

This liability does not infringe on the Government's sovereignty and does not violate the unmistakability doctrine.

The Government in *Winstar*, supra, also asserted that under the sovereign acts doctrine, "whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." The Court in the *Winstar* case held that the sovereign acts doctrine:

*** balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.

In answering the first question, the Court looked at whether the action by the Government having an impact on the public contract was merely incidental to the accomplishment of a broader government objective. The greater the Government's self-interest, the more suspect the claim that the private contractor bear the financial burden of the Government's action. In *Winstar*, the Court found that a substantial purpose of the Government's action was to eliminate the very accounting formula that the acquiring thrifts had been promised. Thus, the Government's self-interest was so substantial that the statute was not "public and general" act for purposes of the sovereign acts defense.

Any changes to the statutory authority for Production Flexibility Contracts would no doubt follow the same analysis as that relied upon by the Court in *Winstar*. To the extent that the farm programs would be altered, it would be likely that the Government would have substantial self-interest in any relief it might obtain from risks allocated it under the contract. Most likely this would result in some legislative change to reduce the amount of money paid to producers. While such change would likely be for the "public and general" benefit, it would undercut the allocation of risks between the parties to the contract and as such, would substantially be in the Government's self-interest.

Finally, the Government in *Winstar* asserted the defense of impossibility. To invoke the defense of impossibility, the Government would have to show that the nonoccurrence of regulatory amendment was a basis assumption of the contracts. That is the parties assumed that the statute on capitalization requirements would not change. As the Court notes, a change was both foreseeable and likely in that case.

The Production Flexibility Contract states in the Appendix to Form CCC-478 (the Production Flexibility Contract) that if the statute on which the contract is based is materially changed during the period of the contract, CCC may require the producer to elect between modification of the contract consistent with the new provisions and termination of the contract. This statement itself is an acknowledgement that the Congress very well may change the Agriculture Market Transition Act prior to its expiration in 2002. Further, if Congress changes the program, it is reasonable and expected that the contracts would be modified accordingly. However, as was true

with the plaintiff in *Winstar* case, producers have no desire to assert that Congress cannot change the underlying statute, but instead, may pursue a claim for breach of contract and damages where any legislative change results in changes to the contract and producers incur financial damages. The acknowledgment of possible legislative change to the Production Flexibility Contract should only serve to weaken any future Government defense of impossibility.

ELECTRIC UTILITY DEREGULATION WILL SAVE AMERICAN FAMILIES BILLIONS OF DOLLARS A YEAR

HON. TOM DELAY

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Mr. DELAY. Mr. Speaker, I rise today, the last day of the historic 104th Congress, to introduce legislation that I believe will bring about a historic change in the way American families think about electricity. Now I know that electricity service isn't necessarily an exciting issue to most Americans, but I think when they learn about the hundreds of dollars a year they stand to save, they will sit up and pay attention.

What most American families don't realize when they get their electricity bill every month is that they could be paying a lot less. There are companies that are ready, willing, and able to sell them electricity for a lot less money, but are prevented from doing that by outdated laws. In the vast majority of cases, the current system forces consumers to buy electricity from only one company, and actually encourages those companies to charge consumers for services they don't need, want or use.

There are no logistical barriers preventing Americans from buying electricity for their homes and businesses in a competitive marketplace. The obstacles are political and legal, and it is our historic opportunity as legislators to remove these barriers for the common good. Electricity service in the United States is a \$200 billion a year industry, and deregulation can save \$60 to \$80 billion a year, much of which will end up in the pockets of my constituents in Texas and families throughout America.

The bill that I am introducing today, the Consumers Electric Power Act, will put an end to the archaic electricity delivery system in the United States and will allow American families to purchase their electricity from any electric service provider in the country. The competition that this legislation will introduce to the electricity market will cause prices to plummet, improve the reliability of electricity service, and spur innovation in the electric service industry.

I know that deregulation is happening on a piecemeal basis at the State level, and that is good. But there is no reason that American families in one State, city, town or neighborhood should be forced to pay more of their hard-earned money than families in the next town over or down the street who have the ability to choose their electric service provider. The Federal interest in free and open competition requires that jurisdiction over the terms and conditions of access to the customer be

Federal and not State—it is the only way that every American will see the benefits of competition in the electric service industry. The free market is a national system, one that will benefit every American family, no matter where they live.

Specifically Mr. Speaker, the Consumers Electric Power Act will guarantee that every customer has the right to choose their electricity service provider by January 1, 1998; ensure that electric service providers are allowed access to compete on a level playing field; preserve and strengthen the State authority with regard to universal service for consumers, universal access for electric service providers, and the promotion of conservation and economic development programs; outline the performance objectives of competitive transmission and distribution systems; and prospectively repeal the Public Utility Holding Company Act of 1935 and section 210 of the Public Utility Regulatory Policies Act 1978 after competition is affirmatively achieved.

This bill very clearly shows the direction that I believe deregulation of the electricity industry should take. I realize that this bill I am dropping today is by no means the last word on this subject. An issue this complex and important must harness the experience and expertise of those individuals who have spent years studying this issue and working in this industry—and who realized years ago that we must deregulate the electricity industry because it is the right thing to do for American families. Input from those Members of Congress who realize the importance of this subject is both expected and welcome.

Mr. Speaker, this Commerce Committee will be the forum for shaping this legislation and I look forward to working with Members of the Committee over the next year to shape a bill that will provide the maximum benefits for consumers. In particular, I want to recognize the importance of two Members of the House of Representatives who have opened the way for electricity deregulation. The Honorable DAN SCHAEFER, my colleague from Colorado, and the Chairman of the Energy and Power Subcommittee, has already introduced an excellent electricity deregulation bill, and I look forward to working with him on behalf of American families. His knowledge of this subject will be invaluable to Members of Congress as they craft electricity deregulation legislation. In addition, the Honorable TOM BLILEY of Virginia, the Chairman of the Commerce Committee, and the Member who will be responsible for bringing this legislation to the floor of the House, has already made this issue his highest priority for the 105th Congress. His determination and ability are sure to serve American families well in the coming years.

Mr. Speaker, by opening this industry to competition, we will not only implement the economic equivalent of a major tax cut, we will unleash a new era of productivity and creativity in this huge and vital industry to lead America into the new millennium.

At this time Mr. Speaker, I would like to submit the text of the Consumers Electric Power Act for inclusion in the RECORD. I hope that my colleagues will study the legislation in the coming months as they prepare to address this important issue in the next Congress.

H.R. —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the "Consumers Electric Power Act of 1996".

(b) **TABLE OF CONTENTS.**—The table of Contents is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings.
- Sec. 3. Consumer choice.
- Sec. 4. State authority.
- Sec. 5. Reliable and nondiscriminatory operation of transmission and distribution systems.
- Sec. 6. Federal transmission tariff reform.
- Sec. 7. Application of Public Utility Holding Company Act and Public Utility Regulatory Policies Act.
- Sec. 8. Transition planning.
- Sec. 9. Generating sources free to serve consumers and resellers.
- Sec. 10. Applicability.
- Sec. 11. Antitrust laws.
- Sec. 12. Judicial review.
- Sec. 13. Definitions.
- Sec. 14. Federal power act.
- Sec. 15. Effective date; savings provisions.
- Sec. 16. Evaluation of effectiveness.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Low-cost and reliable electric service is integral to the vitality of the United States economy, the competitiveness of domestically made goods, and the quality of life of all Americans.

(2) Americans consume electricity worth more than \$200,000,000,000 a year, approximately half of which is for residential purposes, making the monthly electric bill one of the largest expenses for most households.

(3) The cost of electric service has a direct effect on the price, profitability, and competitiveness of goods and services produced in the United States.

(4) Lower priced electric service can be realized by giving all American consumers the right to choose among suppliers of electric service in a competitive market, while maintaining, if not improving the reliability of service those consumers have come to expect.

(5) The development of vibrant competition in the retail market for electric energy will—

(A) reduce the costs of electric service to even the smallest consumers of electricity;

(B) reduce the costs to consumers benefiting from today's lowest regulated rates;

(C) create jobs as American businesses are able to lower costs and better compete in world markets and against foreign competition here at home;

(D) result in a more efficient utility industry; and

(E) reduce environmental impacts.

(6) Monopoly cost-of-service regulation of electricity has failed. It has stifled competition, resulting in high electric service rates for many consumers and few incentives for technological innovation and good customer service by utilities.

(7) High electric service rates are regressive, placing a disproportionate burden on poor ratepayers.

(8) High electric service rates divert consumer dollars that would otherwise be spent for purchasing necessary goods and services, savings, or investments that benefit the economy as a whole.

(9) Congress has authority to enact laws, under the Commerce Clause of the United States Constitution, regarding the generation, transmission, distribution, and sale of electric energy in interstate commerce at the wholesale and retail level. Only Congress can ensure that a competitive retail market is established throughout the United States on an expeditious but orderly basis.

(10) Regional and State variations require that State regulatory authorities should re-

ceive deference in certain decisions relating to electric service.

(11) Consumers of all utilities, whether served by regulated or nonregulated electric utilities (such as municipally owned utilities or rural cooperatives), should have the same rights to receive the benefits of competition and consumer choice.

(12) Consumer choice needed to produce renewable energy development that is market driven fulfills customer desires for clean energy supplies and encourages competition among different renewable technologies. Subjecting renewable energy technologies to the discipline of the free market will better allocate renewable resources and speed the commercialization of renewable technologies than traditional centralized government resource planning.

SEC. 3. CONSUMER CHOICE.

(a) **FREEDOM OF CHOICE.**—(1) Each person has the right to purchase electric service from any electric service provider, notwithstanding any other law.

(2) A Federal, State, or local authority may not deny or limit any person's right to purchase such energy from an electric service provider at a price and on terms and conditions freely arrived at.

(3) A Federal, State, or local authority may not discriminate, or authorize the discrimination, against any person who exercises that person's right to purchase such energy, subject to subsection (b).

(b) **BAN ON EXIT FEES, SUBSIDIES, OR OTHER PENALTIES ON EXERCISING RIGHT OF CHOICE.**—A Federal, State, or local authority may not grant any preference or protection from competition to any electric service provider. For purposes of this subsection, the terms "preference" and "protection from competition" include—

(1) any direct or indirect subsidy; and

(2) any exit fee or other levy imposed in connection with any purchaser who terminates a purchasing relationship with any seller, other than—

(A) a charge levied pursuant to provisions of a service contract that were specifically and freely negotiated and agreed upon by both parties (or generally applicable contract law) to such contract; or

(B) a nondiscriminatory access charge for funding service continuations under section 4(b) (relating to lifeline source).

(c) **EFFECTIVE DATE.**—The provisions of this section shall take effect on January 1, 1998.

(d) **ALTERNATIVE CHOICES.**—Nothing in this Act shall be construed to prohibit or otherwise restrict any electric energy purchaser from having that electric energy delivered through arrangements of the purchaser's choice. Any such alternative shall be consistent with regional or national reliability standards.

SEC. 4. STATE AUTHORITY.

(a) **LOCAL DISTRIBUTION SERVICE.**—Nothing in this Act shall affect the authority and responsibility of any State or local government concerning the obligation to connect consumers to the local distribution system and to ensure the adequate maintenance, safety, and reliability of such local distribution system.

(b) **LIFELINE SERVICE.**—The authority under subsection (a) includes the authority to provide for the continuation of service to residential customers unable to afford electric energy service, including the authority to establish nondiscriminatory local distribution access charges on any power delivered sufficient to cover the cost of such continuation.

(c) **CERTIFICATION OF ELECTRIC SERVICE PROVIDERS.**—No State may establish discriminatory requirements or other obliga-

tions for certification of electric service providers within that State. Nothing in this subsection shall affect the ability of a State to impose requirements necessary to preserve universal service, protect the public safety and welfare, ensure the continued reliability of the distribution system, and safeguard the rights of consumers.

(d) **IF CONSUMERS MAKE NO SELECTION OF AN ELECTRIC SERVICE PROVIDER.**—In the case of a retail customer who fails to select an electric service provider, the State may establish rules under which the customer shall be initially assigned on a nondiscriminatory basis to one of a variety of electric service providers that have filed service terms with an appropriate State authority and met any requirements described in subsection (c).

(e) **ASSURANCE OF APPROPRIATE RATES FOR TRANSITION TO COMPETITION.**—In order to ensure uninterrupted local distribution service, if nondiscriminatory unbundled rates are not in effect by the effective date of this section, interim rates prescribed in the transition plan under section 7 shall apply for any local distribution service until such time as State rates take effect.

(f) **ADDITIONAL STATE AUTHORITY.**—State and local governments shall retain authority over any specific matter not otherwise addressed in this Act, including—

(1) the continuation of universal service;

(2) conservation programs and initiatives;

(3) consumer choice with regard to renewable energy;

(4) research and development programs and initiatives; and

(5) any other matter deemed appropriate by a State or local government.

SEC. 5. RELIABLE AND NONDISCRIMINATORY OPERATION OF TRANSMISSION AND DISTRIBUTION SYSTEMS.

(a) **OPERATION OF TRANSMISSION AND DISTRIBUTION SYSTEMS.**—The Nation's transmission and distribution systems shall be operated to achieve the following objectives:

(1) Organizational separation within remaining vertically integrated firms, between individuals, assets, and systems dedicated to the operation of transmission and distribution systems and those involved in the provision of electric service.

(2) Nondiscriminatory access to the transmission and distribution systems whether for wholesale or retail sale of electric service.

(3) The prevention of preferential treatment (or protection from competition) by system operators toward affiliated service providers.

(4) Access to information on a nondiscriminatory basis concerning—

(A) availability of transmission and distribution service;

(B) operating conditions on transmission and distribution systems; and

(C) rates, terms, and conditions of any arrangement between, or information provided from, the transmission and distribution system operators and their affiliated electric service provider, if any.

(5) Ensuring that the transmission and distribution system operator—

(A) receives adequate and timely information from electric service providers regarding physical flows and physical transactions on the transmission and distribution system;

(B) has access to assets and resources it needs to maintain system balance in the event of unanticipated events or the failure of an electric service provider to perform; and

(C) has authority to implement Commission approved sanctions and penalties for the failure of electric service providers to conform to the tariffs governing access to the transmission and distribution system.

(b) **COMMISSION AUTHORITY.**—In order to ensure consumers' ability to access competing

electric service providers, the Commission shall have the authority, by rule, order, or decision, to provide for nondiscriminatory prices, terms and conditions to transmission and distribution services. With respect to distribution services, the Commission shall defer to State authorities with respect to the matter reserved to the States in section 4. The Commission shall also have the authority, by rule, order, or decision, to take the actions necessary to fulfill the obligations imposed on it by this Act.

SEC. 6. FEDERAL TRANSMISSION TARIFF REFORM.

(a) INITIAL TARIFF REFORM.—By January 1, 1999, the Commission shall promulgate and make effective, rules which provide for nondiscriminatory access to transmission and distribution service as provided in this Act and which eliminate the barriers to competitive electric service presented by existing contracts and arrangements—

(1) between and among transmitting utilities governing the pricing, terms, and conditions of access to transmission and distribution facilities; and

(2) between transmitting utilities and any other entities (directly connected to such transmitting utility's transmission system) providing for the sale of power by such transmitting utilities to any other entities.

(b) CONTINUING REFORM.—The Commission shall by rule, order, or decision ensure that the existing electric utilities are not permitted to exercise market power in the sale of electric service. The Commission shall initiate proceedings following enactment, to be concluded on or before January 1, 1999, in order to determine the extent to which existing utilities have market power in the sale of electric services; and to consider and determine the means for mitigating such market power. In making and enforcing such determinations, the Commission shall have the authority to—

(1) restrict the ability of the electric utility, or its affiliates, to sell such services at market-determined rates, provided that such restrictions shall be limited to those areas and services where the electric utility has market power; and

(2) order the divestiture of assets and functions which are the source of market power, to the extent reasonably necessary to mitigate such market power, provided that such divestiture may include a variety of alternatives including outright sale, lease, or output contracts.

SEC. 7. APPLICATION OF PUBLIC UTILITY HOLDING COMPANY ACT AND PUBLIC UTILITY REGULATORY POLICIES ACT.

(a) PUHCA.—The Public Utility Holding Company Act of 1935 shall cease to apply to an electric utility subject to this Act or to any holding company (as defined in such Act) of such utility if each State in which such utility is providing electric energy services—

(1) determines that the retail customers served by such utility and its affiliates have the ability to purchase electric energy services in accordance with the provisions of section 3 of this Act; and

(2) notifies the Commission and the Securities and Exchange Commission of such determination.

(b) PURPA.—The provisions of section 210 of the Public Utility Regulatory Policies Act of 1978 requiring electric utilities to offer to purchase electric energy from qualifying cogeneration facilities and qualifying small power production facilities at the incremental cost to the utility of alternative electric energy shall cease to apply to an electric utility if each State in which such utility is providing electric services—

(1) determines that the retail customers served by such utility have the ability to

purchase electric energy services in accordance with the provisions of section 3 of this Act; and

(2) notifies the Commission of such determination.

Nothing in this subsection shall be construed to affect any obligation under a binding contract to purchase electric energy entered into before the date of enactment of this Act.

SEC. 8. TRANSITION PLANNING.

(a) COMMISSION RECOMMENDATIONS.—Within 3 months of enactment, the Commission shall make a report to Congress providing its plan for effectuating its obligations under this Act, including any potential obstacles it identifies that could inhibit full and reasonably expeditious implementation.

(b) COMMISSION GUIDELINES.—The Commission may publish preliminary, nonbinding guidelines to facilitate timely compliance with this Act by electric utilities. Such guidelines shall be calculated to give notice of the direction and substance of the Commission's implementation of this Act to facilitate orderly transition and timely compliance, but need not be entirely incorporated in the Commission's final rules.

(c) UTILITY COMPLIANCE.—Nothing in this Act shall prevent utilities from submitting filings in advance of final Commission rules, nor prevent the Commission from making determinations on such filings subject to the final rules.

SEC. 9. GENERATING SOURCES FREE TO SERVE CONSUMERS AND RESELLERS.

No Federal, State, or local government authority may—

(1) regulate the pricing, terms, or conditions of service offerings by electric service providers; or

(2) except as provided in this Act, regulate who may engage in selling electric energy.

SEC. 10. APPLICABILITY.

This Act shall apply with respect to electric energy sold for use or resale within the 50 States and the District of Columbia.

SEC. 11. ANTITRUST LAWS.

Nothing in this Act shall be construed to modify, impair, or supersede the applicability of the Sherman Antitrust Act (15 U.S.C. 1 and following) and amendments thereto, the Clayton Act (15 U.S.C. 12 and following), and amendments thereto, regulations promulgated under such laws, and United States court decisions interpreting such laws.

SEC. 12. JUDICIAL REVIEW.

Judicial review of this Act, or any rule or order under this Act, within the meaning of section 551(4) of title 5, United States Code, may be obtained in the United States Court of Appeals for any appropriate circuit pursuant to the provisions of chapter 7 of title 5, United States Code, except that the second sentence of section 705 thereof shall not apply.

SEC. 13. DEFINITIONS.

For purposes of this Act—

(1) COMMISSION.—The term "Commission" means the Federal Energy Regulatory Commission.

(2) ELECTRIC SERVICE.—The term "electric service" shall mean the provision or sale of electric energy and related goods and services including but not limited to billing, metering, equipment for monitoring, controlling, or managing the consumption or quality of electric energy, generation of electric energy, ancillary services, and other competitively provided goods and services, but shall not include transmission and distribution service.

(3) TRANSMITTING UTILITY.—The term "transmitting utility" has the meaning given such term in the Federal Power Act, including any Federal power marketing

agency, and any other person, engaged in the business of electric energy transmission.

(4) UTILITY OR ELECTRIC UTILITY.—The terms "utility" and "electric utility" shall mean any entity which, as of the date of enactment, owns assets for the transmission or distribution of electric energy.

(5) TRANSMISSION AND DISTRIBUTION SYSTEM OPERATOR.—The term "transmission and distribution system operator" shall mean the entity or part thereof with responsibility for monitoring, contracting, and operating the transmission and distribution system.

SEC. 14. FEDERAL POWER ACT.

This Act shall supersede any provisions of part II of the Federal Power Act that are inconsistent with the provisions of this Act.

SEC. 15. EFFECTIVE DATE; SAVINGS PROVISIONS.

(a) EFFECTIVE DATE.—The provisions of this Act shall take effect 30 days after the date of enactment of this Act, except to the extent expressly provided otherwise in this Act.

(b) EXISTING CONTRACTS.—Nothing in this Act shall alter, diminish, or otherwise affect any rights or obligations under any contract existing as of the date of the enactment of this Act.

SEC. 16. EVALUATION OF EFFECTIVENESS.

Not later than 30 months after the date of the enactment of this Act, the Commission shall conduct, by rule, an evaluation of this Act and submit a report on such evaluation to the Congress. Such evaluation shall include each of the following:

(1) The extent to which electric energy rates have been reduced, and the combined cost of electric energy delivered to consumers, including the transmission costs.

(2) The level of service reliability provided to purchasers of electric energy.

(3) The extent of competition in the electric energy market.

SALUTING THE HONORABLE PATRICIA SCHROEDER OF COLORADO

HON. LOUIS STOKES

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Mr. STOKES. Mr. Speaker, I want to thank our colleague, ELEANOR HOLMERS NORTON, for reserving time today to honor a voice of reason, respect, and compassion in the U.S. House of Representatives, PATRICIA SCHROEDER. After 12 terms in this body, Congresswoman SCHROEDER is retiring as the longest serving woman in the House of Representatives. In this time, PATRICIA SCHROEDER has been an effective example of how women can enlighten Congress to bring about much needed reform.

PAT SCHROEDER has been a tremendous asset both to her colleagues in the House and to her constituents in Colorado's First Congressional District. Her commitment to public service and the progress of our country are noble and irrefutable. Her husband, son, and daughter will gain from PAT SCHROEDER's departure, but ultimately it will be the loss of the House.

Congresswoman SCHROEDER, who currently sits on the House Judiciary Committee, has also had a distinctive and prominent history on what was the House Armed Services Committee. Her persistence has led to increased roles and sensitivity for women in our military. As a result of PAT SCHROEDER's leadership, women