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**Comments on S. 2098,  
the Electric Power Market Competition and Reliability  
Act**

**Statement for the Record  
of Charles B. Higley  
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**before the  
Senate Energy and Natural Resources Committee**

**April 11 & 13, 2000**

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This testimony can be viewed or downloaded at [www.citizen.org/cmep](http://www.citizen.org/cmep). Or write to:

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Public Citizen, founded by Ralph Nader in 1971, is a non-profit research, lobbying, and litigation organization based in Washington, DC. Public Citizen advocates for consumer protection and for government and corporate accountability, and is supported by over 150,000 members throughout the United States. The Critical Mass Energy Project is Public Citizen's energy policy arm, working to decrease reliance on nuclear and fossil fuels and to promote safe, affordable and environmentally-sound energy alternatives.

Thank you for this opportunity to provide you with our concerns regarding the Electric Power Market Competition and Reliability Act (S. 2098), which will be considered by the Senate Energy and Natural Resources Committee in hearings scheduled for April 11 and 13.

My name is Charles Higley, and I am research director for Public Citizen's Critical Mass Energy Project. Public Citizen, founded by Ralph Nader in 1971, is a non-profit research, lobbying, and litigation organization based in Washington, DC. Public Citizen advocates for consumer protection and for government and corporate accountability, and is supported by over 150,000 members throughout the United States. The Critical Mass Energy Project is Public Citizen's energy policy arm, working to decrease reliance on nuclear and fossil fuels and to promote safe, affordable and environmentally-sound energy alternatives.

## **Summary**

As written, S. 2098 fails to protect consumers, competitors, workers, shareholders, and the environment from the abuses of unregulated monopolies created by poorly-crafted state deregulation laws. S. 2098:

- Fails to stop the multi-billion dollar bailout of investor-owned utilities;
- Forces consumers to pay billions for the clean-up costs of nuclear reactors;
- Does not establish "community choice" or "opt-out" municipal aggregation;
- Fails to protect consumers from "slamming" and "cramming";
- Provides no support for programs for low-income customers, or programs to encourage energy efficiency and the development of renewable energy sources;
- Fails to encourage the creation of Citizen Utility Boards;
- Does not create an office of consumer counsel at the Federal Energy Regulatory Commission;
- Disregards the privacy concerns of consumers;
- Ignores the toxic pollution produced by about 500 coal-fired power plants exempt from

provisions of the Clean Air Act;

- Overlooks the need to establish a renewable portfolio standard or net-metering and interconnection standards;
- Inhibits open access to the nation's transmission systems;
- Ignores the need to establish non-profit ownership and operation of the nation's transmission systems;
- Fails to protect public and private interests from unneeded or inappropriate transmission lines;
- Encourages dubious utility mergers;
- Fails to create competitive wholesale electricity markets;
- Ignores abuses at the hands of utility holding companies; and
- Fails to protect utility workers from unsafe working conditions or inappropriate lay-offs.

Given the many shortcomings of S. 2098, Public Citizen urges you to oppose this legislation.

## **Introduction**

Public Citizen has been very critical of state efforts to deregulate retail sales of electricity. As predicted, all the benefits of deregulation are going to investor-owned utilities in the form of multi-billion dollar bailouts, and to large industrial and commercial customers who have the clout to negotiate lower electricity prices.

Meanwhile, residential and small commercial customers are receiving few if any benefits—electricity in many deregulated states is still more expensive than the national average. Competition in wholesale electricity markets has been stymied as investor-owned utility holding companies continue to manipulate the transmission system to favor their own power sales or those of their affiliates.

Small and large businesses are facing unfair competition as utility holding companies cross-subsidize their unregulated subsidiaries with revenues and resources provided by captive ratepayers. Nearly 150,000 utility workers (or 30% of the 1990 utility workforce) have lost their jobs, which is

negatively affecting the reliability of the electric power system since fewer hands are available to do needed maintenance or to restore service after blackouts. Old coal-fired power plants have belched out millions of tons of pollution, which is literally killing thousands of people each year, while ruining lakes, rivers, forests, and farmlands.

In short, state-led deregulation has created unregulated monopolies to the detriment of consumers, competitors, workers, shareholders and the environment.

Unfortunately, if enacted S. 2098 would only make matters worse, as explained in the remainder of this letter.

## **Consumer Protections**

S. 2098 fails to stop the multi-billion dollar bailout of investor-owned utilities. The legislation would let stand regulations issued by the Federal Energy Regulatory Commission (Order 888) that allow investor-owned utilities to recover “wholesale stranded costs” on the backs of ratepayers. Just as state legislators are allowing one of the largest corporate bailouts in history, so too would federal legislators, unless they eliminate the anti-consumer and anti-competition stranded cost rules issued by FERC. Utilities should be forced to eat their bad investments in nuclear power and other over-priced assets. Ratepayers and taxpayers have suffered enough gouging at the hands of the electric power industry.

S. 2098 also contains a provision that would allow nuclear utilities to recover from ratepayers the costs of decommissioning (removing) their reactors. Other businesses have to cover clean-up costs out of their revenues and profits, but this legislation would make an exception for nuclear utilities, who could force their clean-up costs onto consumers. Legislators that support these provisions of S. 2098 would become accomplices to the larceny and lies foisted on the public by the nuclear power industry and its government supporters.

A provision should be added that supports the establishment of “community choice” or “opt-out” aggregation, in which a municipality could aggregate the electric demand of its residences and

businesses; those who wish to purchase their own electricity or to join another buying group would be free to “opt-out” of the community choice group. Without community choice (opt-out) aggregation, many residential consumers may never benefit from the increased buying power that aggregation affords.

The legislation completely ignores the need for provisions to protect consumers from unscrupulous suppliers who are already “slamming” and “cramming” and engaging in other anti-consumer practices. Provisions need to be added to make illegal slamming (switching suppliers without consumer consent) and cramming (adding services without consumer consent).

S. 2098 should be improved by adding a provision that creates a “public benefit fund,” which would provide federal matching funds for state programs that support low-income customers or customers living in expensive-to-serve communities, such as rural areas or certain urban areas. A public benefit fund should also provide matching federal funds for state programs that promote energy efficiency and renewable energy.

Federal legislation should also include a provision that encourages each state to create a Citizen Utility Board. CUBs in the District of Columbia, Illinois, New York, Oregon, and Wisconsin have already saved ratepayers billions of dollars. CUBs in deregulated states would help protect consumers from unsafe or inadequate service, fraudulent advertising, and other anti-consumer abuses.

The bill should contain a provision that creates an office of consumer counsel at the Federal Energy Regulatory Commission. For too long FERC has been dominated by investor-owned utilities, whose quests for profits on transmission facilities and services are in direct conflict with the interests of consumers who want to pay as little as possible for transmission. Ironically, consumers never have had formal representation before the FERC, even though consumers pay \$220 billion per year for electric power.

A provision should be added that protects the privacy of consumer information. Private companies (and even government agencies) are now selling or making available information that provides incredible detail about the financial, medical, and purchasing histories of millions of consumers.

All organizations should be prohibited from selling or distributing personal information unless a person specifically provides authorization.

In addition to these suggestions, consumers and electricity suppliers both would benefit if federal legislation would create national standards for the following areas—national standards would reduce customer confusion while making it easier for a supplier to serve customers in different states:

- *Electricity Bills.* Electricity suppliers should issue bills to consumers that show the quantity and price of electricity purchased, as well as the amount of pollution produced (specifically particulate matter, carbon dioxide, nitrogen oxides, sulfur dioxide, mercury, radiation, and other toxic or hazardous pollutants).
- *Distribution Service and Supply Service Quality Standards.* Distributors and suppliers of electricity should be benchmarked and ranked by a nation-wide, publicly-available index that measures service performance;
- *Bill Payment Plans.* Customers should be provided with deferred payment plans and equal-monthly-budget billing plans;
- *Basic Service.* A customer should be able to receive electricity service even if the customer does not select a new supplier, or if their supplier fails to provide service;
- *Dispute Resolution.* Customers should have access to a fair process for handling service disputes;
- *Change of Suppliers.* Customers should be able to change electricity suppliers without paying excessive fees;
- *Disconnections & Reconnections.* Customers should be protected from unreasonable service disconnections or terminations;
- *Bill Collection Practices.* Suppliers should provide credit to customers in conformance with the Equal Credit Opportunity Act. Deposits for service should not be unreasonable;
- *Meters.* Customers should receive standard metering services without paying excessive fees, and suppliers should be prohibited from using prepayment meters.

## Environmental Protections

S. 2098 fails to address the toxic pollution produced by about 500 coal-fired power plants exempt from provisions of the Clean Air Act. These “grandfathered” power plants not only produce more than half the nation’s electricity, they also produce about one-third of the pollution that causes smog, one-third of the pollution that causes global warming, two-thirds of the pollution that causes acid rain, and one-third of the mercury pollution that has contaminated 50,000 lakes and streams in 39 states.

A lethal loophole in the Clean Air Act allows grandfathered coal plants to produce electricity without using equipment that reduces pollution, making electricity from the old plants less expensive. In contrast, new power plants must use modern equipment to reduce pollution, making electricity from new plants more expensive. This gives the old plants an unfair competitive advantage against cleaner power plants at the expense of public health and the environment.

More importantly, recent studies show that, as a result of state-led deregulation, many grandfathered power plants are producing far more pollution today than they did in 1992. The pollution from grandfathered coal plants is literally killing thousands of Americans each year, while reducing the health of lakes, rivers, forests and croplands.

To eliminate this lethal loophole, federal electricity legislation must include a provision that requires each and every power plant to meet the same standards for pollution, especially for carbon dioxide, sulfur dioxide, nitrogen oxides, soot, mercury, radiation, and other hazardous and toxic emissions.

In addition to provisions that clean up old coal-fired power plants, S. 2098 should also include the following provisions:

- *Renewable Portfolio Standard.* Total generation from renewable resources would equal 5% of all electricity sales by 2005, 10% by 2010, and 20% by 2020 (above and beyond that provided by hydroelectric sources).

- *Net Metering & Grid Interconnection Standards.* The owners of grid-tied, renewable energy systems can reduce their electricity bill by the amount of electricity produced. Federal standards should be established that would allow owners of small power systems to safely and economically connect their systems to the grid.

## **Protections Against Monopoly Power**

S. 2098 does nothing to combat the monopoly power currently enjoyed by most of the nation's investor-owned utilities, even those located in states that have passed deregulation laws. Provisions need to be added that: ensure all suppliers have open access to the transmission system; create non-profit transmissions companies to own and operate the nation's three transmission systems; enable federal agencies to create truly competitive electricity markets; and protect consumers and businesses from abuses by utility holding companies.

### ***Open Access to the Transmission System***

With regard to open access to the transmission system, S. 2098 would make open access more difficult by codifying the loopholes within FERC Order 888.

The intent of Order 888 is to provide all transmission users with open access to the transmission system at rates comparable to the utility's. However, loopholes in Order 888 allow utilities to give themselves preferential transmission service by reserving more transmission capacity than they need, and by engaging in other activities that are keeping competitors from using transmission lines. In contrast, competitors are having transmission service taken away from them, or are forced to pay more for transmission service received, or are unable to get any transmission access in the first place. By codifying the loopholes of Order 888, Section 101 would achieve the exact opposite of the intent of Order 888.

Also, Section 101 would encourage utilities and state commissions to reclassify transmission lines as distribution lines (currently, several utilities are attempting to reclassify, or "refunctionalize" transmission lines as distribution lines). This would allow the utilities to continue controlling the lines—they would not fall under the jurisdiction of regional transmission organizations (RTOs) or even FERC. With exclusive control of reclassified transmission lines, utilities could shelter vast amounts of their retail

market from new entrants. To the detriment of wholesale competition, section 101 would encourage reclassification.

### ***Regional Transmission Organizations***

With respect to the provisions dealing with Regional Transmission Organizations, Public Citizen believes S. 2098 completely misses the mark. The legislation would allow utility holding companies to create RTOs while also owning plants and electricity marketing firms. As long as for-profit utilities own transmission lines *and* power plants *and* power marketing firms, there will never be reasonably priced transmission service, there will never be non-discriminatory open-access to the transmission system, there will never be a reduction of ineffective regulation, and there will never be true competition in wholesale or retail electricity markets.

Consumers want to minimize their use of the transmission system and to pay as little as possible for transmission services, whereas for-profit transmission owners want consumers to use the transmission system as much as possible and to pay the highest possible prices for transmission service. S. 2098 would allow investor-owned utilities to continue engaging in what President Franklin D. Roosevelt called “private socialism,” where the public is forced to pay for profits on an essential, natural monopoly service such as transmission. Profits on transmission service are similar to a tax levied on the public by private interests, hence “private socialism.”

Given that the Eastern, Western, and Texas Interconnections are natural monopolies, Public Citizen recommends that non-profit public transmission companies should own and operate all of the transmission facilities of each Interconnection (one non-profit transmission company for each Interconnection). Having non-profit public transcos own and operate the nation’s three transmission systems would provide consumers with the most efficient, lowest-cost transmission service, eliminating the “private socialism” created when for-profit companies own transmission facilities.

S. 2098 would encourage the formation of for-profit transcos masquerading as RTOs. FERC would not be able to change anything in a utility’s filing to create an RTO—if it met the weak standards set forth in the legislation, FERC would have to accept it (nor can FERC change existing RTOs or

ISOs). This could lead to RTOs comprised of one utility, even though the goal of an RTO is to bring as much transmission under one roof as physically possible. Unless RTOs are large enough, utilities would still be able to manipulate their transmission systems in ways that discriminate against new entrants (pancaked rates, schedule imbalance penalties, insufficient transmission capacity, just to name a few).

One of the standards that an RTO would have to meet is “independence.” However, the bill’s definition of independence is meaningless; it would allow utilities or their affiliates to own the RTO *and* power plants *and* power marketing firms. Unless the RTO is truly independent from anyone who generates power or sells it in wholesale or retail markets, the RTO will be manipulated to favor the owner’s affiliates over those of a competitor.

The legislation is riddled with loopholes that would allow RTOs to continue charging pancaked rates for transmission service. If some one were to transmit power through an RTO, the legislation would allow the RTO to charge different prices for using various parts of the system, making it more expensive for the owner of the power to bring it to market, thereby stifling wholesale competition.

Other provisions would allow utilities to receive “incentives” for joining RTOs. Whenever utilities use the word “incentives,” they really mean “show me the money”; they want more money to do what they were supposed to do anyway. Even more ludicrous is the provision that would allow utilities to receive “incentives” even if they had already joined an RTO. Utility proposals for “incentives,” which would be collected from the pockets of ratepayers, are just further examples of the private socialism of for-profit transmission companies.

Another provision would allow large electric customers to negotiate their own rates for transmission service, throwing out nearly 100 years of precedent that all customers with similar needs should pay the same price for a *regulated* service, such as transmission (that is, non-discriminatory rates).

## ***Expansion of Transmission Facilities***

With regard to the expansion of interstate transmission facilities, S. 2098 would make it easier to site and build transmission lines by stomping on the rights of states and the rights of property owners to protect public and private interests from the environmental and property damage caused by the construction of new transmission lines.

Provisions in S. 2098 would confer the power of eminent domain to anyone who received approval by the FERC to build a new transmission line, even if a state agency decided that the transmission line was not needed or was injurious to public or private interests. In other words, the bill would greatly reduce the ability of citizens or state governments to protect themselves or the public interest from unneeded or inappropriate transmission lines.

Contrary to current law, the FERC would not be able to require the construction or enlargement of needed transmission facilities. Only the entities proposing to build new transmission lines would determine the scope and configuration of the new lines; the FERC could either accept or reject the request, but could not modify it in any way.

## ***Mergers***

Completely absent from S. 2098 are provisions needed to give FERC jurisdiction over mergers involving holding companies or companies that only own power plants; requirements that mergers either *increase* competition or at least do not lessen it; and that mergers provide provable net benefits to consumers.

On a related issue, S. 2098 repeals the Public Utility Holding Company Act of 1935, even though the logic of PUHCA is still valid today. PUHCA was signed into law in response to the wave of mergers and consolidations that gripped the industry during the Roaring Twenties. One of the goals of PUHCA was to reorganize the ownership of utilities into systems that “are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system....”

Since the early part of the 20<sup>th</sup> century, utility engineers and economists have known that utilities could reduce the cost of producing power and increase the reliability of the system if they could share power plants by interconnecting their systems and coordinating operation. However, the utility mergers that occurred during the Roaring Twenties did not result in interconnected and coordinated systems. The large holding companies of the day owned utilities scattered throughout the U.S. and the world, making it mostly impossible for the economic interconnection of utilities. Since the holding companies owned utilities that did not result in an interconnected and coordinated system, holding companies could not deliver to consumers the promise of lower electricity rates.

President Franklin D. Roosevelt's administration was very concerned about the inefficiencies that dominated the industry prior to the enactment of PUHCA:

The growth of the holding-company systems has frequently been primarily directed by promoters' dreams of far-flung power and bankers' schemes for security profits, and has often been attained with the great waste and disregard of public benefit which might be expected from such motives. Whole strings of companies with no particular relation to, and often essentially unconnected with, units in an existing system have been absorbed from time to time. The prices paid for additional units not only have been based upon inflated values but frequently have been run up out of reason by the rivalry of contending systems. Because this growth has been actuated primarily by a desire for size and the power inherent in size, the controlling groups have in many instances done no more than pay lip service to the principle of building up a system as an integrated and economic whole, which might bring actual benefits to its component parts from related operations and unified management. Instead, they have too frequently given us massive, overcapitalized organizations of ever increasing complexity and steadily diminishing coordination and efficiency (*Report of the National Power Policy Committee, 74th Congress, 1st Session, House Doc. No. 137, March 12, 1935*).

The enforcement of PUHCA reorganized the industry into utility systems that were able to provide benefits to consumers that can only be achieved by "interconnected and coordinated" operation. Between 1938 and 1951, average monthly bills for ratepayers dropped 10 to 14 percent, mostly due to the benefits of interconnected and coordinated operation.

The logic of PUHCA and the words of the Roosevelt administration are still relevant today, especially given the wave of dubious mergers sweeping the industry. If utilities cannot be connected to each other into a single “interconnected and coordinated system,” few savings will result to the consumer.

For example, the proposed merger between American Electric Power Company (Columbus, Ohio) and Central and South West Corporation (Dallas) will not be able to provide savings to consumers because their two systems cannot be operated as an “interconnected and coordinated system,” especially since the proposed merger is between a utility in the Eastern Interconnection (AEP) and a utility that is partly in the Texas Interconnection (CSW).

Similarly, the proposed merger between New Century Energies (Denver) and Northern States Power Company (Minneapolis) involves utilities in the Western Interconnection (NCE) and the Eastern Interconnection (NSP); it would be nearly impossible to connect these utilities into a single interconnected system.

Although the following utilities are all located in the Eastern Interconnection, the proposed merger between Unicom (Chicago) and PECO (Philadelphia), the proposed merger between Carolina Power & Light Company (Raleigh) and Florida Progress Corporation (St. Petersburg), and the proposed merger between Energy East (Albany, New York) and CMP Group (Augusta, Maine) involves utilities that cannot be operated as an interconnected and coordinated system. Since these mergers all appear to violate PUHCA (the logic of which is based on the physics and economics of electric power systems), consumers are not likely to see lower electricity prices if these mergers are approved.

In short, Public Citizen believes that PUHCA is still valid today: If merging utilities cannot be connected into a “single interconnected and coordinated system,” few savings will result to the consumer and, therefore, the merger should be prohibited. Repealing PUHCA would only lead to more mergers that “too frequently [give] us massive, overcapitalized organizations of ever increasing complexity and steadily diminishing coordination and efficiency.”

### ***Horizontal Market Power***

S. 2098 contains no provision to deal with problems created when one owner owns (or acquires) too many power plants, also known as horizontal market power. Since utilities or their affiliates continue to own most of the power plants serving a city or a region (even in states with deregulation), they can manipulate the price of electricity to the detriment of consumers (who may have to pay higher prices) and competitors (who may be unable to enter or survive in manipulated electricity markets).

### ***Prohibition of Utility Holding Company Abuses***

S. 2098 has no provision prohibiting holding companies from owning both regulated and non-regulated companies. As long as regulated and non-regulated businesses are part of the same holding company system, ratepayers of the regulated business will likely end up paying cross-subsidies (in the form of higher rates) to the non-regulated affiliates. Competitors suffer because they have to compete against affiliates receiving cross-subsidies. This could greatly harm independent providers of electricity, energy efficiency services, appliance sale & repair, or mechanical, electrical, and plumbing services.

Cross-subsidies between regulated and non-regulated affiliates have plagued electricity consumers since the first utility holding companies were established in the 1890s. To end cross-subsidies once and for all, President Franklin D. Roosevelt wanted PUHCA to prohibit utility holding companies from owning non-regulated subsidiaries, but his vision was defeated by the utility lobby prior to PUHCA's enactment. Public Citizen recommends that Congress follow President Roosevelt's advice and make PUHCA stronger by prohibiting the ownership of non-regulated businesses by utilities (and conversely, prohibit the ownership of regulated companies by non-regulated companies).

Since S. 2098 would repeal PUHCA, the bill would remove laws that prohibit the pyramiding of utility holding companies. The abuses of consumers and shareholders at the hands of the pyramid utility holding companies of the Roaring Twenties are vividly described by the Roosevelt administration:

By the pyramiding of holdings through numerous intermediate holding companies and by the issue, at each level of the structure, of different classes of stock with unequal voting rights, it has frequently been possible for relatively small but powerful groups with a disproportionately small investment of their own to control and to manage solely in their own interest tremendous capital investments of other people's money.

....

For all this concentration so dangerous to his democracy, the American consumer pays the bill. With a large and often unsound capitalization to support, many holding companies have not been able to be satisfied with reasonable dividends on the securities of their operating companies. They have compelled the consumer to bear the burden of various fees, commissions, and other charges which they levy against their subsidiaries (*Report of the National Power Policy Committee, 74th Congress, 1st Session, House Doc. No. 137, March 12, 1935*).

New loopholes added to PUHCA in 1992 already allow U.S. utility holding companies to purchase foreign utilities that have layers and layers of pyramided holdings. For example, Texas Utilities Company, which has about 340 subsidiaries and affiliates worldwide, has acquired foreign companies with layers and layers of holding companies and minority controlling interests. Below is a portion of TU's holdings—indentation means that a company is a subsidiary:

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Texas Utilities Company
  TXU United Kingdom Holdings Company
    Lone Star Gas International, Inc.
      TXU International Holdings Limited
        TXU Europe Limited
          TXU Finance (No. 2) Limited
            TXU Acquisitions Limited
              The Energy Group Limited
                TXU Europe Group plc
                  TXU Europe Power Limited
                    Anglian Power Generators Limited
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As the pyramid shows, 9 layers, each a holding company, separate Texas Utilities Company from its Aglian Power subsidiary, a structure comparable to the pyramids of the giant utility holding companies of the 1920s and 30s. Many other U.S utility holding companies have acquired foreign corporations with comparable levels of pyramiding.

S. 2098's repeal of PUHCA would greatly accelerate the construction of pyramids so detrimental to consumer and shareholders interests alike.

## **Worker Protections**

Since 1990 nearly 150,000 utility workers have been laid-off as utilities prepared for deregulation and the frenzy of mergers that have accompanied it. These lay-offs, along with cut-backs in worker training, have made it much harder for utilities to keep the lights on: fewer workers are available to do needed maintenance or to restore service after blackouts. Cut-backs in training could result in more workers killed or injured, especially those who work directly on power lines or power plants.

In order to improve the reliability and safety of the nation's electric power industry, a provision should be added to S. 2098 requiring power plant owners to ensure that workers have the necessary skills to safely perform their jobs. A provision should require that all utilities and power providers comply with standards that ensure workplace safety, adequate maintenance, and appropriate levels of trained and qualified workers in all aspects of the industry. A provision should require new owners of power plants to rehire the current power plant workers at similar wage rates and benefits.

## **Conclusion**

Given its many problems and shortcomings, Public Citizen urges you to oppose S. 2098 and to support federal legislation that fixes the problems created by the poor laws passed by states that are deregulating their electric utilities.

Thank you for your consideration of our comments.