment on provisions not directly affecting the Environmental Protection Agency, your comments on other provisions are welcome. In particular, please address the following questions:

1. Would the proposal alter the Environmental Protection Agency's existing authority and responsibilities? If so, in what way?

2. Has the State of California requested assistance from the Environmental Protection Agency that the Agency has lacked the authority to grant?

3. Has the Agency initiated any enforcement action against a power plant in California for violation of the laws or regulations in your jurisdiction during the period in which a Stage III Emergency has been declared by the California System Operator? If so, describe the nature of the violation and the remedy obtained and/ or fees and mitigation measures obtained by the Agency. If not, do you anticipate that the Agency may file such an action?

4. Is the Agency aware of any citizen suits that have been initiated during the period in which a Stage III Emergency has been declared by the California System Operator?

5. Does this draft legislation significantly enhance your ability to address the California situation? Are there discretionary actions the Agency has taken or anticipates taking to address the California situation that are not covered by the provisions of this draft legislation?

In order to assist members in responding to Chairman Barton's request for comment on the draft bill, and to prepare for a possible markup later this month, I would appreciate your response by Thursday, April 19, 2001.

Should you have any questions regarding these matters, please contact me or have your staff contact Alison Taylor, Minority Counsel with the Committee on Energy and Commerce, at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachments

cc: The Honorable W.J. "Billy" Tauzin
Chairman
Committee on Energy and Commerce

The Honorable Joe Barton
Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher
Ranking Member
Subcommittee on Energy and Air Quality

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ONE HUNDRED SEVENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

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DAVID V. MARVENTANO, STAFF DIRECTOR

May 1, 2001

The Honorable Spencer Abraham
Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Secretary Abraham:

On April 11, 2001, I wrote to you requesting your comments on draft legislation which was distributed to members of the Subcommittee on Energy and Air Quality by Chairman Joe Barton. To date, I have not received a response from you.

It is critical that you provide Congress with guidance on legislation affecting matters within the jurisdiction of the Department of Energy. There are numerous provisions of this proposal which would substantially affect laws and matters which are clearly within the purview of your Department. Therefore, I am enclosing a copy of my original letter and once again seeking your comments on Mr. Barton's legislative proposal, including answers to the specific question I asked in that letter. Please also find enclosed the most recent draft of Mr. Barton's legislation to which you should address your analysis.

Chairman Barton has stated that a markup of this legislation may occur as early as May 8, 2001. Since you found it necessary to decline a request to testify at hearings to be held this week on the enclosed proposal, your timely response to my letter is of critical importance. As such, I would appreciate having your response as soon as possible, but no later than Friday, May 4, 2001.

In the event that time constraints preclude you from providing a detailed analysis of the attached legislation, you may fulfill my request with a brief response stating either your support or opposition to Mr. Barton's proposal.

Should you have any questions regarding this request, please contact me or have your staff contact the Committee on Energy and Commerce Democratic staff at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Enclosures

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

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Committee on Energy and Commerce
Washington, DC 20515–6115

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DAVID V. MARVENTANO, STAFF DIRECTOR

April 11, 2001

The Honorable Spencer Abraham
Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Secretary Abraham:

I am writing to request your comment on the attached draft legislation, which was distributed to members of the Subcommittee on Energy and Air Quality by Subcommittee Chairman Joe Barton. The draft is described as an "electric emergency bill," which Mr. Barton has indicated could be marked up in the Subcommittee as early as the week of April 23, 2001.

I am concerned about the adequacy of the Federal Energy Regulatory Commission's (FERC) response to the severe problems affecting electricity markets in California and other Western States. However, it is not yet clear whether changes to FERC's existing statutory authority, the Department of Energy's (DOE), or other changes to Federal law are needed.

In order to assist the members of the Subcommittee in evaluating Chairman Barton's draft bill, I would appreciate your comments on each element of this proposed legislation, including provisions relating to the Bonneville Power Administration. In addition, please address the following specific questions:

1. Would enactment of this legislation significantly improve DOE's ability to respond to problems in electricity markets? In terms of timing, would any of the bill's provisions be effective in addressing potential problems this summer in California and other Western States' electricity markets, or other parts of the country, like New York State?

2. In your opinion, would enactment of this legislation significantly improve FERC's ability to respond to potential problems this summer in California and other

Western States' electricity markets, or other parts of the country, this summer? Would it improve FERC's long range ability to respond to similar problems?

In order to assist members in responding to Chairman Barton's request for comment on the draft bill, and to prepare for a possible markup later this month, I would appreciate your response by Thursday, April 19, 2001.

Should you have any questions regarding these matters, please contact me or have your staff contact Sue Sheridan, Minority Counsel with the Committee on Energy and Commerce, at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

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Washington, DC 20515–6115

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DAVID V. MARVENTANO, STAFF DIRECTOR

May 1, 2001

The Honorable Gale A. Norton
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Norton:

On April 13, 2001, I wrote to you requesting your comments on draft legislation which was distributed to members of the Subcommittee on Energy and Air Quality by Chairman Joe Barton. To date, I have not received a response from you.

It is critical that you provide Congress with guidance on legislation affecting matters within the jurisdiction of the Department. Therefore, I am enclosing a copy of my original letter and once again seeking your comments on Mr. Barton's legislative proposal, including answers to the specific questions I asked in that letter. Please also find enclosed the most recent draft of Mr. Barton's legislation to which you should address your analysis. There are numerous provisions which would substantially affect laws and matters which are clearly within the purview of your Department including, but not limited to, Sections 105, 106, 301, and 302.

Chairman Barton has stated that a markup of this legislation may occur as early as May 8, 2001. Since the Chairman declined our request for you to testify at hearings to be held this week on the enclosed proposal, your timely response to my letter is of critical importance. As such, I would appreciate having your response as soon as possible, but no later than Friday, May 4, 2001.

In the event that time constraints preclude you from providing a detailed analysis of the enclosed legislation, you may fulfill my request with a brief response stating either your support or opposition to Mr. Barton's proposal.

Should you have any questions regarding this request, please contact me or have your staff contact Rick Kessler, Committee on Energy and Commerce Democratic staff, at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Enclosures

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

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Washington, DC 20515–6115

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DAVID V. MARVENTANO, STAFF DIRECTOR

April 13, 2001

The Honorable Gale A. Norton
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Norton:

I am writing to request your comment on the attached draft legislation, which was distributed to members of the Subcommittee on Energy and Air Quality by Subcommittee Chairman Joe Barton. Mr. Barton has indicated that the draft, described as an "electric emergency bill," could be marked up in the Subcommittee as early as the week of April 23, 2001. Therefore, in order to assist the members of the Subcommittee in evaluating Chairman Barton's draft bill, I would appreciate your comments on this proposed legislation. While you do not need to comment on provisions not directly affecting the Department, your comments on other provisions are welcome.

In particular, I am interested in your comments on sections 204, 205, and 206 of Mr. Barton's draft legislation which clearly affect resources and authorities that fall under the jurisdiction of the Department. Because the waivers and moratoria provided for in these sections are not limited geographically to any one license or project, your analysis should assume that the maximum number of waivers and moratoria possible are granted. Additionally, your analysis should assume that each waiver or moratorium granted will be in effect for no less than the two years allowed under the legislation.

As part of your response, please address the following questions:

1. How would the proposal affect the Department's existing authority and responsibilities?

2. How long would it take the Department to implement the provisions pertaining to its authority?

3. Would enactment of this legislation affect the ability of the Department to enhance fish and wildlife resources under its jurisdiction?

4. Could enactment of this legislation affect the status of species either currently or proposed to be listed as either threatened or endangered species under the Endangered Species Act or any recovery plans proposed or finalized under that Act?

5. Could enactment of this legislation lead to actions that will affect any litigation or settlements to which the Department or its agencies are party? If so, please include a list of cases and settlements potentially affected by this legislation.

6. Could the enactment of this legislation result in increased costs to the Department?

7. How will the Department ensure that the responsibility for any increased costs resulting from a waiver or moratorium granted pursuant to this legislation are born solely by those benefitting directly and not passed on to the taxpayers at large?

In order to assist members in responding to Chairman Barton's request for comment on the draft bill, and to prepare for a possible markup later this month, I would appreciate your response by Thursday, April 19, 2001.

Should you have any questions regarding this request, please contact me or have your staff contact Rick Kessler, Committee on Energy and Commerce Democratic staff, at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

Mr. DINGELL. Madam Chairman, I thank you for your courtesy to me.

Ms. BONO. Thank you. I just want to point out I got reprimanded by the chairman for saying, "Excuse me," because chairpeople don't say, "Excuse me."

Mr. BARTON. Chairmen never say, "Excuse me."

Ms. BONO. I have to learn these things.

Mr. BARTON. We don't do that.

Ms. BONO. I think I read—so I don't say, "I'm sorry, Mr. Chairman," either, right? All right. Thank you. I am happy to recognize Mr. Waxman for 7 minutes.

Mr. WAXMAN. Thank you very much. I appreciate being recognized to ask some questions of these witnesses, and I thank you all for your testimony.

Mr. Barton said we need a national transmission system. I am new to the Energy Subcommittee. We may need such a thing, but this is an emergency bill. Do any of you feel it needs to be in an emergency bill, that we establish the land for which a transmission system might be used?

Mr. LYNCH. Mr. Waxman, I will start with that. I think it is a good idea to have in the emergency bill something that at least encourages a number of stakeholders to look at what is needed. To give the agencies unmitigated authority to site a facility anywhere, I don't think is appropriate. If it was the intent of the chairman, I am sure he is—I suspect he is amenable to amendments by now. As a large transmission operator that hop-scotches around public lands around the West, I think we can do what needs to be done responsibly and make sure that the crown jewels are not compromised in the process.

Mr. BARTON. Would the gentleman yield?

Mr. WAXMAN. I would be pleased to yield.

Mr. BARTON. I understand the sensitivity of this particular issue, but what percent of the West is federally owned? Isn't it true that in some of these States it is up to three-fourths of the land is Federal land, so you can't do a transmission policy if you don't do some sort of a coordinated review?

Mr. LYNCH. Mr. Barton, it varies from State to State. Oregon, for example, which I am familiar, is about 51 percent federally owned; Nevada is about 75 percent federally owned; I believe Utah is in the 70 to 80 percent ownership range as well. And it is essential that some lines are going to—already do and are going to have to go, and more lines may have to go over Federal lands. And those are some issues that need to be resolved, and I think with some changes to the language you suggested, I think it could be done less controversially.

Mr. WAXMAN. Well, perhaps, but I am still not convinced it needs to be done in a bill to help California right now, because I can see a lot of controversy with these provisions. You talk about the—maybe Mr. Colburn or someone else can help you on this—but it seems to me there are a lot of stakeholders, and if they are not happy with all the way this is being designed, exactly the way it is being designed, we could end up with a controversy that is really aside from the issue before us. Do you agree with that, Mr. Lynch?

Mr. LYNCH. I do, Mr. Waxman, actually. As I said previously, I think it is good to get started. I don't think it is necessary at this point to provide this kind of siting authority to the——

Mr. WAXMAN. So we need to have some hearings on it——

Mr. LYNCH. Yes.

Mr. WAXMAN. [continuing] and get some things going.

Mr. LYNCH. And the Governors are getting engaged in this issue very actively across the regions, so that is a good thing too.

Mr. COLBURN. Mr. Waxman, if I may, I would only add that perhaps there is not a requirement for an emergency bill, but I think there is an urgency regarding transmission. My understanding is that as a Nation we generally have enough generation capacity. However, because we don't have an adequate transmission system, we are building a lot of generation in a lot of places. It is only the generation that has air emissions. So we would certainly support the construction of an adequate transmission system.

Mr. RICHARDSON. Mr. Waxman——

Mr. WAXMAN. Let me move on, if I might. Well, if you want to——

Mr. RICHARDSON. Well, I was just going to agree with Mr. Lynch's comments about the need for review. Transmission is a critical issue. It does have to be addressed, but probably in a more deliberative fashion.

Mr. WAXMAN. Thank you. Now, what we are faced with is an emergency situation in California and other States in the West and maybe broadening out to other parts of the country. The issue that I want to raise, and it has been raised by other members, is how much flexibility in a waiver do we need to put into law now to avoid any kind of problems the Clean Air Act might offer in dealing with the crisis? We heard from the witnesses from California earlier today. They didn't think the problems were created by the Clean Air Act, nor did they think the Clean Air Act is impeding them from addressing the issue.

Mr. Hawkins, you are an expert on the Clean Air Act. There is flexibility, as I understand it, to allow sources out from under emissions limits in the Clean Air Act. Can you tell us whether section 110(f) allows some of that flexibility in your experience with it?

Mr. HAWKINS. Yes. Section 110(f) is the provision in the current law that allows a source to request the Governor and the Governor to request the President for a waiver of up to 4 months of emission limitations or other provisions needed to address an emergency. I personally wrote a number of those waivers in the late 1970's when I worked at EPA, and because the power is non-delegable, I was just the scribe; the President Jimmy Carter signed them. But it has been exercised on a number of occasions, and we turned those things around in 2 or 3 days.

Mr. WAXMAN. It allowed waivers of?

Mr. HAWKINS. It allowed waivers of emission limitations. For example, there was an ice freeze on the Ohio River, which prevented coal barges from reaching some of the power plants. In order to conserve electricity, they wanted to be able to ratchet back on some of the energy consuming emission controls that did produce an increase in emissions and caused them to violate their emission limits. We determined it would not create an urgent public health

problem, and they requested—Governor Rhodes requested a waiver under 110(f), and the President granted it.

Mr. BARTON. Would the gentleman yield? Isn't it true that section 110(f) is limited to—relief is limited to 4 months duration? And isn't it true that the Governor of California declared a state of emergency January 17, which is about 3.5 months ago? While it is true that this particular section of the Clean Air Act does provide relief, it is only for a 4-month period. Isn't that true?

Mr. HAWKINS. That is correct. The Governor of California, to my knowledge, hasn't taken action that actually requires the waiver of any obligation that sources in California would be subject to. If and when he did, that is when he could ask for the waiver. I don't think the declaration of an energy emergency needs to be coterminous with the extent of a waiver of an emission limitation.

Mr. BARTON. That is true. That is true.

Mr. WAXMAN. Thank you.

Mr. BARTON. You are the last questioner, so you are going to be given a lot of discretion on your time.

Mr. WAXMAN. Well, I will try to stay within my time, because it has been a long day, and these witnesses have been very helpful.

Mr. Hawkins, at Tuesday's hearing, Co-Chairman Hébert complained about the reluctance of California to rely on diesel generators. Can you explain why the reluctance to rely on diesel may in fact be warranted?

Mr. HAWKINS. Yes. I think this is one of the most serious public health concerns that we face in California and perhaps in other places this summer. Existing diesel generators are extremely dirty. We don't even know where they are all located. It is like having a bus garage right next door to your house, and these things could operate 24 hours a day. They are extremely polluting. They emit anywhere from 20 to 100 times more pollution, both smog-forming pollution and soot-causing pollution, than other forms of power generation. And the incentives are there to run these generators. And because the regulatory system is essentially blind to the actual location of these units, we have a very serious concern. The public doesn't even know where these facilities are located. And if they go to their air agency, the air agency can't tell them.

One of the things that I think this committee could do that would be very helpful would be to call attention to this problem and urge EPA to help. If it requires a little money, EPA has got contract money. EPA should go out and help States like California find these facilities. It should help deploy special purpose monitors to make sure that we track what happens to pollution in these neighborhoods.

There is an environmental justice issue here also. Many of these industrial backup generators are located in poor communities, in communities that have a hard enough time already. There is a health problem. Some of these diesel generators are located in the parking lots of hospitals. Their stacks release the pollution right next to the air conditioner intakes for the hospitals, and we aren't on top of this situation. And these generators are going to be running, and we need to get on top of it.

Mr. WAXMAN. Mr. Colburn, do you have anything to add? Do you think Mr. Hébert's correct in his criticism that California should rely more on diesel generation?

Mr. COLBURN. No, Mr. Waxman. In fact, I would agree with Mr. Hawkins to such an extent that when this issue arose in New Hampshire 2 years ago due to a change in our rate structure with our utility and we were looking at on the order of 60 new off-grid diesel engines to support saw mills and what not, we were so concerned by it that we legislated regulation of those facilities. States universally are now understanding the need to get their arms around this universe of sources, and we would welcome the opportunity to contribute to that inventory and EPA's assistance, financial or otherwise, as mentioned by Mr. Hawkins.

Mr. WAXMAN. Some have correctly pointed out that action should have been taken years ago to avoid the problems we face today. Of course that is easy to say in hindsight. Can you tell us what actions we should be taking today in Congress to prevent problems years from now in this area? Do you think that enhanced air conditioner efficiency standards might help? And does everyone agree that greater efficiency will help prevent problems in the future like we are experiencing in the West?

Mr. COLBURN. If I might start with that, Representative Waxman. Certainly, air conditioning efficiency, any appliance standard would be helpful. But if we go to the market and first allow customers to perceive what costs they are incurring when they are incurring them, and to decide at that point whether to maintain that load and pay that price or shed that load, that is the single best thing that we could do. I am led to believe, for example, in California's peaks that on the order of 3, perhaps as high as 5, percent was due to clothes drying at the time. I suspect many customers, if they knew how much costs they were incurring, would have chose to defer their clothes drying.

The second thing that we need to do to avoid future problems is build the transmission system. And then, and only then, I think we need to get our arms around new generation—new efficient generation, and that is already well underway, so it is my least concern, frankly.

Mr. WAXMAN. Anyone else want to respond to this question?

Mr. LYNCH. A couple of thoughts, Mr. Waxman. I think some of the comments on transmission just given were absolutely accurate. I think there are above some siting and some tax issues involving transmission that need to be addressed.

A couple of other things I would suggest would be to look at—a lot of this stuff is on the tax side, unfortunately, but you are trying to stimulate behavior, and sometimes tax incentives can do pretty well on that. The renewal of the tax production credit for wind projects, which expires at the end of this calendar year, is an essential component, particularly in the West. We are very bullish on wind development in the West. If we can have wind generation in the Wyomings and the Montanas and we can transmit it around the Western grid, we will be very well off. We can do an awful lot with the resources if we can get it to the customers. The production tax credit is very helpful to that.

There are a couple of other things that might be a little bit more controversial that at least would make it interesting for discussion.

Mr. WAXMAN. Let me ask you to submit that part to us in writing so we can make it part of the record. Otherwise, we are going to get a little bit off target on this legislation.

Mr. LYNCH. Sure.

Mr. WAXMAN. Mr. Hawkins?

Mr. HAWKINS. Yes. I would just mention one bill that is before Congress right now, which is H.R. 778, the Cunningham-Markey bill that is on building efficiency incentives. It is a very important program. If that bill had been law 5 years ago, I think we would not have a problem today. If it becomes law this year, we will help avoid problems in the future. There are other forms of efficiency standards for appliances.

I like to think that if we had meters on top of all of the appliances in our households, like a meter in a taxicab, and it was running, showing how many cents a minute you were consuming in your household and putting onto your bill that you were going to pay at the end of the month, that we would all get smarter about buying more efficient appliances. We don't have those meters, so we have to use effective public education programs to break down the barrier to understanding that these appliances are costing consumers money. They can save money by going out and buying more efficient appliances.

Mr. RICHARDSON. I would add to that, Mr. Waxman, we obviously need to focus on transmission; that has been mentioned. Additional sources of energy, renewable energy and energy conservation. We need to go back to the ethic that we had in this country 20 or 25 years ago where conservation was much more important than it seems to be today. And we also need to focus on the structure of the wholesale power market, because one of the things that happened was that the retail competition was unleashed in California before they had a competitive wholesale market that could actually sustain competition. And so that is a very important issue that needs to be addressed to make sure the problems in California don't appear in other areas.

Mr. WAXMAN. One last question, for the record. I would like to each of you to give yes or no answers, so we can just have it clearly down. Should FERC or Congress, either one, establish cost-of-service based rates or a similar approach to address the runaway wholesale costs? Mr. Richardson?

Mr. RICHARDSON. Ideally FERC should do it. If FERC won't the Congress should.

Mr. LYNCH. Yes, at least on a temporary basis.

Mr. MAKLER. With respect to cost-of-service based rates, Calpine's response would be no. We would be much more inclined to see a price cap rather than cost-for-service rates.

Mr. COLBURN. I can only comment as a citizen, Mr. Waxman, but I would concur with Mr. Makler's sense.

Mr. HAWKINS. NRCD doesn't have an organizational position, but as someone who pays electricity bills, I certainly think that Mr. Markey's comments about res ipsa loquitur makes sense, and that some mechanism designed to limit profits to a reasonable rate of return on some facilities makes a lot of sense.

Mr. WAXMAN. Thank you. Thank you very much, Mr. Chairman.

Mr. BARTON. Seeing no other members present, that is going to conclude our questions. The Chair would ask unanimous consent that we be allowed to put in the record a letter from Reliant Energy concerning several news articles and misquotations. We will show this to the minority staff, but I think this would be without objection. Okay? So ordered.

We also would inform the panelists and the audience it is the Chair's intention to move to markup on this legislation next week. Obviously, based on the 2 days of hearings, there is quite a bit of work to be done to improve the bill. And I would encourage this panelist—these group of panelists to work with members to give us your input into such perfecting amendments.

Summer is coming, and we can academicitize this all we want here in Washington, but they are going to be, most likely, extremely serious blackouts in the west coast this summer and possibly other places in the country. So if there is something that can be done, now is the time, and this is the place, and this is the subcommittee to do it. And I will be working with my distinguished ranking member and other members of the subcommittee to make whatever legislative vehicle possible to make it a reality in the next week or so.

So the gentleman from Virginia wish any final comments? Gentleman from California? Then we are in—this hearing is adjourned.

[Whereupon, at 3:11 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Reliant Energy

P.O. Box 4567
Houston, Texas 77210-4567
Phone. 713 207 3000

May 1, 2001

The Honorable Joe Barton
U.S. House of Representatives
Rayburn House Office Building
Room 2264
Washington, D.C. 20515

Dear Rep. Barton:

I am submitting the following as a response to a letter dated May 1 that your Washington office received from a group of signatories and organizations. That letter regards pending legislation before your committee, and it includes comments attributed to me, by name, that are incorrect — and which continue to be taken out of context by certain special interest groups and those with personal and/or environmental agendas.

What follows is a clarification of an interview I gave to the Los Angeles *Times* earlier this year. During the interview, the reporter sought to pit me against the administration and its environmental programs and plans.

Since giving that interview, I have had to clarify for both the Los Angeles *Times* and the New York *Times* my intent and the fact that the reporter quoted me out of context. The Los Angeles *Times* refused to carry a correction or a clarification; the New York *Times* did carry a letter-to-the-editor clarification, a copy of which is enclosed for your reference. I am also enclosing past correspondence to both papers, responses, and copies of their articles and opinion pieces.

Hopefully, my response below, will set the record straight from our perspective, as the quotations I gave the paper have been widely misinterpreted:

[Clarification of comments made by a Reliant Energy spokesman in a recent Los Angeles Times' story re power plant operations and the possibility of the Bush Administration considering easing air quality regulations, Jan. 25, 2001, "Bush's Idea of Easing Smog Rules Won't Help, Experts Say."]

In a recent interview (Jan. 25, 2001), Reliant Energy responded to a direct question from a Los Angeles Times' reporter, put in the context of: *Do environmental restrictions cause you to "withhold" power?*

Based on the question, which is paraphrased, Reliant Energy had the impression that the question centered upon a deliberate act by the company to withhold power, or to use that as an excuse, because of the stringent air quality environmental restrictions in California.

Reliant Energy said no, such an assertion would be false; the company does not withhold power. But, to clarify, environmental regulations, specifically those regarding air emissions, can and do have an adverse impact on the company's operations in California.

Additional context was necessary to set up the quote, but it was omitted by the reporter. During the course of the interview, it had been thoroughly explained to the reporter how the company works within federal, state, and local regulations to conduct its business.

Since the start of the California energy crisis, wholesale power generators have been widely accused of "withholding" power, which is a false accusation — and which was reflected in the comments made by Reliant Energy in response to the question posed by Los Angeles *Times*.

In a Feb. 1, 2001, Federal Energy Regulatory Commission (FERC) investigative document, "Report on Plant Outages in the State of California," the FERC said that it found no evidence by Reliant Energy and one other wholesale power generator of withholding power to manipulate the market and drive up power prices.

The quote used by the paper made it erroneously appear that current environmental laws have no effect on how the company operates its power plants, when, in fact, they do have a negative effect. In many cases during the course of the energy crisis in California, Reliant Energy has had to shut down plants until such time as air-emission variances in permitted operational run-time could be obtained from local air quality districts, or other steps taken in accordance with local and state regulations, to make the plants legally available to produce maximum power for the state.

Our position is best summed up in Jan. 31, 2001 testimony before the U.S. Senate Energy and Natural Resources Committee. Reliant Energy noted that:

"Our energy production could be further increased were it not for the most restrictive emission limitations in the country imposed by local California air boards… at our current higher-than-normal operating rate, these restrictions will idle significant capacity… this summer when really needed for peak demand.

"...Broader temporary relief of these most restrictive emissions limitations could increase overall energy production by up to 20% for our portfolio and potentially even more for some of the other generation owners in California. Temporarily lifting emissions restrictions may be necessary given the supply shortage California faces this summer."

Thank you for allowing Reliant Energy to clarify its position with you and your committee members.

In addition, I am forwarding copies of this response to all of the signatories and groups noted on the letter your office received — again, in an effort to set the record straight.

Sincerely,

Richard N. Wheatley, APR
Director, Corporate Communications

xc (w/attachments): Joe Stanko
Bud Albright

xc (w/o attachments):
May 1 Letter Signatories to Rep. Barton:

Elizabeth Thompson
Legislative Director
Environmental Defense

Alyssondra Campaigne
Legislative Director
Natural Resources Defense Council

Kevin Collins
Acting Director
Conservation Policy
National Parks Conservation Association

Sandra Schubert
Legislative Counsel
Earthjustice Legal Defense Fund

Robert K. Musil
Executive Director and CEO
Physicians for Social Responsibility

S. Elizabeth Birnbaum
Director of Government Affairs
American Rivers

Kevin Curtis
Vice President
Government Affairs
National Environmental Trust

Gawain Kripke
Director of Economics Programs
Friends of the Earth

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Native American Rights Fund

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Feb. 5, 2001

Ms. Mary Cox
Letters Editor
Los Angeles *Times*
Times Mirror Square
Los Angeles, CA 90053

Via Facsimile: (213) 237-7679

Dear Ms. Cox:

Pursuant to our telephone conversation today, I am submitting the following as a Letter-to-the-Editor. It is a clarification of an interview I gave to the paper, and it sets the record straight from our perspective, as the quotations I gave the paper are being widely misinterpreted:

[Clarification of comments made by a Reliant Energy spokesman in a recent Los Angeles Times' story re power plant operations and the possibility of the Bush Administration considering easing air quality regulations, Jan. 25, 2001, "Bush's Idea of Easing Smog Rules Won't Help, Experts Say."]

In a recent interview (Jan. 25, 2001), Reliant Energy responded to a direct question from a Los Angeles Times' reporter, put in the context of: *Do environmental restrictions cause you to "withhold" power?* Based on the question, which is paraphrased, Reliant Energy had the impression that the question centered upon a deliberate act by the company to withhold power because of the stringent air quality environmental restrictions in California.

Reliant Energy said no, such an assertion would be false; the company does not withhold power. But, to clarify, environmental regulations, specifically those regarding air emissions, can and do have an adverse impact on the company's operations in California.

Additional context was necessary to set up the quote, but it was omitted by the reporter. During the course of the interview, it had been thoroughly explained to the reporter how the company works within federal, state, and local regulations to conduct its business.

Since the start of the California energy crisis, wholesale power generators have been widely accused of "withholding" power, which is a false accusation — and which was reflected in the comments made by Reliant Energy in response to the question posed by Los Angeles Times. Most recently, in a Feb. 1, 2001, Federal Energy Regulatory Commission (FERC) investigative document, "Report on Plant Outages in the State of California," the FERC said that it found no evidence by Reliant Energy and one other wholesale power generator of withholding power to manipulate the market and drive up power prices.

The quote made it erroneously appear that current environmental laws have no effect on how the company operates its power plants, when, in fact, they do have a negative effect. In many cases during the course of the energy crisis in California, Reliant Energy has had to shut down plants until such time as air-emission variances in permitted operational run-time could be obtained from local air quality districts, or other steps taken in accordance with local and state regulations, to make the plants legally available to produce maximum power for the state.

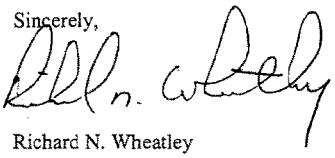
Our position is best summed up in Jan. 31, 2001 testimony before the U.S. Senate Energy and Natural Resources Committee. Reliant Energy noted that:

"Our energy production could be further increased were it not for the most restrictive emission limitations in the country imposed by local California air boards... at our current higher-than-normal operating rate, these restrictions will idle significant capacity... this summer when really needed for peak demand.

"...Broader temporary relief of these most restrictive emissions limitations could increase overall energy production by up to 20% for our portfolio and potentially even more for some of the other generation owners in California. Temporarily lifting emissions restrictions may be necessary given the supply shortage California faces this summer."

Thank you for allowing Reliant Energy to clarify its position.

Sincerely,



Richard N. Wheatley
Director, Corporate Communications

xc: Ms. Narda Zacchino

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Archives

Thursday, January 25, 2001
Home Edition
Section: Part A
Page: A-18

THE CALIFORNIA ENERGY CRISIS

Bush's Idea of Easing Smog Rules Won't Help, Experts Say

■Electricity: Officials point out that power plants are already producing as much as possible and aren't hindered by air quality regulations.

By: MARLA CONE and GARY POLAKOVIC
TIMES ENVIRONMENTAL WRITERS

President Bush has suggested that rolling back California's stringent smog rules would help prevent blackouts.

According to power companies and air-quality officials, he is wrong.

Power plants throughout California are running around the clock, cranking out as many megawatts as possible to ward off blackouts. With only one exception--a plant run by the city of Glendale that is likely to win a reprieve from anti-smog rules soon--California regulations have not short-circuited the amounts of electricity produced, according to power company representatives.

In an interview with CNN last week, Bush said: "If there's any environmental regulations . . . preventing California from having a 100% max output at their plants--as I understand there may be--then we need to relax those standards."

But the assertion that environmental regulations are holding back output "is absolutely false," said Richard Wheatley, spokesman for Houston-based Reliant Energy Co., which operates four Southern California power plants.

"We're making every megawatt available on request. We factor the air quality regulations into our daily operating basis, and they are not causing us to withhold power."

Air quality rules in the Los Angeles region have had a role in raising the cost of power. Plants here are required to install costly pollution controls or to buy emissions credits. But because only a fraction of the state's power is generated in the region, the overall price impact is limited.

Even as Bush suggests rolling back California's rules, his home state of Texas has been cracking down on pollution from its power plants and other industries.

Houston, the largest city in Texas, now has the worst air pollution in the country, and state officials have adopted tougher regulations to comply with federal law.

The new rules on power plants are "as stringent as any state's, probably including California," said Commissioner Ralph Marquez of the Texas Natural Resource Conservation Commission, who was appointed by Bush.

Power plants in the Houston area must cut emissions 93% by 2007, with almost half the reductions due by March 2003. But Marquez said the rules are not expected to shrink the electricity supply.

"My personal prediction is we will have an oversupply, even with the new restrictions," he said.

In California, air-quality regulators have taken a number of steps recently to avoid reducing power output. Glendale is likely to be the next beneficiary.

The city-owned utility there has been required by pollution rules to idle two of its seven units and is generating only 60% of its capacity. If it weren't for the South Coast Air Quality Management District's smog rules, Glendale would be producing an additional 100 megawatts of power, enough to serve 100,000 households.

"A hundred megawatts would not solve the state's problem. But it is unfortunate to see that capacity idle," said Manuel Robledo, Glendale's power management administrator.

The city's municipal utility is unable to operate its plant at full capacity because it is the only utility in the Los Angeles Basin that chose not to participate in a smog market that gives companies more flexibility in meeting pollution limits. Because the Glendale utility is not part of that market, it must meet an annual cap on its emissions. To meet the cap, all seven of its units cannot run year-round.

The city utility has enough power for its own needs, but would like to sell excess power elsewhere in the state. Because of transmission bottlenecks, the extra 100 megawatts would not be available for Northern California, which is the center of the state's current power shortages. Instead, the power would give Southern California more cushion from blackouts.

Glendale is likely to be granted a temporary reprieve from those rules "in a matter of days," said AQMD Assistant Deputy Executive Officer Mohsen Nazemi. "We want to meet California's power demand and at the same time protect air quality in this basin," Nazemi said. The relief would be a short-term variance that would allow greater production during the current energy emergency.

In recent months, air-quality agencies in California have worked with power generators several times to ensure plants can operate at full capacity.

Last month, for example, the AQMD agreed to let AES Corp. keep three plants in Los Angeles and Orange counties running despite severe pollution violations. In return, the company agreed to install anti-smog controls and pay a record-breaking $17-million fine.

A similar deal was worked out in August with the Los Angeles Department of Water and Power, and also between Ventura County's air-quality agency and a Reliant Energy plant in Oxnard.

"We haven't had [production] curbed in any way by the AQMD," said Angelina Galiteva, the DWP's executive director of strategic planning. "To my knowledge, it has not been an issue."

The deals in essence are a trade-off: In the short term, operating the plants in excess of limits could mean dirtier air, particularly in the summer. Power plants emit large volumes of nitrogen oxides, a key ingredient of smog and particle pollution. But as the new pollution controls are installed during the next couple of years, emissions will decline.

Even if pollution regulations were cutting power supply, California would not be able to roll back any of its smog rules without approval from the federal Environmental Protection Agency.

Under the 1990 amendments to the Clean Air Act, signed by Bush's father when he was president, the state must adhere to a plan that reduces smog to healthful levels by 2010.

Asked Wednesday whether Bush would consider giving California a waiver of clean air rules, White House press secretary Ari Fleischer said only that it is "an option that is available to the federal government."

Air-quality regulators say power generators in the Los Angeles Basin have known for seven years that they must reduce their emissions.

Yet the companies delayed installing the costly catalytic equipment that would keep them under their emissions limits. Instead, they were able to exceed their limits and keep operating at full capacity by buying credits in the smog market, known as RECLAIM.

The price of those credits has increased rapidly in recent months. Because of increasing demand, prices for the credits have climbed from a low of 8 cents per pound of pollution to today's $40 per pound, said Ron Davis, general manager of Burbank Water and Power.

"The big impact on us has been cost," he said. "I have to charge [the state] amounts I'm embarrassed about."

To stabilize the market, the AQMD board last week took steps toward dropping power plants from the smog market beginning this spring.

The plant operators will no longer have to buy credits, but will have to install anti-smog equipment in the years to come.

PHOTO: Glendale's power plant is the only one in the state that has cut output because of pollution rules, and it is expected to get a reprieve soon.
PHOTOGRAPHER: Los Angeles Times
Descriptors: Bush, George W, Energy - California, Electricity, Utilities, Ut Ility Rates, Emergencies, Air Pollution - California

Reliant Energy™

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Feb. 5, 2001

Ms. Tom Feyer
Letters Editor
New York *Times*
229 W. 43rd St.
New York, NY 10036-3913

Via Facsimile: (212) 556-3622

Dear Mr. Feyer:

Pursuant to a telephone conversation today with your office, I am submitting the following as a Letter-to-the-Editor. It is a clarification and response to an Op-Ed that appeared Jan. 31, 2001, headlined: "Reckonings: Smog and Mirrors."

In the Op-Ed, contributing writer, Mr. Paul Krugman, lifted a quotation from a Jan. 25, 2001, story that appeared in the Los Angeles *Times*; unfortunately, the quotation needed additional context and elaboration for the sake of accuracy; and the comments that I originally gave the Los Angeles *Times* are being widely misinterpreted. In future, I have advised Mr. Krugman to please go to the extra effort and contact me to make sure such quotations are completely accurate.

The following is my submittal to the New York Times:

[Clarification of comments made by a Reliant Energy spokesman in a recent Los Angeles Times' story re power plant operations and the possibility of the Bush Administration considering easing air quality regulations, Jan. 25, 2001, "Bush's Idea of Easing Smog Rules Won't Help, Experts Say." Portions of the story were subsequently excerpted for an Opinion-Editorial in the New York Times, Jan. 31, 2001, entitled, "Reckonings: Smog and Mirrors."]

In a recent interview (Jan. 25, 2001), Reliant Energy responded to a direct question from a Los Angeles Times' reporter, put in the context of: *Do environmental restrictions cause you to "withhold" power?* Based on the question, which is paraphrased, Reliant Energy had the impression that the question centered upon a deliberate act by the company to withhold power because of the stringent air quality environmental restrictions in California.

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Additional context was necessary to set up the quote, but it was omitted by the LA Times reporter. During the course of the interview, it had been thoroughly explained to the reporter how the company works within federal, state, and local regulations to conduct its business.

Since the start of the California energy crisis, wholesale power generators have been widely accused of "withholding" power, which is a false accusation — and which was reflected in the comments made by Reliant Energy in response to the question posed by Los Angeles Times. Most recently, in a Feb. 1, 2001, Federal Energy Regulatory Commission (FERC) investigative document, "Report on Plant Outages in the State of California," the FERC said that it found no evidence by Reliant Energy and one other wholesale power generator of withholding power to manipulate the market and drive up power prices.

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Our position is best summed up in Jan. 31, 2001 testimony before the U.S. Senate Energy and Natural Resources Committee. Reliant Energy noted that: "Our energy production could be further increased were it not for the most restrictive emission limitations in the country imposed by local California air boards… at our current higher-than-normal operating rate, these restrictions will idle significant capacity… this summer when really needed for peak demand.

"…Broader temporary relief of these most restrictive emissions limitations could increase overall energy production by up to 20% for our portfolio and potentially even more for some of the other generation owners in California. Temporarily lifting emissions restrictions may be necessary given the supply shortage California faces this summer."

Thank you for allowing Reliant Energy to clarify its position.

Sincerely,

Richard N. Wheatley
Director, Corporate Communications

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