

BEFORE THE PUBLIC UTILITIES COMMISSION OF COLORADO

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IN THE MATTER OF THE INVESTIGATION OF REGULATORY AND RATE INCENTIVES FOR CUSTOMERS OF GAS AND ELECTRIC UTILITIES

COMMENTS OF NANCY LAPLACA
PER DECISION C08-1198 FOR DECEMBER 2, 2008 HEARING

These comments are submitted in response to Commission Decision C08-1198, paragraph 4, page 2; requesting comments on the following:

- (a) Tiered (inverted block) rate design;
- (b) Time of Use rate design;
- (c) Rate design as a method of providing assistance to low-income customers;
- (d) Rate design as a method to encourage agricultural use of on-site renewable generation; and
- (e) The content and detail of current billing statements, particularly regarding rate adjustment factors.

Following are my comments in each area.¹

(a) Tiered (inverted block) rate design;

Inverted block rate design will discourage high use of electricity, as well as educate consumers about their own electricity use relative to an average. This type of activity to encourage conservation is clearly in all our best interest, as it saves money and reduces pollution.

(b) Time of Use rate design;



¹ During discussions on the 113EG docket, I was approached by an attorney representing the state. He was concerned that my comments implied that I did not believe the staff is "protecting the public." I certainly do not intend these comments to mean that the staff is not doing its utmost to protect the public, and I applaud the hard work and persistence of the expert staff and attorneys. I believe that I raise issues, such as coal combustion wastes, natural gas drilling contamination, etc., that other parties generally do not.

Time of use rate design will discourage high use of electricity during peak times, as well as educate consumers about their own electricity use. Arizona utilities, including Arizona Public Service Company, have been using time-of-use rates successfully for a number of years. Time-of-use rate design will encourage conservation when we need it most – at peak times.

On page 12 of PSCo's comments, submitted November 12, 2008, PSCo stated:

There are potential revenue impairment issues with large-scale deployments of TOU pricing which will need to be addressed. These include the *under-recovery of fixed costs* if the customer reaction to time-differentiated prices results in a reduction in overall consumption. Public Service *has a real concern of revenue losses* from free riders if TOU rates are only offered on a voluntary basis. Essentially, the only reason a customer would choose a voluntary service tariff is if it will cost less than the alternative.

The above statements are further examples of PSCo's over-riding concern with revenues over actual reductions in electricity consumption. Should we really have a company whose focus is so clearly on revenues rather than delivering value and reducing CO2 emissions? There are plenty of companies that would leap at the chance to implement cost-effective TOU and other programs.

On page 14 of its comments, PSCo complains about voluntary TOU rates:

However, we do know that the system-wide introduction of *voluntary* TOU rates would be a mistake, because it would likely result in *significant* revenue erosion.

PSCo wants it both ways. They don't want to be innovative and really reduce use unless they can profit handsomely, and simply pay lip service to environmental and ratepayer cost concerns.

(c) Rate design as a method of providing assistance to low-income customers:

According to recent studies, energy costs hit low-income households disproportionately. Some fixed-income elderly spend as much as 35% of their annual incomes for energy bills.² According to a June 2008 study by Oppenheimer and MacGregor for Entergy Corporation:

² See Attachment A, the press release a study titled *Energy Efficiency Equals Economic Development*, by Jerrold Oppenheimer and Theo MacGregor, June 2008.

- \$1 million invested in low-income energy efficiency produces economic benefits 34 times its value, including 337 jobs;
- Funds spent on programs to make low-income homes more energy efficient in Entergy's service territory returned 23 times the economic value of the initial investment, including reducing fossil fuel use, lowering crime rates, reducing homelessness and improving health.

Our current economic slowdown means that more people will be unable to pay their electric and gas bills. Although the attached study relates to utility-funded energy efficiency programs, in light of the current economic crisis, we must do all we can to assist the increasing number of citizens who cannot pay utility bills. I suggest that staff contact experts such as the Regulatory Assistance Project or Mr. Jerrold Oppenheimer for ideas on rate design that will help rather than hurt low-income customers.

(d) Rate design as a method to encourage agricultural use of on-site renewable generation; and

I anticipate submitting information on this topic in an additional filing.

(e) The content and detail of current billing statements, particularly regarding rate adjustment factors.

The following factors should be considered when looking at the content and detail of current billing statements:

- Coloradans' overwhelming support of clean energy;
- Fossil fuel pass-through costs are largest share of rate adjustments by far;
- Extensive surveys and focus groups in the late 1990's – including one of PSCo customers – that shows that people want to know the fuel mix and emissions content of electricity
- The fact that global warming awareness and concern has exploded during the past year and so customers want and deserve this critical information; and
- The benefits of educating consumers to change their behavior.

Citizens overwhelmingly support clean energy.

Attachment B³ is a survey of 600 Colorado adults conducted in October 2008, and concludes:

- 76 percent support a moratorium on new coal-fired power plants;
- 87 percent believe that natural gas companies should have to provide information about hazardous chemicals used and produced in natural gas production;"
- 52 percent want government aid for wind and solar power at the same or higher than coal-fired and nuclear power plants;
- Over half want the government to "evenly divide" any subsidies, tax breaks or other incentives for new nuclear coal v. wind and solar."
- 32 percent would go further, having government "shift all or most of subsidies from nuclear and coal to wind and solar."
- 70 percent see coal as the "power sources of yesterday."
- 93 percent see solar and wind "power sources of tomorrow;"
- **68 percent would ask for wind, solar and other renewables if they could "tell your power or utility company where to get the power to run your house."**
- In contrast, 10 percent would pick nuclear and 3 percent would pick coal;
- 67 percent of Coloradans believe have limited time to figure out global warming solutions;
- 57 percent believe "action on global warming will create new jobs and investment."

Last, but not least, most Coloradans do not see today's politicians as "likely to act on climate issues." In fact, two out of five Coloradans have "only a small degree of confidence," and 33 percent have "no confidence" that our current elected officials "will act decisively on global warming issues."⁴

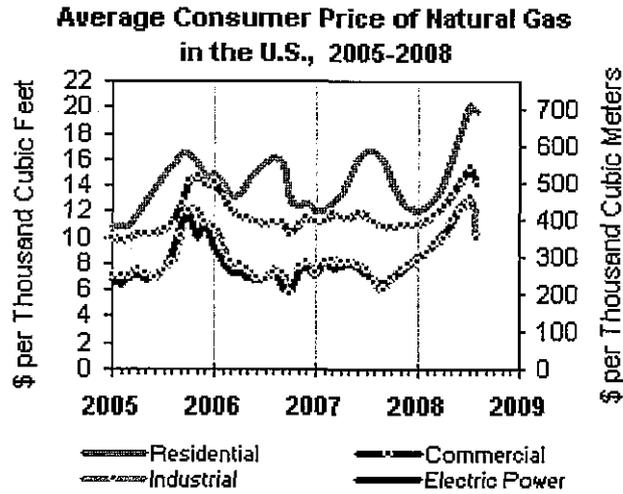
Fossil Fuel Costs Are the Largest Single Share of Rate Adjustments

Colorado and the rest of the U.S. experienced extreme volatility in natural gas prices from 2007 to 2008. In August 2007 natural gas was about \$7.00/MMBtu; prices then doubled, peaking in July 2008, and have since fallen by nearly half. We are essentially back where we

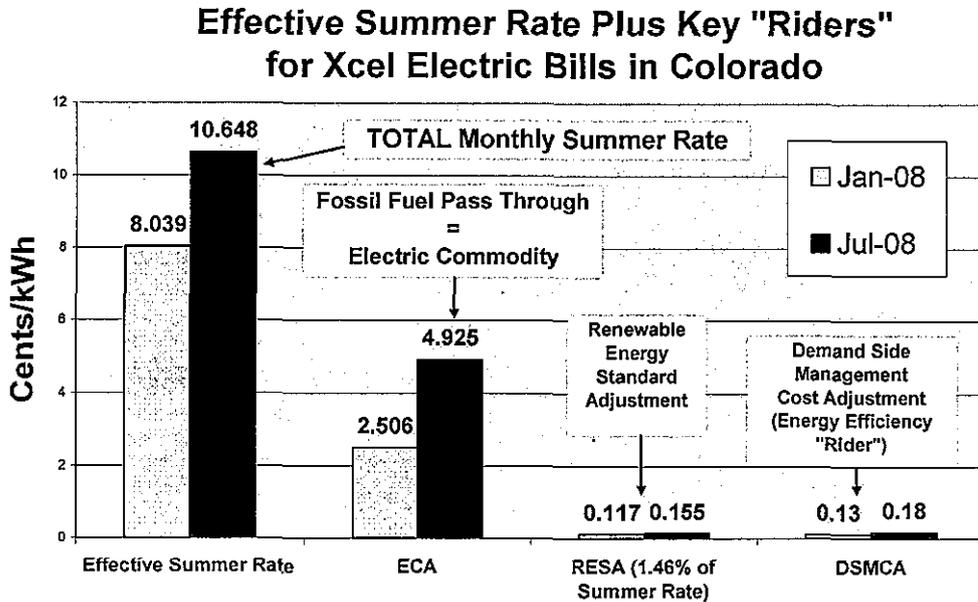
³ Attachment B, Colorado Energy/Climate Survey: *Most in State Oppose More 'Subprime' Investments in Coal, Nuclear Power* <http://www.marketwatch.com/news/story/colorado-energyclimate-survey-most-state/story.aspx?guid=%7b61939086-8683-40B5-A821-8A650E2285B7%7d&dist=hppr>

⁴ "Clean" coal is a good example of our inability to come up with effective solutions that are not industry-oriented. Over a dozen "clean" coal projects in the U.S. have been cancelled, despite industry's best efforts to obtain public funds, loan guarantees and various tax incentives.

were one year ago on natural gas prices, but the stock market has declined by over 40%. See the chart below, titled Average Consumer Price of Natural Gas in the U.S., 2005-2008.⁵



The chart below, titled Effective Summer Rate Plus Key "Riders" for Xcel Electric Bills in Colorado, shows that the largest cost fuel adjustment – by far – is fuel cost adjustors.⁶



**Electric Bill Rate Increases Are Being Driven by Large Increases in Fossil
Fuels-- Not by Investments in Renewables or Efficiency.**

⁵ www.eia.doe.gov

⁶ The chart is also included as Attachment C, and was created by Leslie Glustrom.

Extensive Surveys and Focus Groups Show That Coloradans and Ratepayers Want BOTH Fuel Mix and Emissions Information, and That Environmental Information is Critical

The National Council on Electricity Policy website (www.ncouncil.org) has a wealth of studies under the topic “Information Disclosure” that the Commission and staff might find useful.⁷ Following are findings from a number of different studies, which are attached.

A. Information Disclosure For Electricity Sales: Consumer Preferences⁸

This study included two focus groups, **one composed entirely of ratepayers from Public Service Company of Colorado** in June 1997.⁹ The study looked at not only *what kind of information* consumers wanted to see, but how customers wanted information *to be presented*. Findings included:

- Price is the most important factor, but environmental concerns were important to many;¹⁰
- The study included a “Fuel Facts” table, and a pie chart that showed the fuel mix.¹¹
- Researchers were specifically looking for *whether emissions information would change customers preferred fuel mix*;
- Many participants had no idea where fuel came from, but guesses included natural gas, coal and hydropower;
- Participants mentioned time-of-use pricing and being able to compare one’s own use to an average;¹²
- Significantly, Denver participants *all preferred the pie chart display of fuel mix next to a table with the percentage listed*;¹³
- One group was mixed about whether the sources of “renewable energy” should be broken down, but the second group was adamant that it *should* be broken down so that participants could see the level of hydropower v. wind v. solar;¹⁴

⁷ <http://www.ncouncil.org/resources.cfm>

⁸ Included as Attachment D, *Information Disclosure For Electricity Sales: Consumer Preferences from Focus Groups*, by Lynn Halverson and Edward Holt, Report 3 Rocky Mountain West, 1997.

⁹ The other group, from the East coast, was familiar with customer choice in electricity due to deregulation, and so wanted standardization to be able compare plans.

¹⁰ See Attachment D, *Information Disclosure For Electricity Sales: Consumer Preferences from Focus Groups*, by Lynn Halverson and Edward Holt, Report 3 Rocky Mountain West, 1997, page 1.

¹¹ Id., pages 2-3.

¹² Id., page 5.

¹³ Id., page 7.

¹⁴ Id.

- Participants commented that the pollsters “might be surprised” by how many people would “choose the cleaner stuff over the cost.”¹⁵
- Both groups agreed that the “Emission Facts” information was important to their choice of supplier; and did not express much difficulty understanding technical emissions terms;¹⁶
- **When emissions facts were added to the display, participants switched fuels**, with one person stating “What is going into the atmosphere is more important than the fuel.”¹⁷
- One group decided that they would prefer emissions information “Because there is so much pollution. We need to keep the environment clean.”¹⁸

The study concluded¹⁹ that:

- Participants want standardized information;
- Price is important, but environmental considerations are also very important to many;
- Some groups, when provided emissions information, switch fuel source due to pollution;
- Graphical displays of both fuel and emissions information were preferred;
- Participants want supplier companies to send information directly by mail, supplemented by other channels;
- Both groups accepted that this information might cost a few cents per month, but deemed the expense worthwhile; and

B. Disclosure of Fuel Mix and Emissions: Confidentiality v. Public’s Right to Know²⁰

Retail electricity suppliers sometimes complain that disclosure violates trade secrets that could be considered confidential. Attachment E is a report authored by Mr. Scott Hempling considers a number of issues, including:

- What is a trade secret and how is it defined?
- What existing disclosure laws apply to retail electricity?

¹⁵ Id., page 8.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id., page 14.

²⁰ Attachment E, *Disclosure of Fuel Mix and Emission by Electric Retail Service Providers: Confidentiality v. the Public’s Right to Know*, by Scott Hempling, 1997.

There is no single accepted definition of “trade secret” at the state or federal level.²¹ In *Ruckelshaus v. Monsanto Co.*, 456 U.S. 986 (1984), the U.S. Supreme Court stated:

[w]e emphasize that the *value of a trade secret lies in the competitive advantage it gives its owner over competitors....*

If, however, a *public disclosure of data reveals, for example, the harmful side effects of the submitter’s product* and causes the submitter to suffer a decline in the potential profits from sales of the product, *that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors*, and cannot constitute the taking of a trade secret.

In other words, the U.S. Supreme Court states clearly that a company cannot, for example, assert that disclosing harmful side effects constitutes a “competitive edge.” Monsanto sought to keep information about its pesticides health, safety and environmental data hidden as a “trade secret,” but the Court disagreed. *Ruckelshaus* held that Monsanto could not hide behind the skirts of “competitive edge” to justify refusing to disclose toxic products. This situation is analogous. Xcel isn’t hiding any kind of proprietary information, but instead does not want to reveal this information because people are waking up to the dangers of global warming, and the role that coal-fired power plants play.

Mr. Hempling’s report on disclosure v. the public’s right to know reviews disclosure principles in other areas of commerce, and looks at the language of the Fair Packaging and Labeling Act (FPLA):

*Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.*²²

Under the Fair Packaging and Labeling Act, agencies such as the Food and Drug Administration to the Federal Trade Commission have extensive enforcement authority. As a result, products from cosmetics to food must now include disclosures so that consumers know

²¹ Id. Page 3.

²² 15 U.S.C. section 1451.

what they are buying.²³ President Clinton stated in a memo to the agency heads that Community Right-To-Know protections provide a basic informational tool to encourage informed community-based environmental decision making. Similarly, the Federal Energy Regulatory Commission (FERC) *rejected* a request by gas pipeline companies to stop providing information to the public.

The study made the following policy recommendations:

- Requiring the disclosure of fuel mix and emissions will significantly aid consumers as well as provide suppliers with appropriate market signals;
- Any harm to producers will result from selling a product consumers are not interested in buying, not from losing a competitive edge;
- Information about fuel mix and emissions is already collected and publicly reported by the Environmental Protection Agency, Energy Information Administration; and²⁴
- The public's interest in disclosure outweighs "confidentiality" interests.²⁵

The Hempling study on balancing trade secrets v. the public's right to know includes a discussion about various PUCs' criteria for disclosure, and notes that mere allegations of harm is not enough.²⁶ The report refers to a survey of utility commission practices and notes that the weight assigned to the public's interest varies, based on the importance of the disclosure.

People Are Waking Up to Global Warming and Are Clamoring For Change

People are quickly waking up to the global warming damage from coal.²⁷ Supreme Court Justice Louis D. Brandeis once said "*Sunshine is the best disinfectant.*" We gain nothing by hiding valuable information from the public. The Wall Street Journal reported this week that **Xcel's residential electricity use fell 3% from August through September 2008, the first decline in 40 years.**²⁸

Conclusion

²³ The tragedy unfolding in China of children poisoned by melamine in milk, or of infant feeding bottles and toys made with phthalates, are examples of how we can all benefit from disclosure.

²⁴ *Id.*, page 15.

²⁵ *Id.*, pages 16-17.

²⁶ *Id.*, pages 9-10.

²⁷ Demonstrations at banks that finance coal plants, including Citibank and Bank of America, took place in over 50 cities the weekend of November 14th. See www.dirtymoney.org Attachment F reports on demonstrations in the U.S. and worldwide. Power Shift, a conference on climate change held at the University of Maryland, had 6,000 attendees last year and expects 10,000 this year.

²⁸ See Attachment G, Wall Street Journal, *Surprise Drop in Power Use Delivers Jolt to Utilities*, by Rebecca Smith, November 21, 2008: <http://online.wsj.com/article/SB122722654497346099.html>

LaPlaca requests that Xcel put the following on every monthly bill:

- Fuel mix;
- Emissions from coal, natural gas, energy efficiency and renewable energy;
- CO2 per kWh, with a comparison to national average CO2 emitted per kWh;
- Cost adjustments that are plainly and clearly marked, for example, as “energy efficiency” rather than jargon such as “DSMCA;” and that
- All information is presented in easy-to-read pie charts and graphs.

Respectfully submitted this 25th day of November 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on November 25th 2008, the original and seven copies of the foregoing **COMMENTS OF NANCY LAPLACA** was served by hand delivery on:

Doug Dean, Director
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, CO 80202

and copies were e-mailed, faxed, hand delivered, FedEx'ed, or placed in the United States Mail, postage prepaid, addressed to:

COLORADO PUBLIC UTILITIES COMMISSION
1560 BROADWAY, SUITE 250
DENVER, CO 80202

Attachment A

ENERGY EFFICIENCY EQUALS ECONOMIC DEVELOPMENT: The Economics of Public Utility System Benefit Funds
Published by Entergy Corp.

June 1, 2008

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\$1 million investment in low-income energy efficiency produces economic benefits 34 times its value, including 337 jobs -- triple the impact of tax breaks to attract manufacturing. [State data are available.] Reducing energy use in low-income homes can lower poverty levels and is one of the most potent tools states have for stimulating the economy.

Funds spent on programs to make low-income homes more energy efficient in the Entergy service territory return 23 times the economic value of the initial investment. The study takes into account the programs' impact of reducing the use of fossil fuels, which helps the environment. It also includes in its economic calculations the non-energy benefits the programs create by helping cut poverty -- such as reduced fires, lower crime rates, less homelessness and improved health. Every \$1 million invested in low-income home weatherization and efficiency programs produces 23 times the economic activity including creation of 216 jobs across the region served by Entergy's utilities.

The study explains low-income home energy efficiency is more than the casual tacking up of some weatherstripping and screwing in a few light bulbs. It is a systematic search for inefficiency, based on building science, coupled with professional installation measures to counter the inefficiency. The process begins with a thorough building audit that may employ such technology as appliance meters, blower doors, and infrared cameras in order to detect inefficient appliances and leaks of conditioned air. The next step would be to replace inefficient appliances and use of advanced materials to better insulate homes and eliminate air leaks. **Energy costs hit low-income households disproportionately, according to the study. For example, some elderly who live on fixed incomes spend as much as 35 percent of their annual income for energy bills.**

The study also contains data showing poverty levels are increasing, sharply in some areas served by Entergy's utilities. Among their findings: "Mississippi and Louisiana have the highest percentage of children living in poverty among the states, ranking 50 and 49, respectively. Arkansas and Texas tie for 44th place in the listings."

Hunger is rampant in states served by Entergy. More than 18 percent of people in Mississippi do not have enough to eat, placing it 51st in the rankings. Texas followed at 49, with Louisiana at 45 and Arkansas at 44. "The gap between the rich and poor is widening. Income concentration among the top 1 percent is the greatest since 1929.

Attachment B

Colorado Energy/Climate Survey: Most in State Oppose More 'Subprime' Investments in Coal, Nuclear Power

<http://www.marketwatch.com/news/story/colorado-energyclimate-survey-most-state/story.aspx?guid=%7b61939086-8683-40B5-A821-8A650E2285B7%7d&dist=hppr>

Last update: 1:30 p.m. EDT Oct. 16, 2008

DENVER and WASHINGTON, Oct 16, 2008 /PRNewswire-USNewswire via COMTEX/ -- 86 Percent Want Limits on Subsidies for Oil Shale Production, **76 Percent Support Moratorium on New Coal-Fired Power Plants**; Strong Back Shift to Clean Wind and Solar Power.

If elected officials in Denver and Washington, D.C. are going to continue investing in energy through subsidies, tax breaks and other incentives, the focus should shift from coal and nuclear power to promoting wind and solar energy, enhanced energy efficiency, and highly fuel-efficient vehicles, according to a new **survey of 600 Colorado adults** conducted for www.TheCLEAN.org and the Civil Society Institute (CSI) by the leading U.S. survey firm Opinion Research Corporation (ORC).

The CLEAN/CSI survey was released today with Western Colorado Congress (WCC) and findings include:

- A halt to construction of new coal-fired power plants is supported by most Colorado adults. Just over three out of four respondents in Colorado (76 percent) and 73 percent of Americans would support "a five-year moratorium on new coal-fired power plants in the United States if there was stepped-up investment in clean, safe renewable energy -- such as wind and solar -- and improved home energy-efficiency standards. The moratorium on new coal-fired power plants is favored in Colorado by **57 percent of Republicans, 89 percent of Democrats and 82 percent of Independents.**

- Nearly **nine out of 10 Colorado residents (87 percent)** believe that **"natural gas companies should have to provide information to nearby communities and residents about hazardous chemicals used and produced in natural gas production."** Only about one in 10 (11 percent) disagree on the grounds that "disclosure of hazardous chemicals would give information to competitors and harm the gas company."

- Most Colorado residents want to see **government aid for wind and solar power put on the same or better footing than coal-fired and nuclear power plants. Over half of Colorado residents (52 percent)** and the same number nationwide want the government to **"evenly divide" any subsidies, tax breaks or other incentives for new construction "between nuclear power and coal-fired power plants and energy sources such as wind and solar."** About a third (32 percent) of those in Colorado and 30 percent of Americans would go further, having

the government "shift all or most of them from nuclear power and coal-fired power plants to energy sources such as wind and solar." Only 11 percent of those in Colorado and one in 10 Americans would "keep the incentives for nuclear power and coal-fired power the way they are today."

- **Wind and solar are seen by Colorado residents as the future of energy for America. In Colorado, 71 percent of respondents see oil and 68 percent coal as power sources of yesterday. This compares to more than two out of three Americans who now see coal (70 percent) and oil (67 percent) as the "power sources of yesterday." By contrast, solar and wind are seen as "power sources of tomorrow" by 92 and 93 percent of those in Colorado and 92 percent and 88 percent of Americans, respectively.**

- Colorado residents pick clean energy over coal and nuclear power. Two out of three Americans and **68 percent of those in Colorado would ask for wind, solar and other renewable energy technologies if they could "tell your power or utility company where to get the power to run your house."** By contrast, only 8 percent nationally would pick nuclear power (10 percent in Colorado) and just 3 percent would pick "coal-generated power" nationally versus 3 percent in Colorado.

- Most Colorado residents know that time is running out to deal with global warming. **More than two thirds of those in Colorado (67 percent) and a similar proportion of Americans (63 percent) believe that "global warming is a problem and we have limited time to figure out the solutions to it."**

- The vast majority of those in Colorado see a positive or neutral economic impact from dealing with global warming. **Fewer than one in five in Colorado (18 percent) and the nation as a whole (17 percent) believe that "action on global warming will hurt the U.S. economy,"** while over half (57 percent in Colorado and 51 percent in the US) believe "action on global warming will create new jobs and investment." About a quarter (23 percent in the state and 28 percent nationwide) says that such action "will neither help nor hurt the economy."

- Today's politicians are not seen as likely to act on climate issues. **Two out of five in Colorado and in the nation as a whole, have "only a small degree of confidence" or "no confidence" (27 percent in US and 33 percent in Colorado) that "our current elected officials in the United States will act decisively on global warming issues."**

- Energy issues will figure prominently at the ballot box in November in Colorado. About nine out of 10 respondents in Colorado (89 percent) and 91 percent in the nation as a whole say that "the views of candidates on energy-related issues -- such as gasoline prices, home heating oil prices, global warming and energy independence" will be important as they vote in 2008. Of this amount nearly **three in five (59 percent in Colorado and 58 percent in the US) say that energy issues will be "very important" to how they vote.**

- More than three out of four Americans (78 percent) and even more in Colorado (84 percent) agree with the following statement: **"The effects of global warming require that we take timely and decisive steps for renewable, safe and clean energy sources. We need transitional technologies on our path to energy independence. There are tough choices to be made and tradeoffs. We cannot afford to postpone decisions since there are no perfect options."**

- **Nine out of ten Colorado residents** agree with the following statement: **"The reliance on fossil fuels is the product of the industrial revolution of the 19th and early 20th centuries. Do you think it is time for our nation to start thinking in terms of the concept of a 'new industrial revolution,' one that is characterized by the orderly phasing out of fossil fuels and the phasing in of clean, renewable energy sources -- many of which are available now, such as wind and solar for electricity..."**

For complete survey findings, go to <http://www.TheCLEAN.org>.

SURVEY METHODOLOGY

The TheCLEAN.org/Civil Society Institute poll conducted by Opinion Research Corporation's CARAVAN Services was a telephone survey conducted among a sample of 600 adults (300 men and 300 women) aged 18 and older living in private households in the state of Colorado. Interviewing was completed October 1-5, 2008. The survey was weighted by age and gender to ensure reliable and accurate representation of the total population. The margin of error for surveys with samples of around 600 respondents, at the 95 percent confidence level, is plus or minus 4. percentage points. Smaller sub-groups in any survey will have larger error margins.

ABOUT CSI AND THECLEAN.ORG

The nonprofit and nonpartisan Civil Society Institute (<http://www.CivilSocietyInstitute.org>) is a think tank that serves as a catalyst for change by creating problem-solving interactions among people, and between communities, government and business that can help to improve society.

ABOUT WCC

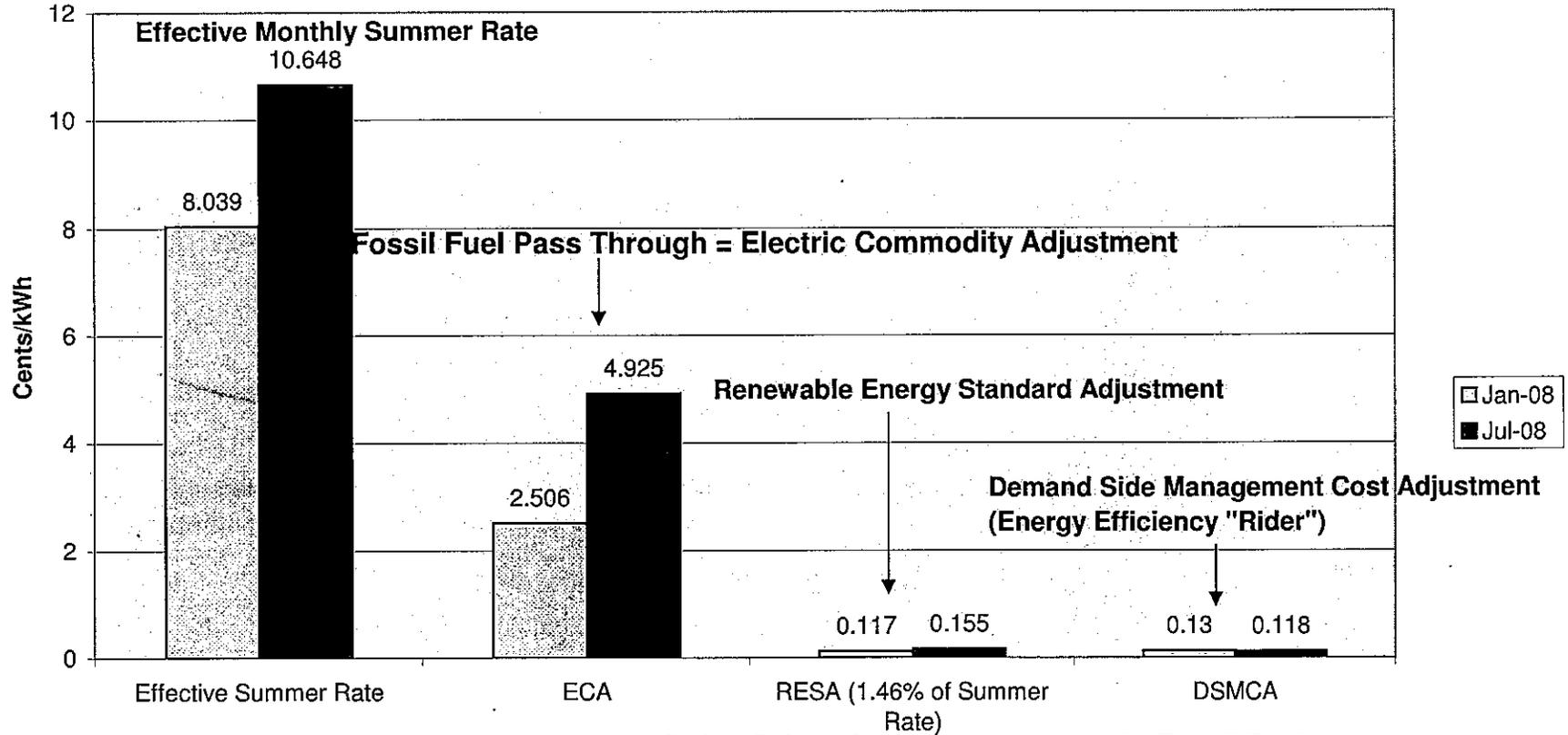
Based in Grand Junction, the Western Colorado Congress is an alliance for community action empowering people to protect and enhance their quality of life in western Colorado. For more information, go to <http://wccongress.org/> on the Web. CONTACT: Ailis Aaron Wolf, (703) 276-3265 or aaaron@hastingsgroup.com.

Attachment C

Xcel spreadsheet on Cost Adjustments

Effective Summer Rate Plus Key "Riders" for Xcel Electric Bills in Colorado--January and July 2008

January 2008 Data from Docket 071-497E and July 2008 Data from Docket 081-267E at the Colorado PUC



**Electric Bill Rate Increases Are Being Driven by Large Increases in Fossil Fuels--
Not by Investments in Renewable Technologies or Efficiency**

**The only way to avoid future fossil fuel rate increases is to accelerate the speed
at which we pursue renewable and energy efficiency technologies**

Attachment D

Information Disclosure For Electricity Sales: Consumer Preferences from Focus Groups, by Lynn Halverson and Edward Holt, Report 3 Rocky Mountain West, 1997.

Background and Objectives

This report documents the results of focus group research evaluating the perceived information needs of electricity consumers. The results reported here are based on the second of a set of focus groups performed as part of the overall study. The first set of focus groups were performed with participants from two New England states that already experienced electricity marketing in retail access pilot programs.¹ The participants in the focus groups described in this report have not yet experienced electricity marketing.

The most distinctive feature of the New England focus group participants is their direct experience with the deregulated marketing of electricity. In addition to being different in terms of experience, the New England participants may have been more motivated consumers (the New England participants were motivated to volunteer for the pilot marketing programs). The research design purposely targeted these experienced consumers to understand the problems they faced in making their electricity supplier decision. As a result, the previous research provided a valuable understanding of the information problems faced by experienced consumers. Appendix D is a summary of the New England focus group research. However, because the New England participants were of similar socio-economic backgrounds and were a self-selected sample of motivated consumers, the results from that research may not hold for inexperienced, unmotivated consumers or consumers in other regions of the country.

Although the topics and methods used to elicit responses were different in the two sets of focus groups, there was some overlap in consumer understanding of the issues and consumer desires for information. Where appropriate, similarities in responses between this set of focus groups and the New England focus groups will be noted.

There are several objectives to this research. First, researchers wanted to learn what information consumers would like to have when they are asked to evaluate competing offers from electricity suppliers. Second, researchers wanted to learn how these consumers would like that information to be presented. Finally, researchers wanted to learn if the findings from the first set of focus groups were unique to those experienced, more motivated New England participants.

Methods

Number, location and segmentation of groups

Researchers conducted a series of six focus groups, four at two sites in California (Fresno and Santa Clara, May 6 and 7) and two at one site in Washington state (Tacoma, May 8) in 1997. The California participants were recruited through the use of a phone screener (Appendix A). The California participants were screened to obtain as much diversity as possible, and to eliminate consumers who are employed by a utility or electric power provider, a market research company or an advertising company.

The Washington participants were selected using the above criteria with an additional requirement that they answer positive five of 10 questions aimed to reflect the respondents' level of environmental concern. In essence, researchers attempted to recruit those who indicated some level of environmental market sensitivity.

Due to regional differences, the California and Washington focus group participants were more ethnically diverse than the New England focus groups. The New England participants were primarily Caucasian, whereas the California and Washington groups contained a greater mix of African-, Asian-, Hispanic- and Native-Americans.

All groups were audio taped. Audio tapes were transcribed to provide written records of the focus groups, for the purpose of this summary.

Discussion topics and props used

Although the actual discussions varied from group to group, the general topics discussed were the same.² The first part of the focus group discussion centered upon determining consumers' knowledge of how their electricity currently is produced, followed by a discussion of whether they had heard about electricity deregulation and if they had any knowledge of what might occur as a result of deregulation.

This first part of the discussion stimulated participants to think about what they currently knew about electricity production and about their current supplier, what factors may be important in making a supplier decision, and what information about the suppliers would be needed to make an informed decision.

After the introductory discussion, the moderator provided a brief explanation of the current situation and what may occur under electricity deregulation. Following the presentation participants, were encouraged to think about what may occur as a result of deregulation and to think about what types of information would be useful to help them make an informed electricity supply decision.

The next part of the discussion covered pricing information. Here, researchers wanted to know how important price information was to consumers and how they wanted this information presented.

In Washington, the pricing discussion was followed by a brief explanation of energy efficiency services. The groups were asked whether they would find this type of information useful, whether cost savings information should be provided, and whether they would need to know the effect on their price of electricity.

The next part of the discussion centered on environmental information and used several props that differed among focus groups. First, a fuel facts table was displayed to the participants. Discussion of this prop concerned whether the information included in the table was important, whether the information was understandable, whether they understood the term "system power," whether they preferred the components of system power to be disclosed, whether they understood the term "renewables," and whether the detailed disclosure of renewables was important.

After the above discussion, a prop was displayed that showed the fuel mixes (as pie charts) for two different products. Participants were told to assume both products were the same price and then were asked to indicate to the moderator which product they preferred and the reasons for their preference. Once this section of the discussion was complete, emissions information was added to the prop. In the emission facts displays, the emissions were stated in technical terms (e.g., carbon dioxide) and the emission levels were stated as deviations above or below a reference level set by the EPA. The emissions information was presented in graphic form (bar charts). Again, participants were asked to indicate their preferred product and the reasons for their preference.

There was also some discussion about the format of the fuel facts and emission facts displays. The moderator probed to determine what components of the displays were the most and least confusing and what information on the displays was most and least useful. In the Washington focus groups the participants discussed their views on hydroelectric power.

In the California groups researchers tested participant reactions to several logos proposed by the California-based Center for Resource Solutions for use as an indicator of environmentally preferred power. Discussion of the logos concerned appropriateness and understanding.

In the Washington focus groups researchers presented an environmental certification statement and asked participants whether this type of information statement was useful and understandable. Researchers also asked whether participants preferred the certification statement or the fuel and emission facts displays.

Researchers concluded the environmental discussion by asking participants whether they thought that choosing an environmentally preferred energy source would have significant environmental benefits and, if so, whether these benefits would occur immediately or over time.

In the California focus groups there was discussion about whether the information provided should relate only to the product being offered for purchase or to the broader scope of the

supplier's electricity supply. In all the groups researchers prompted participants to discuss what additional information they would want in a standardized disclosure form.

Finally, several groups included discussion about the cost of providing this information to consumers and how participants thought it would be paid for.

Strengths and limitations of qualitative research

The primary strength of qualitative research is that it can identify issues of concern to specific populations and can be used to frame questions that can be developed further to derive quantitative data about a topic. As the results of this study will indicate, focus groups often identify issues that researchers may not have considered previously, or they may suggest framing questions differently.

It is important to note that results from focus groups and other qualitative research methods cannot be generalized to a given population because a focus group is not a statistical representation of the population. Focus group participants are selected from the population being studied, but the group is too small for statistical significance. It is therefore important that the interpretation of qualitative data not be misrepresented in quantitative terms. For example, a statement that "six of the nine participants in the focus group agreed on a particular point" should not be interpreted as "67 percent of the population agrees on that point."

Findings

General level of awareness and understanding

Given the significant media coverage in California of the coming electricity market restructuring, it is remarkable how little awareness the participants in California had of the topic and its implications. The Fresno participants, in particular, seemed uninformed about the choices that they will soon be asked to make. The Santa Clara group seemed more willing to confront the coming changes when they were shown the headlines about deregulation in that day's *San Francisco Chronicle* and *San Jose Mercury*. One participant explained his ignorance by saying, "Well, I think we didn't worry about it too much because we didn't have a choice. There's only one supplier and that's it."

Both the California and the Tacoma participants were uncertain of or misinformed about their existing energy resources. When asked how their electricity is now generated, most California participants thought the source is primarily hydropower, and that power supply in California is quite clean. "I was under the impression that PG&E was fairly environmentally conscious," said a Santa Clara participant.

Tacoma participants also mentioned hydropower, which is a significant resource in the Northwest, but several asserted that there is no coal and no nuclear power. Although one nuclear plant in the Northwest closed several years ago, one remains in operation. A large coal plant operates in western Washington not far from Tacoma, of which only one participant seemed aware, and energy is imported from several Montana-based coal plants.

What information do consumers want?

The focus group participants were relatively consistent in their information desires. In general, these desires were consistent with results from the New England focus groups.

Price was important to everyone in the focus groups. Almost everyone, even those with an appreciation for nonprice attributes (e.g., environmental or social considerations) felt that the bottom line was the most important to them. "If they're all going through the same wires," said one person, "I want the cheapest one." Participants were quite insistent that they wanted standardized price information. They particularly wanted prices stated in terms of unit price (price per kilowatt-hour [kWh]). "So long as they're all the same," said a participant from the Fresno group: "I don't have any examples. But they have a way of phrasing things or telling you things in a different way, like it's such and such cents per kilowatt hour and everybody's the same. Instead of offering so much per week or per month, keep it all the same."

Environmental attributes (specifically fuel mix) was considered to be important information. Many focus group participants felt the environmental attributes were important in their energy decision and they felt this type of information should be a part of mandatory disclosure. Typical of their comments was this statement from a woman in Fresno: "I'm concerned about things like tearing up areas that are precious—like a rain forest. I don't want this service at the cost of destroying different areas like that." A participant in one of the Santa Clara groups

said, "A lot of people don't want a nuclear power station in their neighborhood, either. And building these kinds of things is tearing down the redwoods."

When prompted, Tacoma participants liked the idea that energy efficiency options could be included as part of the pricing disclosure. Participants also understood that energy efficiency services may affect their unit price for electricity but may reduce their overall bill through reductions in consumption. But it would be helpful only "If all the companies are required to provide the same information in the same manner."

A desire for information about the supplier company history or reputation was more strongly stated than in the New England focus groups. A Tacoma participant said, "How are we going to make an educated decision when we don't know anything about these companies? We don't know what they're doing out there, really."

In California, several participants emphasized the company track record. "I don't want a little fly-by-night that I'm going to have trouble with in six months and be going through it again," said one in Santa Clara. "I'd want to know how financially stable they are; how many people they're serving, whether they're just a broker for the power or if they're actually generating it."

Consumer protection was an issue for several groups. "What I'd be interested in is who's going to control these companies. Right now, I do have access to the California Utilities Commission and I can complain about the kind of service I'm getting and things like that. I don't see any provision in here for complaining against one of these companies, other than by switching who I'm buying from," was one such comment in Fresno.

A Santa Clara participant voiced a similar concern. "One question I would have is accountability. If something goes wrong, who are they accountable to?" Another added, "Like the PUC or something like that, that oversees...It's like the insurance commission. You can't sell insurance in California unless they approve you and watch over you."

Participants also expressed the belief that, although companies have the right to advertise their companies any way they want, someone should be responsible for providing comparative information in standardized information displays so offers could be easily compared. "I think companies have the right to advertise their stuff in any way they like," said a Santa Clara participant. "But I also think, as I said, the legislative analysts should do a comparison on them. If you were going to give me papers from different companies, more than likely I'd just shuffle them and take one."

Participants were skeptical of advertising claims. A Fresno participant said, "You just shouldn't take people's word just because: 'Yeah, we're environmentally sound, we're blah, blah, blah, use us.' They might put too much frosting on the cake." A Tacoma participant, referring to what information should be provided under deregulation, was more blunt when he said, "Every company should talk through a great big lie detector."

Several other criteria were mentioned in each group as factors in choosing an electricity supplier, including stability of supply, service reliability, customer service and quality of

service. These criteria may be interrelated, and suggest concern about the frequency and duration of electrical outages—or whether their lights will stay on.

Reactions to the environmental displays

As with previous focus groups, the fuel mix—or how the power is generated—was important or of interest to most participants. One person in Tacoma expressed it well. “I think, maybe for some people, it would be important where the power comes from; if it’s hydroelectric, if it’s nuclear...Some folks might not like nuclear power plants. [Or] they may be salmon lovers and not like hydroelectric power.”

For one participant, at least, the fuel mix was not enough to make a good decision. “Well, it’s giving me figures that really don’t mean anything. How is the coal being used? Where is the hydroelectric power being done from? How efficient are these processes that they’re using? How safe are they? Where is the natural gas coming from? How is that being processed? There’s a lot more information you need, other than just that.”

Focus group participants did not know what “system power” meant. When it was explained to them that system power could include a mix of fuel sources that were not explicitly contracted for, participants preferred a breakout of the system power. When asked whether knowing the sources of system power was important to them, one participant said, “It would be to me because, number one, the coal is very bad for the environment. Then—you don’t know what you’re going to be using. So you could be putting atomic energy in there, which you don’t like anyhow. So that would be a strike against you.” Several participants noted that the term system power could be used to hide “dirtier fuel sources.” As a result, participants felt that a list of the components of system power was important. Most focus group participants liked the detailed breakout of the renewable fuel sources, although this level of detail was viewed as less crucial than a detailed breakout of system power.

The technical terms used for the emissions facts panel (sulfur dioxides, etc.) were not liked because most people did not know what these terms meant. “If you’re doing emissions facts, at least explain what the sulphur dioxide and everything does to the air.”

Most focus group participants seemed comfortable with the idea of an organization such as the EPA setting a recommended reference level. Although some were content to leave that to the scientists, several focus group participants said that they also wanted to see the reference level stated on the label, and one went further, “Why did they set it at that particular [level] for the standard?”

In terms of presentation, almost all focus group participants liked the graphical presentation of the fuel and emission facts panels (fuel facts as a pie chart and emission facts as a bar chart).

In general, the focus group participants liked the fuel mix disclosure and many liked the emissions information. Most did not like the eco-label (environmental certification statement) because it did not convey any important information. Basically, all participants preferred having the fuel and emission facts information presented rather than any type of envi-

ronmental certification. "I want more than just one line saying 'This is certified environmentally friendly.' I want to know exactly what they did and who did it."

Interestingly, when participants were provided fuel facts displays for two different products they consistently chose the product that they felt was "cleaner," indicating that fuel mix is being used to identify the environmentally preferred option. However, when the emission facts panels (which indicated that the initial "dirty" option was, in fact, cleaner in terms of air emissions) were added to the display, *all* focus group participants switched their choice. This seems to indicate that emission facts information can override the fuel mix as an indicator of the "environmentally preferred" option. Thus, a supplier selling coal-generated electricity still may be able to market coal if the combustion technology is efficient and relatively clean.

One caveat regarding this exercise is that some participants did not believe that the "cleaner" emissions could be associated with the "dirtier" fuel mix. It was only through efforts by the moderator that all participants accepted that it was possible. This may indicate that firms that have a fuel mix that is perceived as being dirty, but that has relatively clean emissions, may need to educate potential customers about how the emissions are reduced.

When asked which information they would prefer, the fuel facts or the emission facts, most participants wanted both. One cited the two different sets of information in food labeling. "It's like food values on a can or a bag of groceries that tells the ingredients, which is at the top, and then the value—the protein and calories and the fat. They do it there; why not do it here?" This suggests that the two types of data are not completely interchangeable and convey different information.

Opinions about hydro

Because hydroelectricity is so important in the Northwest, the Tacoma groups were asked their opinions about hydro. The Tacoma participants also were screened to be more sensitive to environmental issues than a random selection of consumers, so researchers thought that if anyone would have strong opinions about hydro, these two groups would. In general, while acknowledging the environmental effects, these consumers continue to see the benefits of hydro as a generating resource, but they do not support building more dams.

Participants were quite aware of the effect of hydroelectric dams on salmon. "Salmon like to spawn in a running stream...[T]he Columbia River, today, is nothing but a series of lakes. There are practically no running streams in the Columbia River. That is what wiped out the salmon."

Another participant said, "I'm a little concerned about some of the dams. The salmon runs have declined greatly in the last few years and some of them are endangered. And a lot of the little fry—I guess the fish get chewed up in the turbines when they're trying to go back to the sea. It's something that I'm concerned about, especially in this area, because it's a big part of the economy around here."

However, when asked to choose between hydro and natural gas as a source of electricity, most chose hydro "because it doesn't run out."

"Well, with hydroelectric, I think it's basically a fairly clean form of getting electricity. But, again, there is an environmental impact. If we deactivate all the dams, then we have no flood control. Our flood control and irrigation were one of the main...reasons why the dam system was put up, and not so much for hydroelectric. But with hydroelectric, I would probably prefer it over coal or natural gas because it is a renewable resource."

But another participant reserved judgment. "I can't make an educated guess on that because I really don't know what natural gas may be doing to the environment. We know what hydroelectric is doing in eliminating the salmon and so on. But what's natural gas doing out there?"

In a statement that seemed to summarize the groups' feelings, one participant answered the hydro-natural gas tradeoff, saying "I'd choose the hydroelectric from existing dams, but I wouldn't want to see any more dams built."

Reactions to the California logos

In the two Fresno groups participants were shown four logos (A, B, C and D in Appendix C). Almost all participants initially disliked all four logos. "I don't like 'plug boy,'" said one participant, which was greeted by laughter from the rest of the group. When asked, participants stated that the logos did not suggest any environmental attributes. The logos then were replaced with similar logos that incorporated numbers within the display. The moderator explained that the numbers would indicate the percent of the fuel mix represented by renewable sources. Participants stated that the numbers were a helpful addition but indicated that the logos were still confusing because, without education, most people would not know what the logos meant. Participants felt that the logo would be acceptable if there was some additional text explaining its meaning. One participant felt that an EPA rating would be more helpful than a logo. "I would rather see something like a rating from the Environmental Protection Agency or something that really means something. I don't buy this little symbol because I'd be real skeptical. It's sort of like the term 'natural food' on every other package. And what does it mean? It doesn't mean anything."

"I'd rather have more information," agreed another participant.

In the two Santa Clara groups participants were shown the original four logos; participants again stated that the logos did not suggest any environmental attributes. Three of these logos then were presented, slightly modified and with a statement "50% renewable energy content." This additional information was thought to be helpful. One point mentioned was that if the logos did not have numbers associated with them, then a minimum standard should be set so that a supplier could not use the logo as a part of its marketing strategy if it were only selling electricity made with low levels of renewables.

Attachment E

Disclosure of Fuel Mix and Emission by Electric Retail Service Providers: Confidentiality v. the Public's Right to Know, by Scott Hempling, 1997

Introduction

In economic theory, “perfect information” with regard to prices and product characteristics is one of many idealized conditions that must exist for markets to efficiently allocate resources. In practice, consumers need product information to make informed choices. Where that information is costly for consumers to obtain, government intervention may improve market efficiency.

As the country moves toward retail competition in electricity, consumers will be asked to choose between competing suppliers of electricity and related services. Because electricity is unseen and intangible, consumers will have no practical method to determine the fuel sources used by those suppliers or to verify claims made about such sources without some type of disclosure requirement, such as standard labeling practices. For consumers who are concerned about the environmental, economic and national security implications of various fuel sources, requiring suppliers to disclose their fuel mix and the air emissions generated by that mix, as well as price and price volatility information, will be critically important to making informed choices. Because consumers will have more confidence in verified labeling than in advertising claims, and because advertising may be misleading, disclosure requirements also will be important to retail suppliers whose resource portfolios would be judged more favorably by consumers than those of their competitors.

Some retail suppliers may have concerns about disclosure requirements, including (1) concerns that proprietary information, i.e., “trade secrets,” will be divulged in the process, (2) concerns about the potential administrative complexity and cost of tracking fuel sources and emissions and (3) an unwillingness to reveal unpopular fuel sources and high emissions rates. This paper addresses the legal and policy aspects of the first concern. The issues addressed are:

- What constitutes a trade secret?
- What are the policy principles that have guided disclosure requirements in other areas of commerce?
- How have trade secrets been defined and balanced with the public interest in particular cases, and how have the courts ruled?
- Are the fuel mix and emissions profile of a retail supplier’s overall portfolio likely to be considered a trade secret?
- How might public and private interests be balanced in the retail electricity market?
- What existing disclosure and truth-in-advertising laws might be applied to the retail electricity “product”?
- Would a new federal law be desirable?

The task for regulators and legislators is to maximize the range and quality of information while not unduly jeopardizing a market participant's valid expectation of nondisclosure where a trade secret is at issue.

What Constitutes a Trade Secret?

There is no single, accepted definition of a trade secret in either federal or state law.¹ On the broadest level, a trade secret is nothing more than a property right in intangible property. The owner of a trade secret has the right to prevent unauthorized use and disclosure by those who have access to such trade secrets. See Roger M. Milgrim, *Milgrim on Trade Secrets* §12.02 (Release No. 54, Nov. 1996) [hereinafter "*Milgrim*"]. Those rights are the owner's "property", and they are derived from the common law of the several states. See *Id.*; *Ruckelshaus vs. Monsanto Co.*, 456 U.S. 986 (1984) [hereinafter "*Ruckelshaus*"]. Therefore, based upon such a property interest, an owner of a trade secret may have a direct Fifth Amendment cause of action against the government for wrongful use or disclosure of trade secrets. *Milgrim* at §12.02.

Attempting to define the concept with greater precision has been difficult. There is general agreement that simply dubbing information as a "trade secret" will not automatically trigger the exemptions and protections from disclosure that might be afforded to legitimate trade secret information in regulatory and ratemaking proceedings.² Once the analysis goes beyond that point, however, there is far less clarity.

A conceptual definition of trade secrets is found in the *Restatement of Torts*:³

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract . . . A trade secret is a process or device for continuous use in the operation of the business.⁴

The same source describes a six-prong test for determining whether something is a trade secret:

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁵

Equally important in defining a trade secret is determining what does *not* constitute a trade secret. Providing reasoning that is particularly relevant to the issue of disclosing the fuel mix

and emissions associated with electricity supplies, the Supreme Court said, in a footnoted discussion in *Ruckelshaus*,

[w]e emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. Thus, it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data to improve its own technology that may constitute a taking. *If, however, a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.*⁶

In the end, whether information is to be considered a trade secret is largely a matter of achieving a balance between the competing underlying interests. Determining that balance is a matter that is resolved on a case-by-case basis by policymakers and their administrative agencies, rather than by the courts. (Of course, the courts often are left to ascertain whether a particular agency's disclosure requirement is consistent with the legislatively achieved balance.) In *Ruckelshaus*, the Court stated:

The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective. . . It is enough for us to state that the optimum amount of disclosure to the public is for Congress, not the courts, to decide, and that the statute embodies Congress' judgment on that question.⁷

Therefore, the best guidance for what policymakers may deem to be an "optimum amount of disclosure" comes from a review of the balancing that has been done in other industries and product markets. Several case examples are provided in the following two sections.

Policy Principles Guiding Disclosure Requirements in Other Areas of Commerce

As described in the previous section, it is up to policymakers to decide what constitutes a trade secret. In passing disclosure laws, policymakers at every level of government have explicitly recognized that consumers need access to information for competitive markets to work. Consider the language Congress included in its policy declaration at the outset of the Fair Packaging And Labeling Act (FPLA):

Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.⁸

The Food and Drug Administration (FDA) and the Federal Trade Commission have extensive enforcement authority under the FPLA.⁹ As a result, products ranging from cereal to cosmetics now include disclosures that allow consumers to know what they are buying, and to compare the value of competing choices. Before adoption of the FPLA, consumers could only guess what was in a product or if the product contained the ingredients that it claimed. The FDA is perhaps the foremost example of an agency that has to make tradeoffs between expectations of maintaining trade secrets and the public's need to know.

Other examples of disclosure requirements include the following.

- In a memorandum to the Administrator of the EPA and the heads of the Executive Departments and Agencies, President Clinton stated:

Community Right-to-Know protections provide a basic informational tool to encourage informed community-based environmental decision making and provide a strong incentive for businesses to find their own ways of preventing pollution.¹⁰

- In early 1996, FERC rejected a request to cease the public disclosure of information that had been included in the discount rate reports filed by regulated gas pipeline companies:

[P]ublic reporting of discount rate information permits FERC, as well as other interested parties, to maintain a vigil against discriminatory pricing. Making it more difficult to access this information will diminish the ability of the Commission and the public to discover problem deals.¹¹

- State utility commissions have recognized that disclosure of sensitive information may be required to make a competitive market work. The California PUC addressed the matter in regard to discounts offered for service in the intra-LATA telecommunications market:¹²

Markets thrive when the prices that buyers and sellers arrive at are widely known, and suppressing price information will lead to less efficient markets.

- The Federal Truth-in-Lending Act requires that lending terms be disclosed on documents in a certain type size in a particular location to assure prominence, as well as the use of certain common terms to achieve consistency between disclosures.

In short, there is widespread recognition of the concept that the goal of full and fair competition cannot be advanced by withholding important information from the marketplace.

Balancing Trade Secrets and the Public Interest

This section discusses specific cases where trade secrets have been defined and where those interests have been balanced against the public interest by legislatures and state agencies.

Federal Emergency Planning and Community Right-to-Know Act

The federal Emergency Planning and Community Right-to-Know Act¹³ lists specific factors that must be present before information will be entitled to protection as a trade secret. Among other things, this act established programs to provide the public with important information about the hazardous and toxic chemicals in their communities. Section 11042 grants the administrator of the EPA authority to allow the withholding of specific chemical identity information if the person seeking to withhold establishes that the information constitutes a trade secret. Subsection (b) identifies the four factors that will establish a trade secret:

- Such person has not disclosed the information to any other person, other than [government officials, employees, or persons bound by a confidentiality agreement], and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.
- The information is not required to be disclosed, or otherwise made available, to the public under any other federal or state law.
- Disclosure of the information is likely to cause substantial harm to the competitive position of such person.
- *The chemical identity is not readily discoverable through reverse engineering.*¹⁴

A similar definition of trade secrets is found in the California Government Code. The state's Public Records Act addresses trade secrets as the concept applies to air pollution. All information related to air contaminants or other pollution that is reported to any government agency is deemed a public record subject to disclosure. Trade secrets are excepted from this disclosure requirement. The adopted definition is:

*"Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.*¹⁵

Federal Energy Regulatory Commission

FERC has recently reaffirmed the public reporting of discount rate information.¹⁶ The Natural Gas Act requires a pipeline company to report certain information to FERC, including a

shipper's name and the terms of the shipping contract.¹⁷ Two pipeline companies objected to this level of disclosure, arguing that it unduly compromised trade secrets. They presented FERC with the option to cease the public disclosure of information that had been included in the discount rate reports filed by regulated gas pipeline companies, and substitute customer codes for customer names to protect the confidentiality of customer-specific information.

FERC rejected the request. The discount rate information was found to be necessary to the agency's efforts to prevent discriminatory pricing. The customer names serve a similar purpose by enabling competing shippers to determine whether they are entitled to similar treatment. Therefore FERC concluded that the interests of the emerging competitive market outweighed the interests of particular participants in that market to maintain the confidentiality of the terms of their transactions or the identity of those with whom they were conducting business.

Nuclear Regulatory Commission

Agencies have, in some cases, been able to achieve sufficient disclosure by pursuing alternatives to the disclosure that involves trade secrets. After the Three Mile Island accident, for example, the NRC sought to pursue its concerns about the safety of certain tube-sleeving practices used in a large number of nuclear power plants. To this end, the agency sought to have manufacturers report certain data regarding their tube-sleeving practices. The agency intended to release the results of the safety tests that applied to the tube-sleeving process. Westinghouse, one of the main manufacturers of the plants and much of the equipment used in them, claimed that its tube-sleeving process was proprietary, and the release of specific testing information would help its competitors draw useful inferences about that process.

The NRC determined that its purposes in collecting and releasing the data would be satisfied if, instead of collecting the results of the Westinghouse-specific tests, it used data from several commonly performed safety tests that are routinely performed by Westinghouse and its competitors. The agency determined that release of such information would not compromise important Westinghouse proprietary information. Whatever interest Westinghouse had in preventing the release of such "routine, non-revealing" tests was found to be less important than the public interest in release of such information.

Energy Information Administration

Another such compromise with competing interests is embodied in the data collection practices of the Energy Information Administration (EIA). One hundred companies submit monthly data to EIA on the location, ownership, capacity and operations—including injections, withdrawals and inventories—of all active underground gas storage fields. The data is provided on an aggregate, company-wide basis, and is critical to the agency's efforts to understand system deliverability and overall operations. The agency recently proposed collecting the data on a reservoir-specific basis; each company would be required to report the data for each reservoir in which it held an interest. The gas industry sharply criticized the proposed change because it potentially could cause them substantial competitive harm. Field-specific storage data could give gas suppliers an unfair competitive advantage over the storage operator in negotiating the sale of gas to that storage operator or those customers that have contrac-

tual rights to that storage facility. The notion of equal bargaining power is largely lost if the seller knows the storage operator's stocks are low. It appears that, at least for now, the agency will continue to rely on the current alternative of collecting aggregated data, thus protecting the storage operators from the competitive harm that additional disclosure could cause.

State Utility Commissions

Until recently, utility commission decisions regarding requests to keep information confidential were made in the context of utility franchises and protected market shares. With the prospect of retail competition, many utilities have become increasingly reluctant to disclose a variety of data that may affect their future competitive standing. In states where utility restructuring is under active discussion, confidential data filings appear to have increased both in scope and frequency.¹⁸

The evolution of the electric industry is requiring regulators to reexamine the criteria they use to judge the type of information that is appropriately withheld, i.e., what constitutes a "trade secret."¹⁹ Although courts usually side with commissions when they have investigated claims of confidentiality and have ruled against them, utility requests for confidentiality often are honored by utility commissions.

When states seek to resolve questions of confidentiality, they generally employ a balancing test that weighs the public interest in disclosure against the harm to the disclosing party. Sometimes the balancing test appears in the statute. In Alaska, for example, the relevant statute provides that "[T]he commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public."²⁰

Most commissions that have addressed the issue have required that any alleged harm from disclosure be described specifically. Mere allegations of harm are not enough. The District of Columbia Public Service Commission (PSC) construes the District's Freedom of Information Act (FOIA) as requiring the party seeking to invoke this exemption to show (1) that the party from whom the information was obtained faces actual competition, and (2) that disclosure will cause substantial competitive injury.²¹

The weight assigned to the public interest in disclosure is not absolute but, rather, fluctuates based on the importance of the function served by disclosure. The Arizona Corporation Commission, for example, addressed the issue in its rulemaking on Alternative Operator Service (AOS) providers in the telecommunications industry (Docket No. R-0000-93-056 Dec. No. 58421 (1993)). The applicants for an AOS provider license sought to prevent the public disclosure of certain subscriber name and location information. The commission found that the information serves an important regulatory function, because it assists in the efficient investigation and remediation of end-user complaints. While noting that circumstances might arise that would justify proprietary treatment and nonpublic disclosure, the ACC found no such circumstances present and, therefore, required disclosure.

The Arizona case is an example of the extent of disclosure that can be called for even in the face of fairly compelling arguments that such disclosure impinges upon the company's com-

Attachment F

Climate Protests Escalate Worldwide

by [Ben Block](#) on November 19, 2008

Members of Everglades Earth First!, a Florida-based environmental group, block the construction site of a natural gas-fired power plant in February. Lynne Purvis and seven other members face charges next month for trespassing onto the site. Lynne Purvis stood apart at a Ritz Carlton cocktail party Thursday night. Surrounded by coal, oil, and natural gas executives at a [Bank of America energy conference](#) in Key Biscayne, Florida, Purvis and her six friends had not been invited. Armed with banners and signs, they still made their presence known.

"Bank of America forgot to put alternative energy into the agenda," Purvis, a member of the activist group [Everglades Earth First!](#), said into her megaphone. "So as the clean energy transition team, we were asked to speak to you all tonight." The party guests were less than impressed with Purvis's sense-of-humor. One guest allegedly wrestled the activists' banner out of their hands. During the melee, Purvis said, two of her associates were doused with beer. "We did commit trespassing," Purvis said. "But is trespassing truly a crime as opposed to putting the entire planet in turmoil?"

Climate activists worldwide are raising the stakes, with many turning to civil disobedience to make their voices heard. Actions in recent months have ranged from [chaining themselves to coal conveyor belts in Sydney](#), to [forming port blockades in the Netherlands](#), to [scaling smokestacks in the United Kingdom](#).

The rise in activism reflects growing frustration against the continued, and expanding, use of coal as a source of energy. The fuel, while affordable, is directly linked to climate change and air pollution. "What I see is - in the last year - it just exploded and went from being a sizable amount of people, several thousands of very active youth all around the country, to just hundreds of thousands of young people," said Brianna Cayo Cotter, communications director for [Energy Action Coalition](#), a network of North American youth climate activists. "I feel like the floodgates are about to open. We have the numbers. We have the skills. We have the passion."

In Europe, where some 50 new coal plants are being planned, [Greenpeace is leading a continent-wide campaign \[PDF\]](#) to halt eight upcoming projects in Germany, Belgium, and the Netherlands. In the United Kingdom, plans are under way to build the country's first coal plant in 34 years. Activists have escalated their opposition to the proposed construction this year.

In the United States, a [nationwide fight against 150 proposed new coal-fired power plants](#) that began four years ago has put a serious dent in the coal industry's plans. Through the courts, government lobbying, and acts of civil disobedience, activists have helped cut in half the number of new coal power stations.

The movement achieved a major victory last week. In response to a [Sierra Club lawsuit](#), the U.S. Environmental Protection Agency ruled that a proposed coal plant in Utah would [need a plan for controlling its carbon dioxide \(CO₂\) emissions](#) before being granted a federal operating permit. The ruling essentially delays all such permits for the time being. "In the immediate future, no new coal plant will be moving forward," said Virginia Crame, a Sierra Club associate press secretary.

Meanwhile, the [Rainforest Action Network \(RAN\)](#) has staged campaigns targeting two of the largest funders of such coal projects: Bank of America and Citibank. Last weekend, RAN and Greenpeace

organized more than 50 events across the country to protest the banks' financial support of the fossil fuel industry. "A lot of people are jazzed up about it because global warming was such an important issue in the election on the state and federal level," said Mary Nicol, the Greenpeace student network coordinator. "The cleanest coal plant is the one that isn't built. The youth generation really understands that."

Environmental author Bill McKibben organized 1,400 simultaneous call-to-action events, known as Step It Up, in 2007. He has since founded 350, an organization that raises awareness of the 350 parts per million of CO₂ equivalent that many climate scientists consider the maximum level necessary for a stable climate. Following a rally at the U.S. Capitol yesterday, McKibben said that plans for a fall 2008 global day of action would be announced at the climate conference in Poland next month. "Hopefully there will be rallies on every corner of the planet. We have organizers working on every continent except Antarctica," he said. "We need people to realize that coal is the dirtiest fuel on our planet."

McKibben also said he expects more acts of civil disobedience in the next year. "It'll happen. Keep your eyes open in D.C.," he said. The Energy Action Coalition is **expecting 10,000 participants** at its second annual Powershift, a conference of climate workshops, lobbying, and protests in Washington in February. Similar "climate camps" have been held this past year in London, Hamburg, B and Newcastle (Australia). The large-scale campaigns rekindle memories of effective grassroots campaigns from the 1960s and b 70s. But a saturation of information has made it more difficult now for organizers to attract attention, said Paul Wapner, director of the Global Environmental Politics Program at American University.

"There is a changing landscape in which activism in general, not just environmental, finds its expression," Wapner said. "With the Internet and all sorts of media, it's hard to figure out how one makes a difference and not just have their message get lost in the virtual world."

Regardless of whether the world is watching, more activists are risking arrest for the cause, and more support is coming their way. In the U.K., six Greenpeace activists faced criminal charges this past summer for damaging a coal-fired power station on the Kent coast. With the support of NASA climatologist James Hansen, an Inuit leader, and other environmentalists, the defendants argued that they were acting on behalf of the world - specifically the Pacific island state of Tuvalu, the Arctic ice cap, and China's Yellow River, they said.

The jury ruled that **their actions were indeed protecting property in England and across the globe.** The activists were cleared of all charges. In the United States, 11 protestors who formed a human barrier to a power plant construction site in Virginia in September faced 10 criminal charges and a maximum penalty of 14 years in prison, until a plea bargain was reached last month. Hansen again offered his support. "If this case had gone to trial, I would have requested permission to testify on behalf of these young people, who, for the sake of nature and humanity, had the courage to stand up against powerful b authority," Hansen said in a prepared statement [PDF].

Next month, Lynne Purvis will appear in court as well. She faces charges of trespassing, unlawful assembly, and resisting arrest following a protest earlier this year against the construction of a natural gas-fired power plant in the Everglades. She, too, requested that Hansen testify on her behalf, but he has yet to respond. Stories of climate activists who have avoided punishment did not, however, influence Purvis, she said. "I honestly don't pay too much attention to that kind of stuff. My personal motivation is that whatever the consequence, it's better than the massive consequence that will be felt by the entire community and the entire planet." *Ben Block is a staff writer with the Worldwatch Institute. He can be reached at bblock@worldwatch.org.*

Attachment G

Surprise Drop in Power Use Delivers Jolt to Utilities

<http://online.wsj.com/article/SB122722654497346099.html>

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An unexpected drop in U.S. electricity consumption has utility companies worried that the trend isn't a byproduct of the economic downturn, and could reflect a permanent shift in consumption that will require sweeping change in their industry.

Numbers are trickling in from several large utilities that show shrinking power use by households and businesses in pockets across the country. Utilities have long counted on sales growth of 1% to 2% annually in the U.S., and they created complex operating and expansion plans to meet the needs of a growing population.

"We're in a period where growth is going to be challenged," says Jim Rogers, chief executive of Duke Energy Corp. in Charlotte, N.C.

The data are early and incomplete, but if the trend persists, it could ripple through companies' earnings and compel major changes in the way utilities run their businesses. Utilities are expected to invest \$1.5 trillion to \$2 trillion by 2030 to modernize their electric systems and meet future needs, according to an industry-funded study by the Brattle Group. However, if electricity demand is flat or even declining, utilities must either make significant adjustments to their investment plans or run the risk of building too much capacity. That could end up burdening customers and shareholders with needless expenses.

To be sure, electricity use fluctuates with the economy and population trends. But what has executives stumped is that recent shifts appear larger than others seen previously, and they can't easily be explained by weather fluctuations. They have also penetrated the most stable group of consumers -- households.

Dick Kelly, chief executive of Xcel Energy Inc., Minneapolis, says his company, which has utilities in Colorado and Minnesota, saw home-energy use drop 3% in the period from August through September, "the first time in 40 years I've seen a decline in sales" to homes. He doesn't think foreclosures are responsible for the trend.

Duke Energy Corp.'s third-quarter electricity sales were down 5.9% in the Midwest from the year earlier, including a 9% drop among residential customers. At its utilities operating in the Carolinas, sales were down 4.3% for the three-month period ending Sept. 30 from a year earlier.

American Electric Power Co., which owns utilities operating in 11 states, saw total electricity consumption drop 3.3% in the same period from the prior year. Among residential customers, the drop was 7.2%. However, milder weather played a role.

Utility executives question whether the recent declines are primarily a function of the broader economic downturn. If that's the case, says Xcel's Mr. Kelly, then utilities should continue to build power plants, "because when we come out of the recession, demand could pick up sharply" as consumers begin to splurge again on items like big-screen televisions and other gadgets.

Some feel that the drop heralds a broader change for the industry. Mr. Rogers of Duke Energy says that even in places "where prices were flat to declining," his company still saw lower consumption. "Something fundamental is going on," he says.

Michael Morris, the chief executive of AEP, one of the country's largest utilities, says he thinks the industry should be wary about breaking ground on expensive new projects. "The message is: be cautious about what you build because you may not have the demand" to justify the expense, he says.

Utilities are taking steps to get a better understanding of the cause. Some are asking customers who reduced usage to explain what is influencing them. Xcel and other utilities, for example, have been running environmentally focused campaigns to urge consumers to use less energy recently, a message that might be taking hold.

Power companies are also questioning the reliability of the weather-adjustment models they use to harmonize fluctuating sales from quarter to quarter. "It's more art than science," says Bill Johnson, Chief Executive of Progress Energy Inc., Raleigh, N.C.

If the sector is entering a period of lower demand -- which could accelerate further if the automotive sector collapses -- many utilities will have to change the way they cover their costs.

Utilities are taking a hard look at the way they set rates and generate profits. Many companies are embracing a new rate design based on "decoupling," in which they set prices aimed at covering the basic costs of delivery, with sales above that level being gravy. Regulators have resisted the change in some places, because it typically means that consumers using little energy pay somewhat higher rates.

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