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### "Retail Choice" Is Coming: Have You Hugged Your Utilities Lawyer Today? (Part I)

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be "all Enron, all the time," as multiple committees consider the securities, accounting, labor and retirement, criminal, and political fallout of the largest bankruptcy in U.S. history.

**Prediction: Definitely Maybe**

While conferees on both sides of the aisle profess a desire to complete action by March, the author believes the real window of opportunity is just prior to Memorial Day, assuming that the economic numbers show some rebound in the first quarter of the year. (Some members on both sides of the aisle may be reluctant to cast a final vote for a tightened Code in the midst of deepening recession, although the fact that it's raining has never been a convincing argument for failing to fix a leaky roof.) Beyond then, prospects will diminish as each passing week brings the November elections closer. Nevertheless, bills more controversial than bankruptcy reform have been enacted on a Congress' final night, and both proponents and opponents will be working on this matter right up to the final gavel of adjournment.

Regardless of H.R. 333's final disposition, it is already clear that new developments will require continued bankruptcy oversight and future legislative change. An all-time record number of consumer and commercial bankruptcies were filed in 2001 and the total will likely be higher this year as the recession affects households and businesses. The bankruptcy system is showing signs of severe strain, a situation that should encourage the search for administrative streamlining. Abuses will no doubt continue, and will be easier to perpetrate as the system tries to cope with a flood of cases. The new spate of large Chapter 11s may well give rise to unanticipated legal issues that invite legislative intervention. Congress may also exercise oversight and inquire why Chapter 11 is increasingly a tool of liquidation rather than reorganization and whether this trend requires statutory change.

So, will 2002 finally be the year in which bankruptcy reform is enacted? The odds in favor are at least 50-50, but the outcome is very much up in the air given economic and political factors. Stay tuned, and rest assured that, regardless of the outcome, the bankruptcy system is now such a major economic factor that the Code will continue to evolve amidst raucous debate in future Congresses. Observers and interested parties will be well advised to maintain their optimism and good humor as this drama continues to unfold.

**"RETAIL CHOICE" IS COMING: HAVE YOU HUGGED YOUR UTILITIES LAWYER TODAY? (PART I)**

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There you sit, the largest creditor on the unsecured creditors' committee, knowing that the debtor in possession in a Chapter 11 case might be able to save between 8% and 15% on its combined natural gas and electric bills if only the DIP would renegotiate its utility service contracts under the state's new retail competition legislation. How do you make the rest of the creditors' committee, not to mention the judge and the U.S. Trustee, understand that rejecting the existing energy contracts actually inures to the benefit of the estate? Simple—give them a copy of these two articles.

"Retail Choice"—in utility service is a rallying cry being heard in nearly every state in the nation—means the ability of an individual utility customer to choose which company will provide the desired retail utility (electric, natural gas, local and long distance telephone) service(s) to that customer. This concept is also sometimes referred to as retail competition or utility deregulation. If Retail Choice carries the day, which is by no means certain after California's electric industry meltdown, virtually every party in interest in a Chapter 11 case could benefit from head-to-head competition among retail utility service providers. See, e.g., *Deregulation Proving a Mixed Bag Elsewhere*, Hous. Chron. July 1, 2001, at A1; *Power to the people?* Consumer Rep., June 2001, at 54-56. For purposes of this article, we're focusing on DIPs because, given the duration of most Chapter 7 cases, Retail Choice is most applicable in the context of a Chapter 11 reorganization.

Part I, published in this issue, offers a primer on the history and evolution of competition in the provision of utility services. Part II, which will be published in the April issue, puts the Retail Choice issue in context for bankruptcy practitioners—how it can increase the size of the bankruptcy estate by allowing the DIP to use the executory contract provision of 11 U.S.C. § 365 to seek out less expensive utilities services.

**Background on Competition in the Provision of Retail Utility Services.**

Long-distance / toll telephone customers have been able to select and change their service providers since 1982, when Ma Bell was broken up during the AT&T Antitrust Litigation. See *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, *Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983); *United States v. West-*

ern Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983). *Accord* 15 U.S.C. § 1, 16(e) (2001). During the last few years, this ability to select a retail utility service provider has been expanded to include some local telephone, natural gas and electricity customers. However, in most instances, these opportunities remain available to most retail customers only as part of a limited "pilot," test or transition program.

### Telephone

Competition in local telephone service is probably the most advanced among the previously regulated retail monopoly utility services. As a result of the Telecommunications Act of 1996 and actions by the Federal Communications Commission ("FCC") and the individual states, a growing percentage of the population now has the ability to select between multiple local telephone service providers. 47 U.S.C. §§ 151 *et seq.* (2001).

Under the current system, most customers have at least two different companies providing their wire-based telecommunications service (we are not going to delve in to the realm of mobile / cell telecommunications service which may provide a substitute for either or both the local or toll services discussed herein). One company provides local service, another provides toll service within the customer's state and potentially another may provide toll service between states. In a fully competitive marketplace, the customer's local and toll carrier (not to mention its Internet Service Provider and cell / mobile carrier) may all be the same company (eventually, this group may even include one or all of the original Regional Bell Operating Companies).

The cost and cash flows of providing the various telecommunications services are important in considering between and among competing carriers. Currently, a customer pays its local service provider a monthly fee (to build and maintain the local calling network), plus any usage fees that may relate to that monthly service (caller ID, Directory Assistance, Information, etc.). The customer generally also pays its toll / long distance carrier(s) a monthly charge, as well as any call-related tolls incurred during the billing period. The toll carrier(s), in turn, pay the local service provider at each end of the call a fee for originating or terminating calls inside their local network.

### Natural Gas

The functioning and component parts of the natural gas industry are not too dissimilar from the telephone industry. They just call the parts different things. The natural gas producer extracts the gas from the ground, purifies it to an acceptable generic pipeline standard and delivers the gas to a high-pressure interstate pipeline for delivery across and between states. The interstate pipeline transports the natural gas to the customer's local gas utility at the city gate (a metered valve that quanti-

fies how much gas was taken from the pipeline). Sometimes it takes several such pipelines to get the gas to a customer's local region. The local utility then delivers the gas to the customer through the local distribution system and customer's meter.

A customer or utility could, if it wanted, track a specific molecule of natural gas to ensure that the molecule that it paid for was actually delivered to it. But, given the current purity standards, natural gas is considered fungible and a cubic foot of gas is a cubic foot of gas. Therefore, the question becomes how much gas was delivered to the customer at its meter, not whether a specific molecule of gas was actually delivered to the customer at its meter.

As with the telecommunications industry, it helps to understand how the costs and cash flow between the various carriers in the natural gas industry. Retail customers generally pay the local utility a monthly customer charge (to build and maintain the local distribution system and to acquire and deliver gas to its customers), as well as a consumption fee for the gas used during the billing period. The local utility, in turn, pays the producer a fee to produce the gas, as well as a transportation fee to the pipeline (or pipelines, if more than one) for delivering the gas to the city gate. Sometimes, a local utility will employ a marketer or broker acts to facilitate the entire transaction.

In 1978, Congress passed the Natural Gas Policy Act ("NGPA"), and began the march towards a competitive retail natural gas marketplace. 15 U.S.C. §§ 3301-3432 (2001). Pursuant to the NGPA, the Federal Energy Regulatory Commission ("FERC") issued several orders both to forcibly open the natural gas industry to competition and to control the competitive behavior of the various industry participants, including the pipelines, marketing and aggregating companies and local gas utilities.<sup>3</sup> Ultimately, FERC issued Order 636, to "promot[e] competition among gas suppliers. . . [and to] benefit all gas consumers and the nation by 'ensur[ing] an adequate and reliable supply of (clean and abundant) natural gas at the lowest reasonable price.'"<sup>4</sup>

As a result of these and other FERC orders, any customer seeking to acquire and transport natural gas over an interstate pipeline may do so, so long as it acquires the necessary transport rights from that pipeline. Moreover, some industrial and large commercial customers currently may, depending upon their state, individually acquire and transport their own natural gas to their facilities, paying the pipelines and local utility only a transport fee to deliver the gas.

### Electricity

The component parts of the electric industry are similar to those of the natural gas industry. Again, the names are changed a bit. Most electricity is generated at

commercial generating facilities, sometimes hundreds of miles from where it is used. The newly generated power is converted to a voltage suitable for traveling long distances over the high-voltage transmission lines to the local service area. When the power is close to its end-use location, the voltage is stepped down and then transmitted to the customer's home, office or store, similar to what happens with natural gas.

Historically, each electric utility generated virtually all of the power necessary to service the customer needs in its service territory and then transmitted that power to its service territory over transmission lines that it also owned. Since virtually all of these utilities competed with each other for retail customers and service territory, the concepts of free flowing electrons between service territories to enhance competition never entered the production, construction or transmission development equation. Accordingly, the national electric grid more closely resembles a patchwork quilt than the free-flowing system design of the interstate natural gas pipelines and distribution system.

Although neighboring service territories do interconnect at various points, these interconnections were historically designed only to assist neighboring utilities in case of an emergency, not to facilitate efficient electron flow between, among and across several service territories. Contrary to the gas industry, no national high voltage transmission system exists to enhance the transmission of electricity from region to region across the country. These utility-owned generation, transmission and distribution assets were constructed and are being maintained at huge expense to the local utility and its customers. Accordingly, requiring these same utilities to give up their monopoly rights and potentially guaranteed profits, not to mention the control and sometimes ownership of their facilities, has been and will be an uphill battle.

The Energy Power Act of 1992 started the competitive march in the electric industry by instructing FERC to order electric utilities to permit third parties to use the utilities transmission assets to transmit ("wheel") blocks of wholesale power through the utilities' service area. Essentially, FERC was requiring the transmission line owners to convert their transmission patchwork quilt into a national freeway system for transmitting electricity across and through states. FERC implemented the Energy Policy Act's mandates by issuing FERC Orders 888 and 889, as well as the Independent System Operator ("ISO") and Regional Transmission Organizations ("RTO") orders, each of which seeks to eliminate constraints on the movement of power across regions and permit non-utility power purchasers to buy and transmit blocks of power over large distances to different regions and states.<sup>5</sup>

The ISO and RTO orders seek to have independent third-party entities operate the high voltage transmission lines in order to facilitate the movement of electricity across regions and state boundaries, thereby enhancing competition by reducing (1) the cost to move power long distances, and (2) the transmission owners' opportunities to manipulate the power markets.

Sadly, notwithstanding considerable recent and public discussion, the federal government has no comprehensive electric industry restructuring policy or statute in place. Although the California situation has focused attention upon retail electric competition, it remains highly unlikely that any comprehensive restructuring legislation will pass in the near future. Thus, at least in the near term, the transition to a fully competitive retail electric marketplace will be controlled by the states on a state-by-state basis. Therefore, we can look forward to more differences than similarities between states when considering retail utility competition legislation or programs.

#### **The states follow suit and then lead the charge.**

As a result of the federal efforts, state legislators and regulators have been compelled to take steps to promote a more competitive local telecommunications, natural gas, and electric marketplace. Given the ever-changing competitive environment and limited space available in these articles, we have not attempted to generate an exhaustive list of the individual state efforts to open the various retail utility industries to competition. Nor will we discuss these individual state efforts in detail. Additional information regarding the status of an individual state's utility restructuring efforts may be found on each state's utility commission website.<sup>6</sup>

#### **Who is doing what and where.**

##### *Telecommunications*

Virtually every state utility commission has initiated a rulemaking proceeding and/or opened an administrative docket to implement the mandates of the Telecommunications Act of 1996 and the FCC's local competition orders. Accordingly, we reference only the Public Utilities Commission of Ohio as an example of what a state commission may do to implement these local competition mandates. The Ohio Commission has issued several orders, including arbitration and mediation guidelines and new minimum telephone service standards, to implement the requirements of the Telecommunications Act of 1996 and to promote local competition. **Local Exchange Competition**, Case No. 95-845-TP-COI (June 12, 1996), *order on reh'g*, (February 20, 1997) ("845 Guidelines"); *Arbitration and Mediation Guidelines*, 96-463-TP-UNC (July 18, 1996); **Minimum Telephone Service Standards**, Case No. 96-1175-TP-ORD (June 26, 1997), *order on reh'g*, (September 11, 1997); **Intrastate Universal Service**

**Discounts**, 97-632-TP-COI (November 20, 1997). Additionally, Ohio has also enacted telecommunications legislation to promote competition at the local level. Ohio Rev. Code Ann. §§ 4927.01-4927.09 (Anderson 2001).

*Natural Gas*

As of December 2001, the states pursuing a retail natural gas competition option were California, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Montana, New Jersey, Nebraska, New Mexico, New York, Ohio, Pennsylvania, South Dakota, Virginia, West Virginia, Wisconsin and Wyoming. Most of these states are opening the retail gas market using a pilot program hosted by one or more of the existing local gas utilities. Some states, like Ohio, have enacted legislation to promote natural gas competition at the local level. *See, e.g.*, Ohio Rev. Code Ann. Ch. 4929 (Anderson 2001).

*Electricity*

As of December, 2001, numerous states had passed legislation creating competitive choice of electric generation for retail customers. These programs allow retail customers to select who will generate the electricity that they will use. Generally speaking, full scale implementation of such legislation is delayed between 18 months and 2 years from the date of passage.

The states either moving forward or that have implemented retail competition include Arizona, California<sup>7</sup>, Connecticut, Delaware, District of Columbia, Florida, Indiana, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Virginia and West Virginia. In each of these states, the public utilities or service commission has or will implement the mandates of the state's transition to a competitive marketplace. For example, in Ohio, the Public Utilities Commission opened several administrative dockets to implement the retail choice legislation, *e.g.*, Rules for Minimum Competitive Retail Electric Service Standards (Docket No. 99-1611-EL-ORD), Rules for Market Monitoring (Docket No. 99-1612-EL-ORD), and Amended its Rules for Electric Service and Safety Standards (Docket No. 99-1613-EL-ORD).

Other states, including Arkansas (2003), Montana, Nevada, New Mexico (2007), North Carolina (2006), Oklahoma and West Virginia have considered implementing competition in the retail market, but have decided to delay implementation. Still other states, including Alabama, Alaska, Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, South Dakota, Vermont, Washington, Wisconsin and Wyoming have little likelihood of moving into a competitive utility marketplace in the near term. Only Nebraska is in the position to be

oblivious to the rocky competitive road, since EVERY electric service territory is owned by a municipality or other political subdivision.

**What restructuring and competition actually means to the consumer.**

Almost without exception, signing up for competitive retail utility service means signing a contract with a new service provider. Although the duration of these contracts can vary from six months to three years, one to two years appears to be the norm. In addition to a contract, the look of the monthly bill will almost certainly change. There will be an *à-la-carte* aspect to the bill that did not exist before. The new bill likely will show line items and individual costs reflecting each aspect of providing that particular utility service (for example, an electric bill may show separate costs for fuel, generation, transmission, and distribution). Additionally, the company sending the bill may well change. Sometimes, the new service provider will bill you directly for its services; however, the old service provider may continue to render the bills with an added line items reflecting the new service provider's fees. One thing is certain. Changing retail service providers does not completely remove your old utility from the picture. Remember, the old service provider has built and, hopefully, is maintaining the local distribution system. The new service provider will use that distribution system to provide you with your service. Thus, you will pay for the use of the infrastructure, just like you did before you changed service providers.

Sadly, because residential consumers tend to use significantly less power than commercial or industrial consumers, their total bill with the new service provider may not be noticeably less than it was with their old service provider. However, the results may differ dramatically for larger commercial and industrial consumers. Since these consumers use considerably more power on both a monthly and an annual basis, they can achieve more net savings with smaller marginal rate decreases. Moreover, if a savvy consumer obtains multiple energy products from a single provider (BOTH electricity and natural gas), the consumer can generally exert some price leverage and derive a beneficial rate on each product. It's similar to buying car, homeowners and flood insurance all from the same company and agent.

**What does utility retail competition have to do with a Chapter 11 bankruptcy case.**

In a truly competitive utility environment, customers have the ability to choose between several competing service providers for the specific service(s) that they are seeking, be it local, mobile or long-distance telephone, internet access, data transmission, natural gas, electric service or some combination of some or all of these services. It is the potential benefits of the evolution of

the local electric, natural gas and telecommunications markets that this article addresses. Retail Choice intersects with the Bankruptcy Code because the DIP's existing utility service contracts can sometimes be replaced with new, lower-priced utility contracts.<sup>8</sup> When the DIP saves money, everyone involved in the case benefits. Now that we have whetted your appetite, we will discuss these possible savings in Part II.

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- 2 Nancy B. Rapoport is Dean and Professor of Law at the University of Houston Law Center.
- 3 See, e.g., *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 FR 42408 (Oct. 18, 1985), FERC Stats. & Regs. (Regulations Preamble 1982-1985) 30,665 (1985), *vacated and remanded*, *Associated Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *readopted on an interim basis*, Order No. 500, 52 FR 30334 (Aug. 14, 1987), FERC Stats. & Regs. (Regulations Preambles, 1986-1990) 30,761 (1987), *remanded*, *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, 54 FR 52344 (Dec. 21, 1989), FERC Stats. & Regs. (Regulations Preambles 1986-1990) 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, 55 FR 6605 (Feb. 26, 1990), FERC Stats. & Regs. (Regulations Preambles 1986-1990) 30,880 (1990), *aff'd in part and remanded in part*, *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).
- 4 FERC Order 636, 57 F.R. 13267, 13269 (April 16, 1992), *Order on Reh'g*, Order 636(A), 57 F.R. 36128 (August 12, 1992), *Order on Reh'g*, Order 636(B), 61 F.R. 61272 (November 27, 1992), *Order on Reh'g*, Order 636(C), 78 FERC 61186 (1997).
- 5 Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities, Docket No. RM95-8-000, 888 at 280 (April 24, 1996) ("Order 888") 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. P31,036 (1997), *order on reh'g*, Order No. 888(A), 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. P31,048 (1997), *order on reh'g*, Order No. 888(B), 81 FERC P61,248 (1997), *Order on Reh'g*, Order No. 888(C), 82 FERC P61,046 (1998). *Inquiry Concerning the Commission's Policy on Independent System Operator*, Docket No. PL98-5-000, and *Regional Transmission Organizations*, Docket No. RM99-2-000 (December 20, 1999) ("Order 2000") 65 Fed. Reg. 12,088 (March 8, 2000), 90 FERC Stats. & Regs. P31,092, *order on reh'g*, Order No. 2000(A) 90 FERC Stats. & Regs. P61,201.
- 6 See, e.g., [www.fcc.gov/ceb/local\\_competition/welcome.html](http://www.fcc.gov/ceb/local_competition/welcome.html) (local telephone); [www.nrri.Ohio-State.edu](http://www.nrri.Ohio-State.edu) (electric & natural gas); [www.naruc.org](http://www.naruc.org) (electric & natural gas); [www.eia.doe.gov](http://www.eia.doe.gov) (electric & natural gas); <http://usta.org/statepuc.html> (jump sites to all 50 state commissions).
- 7 On September 20, 2001, the California Public Utilities Commission voted to suspend retail choice in generation.
- 8 This article does not purport to deal with or otherwise address the situation where a utility seeks refuge under the

Bankruptcy Code. We leave that heady topic for others to discuss. See, e.g., Frank P. Darr, *Federal-State Comity in Utility Bankruptcies*, 27 Am. Bus. L.J. 63 (1989); D. Eric Hultman, *Electric Industry Restructuring: Will New Players Emerge from Bankruptcy?*, 17 Am. Bankr. L.J. 50 (May 1998).

## JUDICIAL ESTOPPEL IN STATE COURTS: A SEQUEL

Hon. William Houston Brown and  
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In the January 2001 issue of the *Norton Bankruptcy Law Adviser*, we discussed the use of judicial estoppel by state courts when the debtor in bankruptcy failed to schedule a cause of action and then attempted to pursue that cause of action in state court after the closing of the bankruptcy case. Subsequent to that article, the discussion was expanded in a law review article. Brown, Carpenter and Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197 (Spring 2001) (hereinafter cited as *Debtors' Counsel Beware*), (appendix listing cases from each state that have applied judicial estoppel). Both the Adviser and subsequent article focused upon decisions from the appellate courts in Georgia, which had rigidly applied judicial estoppel to bar the former debtor's pursuit of a suit that was omitted from the bankruptcy schedules.

Our criticism of such applications was largely based upon the state courts' failures to recognize whether the omission of the cause of action was relied upon by the bankruptcy court or otherwise had any material effect upon the bankruptcy case or proceedings in that case. Moreover, we found that courts applying judicial estoppel in this context often claimed to be applying federal judicial estoppel without any discussion of whether judicial estoppel was recognized in their particular federal circuit and without analyzing the traditional elements of the estoppel doctrine. *Debtors' Counsel Beware*, 75 Am. Bankr. L. J. at 222 (discussing estoppel elements of prior inconsistent position, successful assertion in prior proceeding, intent, reliance and privity). Following the publication of our prior articles, several other courts, have considered judicial estoppel in bankruptcy-related contexts. The Georgia courts have been positively inundated with cases raising the issue. This sequel examines those decisions.

A significant case highlighted in the first Adviser article was *Wolfork v. Tackett*, 526 S.E.2d 436 (Ga. Ct. App. 1999), *aff'd*, 540 S.E.2d 611 (Ga.), *cert. denied*, 122 S. Ct. 51 (2001), in which the Georgia courts applied judicial estoppel to preclude prosecution in state court of a tort action filed by a former Chapter 13 debtor who failed to amend her bankruptcy schedules to in-