DETAILED ANALYSIS OF THE "ELECTRICITY EMERGENCY RELIEF ACT"

The "Electricity Emergency Relief Act" being drafted by Rep. Barton has the stated intention of assisting California and the West with the current electricity crisis. Unfortunately, this legislation, if enacted, would not achieve this goal. Instead, this legislation would likely increase energy costs in the West, undermine state efforts to address the electricity crisis, and result in significant environmental degradation throughout the country.

There are four critical problems with this legislation. First, it fails to address runaway wholesale electricity prices. Second, it interferes with California's actions to address the electricity crisis. Third, it creates massive loopholes in the nation's landmark environmental laws. Finally, it fails to adequately address conservation.

I. THE BILL DOES NOT PROTECT CALIFORNIA CONSUMERS FROM EXORBITANT ENERGY PRICES

The single most important federal action for California is the immediate adoption of cost-of-service based wholesale rates in the Western region. California's dysfunctional energy market has resulted in exorbitant spikes in wholesale prices of electricity, while creating opportunities for manipulation and gouging. Wholesale prices have jumped as high as $1,400 per megawatt hour (MWh). The California Independent System Operator (Cal-ISO), the state's power grid operator, has projected that electricity which cost $7 billion in 1999 will cost $70 billion this year. These skyrocketing prices can only partly be explained by natural gas price increases and increased energy demand. Indeed, Cal-ISO has calculated that there have been over $7 billion in overcharges.

The Federal Energy Regulatory Commission (FERC) has the authority to adopt regional cost-of-service based rates to address these price spikes and prevent gouging. It has consistently refused to do so. On April 25, 2001, FERC announced a price mitigation plan, but the FERC order has been widely criticized. The order only lasts for one year; it only applies when power reserves fall below 7.5% in California, despite Cal-ISO's finding that excessive prices are being charged even when such emergencies do not occur; and it "caps" prices at the marginal cost of the highest-cost generator, ensuring windfall profits for most energy producers.

In the absence of action on FERC's part, Congress must enact legislation to institute cost-of-service based wholesale rates in the West to prevent gouging this summer. This approach should be the centerpiece of emergency legislation to address California energy issues. Without cost-of-service based wholesale rates, California's citizens will continue to be exposed to exorbitant wholesale price spikes, and the economies of the state, the West, and indeed the nation may suffer long-term damage.

Unfortunately, this legislation fails to address wholesale prices. As a result, this legislation is simply "window-dressing" that ignores the main problems facing California.

II. THE BILL INTERFERES WITH CALIFORNIA'S EFFORTS TO ADDRESS THE ENERGY CRISIS

Although it is supposed to help California cope with the energy crisis, the legislation in fact contains provisions which will interfere with California's efforts to address its energy problems. For example, the bill would move significant generation out of long-term contracts and into the spot market, creating additional price volatility; it would inhibit California's ability to acquire and upgrade the state's transmission facilities; and it would create new opportunities for gaming the energy market and directly conflict with California's own demand-reduction programs. The legislation also interferes with other state efforts to educate, plan, and reform the electricity market.

A. Section 205: PURPA Contracts

Under the Public Utility Regulatory Policies Act (PURPA), qualifying facilities (QFs) are power suppliers that produce electricity with a specified fuel type (cogeneration or renewables) and meet certain ownership, size, and efficiency criteria established by FERC. Under PURPA, these facilities are allowed to sell their electric output to the local utility at avoided cost rates (the cost the utility would incur but for the existence of the QF).

In California, QFs are an important source of energy. Although QFs have recently been contributing about 3,000-4,000 megawatts (MW), it has not been uncommon for QFs to provide 8,000 MW, or almost 25% of generation into the California electricity system. Most QFs operate under long-term contracts with California's two major utilities, Southern California Edison (SoCal Edison) and Pacific Gas and Electric Co. (PG&E). Under the terms of these long-term contracts, QFs are paid at rates that are significantly above California's historical electricity prices, but are also significantly below the current exorbitant prices.

Section 205 would allow QFs to escape their obligations under their long-term contracts until they have been fully repaid for all past sales of energy. Since PG&E is currently in bankruptcy court and owes QFs over $300 million, and since SoCal Edison currently owes QFs over $800 million, the effect of section 205 is to exempt QFs from their long-term contracts for the foreseeable future.

By effectively releasing them from their long-term contracts, Section 205 allows QFs to sell their power production on the spot market. It thus moves California in exactly the wrong direction -- away from long-term contracts and toward increased reliance on spot markets. This approach would not bring more energy to the market; instead it would simply allow QF owners to double or triple their profits.

Section 205 is not needed to ensure that QFs are paid for the energy they are currently generating. In March 2001, the California Public Utilities Commission (PUC) ordered PG&E and

SoCal Edison to pay QFs for all prospective sales, and QFs are now being paid for the energy they generate.

B. Section 108: Sale of Transmission Assets to State of California

A major component of California's strategy to address the energy crisis is to acquire ownership of the electricity transmission lines currently owned by SoCal Edison and PG&E. State ownership of the transmission lines will serve several vital purposes. The state plans to upgrade and modernize these facilities quickly in order to address critical infrastructure needs, while the sales will infuse the state's financially troubled utilities with sufficient funds, allowing them to begin to return to economic health.

Under current law, the transfer of the transmission lines from the utilities to California would require FERC approval. However, California would be free to operate the transmission lines without being subject to FERC regulation, just like any other governmental entity that owns transmission facilities. Governmental entities have never been subject to FERC jurisdiction, because unlike investor-owned utilities or other private companies, a state is always accountable to the electorate through the political process.

Section 108, however, provides that if California obtains ownership of the transmission lines, California shall be subject to FERC's regulatory jurisdiction. This unprecedented action could substantially interfere with California's efforts to address its energy problems. FERC has extensive regulatory powers that it could use to block or impede California's efforts to upgrade, modernize, and operate transmission lines. This is a particular concern because FERC has already proven itself unsympathetic -- if not hostile -- to the needs of California and the West.

Moreover, section 108 singles out California for treatment that is unlike any other state or municipality in the country. It represents a significant federal intrusion upon traditional state prerogatives. Other state and municipal utilities are not subject to FERC regulation, and there is no justification for singling out California. In fact, any effort to subject California to FERC jurisdiction raises serious constitutional questions, and the provision might run afoul of recent Supreme Court precedents affirming the importance of state sovereignty and discouraging federal efforts to directly regulate state power.

C. Section 102: Price Mitigation in Western Market through Demand Management Incentives

Section 102 directs FERC to establish and manage a market that would allow retail consumers of electricity, including individual households, to sell energy that they do not consume. Regardless of the theoretical merits of such a market, the operational aspects of section 102 are incredibly complex and offer countless opportunities for gaming. Major aspects of the program would be counter-productive, conflicting with California's own demand-reduction programs.

California has established many programs to encourage energy conservation and demand reduction at the retail level. Virtually all of these programs would be jeopardized by section 102. For example, many large retail users of electricity in California have entered into "interruptible load" agreements whereby the retail customers are paid to reduce their electricity use during times when demand is high. If section 102 were enacted, many of these customers would seek to abandon their "interruptible load" agreements. It would be more profitable for them to speculate in the section 102 market, which would further increase California energy prices.

Similarly, section 102 directly conflicts with California's innovative 20/20 Energy Rebate Plan, under which residential, commercial, and industrial customers will receive a 20% rebate on their 2001 summer electric bill if they cut back their electricity use by 20% over last summer's level. Under section 102, California could end up paying twice for the same demand reduction: once under the 20/20 program and once through the section 102 market.

Section 102 could also increase energy consumption. The section allows individual consumers to sell "the total amount of electric load the consumer would otherwise reasonably be expected to consume." This provision invites consumers to increase -- rather than decrease -- consumption in the short run in order to establish high baselines from which future sales can be made. It also invites energy middlemen to game the system by claiming (and selling) artificially large demand "reductions."

These operational problems are compounded by the fact that FERC has no institutional capacity to manage the retail energy market envisioned by section 102. FERC is an overtaxed regulatory agency. It has no experience or qualifications to run the day-to-day operations of the complex energy market created by section 102. In fact, giving FERC this role would represent a vast federalization of responsibilities normally handled by state or regional authorities.

D. Section 107: Guarantee of Payment Required for Certain Emergency Power Sales

The Federal Power Act (FPA) gives the Secretary broad authority to order power sales in the event of war or any emergency that threatens "a shortage of electric energy." To protect consumers, the prices charged by energy generators under these orders must be "just and reasonable" under the circumstances.

Section 107 would seriously undermine the ability of the Energy Secretary to protect consumers during energy emergencies. Section 107 provides that the Secretary cannot require the sale of electricity or natural gas without a guarantee that the seller will be paid "the full purchase price when due." The section does not define "full purchase price," nor does it ensure that the "full purchase price" is fair or reasonable. As a result, since the provision explicitly overrides "any other provision of law," it appears to allow a seller to charge any rates it can obtain during the energy emergency, including rates that gouge desperate consumers. This would significantly interfere with an authority that has been relied upon by both the Clinton

Administration and the Bush Administration.

Furthermore, section 107 also extends to court orders, which could have broad, perhaps unintended consequences, such as limiting a court's discretion in resolving an otherwise straightforward contractual dispute between a buyer and seller of energy. An energy generator could readily take advantage of this provision, knowing that under section 107 a court could not order it to abide by its contractual obligation to sell without a FERC-certified guarantee that it will receive "the full purchase price."

E. Other Provisions That Interfere with California's Efforts To Address the Energy Crisis

1. Section 101: Demand Management Agreements Clearinghouse

This section could result in an increase in the cost of electricity while eliminating the ability of FERC to redress prices that are not just and reasonable. Because section 101(b) deems as a matter of law the price of any willing transaction to be just and reasonable, FERC will be unable to redress prices that would traditionally be found to not be just and reasonable. The section also fails to prevent affiliate transactions which could result in abuse of the provision to escape FERC jurisdiction. Oversight would be extremely difficult as the transactions would be opaque to public scrutiny. Furthermore, California has already initiated many significant demand management programs, and this provision is not coordinated with any of those programs.

2. Section 104: Path 15 Transmission Expansion

Section 104, which authorizes the Western Area Power Administration System (WAPA) to remove the major transmission constraint at Path 15, appears to overlook and potentially interfere with important work that has already been done at the state level. A March 2001 PUC staff report identified constraints on Path 15 as a cause of major reliability problems. Following a PUC order, PG&E applied in April 2001 for authority to upgrade Path 15. It is not clear that WAPA is the best entity to undertake the transmission expansion. Section 104 raises the possibility that WAPA and state efforts to fix Path 15 will conflict with each other.

3. Section 103: Transmission Constraints Study

Section 103, which calls for FERC and the Secretary of Energy to conduct a joint study of transmission congestion, appears to duplicate and potentially undermine measures that have already been taken in California. In March 2001, after extensive investigation, the PUC directed the utilities to undertake thirty-one transmission projects to relieve system congestion by this summer in specified areas of the state. At the same time, the PUC also identified potential system constraints that needed to be addressed for the 2002-2005 timeframe, and announced its intention to explore these and other longer-term transmission planning issues.

A nationwide study of transmission problems may have benefit. However, in the case of California, which has already examined and identified ways of fixing its transmission constraints, a six-month delay for a federal study of the problem seems unwarranted and ill-advised. Furthermore, given the fact that Section 103 does not provide for any consultation with or input from California or the public, legitimate fears may be raised about whether the proposed federal study would take into account the state's and the public's concerns.

4. Section 202: Preparation for Electricity Blackouts

This section, authorizing the Secretary of Energy to prepare for electricity blackouts, appears to duplicate at the federal level efforts that are already being taken at the state level in California. Since the section does not call for any consultation with affected states, it raises the possibility that the Energy Secretary and the Federal Emergency Management Agency (FEMA) may develop emergency plans that are inconsistent with or duplicative of existing state plans. Furthermore, it raises the possibility that state consumers will be subjected to confusing, contradictory messages from state and federal authorities about emergency blackout preparations.

5. Section 306: Regional Transmission Organization in Western Region

Section 306 would establish a regional transmission organization (RTO) to manage transmission facilities if ten or more governors of the fourteen Western states agree to take part. FERC has promoted RTOs as a means of increasing efficiency, reliability, and competitiveness in wholesale electricity markets while eliminating the undue discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility. Indeed, FERC conditioned its April 26, 2001, order addressing California prices upon Cal-ISO and the three California investor-owned utilities proposing plans to form an RTO by June 1, 2001.

Despite FERC's endorsement of a single Western RTO, there appears to be little support, if any, in California or the other Western states for such an organization. Instead, most states seem to favor the creation of several regional RTOs within the Western states. Moreover, it is not clear that such a massive RTO would even be feasible. Federal efforts to force an RTO upon the Western states are heavy-handed and intrusive.

III. THE BILL CONTAINS ANTI-ENVIRONMENT PROVISIONS

This legislation would create new loopholes in the Clean Air Act, the Clean Water Act, the Endangered Species Act, the Federal Power Act, the National Forest Management Act, the Federal Land Policy Management Act, and the National Park Service Organic Act, as well as numerous other laws. It creates threats to public health, increases the risks to endangered species, and threatens water rights throughout the country.

A. Section 106: Federal Transmission Corridors

This provision creates a supermandate to establish transmission facilities on any federal lands where "necessary or appropriate." From Old Faithful to the National Mall to the last remaining roadless areas, every acre of federal land appears to be open for transmission lines under this provision. The Department of Energy would be designated as the lead agency for purposes of the National Environmental Policy Act. This would put DOE in charge of analyzing impacts for which they have historically not been responsible, and have not developed expertise.

This provision would open up 80.7 million acres administered by the National Park System, 91.0 million acres administered by the Fish and Wildlife Service, 191.0 million acres administered by the U.S. Forest Service, and 270.0 million acres administered by the Bureau of Land Management. Additionally, it appears to apply to lands under the jurisdiction of the Department of Defense and the legislative branch. The provision even opens Arlington National Cemetery, the White House lawn, and the U.S. Capitol grounds to the construction of new power lines.

B. Section 301: Hydroelectric Power License Conditions

This provision would undermine federal and state efforts to protect endangered fisheries, with unknown but potentially harmful consequences to water rights holders throughout the nation, especially the West. This provision amends all 1,016 hydropower licenses issued under the Federal Power Act to allow for two-year waivers of any requirement during an undefined "electric supply, generating, or system reliability emergency." Upon request by a governor, hydropower facilities will be able to act in violation of the Clean Water Act, the Endangered Species Act, the Federal Power Act, and the National Environmental Policy Act, or any other requirement contained in the license for a two-year period. Project operations affecting the environment, endangered species, federal trust responsibilities, water rights, water quality, fisheries management, and recreation could all be affected. This section would apply retroactively to previously issued licenses in addition to those licenses issued at a future date.

C. Section 302: Federal Hydropower Generation

This section would allow waivers of any "Federal law, plan, rule, or order (including any court order issued before the date of enactment . . .)" that applies to the operation of any facility "including dam, powerplant, or other facility" under the administrative jurisdiction of the Bonneville Power Administration (BPA) or the Bureau of Reclamation. Waivers are not subject to judicial review. While a governor must request such action, this provision has the unusual feature of allowing a governor to unilaterally trigger a waiver of all federal requirements. This provision sets a dangerous precedent for the enforceability and stability of environmental protection laws.

This section is a direct attack on the recently released federal Snake and Columbia Rivers salmon recovery plan, which requires BPA to set river flow and spill levels to aid the migration of spring and summer salmon runs. Furthermore, it could negate a recent court decision to bring

four lower Snake River dams into compliance with the Clean Water Act.

This section is drafted so broadly that it allows waivers of requirements that have no bearing on electricity generation. For instance, this section appears to authorize even waivers of minimum wage laws and other labor laws, such as the Family Medical Leave Act.

D. Section 303: NOx Preconstruction Requirements for New Generation

California has taken steps to ensure that environmental requirements do not interfere with its efforts to get new generation online in time for this summer. Certain required pollution-control equipment, known as selective catalytic reduction (SCR), has limited current availability and is time-consuming to install. As a result, California has carefully crafted an approach to get new generation online while putting in place enforceable measures to protect air quality and ensure that SCR is installed as soon as possible.

California has allowed up to a one-year delay of SCR installation for some natural gas peaker units. In each case, the state has maintained requirements that offsets be obtained. Also, a 25 ppm NOx emission limit remains in effect during the one-year period. All preconstruction reviews proceed even though installation is being deferred in these limited situations.

Section 303 goes far beyond California's actions. This provision allows EPA upon the request of any state to waive requirements of section 111 of the Clean Air Act relating to oxides of nitrogen and the preconstruction requirements relating to oxides of nitrogen under the state implementation plan. This waiver is very broad and takes place with no opportunity for public comment. It waives all preconstruction requirements for NOx in both attainment and nonattainment areas, not just installation of SCR technology. The waiver applies to all new electricity generation units located in the state, instead of on a case-by-case basis where discretion can be exercised and generation capacity, potential emissions, and equipment availability can be considered. Importantly, offsets are waived, which will ensure that air quality suffers during the waiver period.

Moreover, the section 303 waivers can apply nationwide. This means that if Midwestern governors request a waiver under section 303, air quality in downwind states on the East Coast could be degraded.

The broad waivers in section 303 are unnecessary. The California Air Resources Board (CARB), the California Energy Commission, and EPA Administrator Christine Todd Whitman have all stated that environmental regulations have not limited energy production in California. CARB has specifically testified that federal legislation on this matter is unnecessary. Moreover, any industry fear of citizen suits is without basis and does not justify section 303. State and federal regulators have used "administrative orders" under the enforcement provisions of the Clean Air Act to authorize the delayed installation of SCR in California, precluding any citizen suits against generators.

E. Section 304: Federal Generation During State Emergencies

This provision appears to create an open-ended opportunity for federal entities to operate their generators, including backup and portable generators, in order to generate electricity for use by the federal entity or for sales to a state. Backup generators produce emissions far worse than other forms of generation. This provision, however, does not include the concept of environmental dispatch by which dirtier generation is not dispatched until all cleaner options are utilized. Additionally, this provision may be construed to authorize mothballed facilities to be brought back into service with unknown consequences.

F. Section 305: Emergency Generation

In order to avoid or delay the installation of pollution-control equipment, some energy generation facilities in California proposed limitations on their hours of operations as an alternative to state-required emissions controls. As generation is needed beyond these limited hours, California is working with generators on a case-by-case basis to allow continued operation. In some cases, the state has levied mitigation fees, which allow the state to achieve contemporaneous reductions through other air-pollution-control programs in order to protect public health. In other cases, the state has worked with generators to install pollution controls, so that hourly limitations are unnecessary.

Section 305 goes much further than California's approach, creating unnecessary loopholes in the Clean Air Act. This section creates an expedited state implementation plan (SIP) amendment process, the goal of which is to approve SIP amendments that allow waivers of emissions limitations during energy emergencies. First, subsection (c) allows the waiver of NOx emissions limitations for existing natural-gas-fired electricity generation. Second, subsection (d) allows the waiver of "any otherwise applicable requirements" of the SIP if the person or entity generating energy also consumes it, even if the requirement is not inhibiting electricity generation. Waivers last for up to six months at a time, with no limit on the number of consecutive six-month periods. Waivers appear to apply on a statewide basis, not on a case-by-case basis. Mitigation fees are also waived under this section, preventing the state from obtaining offsetting emission reductions from other sources and removing any financial incentive for the electricity generation facilities to reduce emissions.

As in the case of section 303, section 305 applies nationwide. Section 305 waivers could be allowed in the Midwest, where they could lead to additional air pollution on the East Coast.

EPA may approve the SIP amendment only if EPA determines that the amendment will not increase the net emissions of any air pollutant in any "affected air quality region" and that the amendment "otherwise meets" the requirements of the Clean Air Act. This determination in all likelihood would be a legal fiction. Under section 305, EPA does not approve waivers for individual sources and would not have the details of these waivers before it.

IV. THE BILL'S APPROACH TO CONSERVATION IS INADEQUATE

The legislation fails to adequately address conservation. The legislation provides only a "tip of the hat" to conservation at a time when conservation is the only opportunity to keep the lights on in California this summer.

A. Section 203: Conservation at Federal Facilities

Section 203 would require federal facilities in a state whose governor has declared an electricity emergency to reduce consumption by at least 10%. While this is a step in the right direction, it does not do as much as is possible or necessary. California state facilities have reduced their electricity consumption by 20%. It is appropriate for federal facilities to do the same. Additionally, federal facilities should conserve energy and enhance energy efficiency throughout the country, especially the entire West.

Furthermore, this provision inappropriately sunsets in October 2003. It is interesting to note that the provisions in the bill which promote conservation and energy efficiency sunset, while provisions which relax environmental protections are permanent changes to federal law.

B. Section 201: Emergency Conservation Awareness

Section 201 authorizes the Secretary of Energy to conduct emergency awareness campaigns to promote conservation. While the Secretary is supposed to act "in consultation and coordination with affected states," this section raises the possibility that California consumers could receive contradictory messages from state and federal officials about "the likelihood and consequences of electric energy shortages." For example, if the Secretary and the Governor were to come to different conclusions about the likelihood of imminent shortages, this section could result in consumers receiving confusing and inconsistent information about whether those shortages would occur and what steps, if any, should be taken.

V. THE BILL DOES LITTLE TO HELP CALIFORNIA

The bill contains only one provision that would actually help California. This is the provision allowing California and three other Western states to adjust their standard time if such a move would alleviate an energy crisis. Studies have shown that such an action could save about 1% of energy usage.