



NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

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Ms. Carol Balassa
Director, Service Trade Negotiations
Media, Communication, and Energy Policy
Office of the U.S. Trade Representative
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*Assistant Senate Republican Leader
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William T. Pound
Executive Director

Re: Proposed Disciplines on Domestic Regulation Under GATS Article VI:4

Dear Carol:

I am writing you as chair of the State & Local Working Group on Energy and Trade Policy. The Working Group is convened by the National Conference of State Legislatures (NCSL) and includes public officials and staff from state legislatures, utility commissions, attorneys general, energy agencies, city and county attorneys, municipal utilities and several national associations. We most recently communicated with you regarding the revised U.S. offer under the General Agreement on Trade in Services (GATS) in April of 2005. I write you today to make two main points about the current GATS negotiations on domestic regulation that are taking place within the WTO's Working Party on Domestic Regulation (WPDR):

- First, we support the letter sent to the U.S. Trade Representative (USTR) on June 9th by the Services Working Group of the Intergovernmental Policy Advisory Committee (IGPAC), including the issues identified by the case study on *GATS & LNG Facility Siting in California*.
- Second, we want to emphasize a point not raised in the IGPAC letter but that we feel is critically and fundamentally important, which is that the traditional "public interest" criteria for utility licensing in the United States are inherently subjective standards, and they may conflict with the WPDR proposals that require licensing to be based on "objective" criteria.

We concur with IGPAC's general concerns that the proposed GATS disciplines on domestic regulation could adversely affect state regulatory authority, so we will not cover the same ground in this letter. Of the two case studies sent to you by the IGPAC Services Working Group, the study on *GATS & LNG Facility Siting in California* was initiated by our Working Group after we sent you our *Interim Report on GATS & Electricity* in April of 2005. The version of the case study enclosed reflects further modifications by our Working Group and we hope it is a useful product for you. We look forward to your comments on the LNG study in writing or in conversation. As we did on regulation of electric utility monopolies, we would be happy to convene a meeting of state regulatory experts to explain our observations and to provide further detail.

On our second point, state public utility commissions (PUCs) make regulatory decisions that relate to licensing or technical standards based upon whether the request is in the public interest. As we explained in part IV.F of our *Interim Report on GATS & Electricity*, state law usually provides multiple criteria for defining the public interest, some of which must be balanced against each other on a case-by-

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case basis. The reason that state legislatures have created public utility commissions is to exercise discretion in weighing these multiple factors. In other words, PUCs exist to make subjective decisions that balance competing public and private interests.

For example, the Idaho Code gives the Public Utilities Commission the authority to determine the "public convenience and necessity" for a license, and the service supplier has the burden of establishing the "necessity of additional service" (I.C. § 51-528), which is the converse of GATS proposals that require regulators to establish that domestic regulations are necessary. California delegates equally broad power to its PUC and, like many states, articulates a complex and practical set of competing objectives to balance. For example, in the context of a merger or acquiring a subsidiary, these objectives include economic interests of ratepayers, financial condition of the utility, quality of service, quality of management, fairness to utility employees, fairness to utility shareholders, community economic benefits, and preservation of the regulatory capacity of the PUC. (Cal.Pub.Util.Code § 854.)

Most of the proposals to create new GATS disciplines on domestic regulation include an obligation to base licensing and other decisions on "transparent and objective" criteria. Thus, the objectivity test requires more than transparency; it appears to be a substantive obligation that may conflict with our traditionally subjective standard for balancing competing interests.

This should be a concern for federal regulators as well. Since Congress adopted the Interstate Commerce Act in 1887, the federal government has regulated transportation, energy and other sectors based upon criteria of serving "public convenience and necessity." Where the federal government has taken the lead, such as regulation of wholesale energy markets and transmission, it is important to state and local governments that Congress and federal agencies retain their traditional authority to regulate in the public interest, uninhibited by international obligations to limit regulations to those that are "objective."

On the surface, objectivity is a desirable goal. To raise objectivity to the level of an international obligation, however, undermines the ability of domestic regulators to deal with the inherent complexity of service industries. An international objectivity test moves in the direction of standardized and technocratic regulation and away from regulation in the public interest by legislatures and utility commissions that are accountable for balancing diverse public interests.

Thank you for this opportunity to contribute our analysis. Please feel free to contact me or NCSL's Jeremy Meadows (202-624-8664; jeremy.meadows@ncsl.org) with any questions or comments you may have. We look forward to building a substantive process for state-federal consultation and to being involved as these negotiations progress.

Sincerely,



Representative George Eskridge, Idaho
Chair, State & Local Working Group on Energy & Trade Policy

cc: Christine Bliss, Assistant USTR, Services & Investment
Christopher Melly, Deputy Assistant USTR, Services & Investment
Christina Sevilla, Deputy Assistant USTR, Intergovernmental Affairs & Public Liaison
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