April 15, 2005

An Open Letter to Participants in the
State & Local Working Group on Energy & Trade Policy

Dear Friends:

It is my pleasure to present our completed Interim Report on GATS and Electricity. I think that it is important to note and acknowledge that this report and the year of study that moved us to this point would not have been possible without your time and expertise. On behalf of the Working Group, thank you for your individual contributions. I also want to thank the Office of the U.S. Trade Representative (USTR) for engaging with us in what has proven to be, and will continue to be, a productive exchange and dialogue. Finally, I think it important to note the tremendous legal counsel and secretariat support of the Harrison Institute at Georgetown University Law Center.

The purpose of this interim report is to document the Working Group’s research and analysis thus far relative to the potential impact of trade negotiations under GATS – the General Agreement on Trade in Services – on domestic electricity policy. The report is termed “interim” recognizing that we are engaged in a learning process about evolving issues and that our findings and focus may change.

As part of this learning process, we have successfully commenced a dialogue with USTR at a level quite unprecedented for state and local officials. In the interest of continuing this dialogue, which both the Working Group and USTR have found informational and productive, I sent USTR a copy of our interim report and requested that USTR comment on our findings so far. Carol Balassa, USTR’s director for energy services negotiations, did comment, and you will find it appended at the end of this report.

Ms. Balassa has extended an invitation for a follow-up meeting. I look forward to that meeting, as this is an excellent opportunity to explore further questions we have concerning the impact that trade agreements have on state policy or legislation. A subsequent meeting will allow us the opportunity for additional clarification of Ms. Balassa’s comments. For instance, I would like further explanation of her comments on perceived factual inaccuracies as well as a further discussion of preemption concerns. We realize that trade agreements will not directly preempt state law, but trade agreements could conflict with state law, exposing us to sanctions, penalties, or other complications. There are also issues of distribution monopolies, transmission services, state-federal consultation processes, and GATS scheduling that merit further discussion.

I also appreciated USTR’s statement that “no trade deal [is] being negotiated on electricity between the U.S. and the EU or any other WTO members either bilaterally or in the GATS negotiations,” and I trust that if and when such discussions begin, the USTR will look to this report as a useful compendium of state and local information and concerns while considering the Working Group and its members to be long-term partners and resources.
In closing, I want to recognize two additional participants who have indicated their desire to be associated with the list on page 28 of the report:

1. Véronique Pluviose-Fenton, Principal Legislative Counsel for Policy and Federal Relations at the National League of Cities, and
2. Jim Kerr, North Carolina Utility Commissioner, First Vice-president of the National Association of Regulatory Utility Commissioners (NARUC), and member of NARUC’s Electricity Committee.

The Working Group’s purpose is strictly research and analysis and I hope that you, your colleagues, and your organizations find this report to be a useful tool for understanding international trade agreements and possible implications for state and local authorities. Should you have any questions about the Working Group or this interim report, do not hesitate to contact me or Jeremy Meadows, Committee Director for NCSL’s Economic Development, Trade & Cultural Affairs Committee (202-624-8664, jeremy.meadows@ncsl.org).

Best Regards,

George Eskridge
Representative, Idaho House of Representatives
Chair, Working Group on Energy & Trade Policy
Interim Report – GATS & Electricity
Working Group on Energy & Trade Policy
Representative George Eskridge (Idaho), Chair

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Working Group on Energy & Trade Policy

This is an interim report of the Working Group on Energy & Trade Policy. Working group participants are public officials and staff from state legislatures, public utility commissions, attorneys general, city and county attorneys, municipal utilities, and several national associations. Participants contribute as individuals; their organizations may not have taken a position on the issues raised by this report.

The chair of the working group is Representative George Eskridge of the Idaho House of Representatives, and the convening organization is the National Conference of State Legislatures. Jeremy Meadows is NCSL’s staff director for trade issues. Counsel to the working group is the Harrison Institute for Public Law, Georgetown University Law Center. See page 28 for working group participants.

The working group invites comments on this report. If you have comments, please contact Jeremy Meadows at 202-624-8664, <Jeremy.Meadows@NCSL.org>.
Executive Summary

This is an interim report of the state and local Working Group on Energy & Trade Policy. The mission of the working group is to investigate the potential impact of trade rules on domestic energy policy, raise questions of potential interest to U.S. trade negotiators and report back to state and local governments and associations.

1. Why regulation of electricity is a trade issue. The European Union, the United States and other countries have published proposals that would apply trade rules under GATS, the General Agreement on Trade in Services, to regulation of electricity by federal, state and local governments. If implemented, these international proposals might conflict with state electricity policy and alter the balance of domestic regulatory authority between states and the Federal Energy Regulatory Commission (FERC). Trade rules of GATS apply to more than cross-border trade; they also cover state or federal regulation of utilities or domestic electricity markets where multinational companies have a commercial presence.

2. Meetings with U.S. trade negotiators. In 2004, the Working Group on Energy & Trade Policy consulted three times with U.S. trade negotiators, who described the meetings as timely, productive and unprecedented.

3. GATS commitments and negotiations. In subsectors where countries make a “specific” commitment, GATS trade rules prohibit quantitative limits on service suppliers and policies that place foreign firms at a competitive disadvantage. The current U.S. commitment applies to “services incidental to distribution of electricity.” Proposed commitments would extend to services incidental to transmission, wholesale trade and access to transmission facilities. In addition, WTO members are negotiating GATS rules that would apply to domestic regulation generally, not just to specific commitments.

4. Selected domestic measures and risk of trade conflict. The working group has identified questions about the potential impact of current or proposed GATS commitments regarding:
   - State and local monopolies for distribution – States regulate investor-owned utilities, publicly owned utilities and rural coops, many of which are monopolies for distribution of electricity. The United States has committed to follow a GATS rule that prohibits monopolies for services incidental to distribution.
   - Ancillary services for transmission – Scheduling and system control is an “ancillary” service that is necessary for transmission of electricity. The service is provided by exclusive service suppliers such as regional transmission organizations (RTOs), among others. A proposed GATS commitment would prohibit authorizing exclusive suppliers of services “incidental” to transmission of electricity.
   - Native load preferences – Many states require the utilities they regulate to serve local customers at regulated rates (“native load”) and to reserve their transmission capacity to serve this native load. A proposed GATS commitment would obligate the United States to “ensure” that third-parties (e.g., independent wholesalers or generators) would have access to the same transmission facilities.
   - Rates of federal power marketing authorities (PMAs) – The Bonneville Power Administration is the largest of four federal PMAs that supply wholesale electricity to preferred customers (mostly publicly owned utilities) at the cost of production, which is usually well below wholesale market prices. A proposed GATS commitment would prohibit policies that create an advantage for domestic suppliers of wholesale services.
   - Renewable portfolio standards (RPS) – A growing number of states require the utilities they regulate to obtain a minimum quota of electricity from “renewable” sources that do not include the large-scale hydroelectricity that Canadian suppliers sell into the U.S. wholesale market. A proposed GATS commitment would prohibit policies that disadvantage foreign suppliers of wholesale services.
   - Regulation “in the public interest” – State Public Utility Commissions (PUCs) regulate rates and corporate acquisitions under a broad “public interest” standard that considers cost to consumers, environmental protection and financial stability of a utility. A proposed GATS rule would limit domestic regulation to measures that are no more burdensome than necessary to ensure the quality of a service.

5. Next steps. The working group will continue its analysis and will explore potential safeguards for state and local authority such as excluding selected topics from GATS commitments (e.g., renewable energy) or limiting the coverage of trade rules on domestic regulation of services.
Interim Report – GATS & Electricity

Working Group on Energy & Trade Policy

I. Introduction – why regulation of electricity is a trade issue

A. Trade negotiations cover domestic policy

Energy services are regulated by state and federal governments in a balance of power that is controversial and in a state of flux. In the midst of a national energy debate, state and local officials were surprised to learn that international negotiations on electricity may cover many of the same policy decisions being debated in Congress and state capitols.

These negotiations are part of the “successive rounds of negotiations” under the General Agreement on Trade in Services (GATS), which is one of the trade agreements administered by the World Trade Organization (WTO).¹

Recent developments in the GATS negotiations include a January 2005 communication in which the European Union requests a commitment from the United States (a commitment to follow trade rules) on “services related to energy networks, services for the supply of energy (wholesale, trading and brokering of energy products), services for the final use (energy auditing and energy saving) and decommissioning.”² The next deadline for the United States to respond to the EU request is May 1, 2005.³

The United States has not disclosed its request in the GATS negotiations. However, since 1994, the United States has committed itself to follow trade rules regarding “services incidental to energy distribution”⁴ and has more recently published proposals that cover services incidental to transmission, wholesale trade, and third-party access to transmission facilities. The similarity of U.S. and EU proposals suggests that a trade deal on electricity is nearing completion.

The U.S. trade negotiators first published their proposals on electricity trade in 2000 in response to the WTO Energy Services Coalition, which was co-chaired by executives of Enron and Halliburton.⁵ Since that time, the nation has witnessed the California energy crisis, the fall of Enron, and a heightened sense of caution on the part of state and local policy makers.

While some states have decided to restructure their electric utilities, every state is considering some type of reform in the electric industry. Considering the value of such experimentation, there remains a consensus among states that they should retain jurisdiction to decide whether, how and when to reform.⁶

For example, approximately 17 states now require their utilities to unbundle their retail sales. Approximately 28 states have chosen not to unbundle retail sales, at least not yet. They believe that preserving state regulation of vertically integrated utilities will provide a more stable and efficient energy
future. A third group of approximately six states has delayed, suspended or changed a decision to restructure retail electricity trade.³

Another debate surrounds the efforts of FERC, the Federal Energy Regulatory Commission, to push for a competitive national market for wholesale electricity. Some states have embraced the FERC model for restructuring, and some states have resisted. After years of contentious debate, there are signs of mutual accommodation between FERC and the states. In Congress, the energy debate remains quite fluid, but there is strong bipartisan support for preserving state regulatory authority, while still moving toward a more reliable and efficient system for transmission of electricity.⁴

The question on the mind of state and local officials is this: Will international negotiations lock the country into trade commitments on electricity at a time when domestic policy on electricity is still in a state of flux? More specifically, would proposed trade commitments expand the legal basis for federal preemption of state regulatory authority, whether under the trade rules directly, under rules of the federal energy regulators, or some combination of federal rules and international commitments?

Before analyzing this question, it helps to consider why electricity is a trade issue in the first place.

B. Foreign subsidiaries are major players

Most Americans think of international trade as just goods and services crossing the border. There is, in fact, a growing cross-border trade in electricity between Canada, the United States and Mexico – with the United States becoming an importer of more and more electricity. Trade rules might enable Canada to challenge state or federal policies that constrain the ability of Canadian utilities to sell electricity into the U.S. market. For example, Canadian officials have complained that renewable energy policy discriminates against Canadian exports of electricity.

An even larger dimension of international trade is called “commercial presence” in GATS, which includes foreign ownership of domestic utilities. Commercial presence entails not only established subsidiaries, but also “establishment,” the ability of a foreign firm that is not in the U.S. market to establish its presence in the U.S. market.

Companies based in the United States are also major players abroad. Between 1993 and 1998, energy investments and sales through foreign subsidiaries of U.S. companies increased by well over 100 percent. This expansion was a direct response to domestic restructuring in the UK, Australia and Latin America, and it prompted Enron to lead the advisory committee that guided USTR’s proposals for GATS negotiations.⁷ The U.S. trade negotiators seek to expand access to foreign markets for U.S. firms and their subsidiaries.

At the same time, European holding companies are acquiring American subsidiaries. As a consequence, state regulation of electricity is an issue under GATS because service providers in the United States are owned by foreign firms, whose home country is a member of the WTO.
Selected Subsidiaries of Foreign Companies in the U.S. Electricity Market

<table>
<thead>
<tr>
<th>Electricity Subsector</th>
<th>Subsidiary &amp; Foreign Owner</th>
<th>Geographic Market</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vertically integrated utilities</td>
<td>PacifiCorp (US) – owned by Scottish Power (UK)</td>
<td>California, Oregon, Washington, Utah, Idaho and Wyoming</td>
</tr>
<tr>
<td>Transmission companies</td>
<td>GridAmerica (US), managing partner is National Grid (US) – owned by National Grid Transco (UK)</td>
<td>Transmission and related services in Illinois, Indiana, Missouri, Ohio and Pennsylvania</td>
</tr>
</tbody>
</table>

C. GATS commitments could affect state and federal policy

The office of the United States Trade Representative (USTR) leads trade negotiations for the United States. In a recent article, the USTR’s electricity market analyst explained the relationship between the GATS negotiations and domestic regulatory reform (or “deregulation”) of electricity markets:

Should trade negotiations, which endeavor to expand trade, seek to bring about regulatory reform? Some feel this would be taking the mandate for trade policy too far. * * * While trade negotiations do not appear to be an appropriate means for bringing about regulatory reform, they nevertheless may offer an instrument for supporting reform programs.  

This statement raises questions. Would trade negotiations offer an instrument that FERC can use to restructure electricity markets and state-level regulation? Once trade commitments are in place, would they tie the hands of FERC, eliminating FERC’s ability to develop flexible regional solutions? In the future, trade commitments could be used to persuade states to deregulate, but also to pressure or force states to deregulate. Once made, trade commitments have teeth; they can be enforced through both international and domestic means.

- **International enforcement.** Foreign governments can enforce trade commitments through trade sanctions (punitive tariffs) against U.S. goods and services in any sector. For example, a trade conflict on electricity could lead to trade sanctions on financial services, telecommunications or agriculture.

- **Domestic enforcement.** The U.S. government has an obligation to “take such reasonable measures as may be available to it to ensure their observance [of trade commitments] by regional and local
governments and authorities and non-governmental bodies within its territory.”  Those measures include:
- withholding of federal funds, permits or other kinds of discretion; and / or
- federal preemption of state or local law that conflicts with trade rules.\(^{16}\)

The threat of preemption is not new in the electricity sector, but FERC may only preempt where it is authorized to do so by federal statutes. Trade agreements can create a broader scope of federal power to preempt than FERC has asserted in the past.\(^{17}\) As outlined below, various GATS proposals appear to cover state regulation of:
- State and local monopolies for distribution
- Native load preferences
- Renewable portfolio standards
- General utility regulation in the “public interest”

The GATS proposals also appear to cover federal policies in which most states have a very strong interest. These include FERC regulation of:
- Ancillary services for transmission
- Rates of federal power marketing authorities (PMAs)

**D. Response by state and local officials**

There is substantial overlap of the EU GATS request, the U.S. GATS proposals, and FERC’s domestic policy agenda. Considering the potential impact on state regulatory authority, state and local officials recognized the need to monitor the trade negotiations, much as they would any other federal initiative that affects state sovereignty. In 2003, the chair of Idaho’s joint Committee on Energy, Rep. George Eskridge, expressed his general concerns in a letter to USTR. When there was no response, the NCSL committees on energy and trade invited USTR to attend their December 2003 meeting to discuss the Idaho questions. USTR’s senior energy negotiator did attend and agreed that the questions merited further consultations between USTR and state and local officials.

To prepare for consultations with USTR staff, NCSL took the lead and created the state and local Working Group on Energy and Trade Policy in early 2004. Participants in the working group include public officials and staff of state legislatures, utility regulators, attorneys general, city and county attorneys, local governments, municipal utilities and several national associations that represent state and local public officials in Washington, DC.

Before meeting with U.S. trade negotiators, the working group identified questions about potential conflict between trade rules and domestic energy policy. Given the current language of GATS trade rules and proposed commitments, many of these questions are unanswerable because the trade rules are open-ended or ambiguous and will remain so until a WTO dispute panel interprets them.

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\(^{15}\) NCSL considers federal preemption of state regulation of the electric industry to be wholly inappropriate and unacceptable and opposes federal standards to govern state electric utility regulation or retail ratemaking by state commissions. State jurisdiction should not be eroded.”

NCSL 2004-2005 Policies, Electric Industry Restructuring
Following these meetings, the working group prepared this interim report to assess the potential impact of trade negotiations on domestic electricity policy and to raise questions of potential interest to U.S. trade negotiators. It does not take positions or make recommendations. The working group compiled the report based on contributions from participants (as individuals) with diverse expertise and professional experience. Thus, the report is not designed to reflect the views of any individual or organization. No individual or organization has "endorsed" the report as a policy statement; nor is it binding on any individual or organization.

II. Meetings with U.S. trade negotiators

The working group consulted three times with U.S. trade negotiators, including the staff of USTR and other federal agencies, in early 2004: (1) an introduction to state and local concerns (February 20th), (2) a discussion of procurement questions (April 16th), and (3) a workshop on the scope of services provided by state-regulated monopolies, federal power authorities and independent transmission companies (April 30th).

Much of the meeting time with U.S. trade negotiators was devoted to explaining how states regulate electricity services and how the utilities that states regulate compete in national markets, even though they may be perceived as monopolies in their local markets.

The trade negotiators described these meetings as timely, productive and unprecedented. However, their condition for meeting was that all conversations were off the record. In this report, the working group honors that commitment by not using any information, opinions or interpretations provided by U.S. government staff at those meetings.

Fortunately, there are numerous other sources for this report including public documents filed with the WTO by the United States and other countries engaged in electricity negotiations. In addition, the WTO Secretariat, the Organization for Economic Cooperation and Development (OECD), United Nations agencies, and other organizations have published reports on the status of negotiations on trade in services, including electricity.
III. GATS commitments, negotiations and trade rules

If GATS trade rules apply to domestic electricity policy, will GATS tip the balance of power between states and the federal government (or between states and foreign governments)? This part of the report explains the legal context for answering that question. It summarizes GATS coverage and trade rules, including some of the commitments that have been proposed in the current round of GATS negotiations.

Given the open-ended language of GATS rules and current wording of proposed commitments, it is difficult to interpret the actual risk of conflict until it is too late – when there is an actual dispute and a WTO panel decides what the language should mean. As demonstrated in the recent WTO dispute on Internet gambling, the intent of U.S. negotiators as to the meaning of a GATS commitment is irrelevant. What matters is whether the language of commitments is sufficiently precise to avoid a trade dispute. If it is not, then the burden is on the United States to limit its commitment by listing the categories of law-making that a commitment does not cover.18

A. General Scope of GATS

There are several international agreements that cover U.S. domestic policy on electricity, including agreements on trade in goods, trade in services and investment. The following chart summarizes this legal context.

### International Agreements that Cover Electricity

<table>
<thead>
<tr>
<th>Electricity as . . .</th>
<th>Applicable International Agreements</th>
</tr>
</thead>
</table>
| Trade in goods       | WTO - GATT, General Agreement on Tariffs & Trade  
                       | NAFTA, North American Free Trade Agreement, chapters 3 (goods) and 6 (energy) |
| Trade in services    | WTO - GATS, General Agreement on Trade in Services  
                       | NAFTA chapter 6 (energy) |
| Foreign investment   | NAFTA, chapter 11 (investment)  
                       | FTAs, chapter 10 (investment)  
                       | WTO – TRIMs, Trade Related Investment Measures |

This report focuses only on how GATS covers electricity. However, before we summarize GATS, it is worth noting that more likely scenarios for international trade conflict involve other agreements such as NAFTA’s chapter 11 (foreign investor protection) or the General Agreement on Tariffs and Trade (trade in electricity as a good). For example, a Canadian investor may be more likely to challenge domestic U.S. policies that promote renewable energy than is the Canadian federal government.19 Recent WTO decisions have made clear that trade agreements are likely to overlap, with multiple agreements covering a single government policy measure.20

There are three questions for determining whether a trade agreement, in this case GATS, conflicts with domestic electricity policy. The questions involve coverage, conflict with trade rules, and exceptions that excuse conflicts.

1. **Coverage.** The first step of analysis is, does GATS cover the electricity measure in question? GATS applies to any government “measure” at any level of government “affecting trade in services.”21
GATS defines trade in services in terms of four modes of delivery, two of which are relevant to this report, as highlighted below:

1. **delivery across the border, such as transmission of electricity from Canada to the United States,**
2. delivery to a visiting consumer from another country, such as when a Canadian tourist visits New York,
3. **delivery through “commercial presence,” such as when a UK corporation acquires a subsidiary in Oregon,** and
4. delivery by a visiting supplier from another country (a “natural person”), such as when an engineer from India comes to the United States to practice engineering.

When a nation commits to follow GATS trade rules, it does so with specific reference to each of these modes of service delivery. With electricity, the important modes are (1) cross-border trade and (3) commercial presence.

GATS is complex because it applies two levels of various trade rules to government policy measures. The first level includes general obligations (sometimes called “top down” obligations) that apply to all nations in the WTO unless GATS excludes a government measure from the agreement. These general obligations include Most-Favored-Nation Treatment (no favoring service providers from one country over those of another country), transparency, domestic regulation rules, and monopoly rules. GATS also calls for negotiations on procurement and subsidies of trade in services. The general rules and the general exclusions are explained below.

The second level includes “specific commitments” (sometimes called “bottom up” commitments) within over 120 service sectors and subsectors to follow additional trade rules. The rules include National Treatment (no discrimination), Market Access (e.g., no quantitative limits on the number of service suppliers), and additional commitments (such as third-party access to transmission facilities). National governments make these specific commitments in a process of ongoing rounds of “request-offer” negotiations. To a great extent, this report is concerned with how the United States proposes to define subsectors of electricity trade for purposes of specific commitments that are now being negotiated.

- **Rule conflict.** The second step of analysis is, if GATS covers an electricity measure, does it conflict with a particular trade rule? The GATS rules that are most likely to apply to electricity include “general” rules on domestic regulation and monopolies and “specific commitment” rules including, National Treatment, Market Access and third-party access to transmission facilities. These are all discussed below.

- **Exceptions.** The third step of analysis is, if GATS covers an electricity measure and there is a conflict, does GATS provide an exception that would excuse the conflict? Unlike the GATT, GATS
provides no exception for environmental resource conservation.\textsuperscript{25} GATS might excuse a trade conflict if a specific electricity measure falls within the range of policies that are designed to protect “public morals” or “human, animal or plant life or health.”\textsuperscript{26} Of the various electricity measures covered in this report, the renewable energy measures discussed in part IV.D arguably serve a health objective. However, the health exception has been interpreted narrowly so as to cover only measures that are “necessary,” meaning that the exception is only available when there are no reasonably available alternatives.\textsuperscript{27} The GATS health exception is not likely to apply in the electricity context, so further discussion of the exception exceeds the scope of this report.

In the following summary of GATS, we alter the analytic sequence (coverage, conflict with trade rules, exceptions) by presenting the relevant trade rules first. Explaining the trade rules first provides a context for understanding the importance of GATS coverage. For example, if you know that a state law on licensing monopolies violates a trade rule that prohibits monopolies, you can better appreciate why it is important to limit the commitments that would apply GATS coverage to the state law in the first place.

B. GATS trade rules

1. General rules. The trade rules under Part II of GATS, General Obligations and Disciplines, apply to any measure that affects trade in services, so long as the law is not excluded by the “government authority” test, which described in the following section.

   a) \textit{Domestic regulation.} Negotiations are now underway (and behind schedule) at the WTO’s Council on Trade in Services to “develop any necessary disciplines” for rules that would apply generally to domestic regulation.\textsuperscript{28} Two of these rules would obligate the United States to ensure that electricity measures relating to qualification requirements and procedures, technical standards and licensing requirements are:

   \begin{itemize}
   \item (1) “based on objective and transparent criteria,” and
   \item (2) “not more burdensome than necessary to ensure the quality of the service.”
   \end{itemize}

   As part of the current negotiations, WTO member-nations presented examples of measures that they believe violate these rules. Among the examples are sub-federal measures that are different from one state to the next or measures that differ from federal standards,\textsuperscript{29} a description that fairly applies to federal and state electricity policy in the United States.

   The WTO negotiations on domestic regulation are at a substantive stage. Proposals or analysis have been submitted on topics of central concern to state and local utility regulators, for example, the

\begin{table}[h]
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\begin{tabular}{|l|}
\hline
\textbf{Examples of measures that might violate GATS trade rules on domestic regulation include ...} \\
\hline
\textbf{“Federal and subfederal licensing requirements are different, making a license ... obtained in one state not valid in other states.} \\
\hline
\textbf{Different sub-federal regulations for recognition of qualifications.”} \\
\hline
\textit{WTO Secretariat,} \\
\textit{Note on members’ examples} \\
\hline
\end{tabular}
\end{table}
burden/necessity test (WTO Secretariat), transparency disciplines (United States), and disciplines on licensing procedures (European Union), including licensing at the sub-federal level.  

b) Monopoly disciplines. GATS provides that the United States “shall ensure” that a monopoly in its territory (even if regulated by a state) complies with U.S. specific commitments and:

(1) “shall ensure that such a supplier does not abuse its monopoly position” when it provides services covered by a specific commitment outside of its monopoly service area; and

(2) if a state grants monopoly rights for services covered by a specific U.S. commitment, the United States must negotiate compensatory adjustments in its schedule of GATS commitments.

2. Sector-specific rules. The following rules apply to measures that regulate those sectors in which the United States makes a specific commitment unless the United States limits its commitment. There are currently no limits on the current U.S. commitment for “services incidental to distribution of electricity.”

a) Domestic regulation. Pending implementation of the general rules on domestic regulation (noted above), the transparency and least-burdensome rules also apply to new measures (post-1994) in subsectors in which the United States made a specific commitment (e.g., services incidental to distribution of electricity). While intended as an interim means of protecting the value of commitments, this provision may gain in importance as the WTO continues to negotiate (and not implement) the rules on domestic regulation as a general obligation.

b) National Treatment. GATS prohibits discrimination against foreign service providers, including treatment that “modifies the conditions of competition in favor of services or service suppliers” of domestic firms compared to foreign firms. Various WTO and GATT panels have interpreted National Treatment to require “effective equality of opportunities.”

c) Market Access. GATS prohibits several kinds of quantitative limits on service suppliers, including government measures that limit their number “in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test,” limits on the number of service operations, or measures that restrict or require specific types of legal entity or joint venture.

d) Third party access to transmission and distribution networks. GATS allows countries to negotiate commitments in addition to National Treatment and Market Access. U.S. trade negotiators have proposed an additional commitment to third-party access to transmission and distribution networks. This proposal is modeled on...
the existing additional commitments for telecommunications.\textsuperscript{36}
Under the telecom model, these commitments would obligate the United States to:
• ensure that major suppliers provide access to, interconnection to, and use of “public ... transport networks and services” and other “essential facilities” on terms, conditions and cost-oriented rates that are reasonable;\textsuperscript{37} and
• maintain appropriate measures to prevent major suppliers from “engaging in or continuing anti-competitive practices.”\textsuperscript{38}

According to the WTO, this language requires WTO Members to ensure access “whether or not they have liberalized” the service.\textsuperscript{39} Unlike the other GATS rules, which merely prohibit certain measures, the third-party-access rules appear to require a government to act, or as some call it, to make a pro-competitive commitment.\textsuperscript{40}

C. GATS coverage of domestic measures

1. General exclusions from GATS coverage

a) Government authority exclusion. GATS does not cover a service if it is provided under “government authority,” which means that the service “is supplied neither on a commercial basis nor in competition with one or more service suppliers.”\textsuperscript{41} This provision is sometimes referred to as the government authority exclusion. The way this works is that GATS does cover a service if it is either supplied “on a commercial basis,” or if it is supplied “in competition with one or more service suppliers.”\textsuperscript{42} This test does not exclude a supplier of electricity service simply because the supplier is a monopoly (no competition). That is only one prong of the “neither/nor” test.

The government authority test would exclude electricity services if a monopoly produces electricity and then provides it free to consumers. Such services would be neither commercial nor in competition. However, even non-profit, publicly-owned utilities and cooperatives usually charge for their services at cost.

The WTO Secretariat has opined that any kind of charge or user fee renders a service “commercial” in nature.\textsuperscript{43} That would mean that even nonprofit providers (providers-at-cost) are covered by the general provisions of GATS. Most regulated utilities in the United States are for-profit, investor-owned corporations. Some of the utilities are monopolies, but they all provide “commercial” services in the sense that they charge for their services. In short, the “government authority” exclusion of GATS is likely to exclude monopoly providers of free electricity.

b) Government procurement exclusion. GATS does not apply certain trade rules (Most-Favored-Nation Treatment, National Treatment and Market Access) to procurement unless the government agency purchases the electricity or service “with a view to commercial resale or with a view to use in the supply of services for commercial sale.”\textsuperscript{44} In other words, if a government agency purchases electricity or related services and resells to local consumers, then the procurement
exclusion does not apply, and those services are covered by GATS rules on MFN Treatment, National Treatment and Market Access.

2. Specific commitments under GATS

a) Existing U.S. commitment

In 1994, the United States made a specific GATS commitment on “services incidental to energy distribution.” The WTO Secretariat and the United States seem to agree that the U.S. commitment on services incidental to distribution includes regulation of “transmission and distribution services on a fee or contract basis of electricity.” The WTO further explains that this commitment “seems to include transport and distribution of electricity ... when these services are operated by an independent services supplier and not by a vertically integrated manufacturer.”

The WTO’s conflation of distribution with transmission, as well as “incidental” services with “actual” distribution and transmission, continues in the current GATS negotiations. Recent WTO minutes report that “the Indonesian paper [which responds to earlier proposals by the United States] stated that transmission and distribution of electricity was included in services incidental to energy distribution.”

In short, the scope of the current U.S. commitment on “services incidental to distribution” is open to retroactive interpretation as recently happened in a WTO decision against the United States on Internet gambling. According to both U.S. and WTO sources, it may apply to services incidental to transmission as well as distribution. In addition (as noted below), it may be difficult to separate the services that are necessary for transmission and distribution from the actual transmission and distribution of electricity.

Since existing U.S. commitments may cover state regulation of distribution and federal regulation of transmission to some degree, the question becomes whether the proposed commitments now being negotiated offer more clarity or limits on the existing commitments.

b) Proposed commitments

The working group does not have access to the negotiating proposals that the United States is currently presenting to other countries. However, the European Union has recently released its GATS request, and U.S. negotiators have circulated informal proposals to the WTO in public documents over the past several years. Based on this record, the leading GATS negotiators appear to be advancing several proposals that could affect state and local policy, as well as federal policies that have a direct impact on state and local government.

Recent WTO minutes indicate that the United States, Japan and Chile...
have proposed a “Guide for Scheduling Commitments on Energy Services in the WTO.”\textsuperscript{49} This guide is part of WTO negotiations on how to index the energy sector into a set of common sub-sectors with standard terms for use in negotiating GATS commitments. The working group has not seen this index.

Based on previously published recommendations (not official U.S. requests or offers), there appear to be several proposed commitments that would affect state and local interests. These include:

1. services incidental to transmission or distribution;
2. wholesale, trading and brokering services, and
3. access to transmission facilities.\textsuperscript{50}

\textbf{IV. Selected domestic measures and the risk of trade conflict}

In the electricity sector, Congress has chosen to maintain a system of dual sovereignty – a sharing of regulatory power between the states and the federal government. Generally, the federal government regulates transmission and wholesale electricity trade, while states regulate generation and retail distribution of electricity.

As noted above, states differ in their approach to restructuring (or “ unbundling”) traditional electric utilities. While not all states have decided to restructure their electric utilities, every state is considering some type of reform to its electric industry, including both de-regulation and re-regulation. There is a consensus among states that they should retain their current regulatory authority to decide whether, how and when to reform.\textsuperscript{51}

The general concern of state and local officials is that if GATS trade rules apply to domestic energy policy, GATS will influence the balance of power between states and the federal government (or between states and foreign governments) in a way that is not desirable. This part of the report identifies potential trade conflicts regarding a number of selected domestic measures, some state and some federal. The sections below follow the same methodology for assessing the potential for conflict between GATS rules and a state or federal energy policy:

- **Domestic measure** – First, which domestic “measure” is at risk of a potential trade conflict under GATS?

- **Coverage** – Second, is that measure covered by GATS? GATS coverage involves two steps of analysis,
  - The first step is whether a measure is covered by the general provisions of GATS. Does the measure affect a service that is either commercial or supplied in a competitive market? If not, then the measure is excluded from GATS and the specific commitments do not apply to the measure.
  - If the measure is covered by GATS generally, the second step is whether a specific commitment applies to the measure. Potential specific commitments on electricity include the following services:
    1. services incidental to transmission and distribution,
    2. wholesale trade, and
    3. operation of transmission facilities.

- **Potential for conflict** – Third, which trade rule is most likely to create a potential conflict? The trade rules that apply when there is a specific
commitment include National Treatment, Market Access and third party access.

In the sections that follow, this report identifies “GATS questions” where there is an issue of GATS coverage of state or federal policy or where there is a potential risk of conflict between a trade commitment and domestic policy. The questions are denoted in the text with a “?” in the following format:

? **GATS question – scope of services incidental to distribution.** What is the scope of “services incidental to distribution of electricity”? Is it possible to cover the incidental services that are necessary for distribution and not effectively cover the distribution itself?

### A. State and local monopolies for distribution

1. **Domestic measure.** As noted above, approximately 28 states continue to regulate vertically integrated utilities. Generally, vertically integrated utilities operate within monopoly service areas and provide services at all three stages of electricity supply: generation, wholesale transmission and retail distribution. For example, within its service area, Idaho Power provides transmission and services incidental to transmission, and it has a monopoly for distribution and services incidental to distribution. Idaho Power also buys and sells electricity in the national wholesale market.

   Approximately 17 states have required their vertically integrated utilities to separate transmission from distribution functions. However, in the wake of problems with deregulation in states like California and Montana, approximately six states have delayed or suspended their process of restructuring vertically integrated utilities. For example, to stabilize rising electricity prices, California re-established certain monopoly functions and entered the wholesale market as a purchaser of electricity through long-term wholesale contracts.

   In addition to licensing vertically integrated utilities, many states license municipal utilities and consumer-owned cooperatives, which are monopoly providers of distribution and services incidental to distribution. They purchase some or all of their electricity on the wholesale market for resale to local consumers.

2. **Coverage.** GATS covers state regulation of distribution monopolies generally if those utilities operate either commercially or in a competitive market. Idaho Power is an investor-owned utility that provides electricity services for a profit, so its services are commercial in that sense. There is no language in GATS to support the position that electricity services are not “commercial” just because they are provided
by a regulated monopoly. Coops and municipal monopolies may not operate for a profit, but they do charge to recover the cost of their services, so their services are “commercial” in that sense.

**GATS questions – commercial suppliers.** The plain language of GATS appears to generally cover distribution monopolies because they are commercial in the sense that they charge for their services.

- Are there any grounds for saying that charging for electricity at cost is not “commercial”?
- Are there any grounds for saying that for-profit distribution monopolies are not commercial?

Assuming that GATS applies generally to distribution monopolies, the question of GATS coverage shifts to whether distribution monopolies are covered by a GATS specific commitment.

In 1994, the United States made a specific GATS commitment to “services incidental to energy distribution,” which is retained in the current U.S. offer in the GATS negotiations. The scope of this commitment is unclear in terms of the makeup of “services incidental.” The GATS negotiations to adopt an energy index could clarify the commitment, but publicly available documents do not add clarity.

**GATS questions – scope of services incidental to distribution.**

- What is the scope of “services incidental to distribution of electricity”?
- Is it possible to cover the incidental services that are necessary for distribution and not effectively cover the distribution itself?

The WTO has indicated that governments are free to maintain a monopoly, so long as the country does not make a specific commitment in that service sector, or if it does, so long as the country limits its commitment with respect to that monopoly. The United States has no such limits on its commitment regarding services incidental to distribution.

As noted above, the WTO Secretariat and the United States seem to agree that the U.S. commitment on services incidental to distribution includes regulation of “distribution services on a fee or contract basis of electricity.” The WTO says that this commitment “seems to include ... distribution of electricity ... when these services are operated by an independent services supplier and not by a vertically integrated manufacturer.” The implication is that when a vertically integrated manufacturer provides services to itself, it is not engaging in trade. However, as noted above, vertically integrated utilities charge their ultimate consumers for integrated services, and many vertically integrated utilities contract out for services incidental to distribution (e.g., meter reading or billing services).

**GATS questions – fee or contract services.**

- Is a monopoly covered by a GATS commitment on services incidental to distribution only when the monopoly contracts out for that service?
- If so, what is the basis in GATS for covering monopolies that contract out a service, but not nearby monopolies that provide the
same service for themselves?

? **GATS question – scope of U.S. market.** In a broader sense, some states have retained their traditional monopolies, while other states have unbundled their monopolies.
  o In this regard, is the United States a single market to which GATS applies, or is it 50 state markets?
  o If the United States is a single market from the view of GATS, then why would a GATS commitment not apply to those states with monopolies?

3. **Potential for conflict.** Assuming that distribution monopolies are covered by GATS generally and also by a commitment to services incidental to distribution, as noted above, the GATS rule on Market Access might conflict with state measures that authorize distribution monopolies. This rule prohibits limits on the number of service providers in the form of monopolies or exclusive service suppliers. However, many states do not require their monopolies to contract out incidental services.

? **GATS question – unbundling of services incidental to distribution.**
  If state and local monopolies are covered by a commitment on services incidental to distribution, then does the Market Access rule require that states unbundle those incidental services?

? **GATS question – preemption.** Would a conflict between state-regulated distribution monopolies and the GATS Market Access rule authorize the federal government to preempt state law without a specific act of Congress?

Another GATS rule is the general requirement that if the United States grants monopoly powers, then it has to renegotiate its GATS commitments by providing compensatory access to other markets. This appears to apply to situations where a state deregulates a utility and later decides to provide those services as a single state supplier (as California has done) or through a regulated monopoly.

? **GATS question – renegotiation of GATS commitments.** If a state decides to re-regulate a service in a monopoly setting after a failed experiment in deregulation, then would the United States have to renegotiate its GATS commitments?

Multi-national energy service companies, both at home and abroad, have an interest in expanding GATS coverage to distribution of electricity in the United States. This is because GATS rules such as Market Access function to open markets and limit government measures that create barriers to entry or growth of the company. With regard to services incidental to distribution of electricity, foreign subsidiaries of U.K. companies, such as National Grid U.S. and PacifiCorp, own and operate distribution utilities in the United States. For example, Massachusetts Electric is a National Grid U.S. subsidiary that provides distribution services to 1.2 million customers.
B. Ancillary services for transmission

1. Domestic measures. Generally, FERC regulates interstate transmission and wholesale trade of electricity. Transmission involves more than the physical movement of electric power over transmission lines. In addition, transmission requires a set of “ancillary services” that are necessary to ensure that transmission occurs when and where the electricity is needed and that the transmission does not overload or destabilize the grid. Industry actors use the phrase “ancillary services” in different ways, and there appears to be no standard definition or index listing a common set of “ancillary services.” Any effort to define and classify these services is further complicated by the fact that some regulators use the phrase “interconnected operations service,” which appears to be a broader category that includes certain types of “ancillary services.” These variations in language create room for expansive interpretations if a WTO panel decides a challenge to domestic electricity measures.

This being said, FERC Order 888 does single-out and define six specific “ancillary services” and requires that they be provided with actual transmission because they are “necessary for providing basic transmission service to a customer.” The first ancillary service listed in Order 888 is “scheduling, system control, and dispatch service” (hereafter, scheduling and system control). This is the service to “schedule the movement of power through, out of, within or into [a transmission provider’s] control area.” The service also “requires action by both the customer who provides information about a transaction and the control area that evaluates and accepts (schedules) the transaction,” as well as “dispatch [of] generating resources to maintain generation/load balance and maintain security during the transaction.”

By necessity, scheduling and system control is provided within a service territory. This service plays an important role in FERC’s policy to promote regional transmission service. In late 1999, FERC issued Order 2000, which promoted the voluntary formation of Regional Transmission Organizations (RTOs). RTOs operate transmission facilities on a regional basis, scheduling the movement of power across the transmission grid. In other words, one of the core functions of an RTO is to provide scheduling and system control. This service is not unique to RTOs; all transmission providers, including the traditional vertically integrated utilities, must use the same service as well.

2. Coverage. GATS covers FERC regulation of scheduling and system control generally if that service is provided either commercially or in a competitive market. All transmission providers, including RTOs, charge for scheduling and system control as provided in their open-access transmission tariffs, which are approved and regulated by FERC, so the service is commercial in that sense. Moreover, it should be noted that scheduling and system control is only one of six defined “ancillary services” in FERC Order 888, so GATS may cover the other services as well.

Assuming that GATS applies generally to scheduling and system control, the question of GATS coverage shifts to whether the service is covered by a GATS specific commitment. As noted above, the current U.S. GATS commitment appears to cover services incidental to transmission as well.
as distribution.\textsuperscript{71} U.S. trade negotiators have recommended a GATS commitment for “services ancillary to transmission and distribution of electricity,” which arguably includes scheduling and system control, as well as other ancillary services.\textsuperscript{72} The intent of the proposal is not, however, to cover the actual transmission of electricity.\textsuperscript{73}

The scope of this commitment is unclear in terms of the makeup of “services incidental.” The GATS negotiations to adopt an energy index could clarify the commitment, but publicly available documents do not add clarity.\textsuperscript{74}

? \textbf{GATS questions – scope of services incidental to transmission.} The term “incidental” differs from the term “ancillary” that regulators use in the United States.

- What is the scope of “services incidental to transmission”?
- Are “incidental” services synonymous with “ancillary” services, including the services that are necessary for transmission of electricity?
- Are any “interconnected operations services” included within the scope of “incidental” services?
- Is it possible to cover the services that are necessary for transmission and not effectively cover the transmission itself?

3. \textbf{Potential for conflict.} Assuming that the service of scheduling and system control is covered by GATS generally and also by a commitment on services incidental to transmission, as noted above, the GATS rule on Market Access might conflict with FERC regulation of this service. The Market access rule prohibits government appointment of “exclusive service suppliers.”\textsuperscript{75}

FERC Order No. 888 requires that transmission providers “must provide” and transmission customers “must purchase” scheduling and system control, as well as another service called “reactive supply and voltage control from generation sources.”\textsuperscript{76} All FERC-regulated transmission providers operate on a regional or control-area basis, which means that they are the sole service providers of these two required ancillary services within their service areas.

A GATS commitment to refrain from using exclusive suppliers for scheduling and system control may seem implausible. Yet the comparison of three transmission providers – CAISO (California), MISO (Midwest) and PJM (Mid-Atlantic) – shows that there are choices of degree, even when a monopoly service is involved. Both the MISO and PJM tariffs appear to allow for the contracting out of scheduling and system control to companies that operate at the sub-regional level of a control area.\textsuperscript{77} For example, GridAmerica, an independent transmission company that serves five states within MISO, provides scheduling and system control within its service area. GridAmerica is managed by a subsidiary of National Grid Transco, a U.K. corporation.\textsuperscript{78} In contrast, CAISO does not contract out scheduling and system control.\textsuperscript{79} In other words, RTOs and other transmission providers (including vertically integrated utilities) have choices: Contract out the service or provide it in-house? One regional control area or sub-regional control areas? Three year contracts or 10-year contracts?
GATS questions – Market Access and ancillary services.

- Does a GATS commitment on services incidental to transmission conflict with FERC rules that require transmission providers (including RTOs) to be the exclusive suppliers of scheduling and system control service?
- Could a GATS commitment on services incidental to transmission obligate FERC to change the way it regulates the sole providers (including RTOs) of scheduling and system control or other ancillary services?

GATS question – preemption. Does a GATS commitment authorize FERC to preempt states that do not restructure monopoly provision of services incidental to transmission?

A GATS commitment on ancillary services is consistent with the GATS purpose of opening domestic markets. However, such a GATS commitment may be inconsistent with FERC rules that establish scheduling and system control as a monopoly function of RTOs and other transmission providers. Application of Market Access rules to ancillary services makes it possible for multinational companies (such as GridAmerica) to cite GATS commitments as a reason they should be able to compete for ancillary services (including scheduling and system control) with other sub-regional suppliers or perhaps even the RTO itself.

C. Native load preferences

1. Domestic policy. In most states, the state public utility commission (PUC) licenses electric utilities to operate under a “service obligation.” This obligation is to serve any retail user that requests electricity service within the utility’s service territory. The industry term for serving this in-state demand is “native load.” Federal law also requires the federal power marketing administrations (PMAs, e.g., the Bonneville Power Administration) to serve native load, which includes cooperatives and municipally owned utilities. Under this service obligation, utilities reserve a portion of their transmission capacity to serve their native load, and they manage congestion in transmission through “curtailment,” meaning they suspend access to transmission to external customers if there is a conflict with serving native load.

The Energy Policy Act of 1992 provides for nondiscriminatory open access to the transmission grid to support development of wholesale electricity markets. In Order 888, FERC ordered investor-owned utilities that own transmission lines to make any unused portion of their capacity available to third parties for transmission of wholesale electricity through the utility’s service area (known as “wheeling” electricity).

Wholesale marketers have complained to FERC that native load preferences are discriminatory, and one filed a lawsuit, claiming that the preferences violate Order 888. FERC rejected that complaint, but it has described native load preferences as “problematic” in more recent cases.

2. Coverage. GATS covers regulation of native load preferences (by states or by FERC) generally if the transmission is provided either commercially or in a competitive market. Native load preferences are part of
transmission services provided by for-profit, investor-owned utilities. However, the preferences cover transmission capacity that a utility reserves for itself. Yet even then, utilities charge their customers for the transmission facilities and service, so it is commercial in that sense. For this reason alone, transmission capacity appears to be covered generally by GATS.

It could be argued that a utility’s internal transmission capacity is not provided in competition with another supplier. Yet even the transmission capacity that is not reserved is sold by the utility to external wholesale suppliers who usually have multiple routes to wheel their electricity to a given destination. Moreover, some parts of the U.S. market have unbundled all transmission services, so those parts of the market are competitive. Thus, the presence of competition depends on timing and availability of local transmission alternatives.

\begin{itemize}
\item \textbf{GATS question – general coverage of transmission capacity.}
\begin{itemize}
\item Does the “competition” test of the government authority exclusion apply to the United States as a national market?
\item Or does it apply to specific states or regions in a way that transmission capacity might be in competition in one state, but not in competition in a neighboring state?
\item Would GATS apply if a utility’s transmission capacity is only sometimes supplied in competition?
\item Does GATS apply to a utility when it is serving itself, but still charging its consumers for the service?
\end{itemize}
\end{itemize}

If GATS applies to the U.S. electricity transmission market like Swiss cheese, depending on changing local conditions of competition, then there might be circumstances in which native load preferences are not generally covered by GATS. But there is nothing in the plain language of GATS to suggest that is the case.

Assuming that GATS applies generally to native load preferences, the question of GATS coverage shifts to whether the preferences are covered by a GATS specific commitment.

The proposed GATS additional commitment on third party access would apply to “major suppliers” of “essential facilities” for transmission networks and services.\(^{87}\) In the first GATS case to interpret third party access to telecommunications facilities, the WTO defined “major supplier” in keeping with domestic competition authorities.\(^{88}\) In the electricity sector, FERC regulates competition using a “market power” test, which looks to whether a company is a pivotal supplier in a state or region with the ability to materially affect participation in that market.\(^{89}\) In some states, investor-owned utilities and PMAs are the predominant transmission suppliers, and in other states, there are alternatives such as independent transmission companies or RTOs. In other words, coverage of the GATS commitment on third party access may depend on market conditions that vary from one state to another.

\begin{itemize}
\item \textbf{GATS question – major suppliers.}
\begin{itemize}
\item Would a GATS commitment that applies to “major suppliers” of “essential facilities” for transmission apply to investor-owned
utilities and PMAs in states where they are still the predominant supplier of transmission services?
  o If so, would the commitment apply to such a utility when it operates outside of the area in which it is a major supplier?

3. **Potential for conflict.** Assuming that native load preferences are covered by GATS generally and also by a commitment to third party access, as noted above, the GATS rules on third party access might conflict with state laws. The related GATS rule would require ensuring third party access on terms, conditions, and cost-oriented rates that are “reasonable.” The first GATS case to interpret the rule on third party access found that Mexico’s interconnection rates for telecommunications were unreasonable because the rates excluded price competition for access to telecom facilities.

These rules may conflict with native load preferences. The very purpose of the preferences is to limit third-party access and to avoid price competition by reserving transmission capacity for native load.

“[R]ates ... whose uniform nature excludes price competition ... do not provide [reasonable] access to ... transport networks ...”

_WTO Panel, Mexico - Telecom_

? **GATS question – native load.** Would a GATS commitment to third party access conflict with transmission practices that are designed to avoid price competition for third-party access by reserving transmission capacity for native load?

? **GATS question – anti-competitive practices.**
  o Has FERC or another federal agency described as “anti-competitive” the practices of state-regulated utilities or PMAs?
  o If so, could such statements be grounds for challenging state or PMA native load preferences under this trade rule?

? **GATS question – preemption.**
  o Would a GATS commitment to third party access obligate the United States to take affirmative action to implement the commitment?
  o If so, would this commitment obligate the federal government to preempt state policies (that do not ensure third-party access) without a specific act of Congress?

### D. Renewable portfolio standards

1. **Background.** A growing number of states are adopting policies to promote use of renewable energy sources as a result of growing environmental concerns. Recently, the Western Governors Association adopted a resolution in support of renewable energy as part of a “clean and diversified” energy strategy for Western states. The “renewable” sources usually include wind, solar, small-scale hydro, geothermal and biomass, among other sources. These sources are based on being more environmentally friendly than conventional electric power generation methods. Thus far, none of the sources include large-scale hydropower stations generating greater than 100 megawatts.
As of January 2005, 18 states and the District of Columbia have adopted mandatory Renewable Portfolio Standards (RPS), which require certain percentages of energy sold or consumed in a state to come from renewable resources – either presently or in the future. The states include Arizona, California, Colorado, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas and Wisconsin.  

A second group of nine states encourage but do not require use of renewable sources. These states include Arkansas, Delaware, Illinois, Michigan, Missouri, Montana, New Hampshire, Ohio, and Oklahoma.  

2. **Coverage.** GATS covers RPS measures generally if renewable energy suppliers operate either commercially or in a competitive market. Renewable energy is supplied in a competitive market in most states, including states with monopolies for distribution. Some monopolies meet their RPS obligations by purchasing electricity from renewable sources from competitive markets, and all utilities charge their customers for the renewable energy.

? **GATS question – commercial or competitive suppliers.** The plain language of GATS appears to generally cover RPS because renewable energy is commercial in the sense that some utilities purchase it in the competitive market and utilities charge their customers for electricity from renewable sources. Are there any grounds for saying that renewable electricity is not purchased “in competition” or that it is not sold on a “commercial basis”?  

Assuming that GATS applies generally to RPS measures, the question of GATS coverage shifts to whether the purchase of electricity from renewable sources is covered by a GATS specific commitment.

The EU recently requested a U.S. commitment to wholesale energy services. U.S. trade negotiators have proposed making commitments based on an index that includes wholesale markets, trading and brokering (including sales) and retail supply (including sales). Based on the plain language of “wholesale” trade, these proposed commitments appear to apply to RPS measures that require utilities to purchase a certain percentage of their electricity from renewable energy sources. A question could be raised as to whether the term “wholesale” services might be interpreted more narrowly than the plain language connotation of “sales” so as to cover only transaction services and not the electricity being purchased.

? **GATS question – scope of wholesale commitment.** Would a GATS commitment to “wholesale trade” somehow not include the actual
electricity that utilities purchase? For example, might the commitment apply only to transaction services?

3. **Potential for conflict.** Assuming that RPS measures are covered by GATS generally and also by a commitment to wholesale trade, as noted above, existing or proposed GATS rules might conflict with the state laws. First, the National Treatment rule prohibits *de facto* discrimination when a measure works to the disadvantage of foreign suppliers. In addition, U.S. negotiators have recommended a “variety of principles aimed at ensuring the greatest possible market opening.” One of the principles is “technological neutrality,” meaning that “Market Access commitments should be made without regard for the technology used to provide energy services ...”\(^{101}\)

Canadian officials and policy analysts have already argued that mandatory portfolio standards place Canadian utilities at a competitive disadvantage.\(^{102}\) Canadian utilities aim to sell their surplus generation capacity from large-scale hydro stations into the U.S. wholesale market.

To date, RPS measures exclude large-scale hydro. For example, the New Jersey RPS excludes electricity generated by large-scale hydropower stations that produce more than 30 megawatts.\(^{103}\) Approximately 96 percent of Canadian hydro capacity is produced by hydro generating stations of greater than 30 megawatts, and roughly 60-65 percent of total Canadian exports of electricity to the US are produced from hydropower.\(^{104}\)

Whether this amounts to a violation of National Treatment depends on whether an RPS measure “modifies the conditions of competition in favour of services or service suppliers” of the United States compared to suppliers from Canada.\(^{105}\) Defenders of RPS measures assert that a differential impact on large-scale hydro “does not translate into *de facto* discrimination against Canada” because RPS sources do not discriminate against imports any more than they discriminate against U.S. producers of hydroelectricity.\(^{106}\)

**GATS question – National Treatment and burden of proof.**

- What is the market (or “like product”) for considering National Treatment of Canadian utilities under RPS measures? Is it the U.S. electricity market as a whole (including non-renewable sources), or is the market limited to renewable sources of electricity? If the latter, is large-scale hydro “like” the RPS sources of renewable energy (including small-scale hydro)?
- What is the burden of proof to support a claim that RPS measures, which are facially neutral, change the conditions of competition so as to violate National Treatment? It is enough that the RPS measures exclude large-scale hydro, or would Canada have to prove a certain effect on the ability of Canadian utilities to compete?

In addition to National Treatment, the U.S. proposal on “technological neutrality” for Market Access commitments appears to be at odds with RPS measures, which by nature are technology preferences. They are not neutral. The Market Access provisions of GATS do not prohibit quotas on “inputs” of electricity supply,\(^{107}\) so the issue is whether a neutrality principle would cover electricity inputs.
? **GATS question – technological neutrality.** Would a GATS principle of technological neutrality prohibit quotas regarding inputs to electricity supply based on renewable energy technology?

? **GATS question – international preemption.** Would a conflict between state RPS measures and National Treatment or technological neutrality authorize the federal government to preempt state law without a specific act of Congress?

### E. Rates of federal power marketing administrations

1. **Background.** Congress established five Power Marketing Administrations (PMAs) as federal agencies (now under the Department of Energy) to sell low-cost hydroelectric power from federal dams to largely rural areas that needed electricity in order to develop economically. Of the four PMAs that still exist, the oldest and largest is the Bonneville Power Administration (BPA). The others include the Western, Southwestern and Southeastern Power Administrations (see map).

   While the federal government produces about 10\textsuperscript{11} percent of electricity sold in the United States, BPA provides about half the electricity used by Northwestern states (Oregon, Washington, Idaho and Western Montana) and operates over 75 percent of the region's high-voltage transmission assets.\textsuperscript{108} BPA constructs, operates, and maintains the nation's largest high-voltage transmission system. The measure in question is the method by which BPA sets its rates for wholesale electricity.

2. **Coverage.** GATS covers BPA rate setting generally if BPA sells wholesale power either commercially or in a competitive market.\textsuperscript{111} BPA’s wholesale services are like any commercial operation, except for its mandate to sell to public utilities (co-ops and municipal utilities) at cost.\textsuperscript{112} Even if selling at cost is not commercial, BPA competes with other service providers. For example, BPA customers are free to purchase from Avista and BC Hydro.

? **GATS question – commercial or competitive suppliers.** GATS appears to generally cover BPA rates based on the plain language of GATS and the fact that BPA customers are free to buy electricity from other suppliers. Are there any grounds for saying that BPA rates for electricity at cost are not supplied “in competition”?

Assuming that GATS applies generally BPA rates, the question of GATS coverage shifts to whether BPA marketing is covered by a GATS specific commitment.
As noted above, both the EU and the United States have proposed a GATS commitment on wholesale markets, trading and brokering services. Wholesale power marketing is BPA’s primary function. Yet as noted above, there remains a question about the scope “wholesale” trade.

**GATS questions – scope of wholesale commitment.**

Would a GATS commitment on wholesale services somehow not include the actual electricity that BPA sells to its wholesale customers? For example, might the commitment apply only to transaction services?

3. **Potential for conflict.** Assuming that BPA rates are covered by GATS generally and also by a commitment to wholesale trade, as noted above, the GATS National Treatment rule might conflict with BPA rates. National Treatment provides that government measures must not change the conditions of competition in favor of domestic compared to foreign service providers.\(^{113}\)

BPA rates for wholesale electricity are based on the cost of producing electricity by federal dams plus BPA operating expenses.\(^{114}\) A recent report indicates that BPA’s wholesale rate is $31 per megawatt hour compared to $40 to $50 per megawatt hour on the open market.\(^{115}\)

Critics of the BPA maintain that its rates reflect advantages such as the ability to self-finance and borrow from the U.S. Treasury.\(^{116}\) Defenders of BPA argue that BPA actually pays above-market interest to the Treasury and that the cost differential comes not from any federal subsidy, but from the lower cost of hydro resources in the Pacific Northwest.\(^{117}\)

**GATS question – National Treatment and BPA rates.** Does BPA’s statutory mandate to sell electricity at cost change the conditions of competition so as to disfavor foreign wholesale suppliers in violation of National Treatment under GATS?

The prospect of a GATS commitment that could apply the National Treatment rule to wholesale electricity sales by PMAs comes at a time when there is a domestic policy debate about BPA rates. The federal budget proposed on February 7, 2005 includes legislation to require BPA and the other PMAs to charge market rates.\(^{118}\) Members of Congress from states that depend on PMA sales of electricity announced their opposition to changing BPA’s wholesale rates.\(^{119}\)

**GATS question – National Treatment and wholesale rates.** Would an international trade commitment under GATS authorize or even obligate the federal government to change the rates charged by BPA and other PMAs, even without congressional legislation to do so?

F. **Regulation of electricity “in the public interest”**

1. **Background.** State public utility commissions (PUCs) make many regulatory decisions (e.g., licensing, rates and approval of a merger or acquisition) based on whether the request is “in the public interest.” Usually, state law provides multiple factors that a PUC may consider in defining the public interest on a case-by-case basis.\(^{120}\) The reason that the
PUC exists is to exercise discretion in weighing these multiple factors— in other words, to make subjective decisions that balance competing public and private interests.\textsuperscript{121}

2. \textit{Coverage.} GATS covers state regulation generally if the regulated services are provided either commercially or in a competitive market.\textsuperscript{122} In some jurisdictions, the utilities that PUCs regulate are monopolies within their service areas. Some monopolies that PUCs regulate are private, investor-owned utilities that charge for their services, make a profit and pay dividends to shareholders. The services they offer are commercial in those ways. In addition, the state-regulated monopolies buy, sell and provide electricity services on a competitive basis outside of their monopoly service areas.

Some PUCs regulate municipal utilities and cooperatives, which usually operate as nonprofit distribution monopolies.\textsuperscript{123} They often purchase their electricity in the competitive wholesale market, and they charge for the electricity they sell to their customers.

Finally, some state-regulated utilities are no longer monopolies. They now must compete in the market under state regulation.\textsuperscript{124}

The plain language of GATS suggests that state-regulated utilities are both commercial and competitive, which means that GATS generally applies to state regulation “in the public interest.” To the extent that there are questions about the scope of GATS general coverage, these have been raised above under part IV.A on state-regulated monopolies.

Assuming that GATS applies generally to state regulation, the question of GATS coverage shifts to whether regulation “in the public interest” is covered by a GATS specific commitment.

In 1994, the United States made a specific GATS commitment to “services incidental to energy distribution,”\textsuperscript{125} which is retained in the current U.S. offer in the GATS negotiations.\textsuperscript{126} As noted above in part IV.A, states regulate distribution and services incidental to distribution.

3. \textit{Potential for conflict.} Assuming that state regulation “in the public interest” is covered by GATS generally and also by a commitment on services incidental to distribution, as noted above, the GATS rules on domestic regulation might conflict with the “public interest” standard. As explained in part III.B, negotiations are underway to implement these rules across the board to all state measures that set qualification requirements, technical standards and licensing requirements.

The GATS rules on domestic regulation require that governments make decisions based on objective and transparent criteria, and that the decisions must not be more burdensome than necessary to ensure the quality of a service.\textsuperscript{127} In general, PUC criteria are transparent, but they call for balancing and subjective judgment rather than “objective” outcomes.

\textbf{? GATS question – objective criteria and the public interest.} The GATS rule requires “objective” standards, whereas the “public interest” standard requires a PUC to balance competing public
interests. What is the nature of objectivity, and does it permit balancing of competing interests?

The nature of balancing competing interests is that a regulatory decision will be neither the most burdensome nor the least burdensome, but something in between. Sometimes the competing interests involve quality of service (e.g., reliability), but sometimes they involve environmental protection, financial stability of the utility, affordability of rates for most consumers, or economic development of the community at large.

? **GATS questions – least-burdensome test and the public interest.**
The GATS rule requires measures to be no more burdensome than necessary to ensure the quality of a service, whereas the “public interest” usually produces a compromise or middle-ground policy.

- Does GATS define “burden” only from the perspective of foreign-owned firms seeking to compete in a market?
- Or does it consider the burden of externalized costs on consumers, communities, the environment or other actors?

? **GATS questions – quality of service test and the public interest.**
The GATS rule limits the objective of domestic regulation to ensuring the quality of a service, whereas the “public interest” takes into account other factors such as environmental protection.

- Does GATS exclude consideration of public interests beyond the scope of the quality of a service?
- Does GATS exclude cost to consumers as a dimension of “quality of service”?

V. **Next steps**

May 1st of 2005 is the next date by which WTO nations must post their “offers,” which are publicly announced commitments in specific subsectors. Since 1994, the United States has committed itself to give National Treatment and Market Access to “services incidental to distribution of electricity.” The most recent U.S. offer (March 2003) states that the United States may expand the offer “to include additional services. The specific content of commitments for services ... will be developed pending the results of discussions concerning a proposed guide for scheduling commitments on energy services.”

The Working Group on Energy & Trade Policy convened with a concern that the United States may be finalizing a guide for energy commitments, as well as negotiating commitments on electricity in particular, without first understanding the potential impact on domestic policy or state authority to regulate electricity. The working group successfully initiated an unprecedented yet fruitful exchange and has studied the relevant issues. This report seeks to inform the negotiating process and create a framework for continued dialogue between trade negotiators and state and local officials. Specifically, this report identifies over 50 questions on the potential impact of GATS negotiations, with each question in a specific context of federal, state or local policy on electricity. The working group

“The ... issue is the need to address the overwhelming uncertainty about the meaning of the provisions of the GATS. *** Some of these provisions are so obviously problematic that they cry out for substantive re-negotiation. ”

Jeffrey Lang,  
**Former Deputy USTR**  
January 21, 2000
hopes that U.S. trade negotiators and other interested parties will find this report to be a useful resource.

The working group styled this report as “interim” for several reasons. First, it was not possible to do a thorough analysis of the issues given the time constraints and limited information on GATS negotiations. There are several next steps that the working group may take to further investigate the potential impact of GATS negotiations on domestic regulation of electricity.

1. **Coverage of proposed commitments.** Time did not permit study of several measures of interest to participants in the working group. The working group may extend its analysis of specific measures, including questions that may be of interest to U.S. trade negotiators.

2. **Trade rules on domestic regulation.** Negotiations continue at the WTO on trade rules that might cover domestic regulation across the board, not just within specific sector commitments. The United States is likely to be a pivotal player on such topics as how “licensing” is defined, when a measure becomes more burdensome than “necessary,” and whether the WTO should limit the scope of legitimate regulatory objectives. The working group may look more closely at these proposals, which go to the core of state regulatory authority.

3. **Potential safeguards.** The working group may also identify potential safeguards to avoid conflicts between trade rules and governing authority. For example, the range of potential safeguards may include these options:
   a. **Clarify the text of GATS**, particularly the provisions on domestic regulation that are currently being negotiated at the WTO.
   b. **Clarify and limit the existing U.S. commitment** to “services incidental to distribution of energy” so as to carve out state regulatory authority over distribution monopolies and other state or federal policies that may be covered by an expansive interpretation of this commitment by the WTO.
   c. **Clarify and limit any new commitments** that would adversely affect state regulatory authority or federal regulation of a rapidly changing system of wholesale trade and transmission.

This report is also “interim” in the sense that GATS is only one aspect of trade negotiations that could affect electricity, and electricity is only one of several energy concerns of state and local governments, which include natural gas and oil, among others. For example, the GATS negotiations include a potential U.S. offer that appears to cover siting of new natural gas pipelines and storage facilities. Proposed FTA chapters on investment and cross-border trade in services may affect electricity and other energy concerns. The working group expects to study these agreements and issues as well.

The working group thanks participating contributors and U.S. federal officials and invites comments on this report and potential next steps. If you have comments or questions, please contact Jeremy Meadows at 202-624-8664, <Jeremy.Meadows@NCSL.org>.
Working Group Participants

Working group participants are public officials and staff from state legislatures, public utility commissions, attorneys general, city and county attorneys, municipal utilities, and several national associations.

Chair of the working group – Representative George Eskridge, Idaho House of Representatives, Co-chair of the Idaho Committee on Energy, member of the NCSL Energy Committee.

Convening organization – National Conference of State Legislatures (NCSL). Jeremy Meadows is the staff director for the NCSL Committee on Economic Development, Trade and Cultural Affairs.

Working group mission and participants – The mission of the working group is to investigate the potential impact of trade negotiations on domestic electricity policy, raise questions of potential interest to U.S. trade negotiators, and report back to state and local governments and their associations. It does not take positions or make recommendations. The working group compiled this Interim Report based on contributions from participants (as individuals) with diverse expertise and professional experience. Thus, the report is not designed to reflect the views of any individual or organization. No individual or organization has "endorsed" the report as a policy statement; nor is it binding on any individual or organization. Working group participants include –

- Representative Sheryl Allen, Utah House of Representatives, Co-chair of the Utah Energy Policy Task Force, Chair of the NCSL Committee on Economic Development, Trade and Cultural Affairs
- Matthew Brown, Director of the Energy Program, NCSL
- Karen Cordry, Bankruptcy Counsel, National Association of Attorneys General
- Dick Byers, Policy Analyst, Washington Utilities and Transportation Commission
- Jeffrey Conopask, Ph.D., Staff Subcommittees on Electricity and Gas, National Association of Regulatory Utility Commissioners (NARUC)
- James Harding, Senior Policy Analyst, Seattle City Light
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- Kevin McCarthy, Principal Analyst, Connecticut General Assembly
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- Nancy Skancke, member of IMLA and partner, Law Offices of GKRSE
- Grace Soderberg, Assistant General Counsel, NARUC
- Henry W. Underhill, Jr., General Counsel and Executive Director, IMLA
- Carl Wood, former Commissioner, California Public Utility Commission

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Endnotes


4 United States of America, Schedule of Specific Commitments, GATS/SC/90 (April 1994) 40.


GATS art. 1.3(a).


FERC has recently sought to preempt state law, but based on FERC’s own authorizing legislation, not on federal authority to preempt state law under trade agreements. See Jim Chen THE NATURE OF THE PUBLIC UTILITY: INFRASTRUCTURE, THE MARKET, AND THE LAW, 98 Nw. U. L. Rev. 1617 (Summer 2004) 1661-1665; “Grid battle is joined: FERC’s AEP ruling begs the question: can the feds bypass states that block transmission reform?”, 142 Pub. Utilities Fort. 20 (January 2004).


GATS art. 1.1.

GATS art. 1.2.

GATS art. II.

GATS arts. XIII.2 (procurement) and XV.1 (subsidies).

Compare GATS art. XIV (no conservation exception) with GATT art. XX(g) (conservation exception).

GATS art. XIV (b). See WTO, Report of the Panel, United States – Standards for Reformulated and Conventional Gasoline, 96-0326, WT/DS2/R, 29 January 1996, ¶ 6.21. There are other more technical general exceptions that also are not relevant to this report including measures that are: necessary to secure compliance with laws that prevent deceptive practices or protect privacy; aimed at ensuring imposition or collection of direct taxes; or the result of an agreement on avoidance of double taxation. GATS art. XIV (c), (d) and (e).


GATS art. VI.4.

WTO, Working Party on Domestic Regulation, Informal Note by the Secretariat, Examples of Measures to Be Addressed by Disciplines Under GATS Article VI.4, Annex I – Examples Contributed by Members, Job (01)/62/Rev.2 (July 12, 2002), part A, Licensing requirements and Qualification requirements; Informal Note by the Secretariat, Examples of Measures to be Addressed by Disciplines under GATS Article VI.4, JOB(02)/20/Rev.8, 16 September 2004.
31 GATS art. VIII.2.
32 GATS art. VIII.4.
35 GATS art. XVI.2(a), (c) and (e).
41 GATS art. 1.3(b) and (c).
42 Id.
43 WTO Secretariat, Energy Services: Background Note by the Secretariat, 3, September 9, 1998 (S/C/W/52) 3; Communication from the United States, Classification of Energy Services, 7, May 18, 2000 (S/C/W/27).
44 GATS art. XIII.1.
45 WTO Secretariat, Energy Services: Background Note by the Secretariat, 3, September 9, 1998 (S/C/W/52) 3; Communication from the United States, Classification of Energy Services, 7, May 18, 2000 (S/C/W/27).
46 WTO Secretariat, Background Note, id.

47 WTO, Committee on Specific Commitments, Note by the Secretariat, Report of the Meeting Held on 28 September 2004, S/CSC/M/34 (Nov. 11, 2004) ¶ 38.


53 See GATS art. I.3.

54 WTO, U.S. Schedule of Specific Commitments, GATS/SC/90 (April 1994) 40.

55 Communication from the United States, Initial Offer, TN/S/O/USA (April 9, 2003) 42.


58 WTO Secretariat, Energy Services: Background Note by the Secretariat, 3, September 9, 1998 (S/C/W/52) 3; Communication from the United States, Classification of Energy Services, 7, May 18, 2000 (S/C/W/27).

59 WTO Secretariat, Background Note, id.

60 GATS art. XVI.1.

61 GATS art. VIII.4.


63 See Harrison Institute for Public Law, Comparison of Selected Ancillary Serviced Definitions in the United States (December 2004). This chart compares definitions from FERC orders, selected transmission tariffs, and various private consultant reports. The chart demonstrates the lack of standard definitions and classifications for these services.


FERC Order 888.

FERC Order 888.

FERC Order 888.


See GATS art. 1.3.


WTO Secretariat, Energy Services: Background Note by the Secretariat, 3, September 9, 1998 (S/C/W/52) 3; Communication from the United States, Classification of Energy Services, 7, May 18, 2000 (S/C/W/27).


Id.


GATS art. XVI.2(a).

FERC Order 888.


Pacific Northwest Electric Power Planning and Conservation Act, 16 USC § 839(c) (preference to public bodies and cooperatives).

See, Idaho Code § 61-332D (Wheeling services); Snake River Valley Elec. Ass’n v. PacifiCorp, 357 F.3d 1042 (9th Cir. 2004).

2003 FERC LEXIS 2068, ORDER DENYING REHEARING AND CONDITIONALLY ACCEPTING
COMPLIANCE FILING (October 22, 2003); Arizona Public Service Company v. Idaho Power Company,
aff’g initial decision & denying rehearing, 100 FERC P 61,253, 2002 WL 3134205 (FERC) (Sept. 5,
2002); Arizona Public Service Company v. Idaho Power Company, initial decision, 91 FERC P 63,004,

84 Id.

85 The New PJM Companies, American Electric Power Service Corp., Commonwealth Edison Co., Dayton
Power and Light Co. and PJM Interconnection, LLC, Docket No. ER03-262-009, FEDERAL ENERGY
REGULATORY COMMISSION - ALJ, 106 F.E.R.C. P63,029; 2004 FERC LEXIS 487, March 12,
2004, as Amended March 25, 2004, ¶ 189 (citing a conflict between Kentucky native load preferences
and the PJM curtailment tariff); see “ALJ says AEP should join PJM, Platts T&D Magazine (Mar. 25,
2004); see also, e.g., Promoting Wholesale Competition Through Open Access Non-discriminatory
Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and
Transmitting Utilities, Docket No. RM95-8-000, Docket No. RM94-7-001, FEDERAL ENERGY
REGULATORY COMMISSION – COMMISSION, 75 F.E.R.C. P61,080; 1996 FERC LEXIS 777,
ORDER NO. 888; FINAL RULE, April 24, 1996, 98-100.

86 See GATS art. I.3.

87 WTO, U.S. Schedule of Specific Commitments, Supplement 2 (Telecommunications), Attachment –
Reference Paper, GATS/SC/90/Suppl.2 (Apr. 11, 1997) ¶2.2; WTO, Services Agreement, Annex on
4, 2005.

88 Mexico – Measures Affecting Telecommunications Services, Report of the Panel, WTO, WT/DS204/R

89 See “Denied SMD by Energy Bill, FERC to Focus on Market Power Test – Brownell, Platts T&D

90 WTO, U.S. Schedule of Specific Commitments, Supplement 2 (Telecommunications), Attachment –
Reference Paper, GATS/SC/90/Suppl.2 (Apr. 11, 1997) ¶2.2; WTO, Services Agreement, Annex on
4, 2005.

91 The WTO panel found that "rates which exceed cost-based rates to this extent, and whose uniform nature
excludes price competition in the relevant market of the telecommunications services bound under
Mexico’s Schedule, do not provide access to and use of public telecommunications transport networks
and services in Mexico ‘on reasonable … terms.’” Mexico – Measures Affecting Telecommunications

92 Western Governors Association, Clean and Diversified Energy Initiative for the West, WGA Resolution
04-14 (June 22, 2004, sponsored by Governors Richardson and Schwarzenegger), available at


94 See Jeff Deyette, “Powerful Solutions: Seven Ways to Switch America to Renewable Electricity,” Union
2004), viewed March 2, 2005; Western Governors Association, Clean and Diversified Energy Initiative
for the West, WGA Resolution 04-14 (June 22, 2004, sponsored by Governors Richardson and
Schwarzenegger) 4 (hydro is not one of the resources listed), available at


97 See GATS art. I.3.


100 GATS art. XXVII.3.


GATS, art. XVI.2(c), fn. 9.


111 See GATS art. I.3.

112 Pacific Northwest Electric Power Planning and Conservation Act, 16 USC §§ 832(f) (elements in determining rates) and 839(c) (preference to public bodies and cooperatives).

113 GATS, art. XVII.3.

114 Pacific Northwest Electric Power Planning and Conservation Act, 16 USC §§ 832(f) (elements in determining rates) and 839(c) (preference to public bodies and cooperatives).


122 See GATS art. I.3.


United States of America, Schedule of Specific Commitments, GATS/SC/90 (April 1994) 40.

Communication from the United States, Initial Offer, TN/S/O/USA (April 9, 2003) 42.

GATS art. VI.4.
