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Calendar No. 592

103D CONGRESS
2d Session

SENATE

REPORT
103–351

# MULTISTATE UTILITY CONSUMER PROTECTION ACT OF 1994

AUGUST 22 (legislative day, AUGUST 18), 1994.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 544]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 544) to amend the Federal Power Act to protect consumers of multistate utility systems, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION. 1. SHORT TITLE.

This Act may be cited as the "Multistate Utility Consumer Protection Act of 1994".

SEC. 2. AUTHORITY TO DISALLOW RECOVERY OF CERTAIN COSTS UNDER FEDERAL POWER ACT.

Section 318 of the Federal Power Act is amended—

(1) by inserting "(a)" after "Sec. 318."; and

(2) by adding at the end thereof the following new subsections:

"(b)(1) The Commission shall have the authority to disallow recovery in jurisdictional rates of any costs incurred by a public utility pursuant to a transaction that has been authorized under section 13(b) of the Public Utility Holding Company Act of 1935, including costs allocated to such public utility in accordance with subsection (d), if the Commission determines that the recovery of such costs is unjust, unreasonable or unduly preferential or discriminatory under sections 205 or 206 of this Act.



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"(b)(2) Nothing in the Public Utility Holding Company Act of 1935, or any actions taken thereunder, shall prevent a State commission from exercising its jurisdiction to the extent otherwise authorized under applicable law with respect to the recovery by a public utility in its retail rates of costs incurred by such public utility pursuant to a transaction authorized by the Securities and Exchange Commission under section 13(b) between an associate company and such public utility, including costs allocated to such public utility in accordance with subsection (d).

"(c) In any proceeding of the Commission to consider the recovery of costs described in subsection (b)(1), there shall be a rebuttable presumption that such costs are just, reasonable, and not unduly discriminatory or preferential within the meaning of this Act.

"(d)(1) In any proceeding of the Commission to consider the recovery of costs, the Commission shall give substantial deference to an allocation of charges for services, construction work or goods among associate companies under section 13 of the Public Utility Holding Company Act of 1935, whether made by rule, regulation, or order of the Securities and Exchange Commission prior to or following the enactment of this subsection.

"(d)(2) If the Commission pursuant to subsection (d)(1) establishes an allocation of charges that differs from an allocation established by the Securities and Exchange Commission with respect to the same charges, the allocation established by the Federal Energy Regulatory Commission shall be effective 12 months from the date of the order of the Federal Energy Regulatory Commission establishing such allocation, and binding on the Securities and Exchange Commission as of that date.

"(e) An allocation of charges for services, construction work or goods among associate companies under section 13 of the Public Utility Holding Company Act of 1935, whether made by rule, regulation or order of the Securities and Exchange Commission prior to or following enactment of this subsection, shall prevent a State commission from using a different allocation with respect to the assignment of costs to any associate company.

"(f) subsection (b) shall not apply to:

"(1) any cost incurred and recovered prior to July 15, 1994, whether or not subject to refund or adjustment; or

"(2) any uncontested settlement approved by the Commission or a State commission prior to the date of enactment of the Multistate Utility Consumer Protection Act of 1994.

"(3) IMPACT ON OTHER MATTERS.—The enactment of the Multistate Utility Consumer Protection Act of 1994 shall in no way affect FERC Docket No. FA89–28.

"(4) SAVINGS PROVISION.—Section 318(b) of the Federal Power Act shall not apply to any cost incurred and recovered prior to the date of enactment of the Multistate Utility Consumer Protection Act of 1994 pursuant to a contract or other arrangement for the sale of fuel from Windsor Coal Company or Central Ohio Coal Company which has been the subject of a determination by the Securities and Exchange Commission prior to the date of enactment of the Multistate Utility Consumer Protection Act of 1994, or any cost prudently incurred after the date of enactment of the Multistate Utility Consumer Protection Act of 1994 pursuant to such a contract or other such arrangement on or before December 31, 2000.".

## PURPOSE OF THE MEASURE

S. 544, as reported by the Committee, amends the Federal Power Act to protect consumers of multistate electric utility systems.

## BACKGROUND AND NEED

This legislation is made necessary by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Ohio Power* v. *FERC,* 954 F.2d 779 (1992), which substantially undermined the ability of the Federal energy Regulatory Commission (FERC) to effectively regulate the wholesale rates of multistate electric utilities that are also subject to the jurisdiction of the Secu-

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rities and Exchange Commission (SEC). The purpose of this legislation is to restore FERC's ratemaking authority.

Registered public utility holding companies are multistate utilities that are regulated by the SEC under the Public Utility Holding Company Act of 1935 (PUHCA). There are ten registered electric public utility holding companies, serving approximately 49 million households in 30 states.

Each registered utility holding company has subsidiaries, some of which are public utilities and some of which are non-utilities that contract with the public utility subsidiaries to perform services, sales, or construction. Under section 13(b) of PUHCA, the SEC is required to insure that such contracts are in the public interest and are performed "economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies." Thus, the focus of the SEC is on intra-corporate transactions, and not on ratemaking.

At the same time, FERC is required by sections 205 and 206 of the Federal Power Act (FPA) to oversee the rates charged for wholesale electricity by public utilities, including sales by public utility subsidiaries of registered utility holding companies. The primary purpose of the FERC review is to assure that rates received by the public utility are "just and reasonable."

From 1935, when Congress enacted both PUHCA and the FPA, until the *Ohio Power* decision in 1992, this statutory framework performed quite well. The SEC oversaw the price charged for the performance of service, sales, and construction contracts, and FERC reviewed the reasonableness of the inclusion of those costs in the rates for the wholesale sale of electricity. In other words, FERC had the authority to disallow recovery of an affiliate charge even where the SEC allowed the cost to be charged by one affiliate to another pursuant to section 13(b) of PUHCA. Although this was an overlap in jurisdiction between the two agencies, it was not problematic. As FERC Chair Moler testified before the Committee, "there were no significant problems resulting from the overlap in SEC–FERC jurisdiction, until a series of court decisions involving the wholesale rates of Ohio Power Company (Ohio Power)."

In *Ohio Power,* a utility subsidiary of a registered utility holding company entered into a contract with another subsidiary of the same registered holding company for the purchase of coal. Pursuant to Section 13(b) of PUHCA, the SEC required that the coal subsidiary charge the utility subsidiary an amount based on the actual cost of producing the coal, plus a reasonable rate of return. The utility subsidiary later applied to FERC to increase its wholesale electric rates to reflect, among other things, the cost paid pursuant to the coal contract. In the meantime, the FERC modified its pass-through standard for goods from an "at cost" approach to a market-based approach. As a result, FERC declined to pass through a portion of the coal contract cost on the ground that the resulting rate would be unreasonable because the at-cost price paid to the subsidiary for the coal was, in many instances, far in excess of the comparable market rate for coal.

The utility subsidiary appealed FERC's cost disallowance to the Court of Appeals for the D.C. Circuit. That court overturned FERC based on section 318 of the FPA, which is intended to resolve cer-

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tain jurisdictional conflicts between the SEC and FERC. The court ruled that section 318 divested FERC of ratemaking jurisdiction because the SEC was responsible for setting the interaffiliate price under PUHCA. *Ohio Power* v. *FERC,* 880 F. 2d 1400 (D.C. Cir. 1989). In concurring, Judge Mikva disagreed with the court's analysis of section 318, but agreed with the result based on a FERC regulation requiring that fuel costs subject to the jurisdiction of another regulatory body be deemed reasonable by FERC and includable in rates.

On appeal, the Supreme Court reversed the D.C. Circuit's analysis of section 318, holding that it was inapplicable to the circumstances presented. *Arcadia, Ohio* v. *Ohio Power Co.,* 111 S.Ct. 415 (1990). The Court remanded the case for further consideration.

On remand, the D.C. Circuit adopted Judge Mikva's reasoning for overturning the FERC order. *Ohio Power* v. *FERC,* 954 F.2d at 783. If this had been the only basis for the court's decision, there would be no problem because FERC could amend its regulation, as it is currently in the process of doing. However, the court went on to reason that the SEC's specific authority under PUHCA to set interaffiliate prices "at cost" overrode FERC's general authority under the FPA to set rates that are "just and reasonable." Consequently, the court ruled that FERC lacks the authority to review a price established in an interaffiliate contract when setting the wholesale electric rates to be charged by subsidiaries of a registered public utility holding company. Instead, the interaffiliate price must be fully included in rates as a cost, even if FERC would otherwise have concluded that such inclusion would lead to rates that are not just and reasonable. It is this aspect of the court's ruling that necessitated this legislation.

Under the court's ruling, the SEC would be solely responsible for protecting ratepayers from excessively high or imprudently incurred costs charged in affiliate service, sales, or construction contracts. This would be the case despite the fact that the SEC does not hold trial-type, evidentiary hearings with respect to section 13(b) contracts, and does not have the resources or procedural mechanisms to adequately review such contracts from a ratemaking perspective. For example, the SEC, unlike FERC, has no authority to order refunds.

It is also important that the rationale of the court's ruling may not be limited to fuel procurement from affiliates. There is concern that it could affect not only goods, but other section 13(b) affiliate transactions, like services (including the operation of power plants), as well as construction of power plants and transmission lines. These may be involve many millions of dollars that will be recovered from electric consumers. In addition, some have suggested that the court's reasoning could potentially be extended to state utility commission review of section 13(b) affiliate contract costs in the retail rates charged by public utility subsidiaries of registered utility holding companies.

The decision also creates a dichotomy in the rate regulation of electric utilities. Those electric utilities that are members of registered utility holding company systems have the ability to insulate significant portions of their costs from FERC review by forming affiliates to perform services for them, or sell goods to them. Those

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utilities that are not part of a registered holding company system will continue to have their costs scrutinized by FERC to the extent such costs are included in wholesale rates.

As reported by the Committee, S. 544 would overturn *Ohio Power,* thereby restoring FERC's authority prospectively (from July 15, 1994) to review costs associated with service, sales and construction contracts between affiliated companies of a registered utility holding company system for the purposes of establishing just and reasonable wholesale electric rates under the Federal Power Act. Similarly, the legislation makes it clear that nothing in PUCHA, nor any actions taken by the SEC thereunder, preempts state utility commissions from reviewing the allocated costs associated with service, sales, and construction contracts regulated under PUCHA when performing retail ratemaking as otherwise authorized by applicable law. However, the legislation does not alter in any way the Supreme Court's rulings in *Mississippi Power & Light Co.* v. *Mississippi,* 487 U.S. 354 (1988), or *Nantahala Power and Light Co.* v. *Thornburg,* 476 U.S. 953 (1986).

## LEGISLATIVE HISTORY

S. 544 was introduced by Senator Bumpers on March 10, 1993. The Committee on Energy and Natural Resources held a hearing on the bill on May 25, 1993 (S. Hrg. 103–234).

Chairman Johnston transmitted the language of the reported bill to the Senate Committee on Commerce, Science and Transportation for inclusion in S. 1822, the Communications Act of 1994, along with language prepared by Chairman Donald W. Riegle, Jr. of the Senate Committee on Banking, Housing and Urban Affairs that would amend PUCHA to allow registered utility holding companies to participate in the provision of telecommunications services. The language of the reported bill is now included as paragraphs 302(b)(2), (3), and (4) of S. 1822, which was ordered reported by the Commerce Committee on August 10, 1994.

## COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Senate Committee on Energy and Natural Resources, in an open business session on July 22, 1994, by vote of a quorum present, recommended that the Senate pass the bill as described herein.

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The roll call vote on reporting the measure was 14 yeas and 5 nays, as follows:

| YEAS | NAYS |
|---|---|
| Mr. Johnston | Mr. Wallop |
| Mr. Bumpers | Mr. Murkowski [1] |
| Mr. Ford | Mr. Craig |
| Mr. Bradley [1] | Mr. Bennett |
| Mr. Bingaman [1] | Mr. Specter [1] |
| Mr. Akaka | |
| Mr. Shelby [1] | |
| Mr. Wellstone [1] | |
| Mr. Campbell [1] | |
| Mr. Mathews | |
| Mr. Dorgan | |
| Mr. Hatfield [1] | |
| Mr. Nickles | |
| Mr. Lott | |

[1] Indicates proxy vote.

## COMMITTEE AMENDMENTS

The purpose of the substitute bill, as amended, is to restore effective regulatory review over the electric rate impacts associated with service, sales and construction contracts between affiliated companies of registered utility holding company systems.

## SECTION-BY-SECTION ANALYSIS

Section 1 retitles the bill "the Multistate Utility Consumer Protection Act of 1994".

Section 2 amends Section 318 of the Federal Power Act to make the existing text subsection 318(a), and then adds new subsections (b) through (f).

New subsection 318(b)(1) authorizes FERC prospectively (with respect to costs not incurred and recovered prior to July 15, 1994) to disallow the recovery of costs incurred by a jurisdictional utility pursuant to contracts regulated by the SEC pursuant to Section 13(b) of PUHCA. This would overturn the *Ohio Power* decision.

New subsection 318(b)(2) provides that neither PUHCA, or any actions taken thereunder, shall prevent any state utility commission prospectively (again, with respect to costs not incurred and recovered prior to July 15, 1994) from disallowing the recovery of costs incurred by a jurisdictional utility pursuant to contracts regulated by the SEC pursuant to Section 13(b) of PUHCA. For example, there was some concern that the "at cost" language of section 13(b) would be used to preclude retail ratemaking by a state commission under a state statute providing that rates by "just and reasonable." This subsection assures that such state retail ratemaking, performed under existing authority, is protected.

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New subsection 318(c) creates a rebuttable presumption in any rate proceeding of FERC that a cost resulting from a contract regulated pursuant to Section 13(b) of PUHCA is just, reasonable, and not unduly discriminatory or preferential.

New subsection 318(d) concerns the allocation of costs associated with service, sales and construction contracts by the SEC among companies associated with a registered utility holding company. New subsection 318(d)(1) provides that FERC shall give substantial deference to the SEC's allocation of cost among public utility company subsidiaries, whether such allocation is made prior to or following enactment of this legislation. In other words, FERC cannot use a different allocation for ratemaking purposes unless it finds the SEC allocation under section 13 to be outside a relatively wide range of reasonableness. Thus, the SEC allocation might not be the allocation that FERC would have reached if the matter had arisen at FERC first, but FERC must nevertheless use it if it is reasonable. This subsection does not limit the authority of FERC to review the reasonableness or prudence of costs allocated to a public utility once the allocation among the associate companies is determined.

New subsection 318(d)(2) provides that if FERC does establish a different cost allocation, the new allocation does not become effective until 12 months from the date of the FERC order establishing that allocation. This is intended to give the registered utility holding company and its subsidiaries time to make any adjustments necessitated by the new allocation. At the end of the 12 months, the new allocation is binding on the SEC and the state commissions.

New subsection 318(e) prevents a state commission from using a different allocation than the SEC allocation made pursuant to Section 13 of PUHCA for costs associated with service, sales and construction contracts between holding company affiliates. Pursuant to new subsection 318(d)(2), the SEC is bound to implement, by rule, regulation, or order, the FERC allocation order by the end of the 12 month period. The SEC rule, regulation, or order is binding on state commissions pursuant to subsection 318(e). Subsection 318(e) does not limit the authority of a state commission to review the reasonableness or prudence of allocated costs.

New subsection 318(f) provides that subsection 318(b) shall not apply to any costs incurred and recovered from ratepayers prior to July 15, 1994. Thus, the restoration of FERC's authority to disallow costs incurred pursuant to a transaction authorized under section 13(b) of PUHCA is prospective in nature. New subsection 318(f) also provides that section 318(b) shall not apply to costs related to uncontested settlements approved by FERC or a State Commission prior to the date of enactment.

The reported bill also provides that it does not affect FERC Docket No. FA89–28. It is the Committee's understanding that the parties to this proceeding have entered into a tentative settlement of this case. If the case is not settled, the Committee takes no position on the application of *Ohio Power,* if any, to this case.

Finally, the bill provides that subsection 318(b) does not apply to any costs incurred and recovered prior to the date of enactment pursuant to a contract or other arrangement for the sale of fuel from the Windsor Coal Company or the Central Ohio Coal Com-

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pany which has been the subject of a determination by the SEC prior to the date of enactment, or any cost prudently incurred after the date of enactment pursuant to such a contract or other such arrangement on or before December 31, 2000. It is the Committee's understanding that each of the named companies has one fuel contract that would be covered by this provision. It is important to note that the prudence requirement applies only to costs incurred between the date of enactment and December 31, 2000; it does not apply to costs incurred and recovered prior to the date of enactment. Prudence would be determined by FERC and the relevant state utility commissions.

## COST AND REGULATORY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, August 17, 1994.*

Hon. J. BENNETT JOHNSON,
*Chairman, Committee on Energy and Natural Resources, United States Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 544, the Multistate Utility Consumer Protection Act of 1994, as ordered reported by the Senate Committee on Energy and Natural Resources on July 22, 1994. CBO estimates that enacting the bill would have no net effect of the federal budget.

The bill would amend the Federal Power Act to grant additional authority to the Federal Energy Regulatory Commission (FERC) to review and disallow the costs associated with transactions of a public utility holding company and an affiliated company, for purposes of determining a just and reasonable rate for consumers. This provision may increase FERC's workload, but because the agency recovers 100 percent of its costs through user fees, any increase in its administrative costs would be offset by an equal change in the fees that the commission charges. Hence, the bill's provisions would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enactment of S. 544 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill. In addition, CBO estimates that enacting the bill would have no significant impact on the budgets of state and local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Pete Fontaine.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

## REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in implementing

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S. 544. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 544 as amended.

## EXECUTIVE COMMUNICATIONS

On June 9, 1993, the Committee on Energy and National Resources requested legislative reports from the Department of Energy and the Office of Management and Budget setting forth executive views on S. 544. The reports had not been received a the time this report was filed. When the reports become available, the chairman will request that they be printed in the Congressional Record for the advice of the Senate.

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## ADDITIONAL VIEWS OF SENATOR WALLOP

I voted against this legislation because it is bad public policy. Rather than address the issues raised by the *Ohio Power* court case in a straightforward manner, the Committee-reported bill instead creates a complex, overlapping, and confusing regulatory maze. It engenders duplicative regulation; it contains no mechanism to obtain a clear, timely, and final regulatory decision; it squeezes electric utilities between conflicting agency decisions; and it virtually guarantees the very trapping of costs that the *Ohio Power* Court found unacceptable. In short, the cure is worse than the disease.

The proponents of this legislation are motivated by two key concerns. One, the *Ohio Power* decision hinders the efforts of the Federal Energy Regulatory Commission and state public utility commissions to carry out their regulatory duties. Two, the Securities and Exchange Commission is not as effective a regulator as is the FERC. These are valid concerns and should be addressed; but we should do so in a way that makes regulation more effective, not more confusing.

In *Ohio Power*, the Court recognized that registered electric utility holding companies should not be whipsawed between conflicting decisions of two federal regulatory agencies—decisions based on two different statutes having two different standards. The Court put a stop to that by ruling that Congress gave exclusive jurisdiction to a single agency. That decision makes good policy sense: only one agency, employing one standard, ought to be responsible for regulating an activity. Unfortunately, that is precisely what the Committee-reported bill does not do.

Instead of deciding whether the SEC or the FERC is to be in charge,the Committee-reported bill puts both agencies in charge. Instead of deciding whether regulation is to be pursuant to the Public Utility Holding Company Act or the Federal Power Act, the Committee-reported bill applies both statutes. I do not care particularly which agency is put in charge or which statutory standard is used, but I do care that only one agency be in charge and only one standard be used.

I am also concerned because the Committee-reported bill does not respect the sanctity of contracts or provide for finality of federal decision making. Notwithstanding the SEC's review and approval of a contract, the Committee-reported bill allows the FERC, at any time, to create and apply a new review standard to a pre-existing contract. This is true for both new and old contracts. Even if a contract conformed to FERC's passthrough standard at the time the SEC approved it, the Committee-reported bill allows the FERC to change its standard and to apply it to the contract. That, in fact, is exactly what led to *Ohio Power*. Even if made legal, it is not fair nor is it good policy.



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Contract sanctity and finality of decision-making have long been important to this Committee and to the Congress. Once a contract has been federally approved, a company should be able to rely on the continued validity of that federal decision. In other legislative initiatives we have always sought to avoid retroactive changes and upsetting existing contracts. Thus, the SEC's recommendation for "grandfathering" existing contracts was well taken; unfortunately, the Committee decided to ignore the advice.

The proponents of this legislation claim it is needed to restore state public utility commission authority to where it was prior to *Ohio Power*. However, it provides that cost allocations made by the SEC "* * * shall prevent a State Commission from using a different allocation with respect to the assignment of costs. * * *" This is brand new and entirely unique statutory authority preempting state public utility commissions.

Curiously, although the Committee-reported bill gives state public utility commissions authority to second-guess and "trump" certain SEC decisions, it does not give them the same authority with respect to similar FERC decisions. I know of no policy rationale for this distinction. Moreover, if we want to empower state public utility commissions, we should simply put them in charge in the first place, not just give them the power to second-guess SEC decisions.

Another troubling aspect of the Committee-reported bill is its resurrection of the very "cost trapping" the *Ohio Power* Court found unacceptable. Cost-trapping will occur when a utility incurs costs pursuant to an SEC approval, but the FERC or a state public utility commission subsequently denies their passthrough pursuant to the Committee-reported bill. Making a utility the "fall guy" for disagreements among regulatory agencies is not only patently unfair, but also bad public policy.

I am also very concerned that the Committee-reported bill sets a very bad precedent. Allowing one Federal agency to "trump" the decisions of another agency, and a state agency to "trump" a federal agency, has obvious implications for other federal decision making. FERC's hydroelectric licensing and natural gas pipeline regulation are two prime examples. Good public policy demands that a single agency—whomever that may be—be the final arbiter.

It is evident that the Committee-reported bill creates many more problems than it cures, any one of which constitutes sufficient reason to vote against it. If we cannot find a better way to address *Ohio Power,* then we ought not legislate at all.

MALCOLM WALLOP.

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## CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by this measure are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

### FEDERAL POWER ACT

* * * * * * *

SEC. 318. *(a)* If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act, or any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person.

*(b)(1) The Commission shall have the authority to disallow recovery in jurisdictional rates of any costs incurred by a public utility pursuant to a transaction that has been authorized under section 13(b) of the Public Utility Holding Company Act of 1935, including costs allocated to such public utility in accordance with subsection (d), if the Commission determines that the recovery of such costs is unjust, unreasonable or unduly preferential or discriminatory under sections 205 or 206 of this Act.*

*(b)(2) Nothing in the Public Utility Holding Company Act of 1935, or any actions taken thereunder, shall prevent a State Commission from exercising its jurisdiction to the extent otherwise authorized under applicable law with respect to the recovery by a public utility in its retail rates of costs incurred by such public utility pursuant to a transaction authorized by the Securities and Exchange Commission under section 13(b) between an associate company and such public utility, including costs allocated to such public utility in accordance with subsection (d).*

*(c) In any proceeding of the Commission to consider the recovery of costs described in subsection (b)(1), there shall be a rebuttable presumption that such costs are just, reasonable, and not unduly discriminatory or preferential within the meaning of this Act.*

*(d)(1) In any proceeding of the Commission to consider the recovery of costs, the Commission shall give substantial deference to an*



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*allocation of charges for services, construction work or goods among associate companies under section 13 of the Public Utility Holding Company Act of 1935, whether made by rule, regulation, or order of the Securities and Exchange Commission prior to or following the enactment of this subsection.*

*(d)(2) If the Commission pursuant to subsection (d)(1) establishes an allocation of charges that differs from an allocation established by the Securities and Exchange Commission with respect to the same charges, the allocation established by the Federal Energy Regulatory Commission shall be effective 12 months from the date of the order of the Federal Energy Regulatory Commission establishing such allocation, and binding on the Securities and Exchange Commission as of that date.*

*(e) An allocation of charges for services, construction work or goods among associated companies under section 13 of the Public Utility Holding Company Act of 1935, whether made by rule, regulation or order of the Securities and Exchange Commission prior to or following enactment of this subsection, shall prevent a State commission from using a different allocation with respect to the assignment of costs to any associate company.*

*(f) Subsection (b) shall not apply to:*

*(1) any cost incurred and recovered prior to July 15, 1994, whether or not subject to refund or adjustment;*

*(2) any uncontested settlement approved by the Commission or a State commission prior to the date of enactment of the Multistate Utility Consumer Protection Act of 1994.*

*(3) Impact on Other Matters—The enactment of the Multistate Consumer Protection Act of 1994 shall in no way affect FERC Docket No. FA89–28.*

*(4) Savings Provision.—Section 318(b) of the Federal Power Act shall not apply to any cost incurred and recovered prior to the date of enactment of the Multistate Utility Consumer Protection Act of 1994 pursuant to a contract or other arrangement for the sale of fuel from Windsor Coal Company or Central Ohio Coal Company which has been the subject to a determination by the Securities and Exchange Commission prior to the date of enactment of the Multistate Utility Consumer Protection Act of 1994, or any cost prudently incurred after the date of enactment of the Multistate Utility Consumer Protection Act of 1994 pursuant to such a contract or other such arrangement on or before December 31, 2000.*

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