

**THE ENERGY POLICY ACT OF 2005,
AND ITS IMPACTS ON THE PACIFIC NORTHWEST**

**Craig Gannett and Daniel Adamson
Davis Wright Tremaine LLP**

**Law Seminars International's 11th Annual Conference on
Buying and Selling Electric Power in the West
January 19 & 20, 2006**

The Energy Policy Act of 2005 (EPAct) is the first major federal energy legislation since the Energy Policy Act of 1992. Among other things, EPAct repeals the Public Utility Holding Company Act of 1935 (PUHCA), reforms the Public Utility Regulatory Policies Act of 1978 (PURPA), and amends the merger review authority of the Federal Energy Regulatory Commission (FERC).

EPAct also focuses on the electric transmission system by giving FERC jurisdiction to site transmission facilities, providing incentives for transmission infrastructure investment, and creating a new organization to insure the reliability of the bulk power system. EPAct also encourages the development of renewable resources through tax incentives, and reforms the process for relicensing hydropower facilities. It also includes several provisions aimed at preventing the type of market abuse that occurred during the Western energy crisis.

This paper describes EPAct's key provisions and examines their impact on Northwest market participants, including hydropower owners, investor-owned utilities, the Bonneville Power Administration (BPA) and other publicly-owned utilities, tribes, independent power producers, developers of renewable energy, and consumers.

I. HYDROPOWER OWNERS

A. Hydropower Relicensing Reform (Section 241)

Section 241 of EPAct significantly reforms the hydropower relicensing process, making federal agencies more accountable for their actions. Although not dramatic, these reforms give agencies an additional incentive to ensure that the mandatory conditions that they impose on hydroelectric projects during the relicensing process are cost-effective and supported by the facts.

Specifically, Section 241 makes three principle changes. First, it entitles any party to a relicensing proceeding to an expedited agency trial-type hearing within 90 days, with respect to disputed material facts regarding mandatory conditions. This allows licensees and others an opportunity to disprove factual assertions used by agencies to support mandatory conditions.

Second, it allows parties to a relicensing proceeding to propose alternatives to mandatory conditions proposed by federal agencies. The proposed alternative must be adopted by the

agency if it meets the same environmental standard, and either costs less to implement or allows for the production of more electricity, as compared with the mandatory condition proposed by the agency.

Third, before issuing any mandatory condition, the agency must document that it gave “equal consideration” to the economic and environmental impacts of the condition, including effects on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality.

The Departments of Agriculture, Commerce, and Interior recently promulgated an interim final rule establishing procedures for trial-type hearings and for the consideration of proposed alternative conditions. *Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses*, 70 Fed. Reg. 69803 (Nov. 17, 2005)(to be codified at 7 C.F.R. pt. 1, 43 C.F.R. pt. 45, 50 C.F.R. pt. 221). The interim rule applies to pending license proceedings where no license had issued as of November 17, 2005.

The interim rule mandates that the trial-type hearings be referred to an administrative law judge (ALJ) and completed within 90 days, including the presentation of evidence, the examination of witnesses, and the issuance of a final decision. The interim rule provides that the ALJ’s findings of fact are final, and cannot be overturned by other agency personnel. This is important because otherwise the ALJ’s findings could be revised or ignored by the agency personnel who submitted the mandatory condition at issue. Similarly, alternative conditions proposed by interested parties must be accepted by the agencies unless specific findings are made to the contrary.

Significantly, the interim rule also applies to the exercise of reserved conditioning authority by federal agencies. For example, under Section 18 of the Federal Power Act (FPA), the U.S. Fish and Wildlife Service and NOAA Fisheries can include language in a new hydropower license that reserves their authority to require the dam owner to install a fishway at any time during the term of the new license, which may be up to 50 years. The interim rule makes clear that the exercise of this authority 10 or 20 years after the license is issued is subject to all of the requirements of Section 241. This is extremely important because, among other things, it means that federal agencies cannot avoid the requirements of Section 241 simply by waiting to exercise their authority after the new license has been issued by FERC.

One problem with the interim rule is that it requires interested parties to seek a trial-type hearing in response to the filing of preliminary mandatory conditions, rather than in response to the final conditions submitted by agencies later in the relicensing process. This is inefficient because often the agency concerns reflected in their preliminary conditions are resolved through negotiations before final conditions are submitted. By waiting until final conditions are filed, the trial-type hearing would be used only as a last resort, after negotiations had failed. In joint comments filed earlier this week, the Edison Electric Institute and the National Hydropower Association urged the agencies to make this change in their final rulemaking.

In contrast, the interim rule appropriately provides that parties submit alternative conditions in response to preliminary mandatory conditions. This will help expedite the resolution of disputed issues by forcing the license applicant and other parties to put their alternatives on the table early in the process, and clearly articulate why their alternative meets the relevant environmental goals in a more cost-effective manner. It will also permit FERC to fully analyze the environmental impacts of the proposed alternatives in its NEPA environmental documents.

B. Production Tax Credit for Incremental Hydro (Section 1301)

A significant breakthrough for hydropower was Section 1301, which provides a tax credit of 0.9 cents per kilowatt hour for incremental hydropower produced at existing dams through capacity additions or improved efficiency. Hydropower had not been included in previously-enacted renewable production tax credits, which had mainly benefited wind power.

The credit is available for 10 years from the date the improvement is placed in service. The same credit is available to owners of existing non-hydropower dams who add turbines or other generating devices to their dams, subject to certain limitations regarding structural changes to the dam.

In either case, a key limitation is that the improvement must be placed in service by December 31, 2007 to qualify for the credit. Practically, this short timeframe may make it difficult for hydropower owners to qualify because it typically takes four to five years to plan, design, fabricate, and install a major upgrade at an existing hydropower facility, and it can take even longer if a license amendment is required. Nevertheless, this provision represents a significant step forward in recognizing hydropower as a renewable resource. If the required in-service date can be extended in future legislation, it could provide a substantial benefit to Northwest hydropower owners.

C. Incentive Payments (Sections 242 and 243)

EPAct further encourages the development of hydropower production by offering incentives payments, as opposed to tax credits, for increased capacity and improved efficiency at existing dams. However, these incentive payments are subject to Congressional appropriation, which may be difficult to obtain.

Specifically, EPAct offers incentive payments of 1.8 cents per kilowatt hour for the installation of a turbine or other generating device at existing dams, with no facility receiving more than \$750,000 in a single calendar year. Pursuant to Section 243, hydropower owners and operators of hydroelectric facilities at existing dams that make capital improvements to facilities directly related to improved efficiency by at least 3 percent are also eligible to receive incentive payments. Such payments will not exceed 10 percent of the costs of the capital improvements, or \$750,000, with respect to improvements at a single facility.

II. INVESTOR-OWNED UTILITIES

A. Reliability Standards (Section 1211)

The inclusion of reliability standards in EPAct acknowledges that the bulk power system is broadly integrated. EPAct creates federal reliability standards by providing FERC with jurisdiction over an Electric Reliability Organization (ERO), regional entities, and any user, owner or operator of the bulk power system for the purpose of approving and enforcing reliability standards.

FERC continues to finalize rules to implement EPAct's reliability provisions. The rulemaking process has been contentious because of conflicts over whether an ERO should strive to implement reliability standards on a national or regional basis. More importantly, concerns persist that FERC and/or the ERO will dictate utility operations to ensure that reliability standards are achieved. The Northwest's unique energy portfolio of intermittent resources, such as hydropower, and the prevalence of publicly-owned utilities that are not accustomed to FERC oversight means that national reliability standards may cause consternation in the Northwest.

The ERO approved by FERC will develop and enforce reliability standards and must adopt rules that: (1) assure independence; (2) equitably allocate reasonable dues, fees, and other charges among end users; (3) provide fair and impartial procedures for enforcement of reliability standards; and (4) provide for reasonable notice and opportunity for public comment, due process, openness, and a balancing of interests in developing reliability standards. Proposed reliability standards and penalties imposed on users, owners, or operators of the bulk power system are then subject to review by FERC. Once established, the ERO may delegate its standard-setting and enforcement authority to regional entities.

B. Transmission Infrastructure Siting (Section 1221)

The federal transmission siting authority contained in Section 1221 is not as strong or straightforward as it could be, but it may be enough to encourage state siting authorities to permit necessary transmission projects in a reasonably timely manner to avoid federal involvement in siting decisions.

Section 1221 requires the Department of Energy to conduct a study of electric transmission congestion, and then designate as national electric transmission corridors any geographic area experiencing electric transmission capacity constraints or congestion that adversely affects consumers. Within these corridors, FERC is then authorized to issue permits for the construction or modification of transmission facilities over property other than property owned by the U.S. or a state (i.e., private property), but only under certain circumstances.

Specifically, FERC may issue a permit if it finds that, among other things: (1) the state in which the transmission facilities are to be constructed or modified does not have the authority to do so, or to consider the interstate benefits of the project; (2) the applicant for a permit is a transmitting utility under the FPA, but does not qualify for a permit under state law because it

does not serve end-use customers in that state; or (3) the state has failed to act within one year, or has conditioned approval in a manner that does not significantly reduce transmission congestion or is not economically feasible.

Once FERC issues the permit, the holder may then acquire the necessary rights-of-way on private lands using eminent domain authority. The permit holder may proceed in either federal or state court to acquire the necessary right-of-way, including the establishment of the fair market value of the private property taken.

The Department of Energy is the lead agency for coordinating all federal authorizations and related environmental reviews, including coordination with state agencies and tribes, and establishing deadlines. If an agency denies a federal authorization or fails to act in a timely manner, the applicant or any state in which the facility would be located may file an appeal with the President. The President is then to issue a decision within 90 days, but in doing so he must comply with applicable federal law, including NEPA, the Endangered Species Act, and the Clean Water Act. How such an appeal would actually work in practice is unclear.

Of at least some interest to the Northwest, Section 1221 also allows three or more contiguous states to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies. Legislation to create such a compact is currently pending in the Washington State Legislature, although its prospects are uncertain.

These regional agencies would have authority to permit siting of transmission facilities, including facilities in national interest electric transmission corridors. FERC would have no authority to issue a permit for the construction or modification of an electric transmission facility within a state that is a party to a compact, unless the members of the compact are in disagreement and withheld approval for more than a year, or condition approval so that it will not significantly reduce congestion or is not economically feasible.

As to transmission rights of way over federal lands, Section 368 requires that the Secretaries of Agriculture, Commerce, Defense, Energy, and Interior, in consultation with FERC, states, tribes, and affected utility industries, designate corridors for, among other things, electric transmission and distribution facilities, perform the environmental review necessary to complete the designations, and incorporate such designated corridors into their land use and resource management plans. Regarding the 11 Western states, this process must be completed within two years, and must be completed within four years for the other states. Once designated, federal agencies are to expedite applications to construct or modify electric transmission and distribution facilities within the corridors.

As a practical matter, the Northwest benefits from the fact that BPA is generally not subject to State law and is able to exercise federal eminent domain to expand its transmission system. To that extent, it may not matter that the above-described process is far more convoluted than FERC's clear eminent domain authority for natural gas pipelines. However, to the extent that entities other than BPA may increasingly seek to build transmission facilities in the region, it is not clear that Section 1221 will provide them with expeditious results.

C. PUHCA Repeal (Sections 1261 to 1277)

The elimination of PUHCA's limits on investment in the utility sector will likely increase investment in this sector. Interstate holding companies and foreign investors may play a larger role in the energy industry, including increased investment in all types of energy assets. Berkshire Hathaway's proposed purchase of PacifiCorp is the prime example of this phenomenon.

The repeal of PUHCA and the potential for overall industry consolidation may also lead to large domestic or foreign utility holding companies acquiring individual utilities throughout the country. PUHCA repeal could spur the creation of national, as opposed to regional, utility companies. The pace of this consolidation will in large part be determined by the states, who will have to approve mergers and acquisitions of utility assets subject to their jurisdiction.

In place of PUHCA, EAct includes provisions that authorize FERC and state commissions to require holding companies, associate companies, and affiliate companies to provide them with books, accounts, memoranda, and other records that the commissions determine are reasonably necessary to discharge their jurisdictional responsibilities. Certain qualified facilities, exempt wholesale generators, and foreign utility companies are exempt from the information access requirement. FERC retains its authority to ensure that affiliate transactions reflect just and reasonable rates, including the denial or approval of the pass-through of costs, the prevention of cross-subsidization, and the promulgation of consumer protection regulations.

D. FERC Merger Review Authority (Section 1289)

Closely related to the repeal of PUHCA are provisions amending FERC's merger review authority. EAct raises the threshold for FERC review of electric utility mergers from \$50,000 to \$10 million, but expands FERC's merger review authority to include acquisitions of generation facilities used in interstate commerce and where FERC has wholesale ratemaking jurisdiction. EAct also requires FERC to review mergers and acquisitions involving holding company systems that include transmitting utilities.

Any merger review must determine whether the merger or transaction is in the public interest, and that the transaction will not result in "cross-subsidization of a non-utility associate company" or "the pledge or encumbrance of utility assets for the benefit of an associate company." FERC, however, may allow such cross-subsidization, pledge, or encumbrance if found to be in the public interest.

E. PURPA Reform (Section 1253)

PURPA reform has the potential to eliminate requirements that electric utilities enter into new contracts to purchase or sell electricity to existing qualifying facilities. Moreover, EAct

eliminates ownership limitations under PURPA, which could lead to increased acquisitions of qualifying facilities by holding companies and electric utilities.

Specifically, EAct repeals the mandatory purchase requirement of PURPA prospectively for qualifying cogeneration and small power production facilities that have nondiscriminatory access to: (1) independently-administered, auction-based day-ahead and real-time wholesale markets and to wholesale markets for long-term sales of capacity and electric energy, or (2) nondiscriminatory transmission and interconnection services provided by a FERC-approved regional transmission organization (RTO) or independent system operator (ISO) and competitive wholesale markets that provide a meaningful opportunity to sell capacity and electric energy to buyers other than the utility to which the qualifying facility is interconnected. The mandatory purchase obligation may also be eliminated where a qualifying facility has nondiscriminatory access to wholesale markets that are comparable to the markets described above. An electric utility may file an application with FERC demonstrating that a competitive wholesale market exists to obtain relief from mandatory purchase obligations.

F. Transmission Infrastructure Investment (Section 1241)

The goal of Section 1241 is to increase investment in transmission infrastructure to improve reliability and create competitive markets by reducing congestion. It requires FERC to issue regulations including incentives to: (1) promote capital investments in transmission regardless of facility ownership; (2) increase return on equity; (3) allow for the recovery of all prudently incurred costs of complying with mandatory reliability standards and transmission infrastructure development; and (4) encourage the deployment of advanced technologies to improve the capacity and efficiency of transmission facilities. This section also mandates that FERC provide incentives to electric utilities or transmitting utilities that join an RTO, including the recovery of costs through transmission rates charged by the utility or the RTO.

FERC has offered transmission investment incentives in the past and yet congestion persists. Whether a new rulemaking on this subject will lead to substantial new investment remains to be seen.

G. Electric Transmission Property (Section 1308)

To promote increased investment in transmission infrastructure, EAct shortens the cost recovery period from 20 to 15 years for certain transmission facilities.

H. Dispositions of Transmission Property to Implement FERC Restructuring Policy (Section 1305)

As part of the continuing effort to promote RTOs and ISOs, the American Jobs Creation Act (Jobs Bill), enacted in 2004, allowed for any taxes associated with a qualifying electric transmission transaction to be paid over eight years, rather than in a single year. As defined in the Jobs Bill, a “qualifying electric transmission transaction” is any sale or other disposition of

transmission assets to an independent transmission company, including ISOs, prior to January 1, 2007.

To further encourage RTO and ISO development, EPAct extends the Jobs Bill provision by an additional year to allow sales during 2007 to qualify for the extended eight-year recognition period. Section 1305 represents another example of federal policy to encourage the development of RTOs and ISOs.

I. Credit for Investment in Clean Coal Facilities (Section 1307)

Clean coal incentives in EPAct are designed to promote electricity generation diversity, including increased use of low-sulfur coal. Section 1307 provides for tax credits of 15 percent and 20 percent for investment in clean coal facilities producing electricity. EPAct also provides a 20 percent credit for integrated gasification combined cycle (IGCC) and industrial gasification projects. Other advanced coal-based projects receive a 15 percent credit. The Secretary of Energy may allocate up to \$800 million in credits for IGCC projects, up to \$500 million for other advanced coal-based technologies, and up to \$350 million for industrial gasification projects.

III. BPA, PUBLICLY-OWNED UTILITIES, AND TRIBES

A. Refund Authority (Section 1286)

Section 1286 impacts the Northwest energy market to the extent BPA and other publicly-owned utilities are in certain cases subject to FERC refund authority related to charges for short-term sales (31 days or less).

Specifically, EPAct provides that publicly-owned utilities are subject to FERC refund authority with respect to short-term sales. However, such refund authority only applies to sales into “an organized market in which the rates for such sales are established by Commission-approved tariff.” Therefore, in the West it will only apply to sales made into the California market, and not bilateral transactions in the Northwest.

In addition, this provision does not apply to electric cooperatives, or entities that have annual electricity sales of less than 8 million MWh. FERC may order a refund only for short-term sales made by BPA where rates are higher than the highest just and reasonable rate charged by any other entity for a short-term sale in the same geographic market and for a similar period as the sale by BPA.

B. Open Nondiscriminatory Access (Section 1231)

Section 1231 authorizes FERC to require publicly-owned utilities, including BPA, to provide transmission service at comparable rates and terms and conditions to those it requires of itself. This provision significantly increases FERC’s authority over publicly-owned transmission systems. An exemption exists for publicly-owned utilities or electric cooperatives that sell less than four million MWh of electricity per year, do not own or operate any transmission facilities

that are necessary for operating an interconnected transmission system, or meet other criteria that FERC determines are in the public interest.

C. Federal Utility Participation in Transmission Organizations (Section 1232)

Section 1232 provides for the voluntary participation of BPA and other federal utilities in RTOs and ISOs, subject to certain monitoring and participation standards. FERC will not have any authority over a federal utility's electric generation assets, electric capacity, marketed energy, or power sales activities related to participation in an RTO.

Any ambiguity as to whether BPA may participate in an RTO is now eliminated. This tends to support continued development of an RTO, or similar organization, in the Northwest.

D. Protection of Transmission Contracts in the Pacific Northwest (Section 1235)

Section 1235 effectively precludes FERC from abrogating transmission contracts in the Northwest in the name of RTO or ISO development, leaving decisions regarding contract modification to individual contract holders. Included at the request of members of the Northwest Congressional delegation, this provision is contrary to other provisions of the new law that generally enhance FERC authority.

E. Renewable Energy Production Incentive (Section 202)

The Renewable Energy Production Incentive (REPI) was first authorized in the Energy Policy Act of 1992 because the existing tax credit for renewable energy production was not available to publicly-owned utilities, which are tax-exempt. Instead, publicly-owned utilities are provided with direct payments for renewable energy production. EAct reauthorizes the REPI program for qualified renewable energy facilities first used before October 1, 2016, expands it to include tribal governments and Native Corporations, and expands it to include energy production from landfill gas, livestock methane, and ocean energy.

F. Clean Renewable Energy Bonds (Section 1303)

In an effort to further the development of renewable resources by publicly-owned utilities, EAct establishes a new tax credit for bonds issued by state and municipal electric utilities, tribes, and rural electric cooperatives to finance the construction of renewable energy facilities identified pursuant to Section 45. Among other requirements, 95 percent of the proceeds must be used within five years from the date of issuance to finance capital expenditures incurred for Section 45 qualifying facilities.

The holder of a tax credit bond receives a tax credit (set by Department of Treasury) in lieu of interest to be paid by the issuer. As a result, bond issuers can borrow financing for renewable projects with no interest. The maximum value of renewable energy bonds is capped by the Department at \$800 million, with the Department only allowed to allocate up to \$500

million to government bodies. The program began on January 1, 2006, and expires on December 31, 2007.

G. Indian Energy (Sections 501 to 506)

EPAct provides for the development of energy resources and infrastructure on Indian lands. These provisions may substantially increase the profile of tribes in the energy market and lead to increased economic growth.

Specifically, EPAct creates a new Office of Indian Energy Policy and Programs charged with: (1) promoting Indian tribal energy development, efficiency and use; (2) reducing or stabilizing energy costs; (3) enhancing and strengthening Indian tribal energy and economic infrastructure; and (4) bringing electric power and service to Indian lands. EPAct also establishes programs to provide grants, low-interest loans, and loan guarantees for energy resource and infrastructure development on Indian lands. Finally, BPA is encouraged to take a more active role in facilitating the development and use of Indian energy.

IV. INDEPENDENT POWER PRODUCERS

A. Native Load Service Obligation (Section 1233)

In contrast to several other provisions promoting the development of RTOs and ISOs, Section 1233 also allows utilities to commit their generation and transmission resources to serve native load before making such resources available for use by others. EPAct also grandfathers existing methodologies for allocations and auctions of transmission rights by an RTO or ISO prior to January 1, 2005. Where an RTO or ISO has not allocated or auctioned transmission rights, FERC is required to consider native load service obligations when authorizing future allocation methodologies. Whether this provision will impede RTO or ISO development in the Northwest is unclear.

B. Funding of New Interconnection and Transmission Upgrades (Section 1242)

EPAct authorizes FERC to approve a participant funding plan involving new interconnections and transmission upgrades, regardless of whether the applicant is a member of an RTO or ISO. The only constraints are that the plan must result in rates that are just and reasonable, not unduly discriminatory, and consistent with Sections 205 and 206 of the FPA. This essentially codifies FERC's discretion to allocate the costs resulting from new interconnections and transmission upgrades.

V. RENEWABLE DEVELOPERS

A. Production Tax Credits (Section 1301)

The extension of the Section 45 tax credit may have a significant impact in the Northwest by providing financial incentives and certainty for project developers. Several wind projects

have been developed with speculation that others will come on-line. An increase in geothermal projects may also be realized. Further extension of the production tax credit would contribute to the continued development of renewable resources in the Northwest.

More specifically, EAct extends the Section 45 production tax credit two years to allow wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation power, landfill gas, and trash combustion facilities “placed in service” before January 1, 2008, to be eligible for the credit. EAct also extends the tax credit to include two new qualifying facilities - incremental hydropower and Indian coal.¹ EAct ensures that all qualified facilities placed in service after the date of enactment, except for Indian coal, can collect the credit for a 10-year period.

B. Federal Purchase Requirement (Section 203)

While EAct does not include a federal renewable portfolio standard, it does include a federal renewable purchase requirement. This provision represents an important policy statement recognizing the role of renewable resources in the nation’s future energy portfolio. Ultimately, this provision may have the effect of spurring development of renewable resources as the federal government increases its energy consumption.

Specifically, the federal renewable purchase requirement mandates that the total amount of electric energy consumed by the federal government shall consist of 3 percent or more of renewable energy between 2007 and 2009, 5 percent or more of renewable energy between 2010 and 2012, and 7.5 percent or more of renewable energy in 2013 and thereafter, as economically and technically feasible. The term “renewable energy” includes solar, wind, biomass, landfill gas, ocean, geothermal, municipal solid water, and incremental hydro.

C. Climate Change (Sections 1601 and 1611)

EAct includes provisions addressing climate change by promoting the commercialization and deployment of greenhouse gas intensity-reducing technologies and practices. EAct also authorizes the Department of Energy to fund demonstration projects to reduce greenhouse gas intensity, subject to Congressional appropriations.

These provisions are modest, but their inclusion is evidence of the increasing likelihood that mandatory greenhouse gas regulation will become law within the next few years. Although the Senate rejected an amendment by Senators McCain (R-AZ) and Lieberman (D-CT) that would have imposed a mandatory cap-and-trade program to reduce greenhouse gas emissions to 2000 levels by 2010-2015, the Senate then passed a non-binding Sense of the Senate resolution sponsored by Senator Bingaman (D-NM), Senator Domenici (R-NM), Senator Cantwell (D-WA), and others, by a vote of 53-44.

¹ See Section I.B, *supra*, for a discussion of the production tax credit as it relates to incremental hydropower.

That resolution notes that there is a “growing scientific consensus that human activity is a substantial cause of greenhouse gas accumulation in the atmosphere,” and calls for Congress to enact “mandatory, market-based limits and incentives” to reverse the growth of those emissions. Senator Domenici’s support of this resolution is key because he is the Chairman of the Senate Energy and Natural Resources Committee, and is widely respected by his fellow Republicans, who have generally been skeptical of the need to address climate change.

Following enactment of EAct, Chairman Domenici and Senator Bingaman led the Energy Committee in holding several hearings later in the year on climate change technology and the economic impact of climate change legislation on the domestic economy. More hearings will be held this year, and it is likely that legislation calling for some form of mandatory regulation will be introduced. The shape of this legislation will be critically important to the Northwest because it may have the effect of either penalizing or rewarding the utilities that own the emission-free hydropower upon which the region depends.

D. Geothermal Energy (Sections 221 to 237)

As part of an effort to promote the development of renewable resources, EAct includes several amendments to the Geothermal Steam Act of 1970. These reforms are intended to streamline the regulatory process associated with the development of geothermal energy, which is largely located in the West.

To facilitate increased development and production of geothermal energy, the Secretary of Interior must accept nominations of land to be leased at any time from qualified companies and individuals, conduct competitive lease sales at least once every two years, and make available for two years for noncompetitive leasing any tract for which no bids were received during the course of a competitive leasing sale. EAct also amends the royalty payment process. Section 225 requires the Secretaries of Interior and Agriculture to enter a memorandum of understanding to coordinate leasing and permitting to facilitate geothermal development.

VI. CONSUMERS

A. False Statements and Market Manipulation (Sections 1282 and 1283)

A goal of EAct is to prevent the types of behavior perpetrated during the Western energy crisis. As a result, EAct includes several consumer protection measures, including a prohibition on false statements and market manipulation. Violation of these provisions may lead to substantial criminal and civil penalties for individuals and companies and result in far-reaching impacts on industry stakeholders.

Specifically, EAct prohibits an entity from willfully or knowingly reporting false statements related to wholesale electricity prices or the availability of transmission capacity. Moreover, EAct prohibits the use of manipulative or deceptive devices or contrivances (as defined by Section 10(b) of the Securities Exchange Act of 1934) in contravention of FERC rules and regulations.

B. Enforcement (Section 1284)

Consistent with provisions prohibiting false statements and market manipulation, EAct updates enforcement provisions for violations of the FPA. With new leverage, FERC may impose its authority in a more dramatic fashion to discourage such behavior.

Specifically, EAct increases criminal and civil enforcement penalties and expands the list of entities against which a complaint may be filed to include transmitting utilities, such as BPA. Criminal fines increase from \$5,000 to \$1 million, and potential imprisonment increases from two years to five years, for violations of any provision of the FPA. Violations of any rule, regulation, restriction, condition, or order are subject to a fine of \$25,000 (increased from \$500) for each day during which the offense occurs. Civil penalties are expanded for violations of Part II of the FPA, or any rule or order issued therein, and increased from \$10,000 to \$1 million per day for each day the violation continues.

C. Market Transparency (Section 1281)

EAct also includes a market transparency provision to avoid the pitfalls of the Western energy crisis. Specifically, FERC is authorized to promulgate rules to provide for the timely dissemination of information about wholesale electricity prices and transmission service. FERC may obtain the necessary information from market participants and price publications. Alternatively, FERC may establish an electronic information system to provide FERC and the public with access to information necessary to facilitate price discovery and market transparency.

Despite exemptions for information that would be detrimental to the operation of an effective market or jeopardize system security, concerns may develop over the types of disclosures that are necessary to be in compliance with market transparency rules.

D. Relief for Extraordinary Violations (Section 1290)

EAct provides potential relief to Snohomish County, Washington ratepayers in connection with power contracts entered into with Enron. Specifically, Section 1290 provides FERC with exclusive jurisdiction to determine whether termination payments included as part of certain power contracts (where the power was not delivered by the seller) are unlawful on grounds that the contract is unjust and unreasonable or contrary to the public interest. This provision applies to any power contracts entered into in the Western Interconnection prior to June 20, 2001, where no final order had been issued by FERC or any other jurisdiction determining the rights of a seller in a proceeding pending as of August 8, 2005.

The practical effect of this provision is to prevent a bankruptcy court from requiring that the Public Utility District No. 1 of Snohomish County, and its customers, pay \$122 million in contract termination payments to Enron for canceling power contracts during the Western energy crisis. The contracts covered by this provision are the subject of an ongoing FERC proceeding, which will ultimately determine if any refunds are granted.