



## **DISRUPTIVE ELECTRICITY TECHNOLOGIES: CHALLENGES FOR COMPETITION**

Wednesday, May 27, 2015  
National Press Club, Washington, DC

### **SUMMARY OF PROCEEDINGS<sup>1</sup>**

#### **I. Introduction**

The American Antitrust Institute (AAI) held its 15th annual Energy Roundtable on May 27, 2015 at the National Press Club in Washington D.C. The AAI greatly appreciates the generous assistance and sponsorship of both the National Rural Electric Cooperative Association (NRECA) and the American Public Power Association (APPA) in making the Roundtable possible. The AAI's Annual Energy Roundtable seeks to bring together various stakeholders and perspectives to discuss current competition policy issues in electricity markets, particularly the intersection between antitrust and regulation.

This year's Roundtable focused on the state of emerging disruptive electricity technologies, the pressures they exert on the current utility model, and the competitive issues they introduce in retail and wholesale markets. More than 40 participants from the academic, advocacy, consulting, government, industry, and trade association sectors participated in the Roundtable. AAI President Diana Moss developed the agenda and presided over the discussion. The proceedings were off the record and not transcribed. This report briefly summarizes the presentations and accompanying discussion, without attribution to any individual participant or group of participants.

The following speakers made presentations:

- Heather Bailey, Executive Director of Energy Strategy and Electric Utility Development for the City of Boulder Energy Future
- Paula Carmody, Maryland People's Counsel
- Jeff Dennis, Director of the Division of Policy Development in the Office of Energy Policy and Innovation, Federal Energy Regulatory Commission
- Jade Eaton, Trial Attorney, Antitrust Division, U.S. Department of Justice
- Mark Hegedus, Attorney, Office of the General Counsel, Federal Trade Commission

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<sup>1</sup> Prepared by Geoff Kozen, Grant Research Counsel, American Antitrust Institute.

- John E. Kwoka, Neal F. Finnegan Distinguished Professor, Department of Economics, Northeastern University
- Dave Mohre, Executive Director of the Energy and Power Division of the National Rural Electric Cooperative Association
- Diana Moss, President, American Antitrust Institute
- Jeffrey I. Shinder, Partner, Constantine Cannon
- Abraham Silverman, Assistant General Counsel–Regulatory, NRG Energy
- Paul Sotkiewicz, Chief Economist, Markets Division, PJM Interconnection

## **II. Year In Review**

**David Mohre** opened the Roundtable with a recap of the year’s major events in electricity and energy, and a forecast of the impact these disruptive technologies may have on electric cooperatives. There are four major issues facing the electricity industry: (1) evolving Environmental Protection Agency (EPA) rules on CO<sub>2</sub> under Section 111(d) of the Clean Air Act; (2) production capacity growth in natural gas markets; (3) industry-wide decreases in load growth; and (4) the emergence of disruptive technologies that facilitate distributed generation (DG), like solar.

### **A. Evolving EPA Rules**

The EPA is preparing new rules on mercury and air toxicity standards, as well as new source performance standards for new and existing plants. Its Clean Power Program, which remains in draft form, requires a 30% reduction in carbon intensity by 2030. The Program, which the EPA describes as “flexible,” relies on four building blocks: increasing efficiency at existing generation facilities, increasing natural gas generation capacity, increasing use of renewables and nuclear, and increasing end-use energy efficiency. In the wake of advocacy by utilities, the Federal Energy Regulatory Commission (FERC) has encouraged the EPA to recognize that reliability of the electric system must be maintained.

The EPA’s new rules are likely to increase the cost of coal generation and lead a shift away from coal. With substantial coal retirements/shut downs in the future, remaining coal plants must add additional environmental controls at a substantial cost, including an estimated \$400-\$700 per KW in pollution control equipment. This raises questions about whether it will be cost effective for any coal plants to stay open, or if we will see a market-wide shift to natural gas. Meanwhile, a proposed new source performance standard requires 50% carbon capture for new coal plants, which is not yet commercially feasible. If the proposal is adopted, it is likely that no new coal plants will be built in the United States.

### **B. Production Capacity Growth in Natural Gas Markets**

In the short-to-medium term, we are likely to see a strong shift toward natural gas for generation. Coal accounted for about 52% of generation for decades, but dropped to 39% by 2014, and it is expected to fall to within the range of 16-34% by 2036. Meanwhile, natural gas shifted from 16% of total generation historically, to 27% in 2014, and could rise to 30-55% by 2036. The price of natural gas will be a critical determinant of its market share, and in recent years natural

gas has been subject to price volatility. Hurricane Katrina, insufficient pipeline and storage infrastructure during the polar vortex, and other weather phenomena have been problems in the past. But with the increased use of fracking, prices have dropped precipitously and greater price stability is likely in the future. There are sufficient reserves to meet this greater demand, but prices are unlikely to stay as low as they are. With a 30–40% demand increase coming from approved liquefied natural gas (LNG) exports and domestic manufacturing, price effects are likely to follow.

### **C. Industry-Wide Decreases in Load Growth**

There has been a substantial drop in the rate of load growth over the last sixty years, especially relative to the rate of population growth. Decreasing load growth is not just an artifact of the slow economy; it also represents the effects of the shift from a manufacturing to a service economy. Alongside that change, the industry is dealing with permanent efficiency and productivity gains, as is apparent already with light bulbs and refrigerators. Meanwhile, states are pushing for even higher renewable and energy efficiency portfolio standards, arguably are a challenge for the industry. Despite the challenge, most utilities support such standards, if they are cost effective.

### **D. The Emergence of Disruptive Technologies that Facilitate DG**

Emerging technologies and more cost-effective renewables will likely further decrease load growth rates. The cost of rooftop solar has fallen precipitously to just over 20 cents per kilowatt hour (kwh). With tax credits, the cost could fall further to 10 or 11 cents per kwh. Utility solar, with tax credits, could soon be as low as five cents per kwh. But despite these falling prices, there is a qualitative difference between this intermittent resource and reliable power capable of being generated on demand. The impact of DG and combined heat and power energy systems is to reduce load by about 15%, a number that is mostly flat across the country.

The impact of DG on cooperatives is in rate decisions and planning and operating costs, and it may affect investment in future generation resources such as digital and smart hardware. Since a substantial portion of fixed costs are rolled into variable charges, a 30% penetration of rooftop solar will reduce fixed-cost recovery by about 15% and highlights the fixed cost subsidy provided by other customers rooftop solar subscribers.

Moving toward more fixed-variable rates would help solve the problem, but requires technology changes and highlights the need for sustainable ways to integrate cost-effective renewables and DG into the grid, while eliminating rate subsidies and ensuring full payment of costs for utility-provide grid connection services. These objectives have implications for setting renewable portfolio standards and the adoption of net metering vs. size limits. Several possible solutions include a fixed-variable rate model that provides fairness and equity by members and customers, separating DG members from non-DG members for cost-allocation purposes, and grid-usage charges for members with DG. In the long-term DG will not be a disruptive technology, emphasizing the need to turn it into a sustainable technology now.

### III. Highlights of the Morning Presentations - Disruptive Electricity Technologies—The Consumer, the Utility, and the Market

#### A. Morning Panel

Moderator **John Kwoka** opened the morning panel by defining disruptive technology, with an emphasis on redefining the current equilibrium, bringing new agents to action, transforming markets and consumer opportunities, and potentially redefining producer expectations. New technologies transform products, markets and alter the value of embedded technology and intellectual and physical capital. Such change is not new in the energy sector. In the past 25 years, auction markets, deregulation, consumer choice, and other changes have forced the market to adapt to new equilibria. But the market is now in a more-or-less permanent state of disequilibrium while striving to achieve the goal of providing reliable energy at reasonable cost.

The morning panel was tasked with looking at the future course of technological change. Micro grids, smart meters, DG, and independent transmission owners all raise issues in near term. Farther ahead are potentially dramatic changes in energy storage, changes in transmission, and electric vehicles, which could upend the traditional utility model. These disruptive technologies do not arise in a vacuum. There are market, regulatory, political, and social implications that all need to be addressed in the process.

One panelist discussed the issues from a broad, consumer-oriented perspective. While many of the changes that are transforming the industry are from new technologies (like smart grids), it was noted that many of the most important changes come from the public policy responses to these technologies. Net energy metering, advanced metering infrastructure (AMI) support, grants, and credits have all been introduced by states. At the federal level, there are clean power plant proposals from the EPA, FERC rules, and Regional Transmission Organization (RTO) proceedings.

But key concerns persist, and must be addressed, including accessibility to service, affordability, safety, equity, environmental responsiveness, and accountability. The current regulatory framework addresses these needs, and can be adapted to new technologies, including DG. Work remains to be done, however, to address integration among new technologies and service integration into the existing business and regulatory models.

Moving forward, policymakers should focus on three areas where consumers may be adversely affected by ongoing changes. First, there are equity and fairness issues raised by changes to net energy metering, and likely short-term cost increases. Second, data security and privacy issues arise as energy data becomes more valuable. Voluntary standards may thus no longer suffice to protect consumers. Finally, there are challenges surrounding clarifying who has oversight and jurisdiction over new products and services used in conjunction with DG.

Another panelist discussed possible competitive issues surrounding disruptive technologies. While new technology can incentivize incumbents to create more efficient and effective products, it can also lead to a “circle the wagons” effect that can involve coordination among firms. The *Allied Conduit and Tube v. Indian Head* case of 1988 provides an illustrative example

in which PVC pipe disrupted the steel conduit industry and a professional association sought to exclude PVC by setting exclusionary safety standards.

State and local governments should be vigilant in examining the economic incentives of participants who adopt standards when disruptive technology is involved. *US v. Rochester Gas & Electric* is illustrative here, which involved power co-generated by the University of Rochester for sale to other local area colleges. The local utility countered by offering a requirements contract that would have eliminated much of the benefit of building a co-generation plant, and restricted the university from soliciting other customers or providing customers with energy. This example highlights incentives surrounding utility customers also as potential utility competitors, where there may incentives to squelch potential competition.

Another panelist raised a number of issues that energy market participants will face as the industry becomes more distributed. At the moment, wholesale markets are a comfortable place to be, with adequate guidance for participants. But when the industry decentralizes, those participants may face multiple sets of guidelines, and be more exposed to different state-level regulation. Fast-chargers for electric cars are an example. Because they are expensive to build and maintain, FERC could require companies seeking to invest in them to do so independently, thus transferring risk onto shareholders. In contrast, Maryland has authorized utilities to do the same thing, but to rate-base their investment, shifting risk to ratepayers. This creates potential problems for future investment by penalizing the first-movers who shouldered their own risk. Likewise, Maryland has authorized utilities to invest in and build micro grids, with the implication that consumers bear the risk and utility shareholders reap the gains.

To address many of these problems, FERC should exercise their jurisdiction over the DG market. Whether FERC sets the right price for demand response (DR) is not important in this case. What is important is that FERC could choose to set a price, if the Commission deemed it necessary. Without the ability to aggregate products under the umbrella of wholesale markets, much will be left to the states (who would have substantial regulatory authority).

A final panelist stressed the importance of allowing the competitive process to work, and avoiding the picking of winners and losers, because those picks are likely to be incorrect. The current discussion in the industry is reminiscent of the Public Utility Regulatory Policy Act (PURPA) era. Many, including regulators, appear to think that because new technologies—especially rooftop solar—are technologically possible, it means they are certain to materialize. But this is not a given; rooftop solar still grapples with uncertain scale and scope economies that benefit traditional utilities-scale resources.

Designing markets to facilitate proper response to price signals requires knowing what drives the adoption of technology like rooftop solar. Without the grid, no DG technologies can be effectively monetized. Current, artificially low prices lead to a number of problems. For example, if rooftop solar consumers are installing for reliability, then they are not paying adequately because prices are too low at the peak. They are also over-incentivized by being connected to the grid while avoiding fixed costs, which leads to cross-subsidy. Moving to a fixed-variable rate design makes sense to combat these problems.

## B. Morning Discussion

The morning discussion hinged on how past changes reshaped the supply side of electricity markets, raising questions of access, structure, and market design, while recent changes have occurred primarily on the demand side. The discussion included the blurring of lines between retail and wholesale markets, increases in consumer choice, and developing concerns related to equity and fairness.

- ***On increased consumer choice:*** Participants noted that to understand recent moves toward increased reliance on competitive services, it is critical to understand what motivates consumers. Forcing consumers to grapple with too much data (that most neither want nor know how to deal with) is not a benefit. With issues like variable-rate contracts, consumers should be able to opt in rather than be forced to opt out. That way interested consumers can make informed decisions, while consumers who are not interested in or able to adopt more data-intensive practices can avoid the burden. In contrast, one participant stressed that consumers should not be entirely insulated from price volatility. Exposure to prices can lead to permanent adaptations, like installation of insulation, which are fundamental changes in consumer investments, not merely changes in usage. What is important is finding a way to balance the benefits of exposure to pricing pressures while still protecting low-income and low-information consumers.
- ***On dynamic retail pricing:*** Participants discussed how much of the current “change” represents technology finally catching up to economic theory. Consumers are now capable of seeing the real price of the electricity they are consuming at small intervals. Participants, however, were divided on the implications. One panelist noted that consumers know how to deal with price fluctuations—they do so on a daily basis in other markets—and concluded that it is time for wholesale prices to be translated into dynamic retail rates. Other panelists disagreed, believing that average market participants will not monitor usage and prices in small intervals, and so will not engage enough to be price responsive.
- ***On the bifurcation of new technology adaptation in organized and non-organized markets:*** Participants all agreed that it is not problematic to have different levels of adoption in different states. They stressed that this is a natural outgrowth of differing local needs. Issues like population density, different risks of natural disasters causing grid disturbances, and rates differences all affect whether markets are organized, and may also affect the rate of DG adoption.
- ***On the blurring of wholesale and retail markets:*** One participant stressed the need for a Texas-style competitive retail market, as frameworks in other states can stymie innovative entry. When natural gas prices are low and states hedge forward, other modes of generation cannot compete, even if they provide better value in the long-term. The participants also noted that the Federal Power Act was written when the industry could be cleanly divided into production and resale, and wholesale and local. But these divisions are no longer as stark as they once were, so a modernized regulatory framework would

likely be beneficial. Despite that likelihood, participants acknowledged that there was no hope for new national legislation taking regulatory authority away from states.

- ***On the erosion of foundations and the risk of the death spiral:*** Panelists disagreed on whether the death spiral represented a realistic possibility. A participant began by breaking down the market, and noting that parts of the system can sustain a competitive model, while others, like a distribution, cannot. The real problem is that these new technologies represent an alternative to distribution; any death spiral discussion should be limited to areas where such an effect is possible. One panelist believed it can happen very easily when rates are set too low and fixed costs cannot be recovered. The panelist feared that as consumers go off grid, rates will rise and reliability will drop, exacerbating grid defections. Another panelist was skeptical, noting that the death spiral assumes static regulation, rather than changing rate structures in response to, for example, the level of solar penetration. States are paying attention to the health of their local utility markets and will not simply allow them deteriorate without taking action.
- ***On non-monetizable costs:*** Participants discussed how wholesale and organized markets, in driving prices down, fail to monetize costs associated with climate change, fuel diversity risk, and national security. This is recognizably a focus on short-term efficiency, possibly at the expense of longer-term benefits. But participants conceded that there is no way to incorporate these costs without a significant change in how electricity is priced.

#### **IV. Luncheon Keynote Address**

Luncheon keynote speaker **Heather Bailey** focused on the development of a municipal power utility in Boulder, Colorado. The city is currently served by the incumbent investor-owned utility. The city has adopted a local goal of attaining the goals laid out in the Kyoto 2050 agreement, a goal which is at odds with the goal of many of other utility customers who are simply looking for reliability and low price. Boulder residents, by referendum, have made clear that they are instead focused on increased access to DG, improved demand-side management, expanded low-carbon solutions, and better utilization of renewable energy resources. The two competing goals cannot be aligned in a cost-effective way.

A second concern that motivates the City of Boulder's plan is having local ownership that is more responsive to demand for adoption of new, more environmentally stable technologies. In deciding to create a municipal utility, the city modeled seven different scenarios of supply and looked at the cost of power. They found that owning the system, including the poles and wires, was critical to creating a green supply that was cost-effective and reliable for consumers.

Several important questions have grown out of the Boulder experience. She asked how other cities or regions -- that may have substantially different goals or values relative to the Boulder population -- will be able to meet those goals under a traditional utility model. She also queried how cities and states should deal with utility non-responsiveness to consumers who want new technologies.

She noted that the power grid is likely to be around for a long time, because utilities excel at delivering reliable electricity. But there is no reason to believe that utilities are equally able to meet consumer demand in the energy-services market, including DR, behind the meter, rooftop solar, peer-to-peer power sharing, or management of micro grids. Separation of the utility-controlled grid from the services market will allow investment, innovation, and competition in the latter market.

Innovators can both bear the risk and reap the reward of creating services that consumers want, and that consumers are willing to pay for. One potential analogy is that utilities provide an “operating system,” but one that allows for a competitive marketplace for energy “apps” that consumers can purchase. Currently regulation from states limits competition in the energy services market and impedes this dynamic.

Several policy reforms will help move the country to more competitive, effective, energy markets, including peer-to-peer energy sharing, community choice aggregation, alternative energy efficiency management, removing the 120% cap on solar generation, usage of performance-based rates and grid modernization, state carbon taxes, and time of use rates.

## **V. Highlights of the Afternoon Presentations - Competitive Issues Surrounding Disruptive Technologies—Emerging Concerns, Lessons from History, and Enforcement**

### **A. Afternoon Panel**

Moderator **Diana Moss** began by noting that antitrust traditionally cares a lot about price, innovation, and output. So it is interesting to hear so many other concerns, to focus on things that antitrust does not do well like reliability, quality, and safety. But these concerns are important in the power industry, and the food industry, and so should be taken into account, for example, in merger discussions.

It is also interesting to note that there exists a middle market where the consumer is interfacing with the utility that raises issues of data privacy and consumer protection. The competitive services market poses a form of rivalry to vertically integrated utilities, which may incent vertically integrated utilities to engage in strategic, anticompetitive conduct, even in regulated areas of electricity.

One panelist described concerns about whether public or private antitrust enforcement is capable of reaching much of the emerging conduct that poses competitive issues in the electricity markets. Competitive issues stem from the declining cost of rooftop solar, which has led entrenched utilities to adopt multiple methods to thwart increasingly vibrant competition. The clash represents a classic paradigm of the real antitrust issues that matter—a paradigm that “almost always includes an established way of doing business and a disruptive technology coming along and upsetting that business model and the incumbents doing what they can to undermine that new business model.”

There are four situations where pushback is occurring: utilities are (1) requiring onerous filings by customers wishing to adopt the new technology; (2) using pricing to dissuade consumers from adopting new technology (discriminatory flat monthly charges on rooftop solar; discriminatory demand charges; revising net metering so that it is compromising viability of solar); (3) targeting consumers with deceptive conduct that may dissuade adoption; and (4) coordinating rate filings to divert market share from DG.

While each of these modes of conduct could lead to anticompetitive results, there is a “gauntlet” that any party wishing to mount an antitrust challenge must face. The gauntlet begins with challenges under *Twombly* for purported coordinated filings. It continues with challenges under *Trinko*: if the regulatory regime mandates interconnection, that precedent almost certainly rules out a successful claim. Plaintiffs must then contend with a state action argument, as well as hazard First Amendment claims stemming from *Noerr-Pennington* immunity in ratemaking filings. Finally, litigants may have to address the Filed Rate Doctrine. This complex landscape is not easy to navigate, and few claims will succeed. *Solar City v. Salt River Project* may well succeed, allowing for clarification of policy issues such as the death spiral, subsidy pricing, and others.

Another panelist focused on recent Federal Trade Commission (FTC) actions addressing issues in the energy market. FTC work at both the state and federal levels strongly encourages regulators to focus on incentives in decision-making. The FTC recently filed comments in New York’s Reforming Energy Proceeding, arguing that there should be competition over who would operate the grid, rather than an assumption that it would be an incumbent. Recent comments have also dealt with dynamic pricing in states and focusing on transparency. The agency believes strongly in price signals, but they cannot be effective unless consumers can see prices and respond. The Commission is increasingly looking at consumer protection issues in energy markets, especially related to consumer data.

The FTC has been active in Supreme Court cases that have a bearing on energy-market competition. The implications of the 2013 *Actavis* case extend beyond pharmaceuticals to the analysis of potential competition, and the recognition that antitrust harm can include the squelching of the risk of future competition. Likewise, the *Oneok* decision bears on energy markets by allowing space to litigate possible anticompetitive conduct. A finding of field preemption would have extirpated challenges, even when a good theory of anticompetitive conduct can be articulated. Finally, the FTC’s recent state action cases, *Phoebe Putney* and *NC Dental*, are important for antitrust enforcement in regulated energy markets. The cases together have clarified both prongs of the state action test, and in both cases, the Court confirmed that state action immunity and repeals of the antitrust law by implication are disfavored.

Another panelist provided insight into FERC’s thinking on disruptive technology, noting that while the morning discussion focused on the impact of disruptive technology on existing utility models, FERC has focused less on disruptiveness and more on whether there is sufficient consumer access to new services where they are desired and can be helpful. In that regard, legacy rules based on how grids used to work -- but which no longer have good technical justifications (e.g., minimum run time requirements or minimum size standards) -- can be used to exclude

rivals, and can become unfair or unjustified. As part of the modernization of energy regulations, FERC has required RTOs to eliminate some of these antiquated rules.

FERC also appears focused on market rules that fail to account for the value of new technologies. Existing technologies may provide less benefit to consumers than new, competing technologies. An example would be in frequency regulations: a new form of storage technology that can respond to increased demand in a second, compared to dated storage systems that take time to ramp up. Consumers would likely benefit from the adoption of these new devices, but utilities are compensated regardless of whether they adopt these innovations or not. The Commission is studying how to fairly compensate utilities for investment in these kinds of resources to properly incent creation of services.

There are a number of other miscellaneous projects that FERC is undertaking to ensure energy markets remain competitive where feasible. The Commission has focused on market-power screens as applied to ancillary services to combat tactics of would-be monopolists aimed at preventing potential competitors from acquiring necessary inputs. FERC has also made transparency of information an agency goal, established by Order 784, so that consumers can make informed decisions on whether to self-supply ancillary services or purchase from utilities. Lastly, FERC has focused on creating interconnectedness rules that will address issues created by solar technologies.

The Commission appears focused on ways to level the playing field such that new market participants can compete against entrenched ways of doing business. The agency is trying to make room for disruptive technologies, but also for new sources of capital and new forms of business organization. The best example of this is Order 1000, which eliminates the right of first refusal to build transmission projects. This gives non-incumbents a true opportunity to compete to build transmission projects, but more needs to be done to make opportunities truly equal—there are still inequalities in determining how needs are identified, how to assess the qualifications, and in adopting fair, open, and transparent ways to evaluate projects upon completion.

## **B. Afternoon Discussion**

The afternoon discussion focused on whether the challenges posed by disruptive technologies require new modes of regulatory and antitrust oversight or whether -- while the technologies themselves are new -- the legal response strategies are merely being recycled from the era of deregulation. Participants largely agreed that, at least on the wholesale side, the changes were “old wine in a new bottle,” and so much of the discussion focused on lessons from history and possible new concerns going forward.

- ***On utility responses to disruptive technology:*** One participant highlighted that the tacks that utilities are taking are not uncommon ways to protect market share in the face of innovative new competition. The incumbents are using levers like control of pricing, interconnection issues, and deception. A lot of incumbents restructure themselves, spin off their transmission assets into subsidiaries and compete, but these entities already have a formula rate on file with FERC, whereas new entrants will not. So it will be very hard for regional regulators to make reasoned decisions on a level playing field that involve

considering costs in an apples-to-apples way. The *Salt River Project* case raises issues of discrimination against DG solar compared to utility solar. The participant conceded that it is too simplistic to say we have seen this all before, and antitrust answers will have to be informed by the particulars, but it is very familiar.

- ***On tensions between the regulatory structure and the market, and how antitrust tools can address those tensions:*** Participants expressed concerns that the regulatory structure prevents good signaling moving through all levels of the market, and regulations at the retail level create access problems. Thus, the areas that most need antitrust enforcement tend to be the regulated ones. A discussant noted, however, that the “gauntlet” concept would inhibit most antitrust scrutiny of the conduct. Where there is no regulatory answer to anticompetitive practices designed to exclude new technologies, there should be an antitrust remedy.
- ***On the role of antitrust and the flexibility inherent in the EPA Clean Power Plan:*** Participants discussed how exclusion can be executed differently in open markets, quasi-regulated markets, and under full regulation. Discussants mentioned that in wholesale markets, exclusion is largely accomplished through interconnection issues. Wholesale market participants burden the process through a death-by-a-thousand-cuts interconnection thicket. But this is the easy case, because it falls within FERC’s jurisdiction. Participants also discussed whether there was an effective remedy absent courts regulating prices. One commentator raised the question of whether there really is a difference between pricing and interconnection, because utilities can set prices such that interconnection is not cost effective. That being the case, it is a real question whether antitrust courts are competent to address it rather than regulators. The real concern of the participants is whether or not states are sophisticated enough to deal with this type of subtle exclusion on a distributed retail level and whether any remedy other than antitrust would exist in practice.
- ***On electricity market mergers:*** Discussion centered on the difficulty of finding a regulator at any level willing to shoulder responsibility for the *Exelon-Pepco* merger. FERC appeared to conclude that the generation involved was not wholesale, but rather DG, and so was outside its jurisdictional mandate. States have traditionally not regulated generation, and so are not equipped with either the expertise or the resources to deal with such mergers; they are unlikely to exercise their merger authority in this type of situation. One commentator believed that small consumers selling excess DG to the grid represents sales to resale, meaning FERC should be able to exercise jurisdiction. The agency, in the eyes of the commentator, should adopt a longer view in case a DG revolution takes place. Otherwise, the discussants agreed, it is incumbent on the DOJ and the private antitrust bar to prevent this sort of merger.