

# PUHCA REPEAL FOR DUMMIES - The Sequel\*

June 2005

*And we will all really be dummies if we allow PUHCA to be repealed.*

Chirpy congressional aide to sad PUHCA Poobah\*:

Q. So, old Poobah, you claim the sky will fall if PUHCA is repealed?

A. No, the sky will be okay. It's only the utilities, the stock markets and the national economy that will fall, and, of course, people's 401(k) and other pension plans. But electric rates certainly won't! You can count on them going up and up and up, just like current gasoline prices.

Q. Why? There's no shortage of electricity like there is of oil.

A. Even President Bush has admitted that we don't have a shortage of oil, but of oil refineries. The reason for that is that it's not in the financial interests of the oil companies to maintain sufficient refinery capacity; they'd rather sell less product at higher prices.

Q. You're not saying that electricity requires refineries?

A. No, it requires power plants. And it won't be in the financial interests of utilities to build more power plants, so they won't. This will keep high the prices and the profits from their other plants, just as the "shortages" of power in California did in 2000-2001 (when, among other things, various utilities shut down some of their plants) to drive up prices for the others.

Q. Then why aren't electricity prices high now?

A. There has been too much power plant capacity in most parts of the country, by as much as 40%, as well as price caps in many states. That's why "merchant" power plants have been going bankrupt or defaulting on their loans. But once power generation is totally deregulated, there is no way under existing laws that any government agency can make utility owners build more power plants.

Q. So they can keep power plant capacity supply low and electricity prices high?

---

\* The PUHCA POOBAH is the author of the famed treatise, "PUHCA for Dummies," available—for free!—at <http://www.citizen.org/cmep>. (Typical fan letter: "I laughed, I cried. Love, Mama.") The Poobah was a lawyer at FERC for ten years, then spent 17 years with an international law firm helping Fortune 500 companies, utilities, investment banks and other power plant builders around the world comply with PUHCA and other regulatory statutes. She has also spoken to foreign energy departments on the history of regulation and deregulation in the U.S. Since 2003, she has been a volunteer attorney at Public Citizen, trying to save what she believes is a vital consumer, investor, environmental and national economy protection statute, the Public Utility Holding Company Act of 1935 (PUHCA), that pending energy bills in both houses of Congress would repeal after 70 years.

- A. You got it, not-so-dummy.
- Q. Where does PUHCA fit in? It's FERC\*\* that's allowing "the market" to set rates.
- A. FERC's rationale is that there will be plenty of competition among power suppliers to keep rates low. But if PUHCA is repealed, everyone agrees there will be massive consolidation of utility and power plant ownership. Consolidation of ownership does NOT lead to competition. The unregulated utility owners would be pretty stupid to lower their prices by competing with themselves.
- Q. You are such a Cassandra! (She is the one who was always so gloomy, right?)
- A. Yes, and, if you recall the story, her predictions always came true. Her curse was not that she could foretell the future, but that no one would believe her.
- Q. OK, I'll bite. What terrible things are going to happen after PUHCA repeal?
- A. First, without PUHCA, there will again be massive consolidation of utility ownership. PUHCA prohibits the re-creation of the huge holding companies (the Power Trusts) that grew up in the 1920s and '30s, when three utility holding companies owned nearly half of all the electric utilities in the country.
- Q. Surely the antitrust laws will stop that from happening again?
- A. They didn't stop it in the '20s and '30s, and they won't stop it now. The Federal Trade Commission, an antitrust law enforcer, in fact, did the huge study of holding company abuses in the '20s that occurred despite the antitrust laws and were the basis for enacting PUHCA.
- Q. We also have the State Utility Commissions to regulate utility mergers.
- A. Actually, that was why PUHCA was passed. The very most sophisticated State Utility Commission in the 1920s was New York's, which was fully backed by its Governor, who made himself an expert in utility regulation, one Franklin D. Roosevelt. New York was still unable to regulate multi-state utility holding companies, which is why FDR pushed PUHCA enactment. PUHCA gave regulation over multi-state utility owners to the SEC. States can't regulate such interstate utility-owning companies today, for the same reasons.
- Q. But the SEC does regulate these multi-state utility holding companies?

---

\*\* FERC is the acronym for the Federal Energy Regulatory Commission which has authority under the Federal Power Act, which was Part II of the same 1935 law as PUHCA, to regulate the rates for transmission and wholesale sales (sales for resale) in interstate commerce. FERC has in recent years allowed wholesale electricity rates to be set by the "market," illegally according to those (including Public Citizen, Inc.) suing FERC in the D. C. Circuit Court of Appeals in Docket No. 04-123

- A. It does now, but when PUHCA is repealed, that will stop, other than the regulation the SEC has over all companies to protect investors, not utility consumers.
- Q. Can't FERC regulate the finances of utility owners?
- A. No.
- Q. But FERC does regulate utility mergers?
- A. Aside from the fact that FERC has never declined to approve a utility merger, including the huge, widespread AEP/CSW one (FERC required that merged company of 36,000 MW to only give up 500 MW of power, one good-sized merchant power plant), FERC lacks jurisdiction over holding company mergers and over generating plants. For that matter, FERC also lacks jurisdiction over mergers of distribution facilities, and of utilities merging with non-utility companies (like oil companies) or foreign companies. Frenchies could buy your local utility.
- Q. What's wrong with Frenchies?
- A. Ah, a non-xenophobe—very commendable! But if you had to go to Paris to protest your electric utility service or bill...
- Q. I'd love to go to Paris!
- A. What about Bonn?
- Q. A Bonn voyage? Get it? Ha, ha, ha...I just kill myself! But, you're right, I'd rather my utility service provider be headquartered a little closer to home and be a little more accountable to me and my neighbors. The French or Germans might not respond to voter pressure if our rates shoot up or our service goes sour.
- A. You think?
- Q. Well, at least one proposed Senate amendment would give FERC some more merger jurisdiction.
- A. Not over the Frenchies, etc. But in any case, FERC has no standard under the Federal Power Act, as there is in Section 11 of PUHCA, for limiting the size, spread and number of holding companies, and also has no authority to prevent or break up existing giant utility conglomerates, as Section 11 of PUHCA provides. With no substantial change in FERC's standard of review for mergers, with new authority comparable to Section 11's, additional merger jurisdiction would mean very little.
- Q. What is the second Big Thing that you say makes PUHCA so great?
- A. It prohibits non-utilities, such as oil companies, investment banks, construction

firms, etc., from owning utilities and exploiting their captive customers to subsidize the owners' other businesses. Non-utility companies have to get rid of their non-utility businesses under Section 11 of PUHCA if they are going to acquire a utility.

Q. That's harsh!

A. Actually, it was a compromise in 1935; FDR wanted to flatly ban holding companies from owning public utilities because of the huge number of Enron-like abuses among utility affiliates that had occurred in the 1920s and '30s.

Q. What's wrong with oil companies owning electric utilities?

A. Nothing, if you would like to see an oil/electricity/natural gas cartel in place of our simple oil cartel. And if you want electric and natural gas rates to go the way of gasoline prices, it would be a great start for oil companies to own utilities.

Q. That couldn't happen! The antitrust laws...

A. Wouldn't have anything to say about a merger between oil and electric and natural gas utilities. And besides, look at ChevronTexaco, ExxonMobil, etc. The antitrust laws don't appear offended by these huge oil company combinations.

Q. Why do you claim environmentalists should support PUHCA?

A. The Union of Concerned Scientists has pointed out that if PUHCA is repealed and there is massive concentration of fossil fuel power plant ownership, such owners will have no interest in allowing renewable fuels to seriously compete with their fossil fuel plants, and will have substantial muscle to prevent it.

Q. What other environmental consequences?

A. If PUHCA is gone, companies like GE that want to sell nuclear turbines to utilities would do well to own interests in such utilities. That's how the holding company device was first applied to utilities—in 1905 by GE when it wanted to sell electrical equipment to them. GE bought the utilities, and that made such sales much easier.

Q. Oh, come on, they couldn't do that sort of thing today!

A. The Wall Street Journal stated on June 15, 2005, that "Analysts predict General Electric Co. would be one of the first bidders [for utilities] if [PUHCA] is scrapped."

Q. Well other companies besides GE would be investing in power plants.

A. Yes. Construction firms were among the first utility owners.

Q. Like Halliburton?

A. Absolutely. The construction firm Stone and Webster acquired a chain of utilities in

the 1920s so it could provide them with construction services.

Q. But, say, Warren Buffett of Berkshire Hathaway is a GOOD GUY! We WANT him to own utilities.

A. His being a good guy apparently didn't stop two Berkshire Hathaway executives, who recently pleaded guilty to knowing that AIG was going to "cook its books" in a joint investment scheme with Berkshire. By the way, not only is Berkshire Hathaway acquiring a six-state utility holding company to add to its existing MidAmerican Energy, but AIG itself owns at least 15 PUHCA-exempt power plants.

Q. But we need investment in utilities!

A. Actually, not from the next Enron's of the world, we don't. Try to imagine the Enron debacle on a national scale; that's where we're headed.

Q. But investors....

A. Standard and Poor's and Fitch's credit ratings both say that PUHCA-regulated utility holding companies have much better credit ratings, and thus, better investment potential, than non-regulated utilities. Also, contrary to one of the Big Myths currently being circulated on Capital Hill, the Edison Electric Institute's own recent study shows that there is still plenty of investment in transmission lines, without Warren Buffett.

Q. OK, Cassandra.

A. The Securities and Exchange Commission under PUHCA now comprehensively regulates--in order to protect consumers and investors--the financial transactions of interstate utility holding companies that can't be regulated effectively by a single state. Without PUHCA, no entity--state or federal--will be able to effectively regulate such finances, and we are opening up a trillion dollars worth of utility assets to an Enron-Sam Insull-like extravaganza of abuses.

Q. Surely not! There must be some agency, somewhere, that will prevent that?

A. No, there isn't. If you and any of your constituents happen to have any money in the stock markets--well, that's going to be a real problem.

Q. How is that?

A. Prior to PUHCA, there were 53 utility holding company bankruptcies and 23 bank loan defaults. Just since the 1992 exemptions from PUHCA, there have been numerous bankruptcies of PUHCA-exempt utilities--Mirant, NRG, Enron, of course, NEG, others--and lots of power plants sold at "fire sale" prices and snapped up by investment banks or going to them by default on their loans.

- Q. What's wrong with investment banks owning power plants?
- A. They tend to want to make really big returns on their investments and big fees on doing deals, not to provide good, low-cost utility service. The only people who can make big profits and fees possible are utility ratepayers, by paying more for electricity and natural gas.
- Q. Well, Cassandra-Poobah, I don't believe you.
- A. Wow, that's a first!
- Q. Why would the Members of both houses of the United States Congress put PUHCA repeal into their energy bills if all these dreadful things were going to happen to their constituents and, gee, to themselves and even to the country!
- A. Well, there are people called "Lobbyists," and according to ancient legend, while they cannot foresee the future, they will always be believed as long as they are backed by people called "Campaign Contributors."
- Q. You are so cynical, PUHCA Poobah.
- A. Yes, I am. Two years ago, when I wrote "PUHCA for Dummies," I was an innocent who thought people in the Congress just didn't understand what would happen to the country and to their constituents if PUHCA was repealed, and so I would come and warn them. Now, I'm afraid they do understand, but just don't care as long as the lobbyists and contributors support PUHCA repeal, and that is cynical indeed.
- Q. So, old Poobah, what will you do with yourself when PUHCA is in fact repealed?
- A. What a Cassandra always does; as the utilities, stock markets, economy, and pensions go up in flames like the ancient City of Troy, I'll say: "I tried to warn you...."