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**ENERGY AND TELECOMMUNICATIONS SECTOR ASSISTANCE
FOR MINISTRY OF ECONOMIC POLICY AND DEVELOPMENT
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**LEGAL REVIEW OF A DRAFT LAW ENTITLED "PRINCIPLES OF
POWER GENERATION AND POWER DISTRIBUTION"**

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I. INTRODUCTION

Following the enactment and the initial implementation of the Small-Scale Privatization and the Large-Scale Privatization Laws of the Czech and Slovak Federated Republic, the National Assembly began to turn its attention to more specific matters, such as laws relating to the legal and regulatory framework for natural monopolies in the telecommunications and energy sectors and other laws, including a business code, necessary to create a market economy. In those areas where natural monopolies exist, the challenge is to create a legal and regulatory framework conducive to the investment of private capital and the provision of quality service for the Czech and Slovak people. In order to achieve these goals, regulatory agencies must be created, clear regulations promulgated and a role for private capital created.

Milbank, Tweed, Hadley and McCioy recently sent a team to the Czech and Slovak Federated Republic as part of the Deloitte and Touche consortium funded by the United States Agency for International Development. The Czech Republic Ministry of Economic Policy and Development (the "Ministry") asked the Milbank team to review a draft of a bill entitled "Principles of Power Generation and Power Distribution" (the "Principles") so that the Ministry could be better prepared for the policy issues that will emerge once public debate on the proposed bill begins.^{1/} This report presents Milbank's review of the Principles.

Among the questions addressed are the following:

(1) Do the Principles, viewed from a U.S. law perspective, create a coherent legal and regulatory framework for the electricity sector?

(2) Do the Principles create a legal and regulatory framework for the electricity sector in the Czech and Slovak Federated Republic that is consistent with current and proposed energy laws and policies of the European Economic Community, including the proposed European Energy Charter?

^{1/}In the English language translation made available to us, the explanatory paragraphs appear in italics. For purposes of our review, we have assumed that the explanatory paragraphs are not part of the draft law *per se*.

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II. THE U.S. PERSPECTIVE

The regulation of electric utilities in the United States provides a useful basis of comparison for any proposed system of regulation. This does not mean that the U.S. system represents the ideal, for the U.S. system of utility regulation has been widely criticized as cumbersome, inefficient and, at times, ineffective. Yet even with these perceived shortcomings in mind, the U.S. model can be instructive to the would-be regulator because the U.S. model provides high levels of protection for consumers against the monopoly power of utilities. Additionally, recent efforts to address the shortcomings of the U.S. system may provide valuable insights on regulatory reform and the introduction of competition into the utility sector.

Neither the structure of the U.S. regulatory system nor the techniques that it employs were designed with today's electric industry in mind. As the industry expanded, the structure evolved from purely local regulation, to regulation at the state level, and, finally, to federal regulation. The techniques of economic regulation were originally adopted from the regulation of railroads in the late 1800's. Such regulations were promulgated in order to curb the economic power of the railroads. This historical background explains in part why the U.S. system is so concerned with protecting individuals from the economic power of electric utilities. Manifestation of this tendency is found in the way rates and charges for utility services are calculated, the quality of the service offered, and the manner in which property rights of natural and juridical persons and the health and safety of the public are protected. Other regulatory goals, such as economic efficiency and industrial competitiveness, have been viewed as less important until recently.

The U.S. regulatory system has traditionally regulated every aspect of the privately-owned electric utility industry, from the procurement of fuels to the delivery of electric power to the end-user. Entry of utility companies is regulated at the state level, either through awarding an exclusive territorial franchise or by granting certificates of public need to proposed power plants and transmission lines. The federal government licenses only nuclear plants and hydroelectric facilities.

Rates for retail electric service are generally set by state regulatory authorities. Municipally-owned systems are usually self-regulated. Rates for electric power transmission and wholesale sales in interstate commerce are set at the federal level.

At both the state and federal levels, rates for long-term service are established on a cost-of-service basis. Under this system, utility rates are set so as to allow the utility the opportunity to recover its prudently incurred costs, including a reasonable return on its capital.

Regulators at both state and federal levels are also concerned with "equity" considerations. Regulatory statutes generally prohibit undue discrimination among customers or undue preferences among customer classes. Such concerns arise in the design of utility rates

since many of the utility's costs will be common to many classes of customers. Regulators design cost-based rates by allocating such costs.

In general, cost-based regulation has been criticized for providing few incentives to perform efficiently or to minimize costs. Utilities typically are allowed to recover all operating costs in their rates. Any cost savings are passed through to ratepayers. Fuel costs are often directly reflected in rates through use of a "fuel adjustment charge." Utility ratepayers receive the benefits of increases in generating efficiency or substitution of lower cost fuels. A utility's profits are based upon its invested capital. Under cost-based regulation, regulators must guard against over-investment on the part of the utility. Alternatives to cost-based regulation include incentive regulation, price cap regulation and competition.

Incentive regulation generally allows utilities to profit from achieving specified goals. For example, a utility may be allowed extra profits for conducting energy conservation programs or for achieving a targeted level of availability in its nuclear plant operations. The objective is to produce a "win-win" situation in which consumers and the utility share in the benefits of increased efficiency. The problems with this approach include diversion of management expertise to the specifics of the incentives and rewarding the utility for gains that would be realized in any event. For example, if extra profits are promised for implementing an energy conservation program, management expertise may be diverted from such areas as plant maintenance, engineering or fuel procurement. Any cost increases in these areas would ordinarily be passed through to ratepayers.

Price cap regulation regulates price levels rather than costs. Utilities are provided incentives to reduce costs without the restrictive and selective focus of an incentive program. The utilities themselves, and not the regulators, decide where to employ management expertise for the greatest cost reductions. However, an incentive also arises to allow the quality of service to deteriorate. In the United States, price cap regulation has been used in the telecommunications sector and to set rates for certain non-utility electric power producers.

Competition is generally acknowledged to be superior to any form of regulation but only where competitive markets are feasible. In the United States, electricity generation has emerged as a candidate for market-based regulation. In this context, regulators focus their efforts on assuring the competitive nature of the market. Prices are not regulated directly. However, most industry observers agree that electricity transmission and distribution are natural monopolies in which economic competition is infeasible.

III. EC LAW AND POLICY

This part of the report considers the Principles in the light of EC law and policy on energy. It is divided into two sections. The first describes in general terms the applicable EC law. The second identifies and briefly describes the future direction of the EC energy law.

A. An Overview of EC Energy Law

The current regulatory framework of the EC's energy sector is partially set forth in treaties among Member States establishing the European Coal and Steel Community ("ECSC"), which regulates coal, the European Atomic Energy Community ("Euratom"), which regulates the nuclear sector, and the European Economic Community ("EEC"), which regulates the energy sector, except for coal and nuclear energy. These treaties provide the general basis for the EC's efforts to create a single energy market.

In 1988, the Commission of the European Communities (the "Commission") proposed, in an report entitled "The Internal Energy Market" (the "Report"), the policy basis on which it intends to create an internal energy market.^{2/} The Report, prepared after the Rhodes Council meeting of June 1987, identifies the benefits of an internal energy market and the main priorities for the removal of obstacles to it and sets out an inventory of such obstacles in a series of Annexes. The Report sets forth the four policies that have formed the EC's overall energy strategy since 1988:

- the application to the energy sector of the principles set out in the Commission White Paper on "Completing the Internal Market" concerning the removal of technical and fiscal barriers to an internal market;^{3/}
- the more rigorous application of European Community law relating to the free movement of goods, state monopolies, competition rules and state aids;
- the harmonization of environmental protection standards; and
- the regulation of issues specific to the energy sector, including costs, prices, tariffs and infrastructure.

^{2/} COM(88) 238 final, 2nd May 1988 (subsequently published as a Special Issue of the "Energy in Europe" series, entitled "The Internal Energy Market" (1988)).

^{3/} COM(85) 310 final, 14th June 1985.

These four policies are also the basis of further legal developments. On 10 December 1991, the EC Heads of Government agreed to amend the EEC Treaty of Rome by, *inter alia*, adopting a new chapter entitled "Energy." The new Energy Chapter provides that, "within the framework of a market economy," the EC will:

- promote security and regularity of supplies under satisfactory economic conditions;
- ensure an effective internal market in the energy sphere;
- ensure a "suitable reaction in the event of a crisis, particularly in the oil sector;" and
- "promote the rational use of energy and the development and use of potentially profitable new and renewable energy sources."

From 1 January 1993, the EC will also be formally committed to "the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures." The amended EEC Treaty will provide:

Within the framework of a system of open and competitive markets, action by the Community shall aim in particular at promoting the interconnection and inter-operability of national networks as well as access to such networks. It shall take account in particular of the need to link island, land-locked and peripheral regions with the central regions of the Community.

Absent a fully developed EC energy policy, the entire energy sector, including power generation and distribution is subject to the general rules of Community law. Of particular importance are the provisions on:

- free movement of goods (Articles 30-36 EEC);
- freedom to provide services and freedom of establishment (Articles 52-58 and 59-63 EEC);
- competition rules (Articles 85 and 86 EEC);
- subsidies and state aids (Articles 92-93 EEC); and
- environmental protection (Articles 130R-130T).

The ECSC regulates only certain aspects of the coal industry, the Euratom, only certain aspects of the nuclear industry, and the EEC Treaty, in general terms, the rest of the energy sector. Although a more coherent approach has been evident since the 1988 Report, the large body of rules governing the various sectors of the energy industry shows the extent to which current regulation of the energy sector remains somewhat piecemeal.

In respect of electricity, the Community requires Member States to provide the Commission with information on certain large-scale investment projects, including certain conventional thermal power stations, hydroelectric power stations and overhead and underground transmission lines.^{4/} The Community has legislated on the security of energy supply,^{5/} on electricity tariff structures, on price transparency, and on the reduction of polluting emissions from industrial facilities, including power plants.^{6/} Additionally, it is clear that the EEC Treaty provisions on the right of establishment, the freedom to provide services and public procurement and supply contracts are, in principle, applicable to the electricity industry.

In respect of hydrocarbons, natural gas and oil, specialized community legislation is limited. The Community has enacted rules pertaining to:

- information requirements relating to registration and notification of certain imports;
- tariffs and pricing;
- large-scale investment projects;
- security of supply;
- maintenance of stocks and supplies;
- export restrictions in times of emergency; and
- Community aid for certain projects.

The Community is also further developing a body of rules encouraging energy efficiency and the use of renewable energy resources.

^{4/} See, EC Council Regulation 1056/72.

^{5/} See, e.g., EC Council Directive 68/414 and EC Council Directive 75/339.

^{6/} See, e.g., EC Council Directive 84/360.

B. Future Directions

Future EC energy legislation will be designed to develop further the single market approach. The Commission's 1988 Report identified a lengthy list of obstacles to the creation of a single energy market. These relate to:

- infrastructure;
- anti-competitive agreements;
- large state aids to certain sectors;
- public procurement limitations;
- taxation disparities on Value Added Tax ("VAT") and excise duties; and
- disparities in technical standards.

In the electricity sector, the obstacles identified by the Commission suggest that the Community is still very far from a unified market. Obstacles to such a market include:

- inequalities in the treatment of electricity producers in the Community, including differences in financial treatment of utilities, authorization procedures for new projects, fuel prices, and standards of environmental protection;
- national compartmentalization of transmission systems;
- non-existence of a "common-carrier" system;
- restrictions on transmission access available to industrial auto-producers and other private producers;
- disparities in national taxation, particularly the VAT;
- anti-competitive elements arising from long-term supply contracts between distributors and consumers; and
- anti-competitive elements arising from inadequate transparency of electricity prices, transfer prices, fuel prices and production costs.

In the natural gas sector, the Commission has identified a similarly large number of potential obstacles:

- an inadequately integrated piping system, including limitations on the right of transit;
- possible anti-competitive structures due to a lack of price transparency;
- disparities in technical standards, such as safety and inspection of gas appliances;
- the existence of relatively closed markets in respect of public contracts;
- limitations on free movement of gas established by national legislation and by the 1975 Council Directive restricting the use of natural gas in power stations (repealed in 1991); and
- disparities in national legislation relating to exploration and production, transport, storage, distribution and marketing.

In the second half of December 1991, the EC and other European governments, including that of the Czech and Slovak Federated Republic, are expected to sign a declaration establishing the "European Energy Charter," which will provide a non-binding framework for the development of energy policy and law across Europe based on the four policies set forth in the Commission's 1988 Report.

Although the EC has identified the major obstacles to a single market in energy, much work needs to be completed before that objective can be realized. Nonetheless, the process has already begun, and countries like the Czech and Slovak Federated Republic may want to develop legislation based on the EC work to date.

IV. U.S. AND EC LAW PERSPECTIVES ON THE THIRTEEN PRINCIPLES SET OUT IN THE "PRINCIPLES OF POWER GENERATION AND POWER DISTRIBUTION"

The following section reviews the thirteen principles set out in the Principles. The Principles consist solely of thirteen statements of principle that address various aspects of the electric utility industry. Although many topics are addressed, a number of key subjects are not covered. Chief among these are price regulation of retail and wholesale electric service, financial and corporate regulation of distribution companies, the operation of the transmission network and the general organization of the electric power industry. The

Principles direct administrative bodies to issue rules but provide little guidance on the substance of these rules and no deadlines for implementation.

In this section, the thirteen principles are reviewed sequentially from the twin perspectives of the U.S. experience with electric utility regulation and the emerging body of EC law and regulation.

The U.S. perspective is helpful for two reasons. First, privately owned electric utilities have existed in the United States for over one-hundred years, and the accumulated experience with regulating such companies is comprehensive. Second, the United States has been at the forefront of introducing economic competition into the utility sector. Although other nations have recently moved ahead in this area, the ten years of experience with competition in the United States is invaluable for evaluating what works and what does not.

Because of the changes in the EC Treaty, it will simply not be credible to develop power generation and distribution legislation outside the context of a framework of legislation that:

- (a) establishes broad policy guidelines relating to, *inter alia*:
 - security of supply;
 - environmental protection and natural resource conservation^{7/};
 - the development of appropriate energy technology^{8/}; and
 - access to, and interconnection with, a pan-European market; and

- (b) gives effect to the fundamental principles of EC law, which in this context include:
 - free movement of goods and services^{9/};
 - freedom of establishment;

^{7/} See generally Appendix II, Section E.

^{8/} See, e.g., Council Regulation 2008/90 (Appendix II, Section A-9).

^{9/} See, e.g., Council Directive 90/547 (Appendix II, Section B-5); Council Directive 91/296 (Appendix II, Section C-5).

- removal of physical, technical and fiscal barriers to trade^{10/};
 - maintenance of competition^{11/};
 - protection of the consumer and the environment^{12/}; and
 - harmonious regional development, particularly of "less-favored regions"^{13/}; and
- (c) gives effect to EC secondary legislation in the field of energy and energy-related matters (*see* Appendix II).

Principle No. 1:

The first principle explains that the Principles cover power generation, distribution and regulation. The explanatory paragraph notes that demand-side activities are not covered. It notes that the demand-side will be "covered by another regulation."

a. A U.S. Perspective

As a threshold matter, we should make an effort to ascertain the status of any draft legislation or regulations pertaining to demand-side matters, such as energy conservation and demand management. In the United States, analysis of demand-side alternatives to new power plants is increasingly being required by state regulatory authorities as part of the power plant siting and certification process.

b. An EC Perspective

The principles would be more attuned to EC law and policy if "power consumption control" matters were dealt with in the same instrument or, at least, a separate instrument were to be adopted and made effective simultaneously, together with clear cross-

^{10/} See, e.g., Council Directive 90/396 (Appendix II, Section C-4); Council Regulation 2592/79 (Appendix II, Section D-4); Council Regulation 2592/79 (Appendix II, Section D-4); Council Directive 82/885 (Appendix II, Section E-8).

^{11/} See, e.g., Council Directive 90/531 (Appendix II, Section A-8); Commission Decision 85/215 (Appendix II, Section A-5).

^{12/} See, e.g., Council Directive 94/360 (Appendix II, Section A-4); Council Directive 88/609 (Appendix II, Section A-7).

^{13/} See, e.g., Council Regulation 3301/86 (Appendix II, Section A-6).

referencing. Furthermore, the principles are unlikely to be credibly received without clear legislation and implementing regulations establishing, at a minimum:

- a clear administrative structure and appropriate administrative rules;
- public procurement rules;
- competition rules; and
- clear technical standards concerning, inter alia, consumer and environmental protection.

Principle No. 2:

The second principle serves to define two terms: (1) "public power supply" and (2) "public power distribution." Public power supply appears to be the more general definition; it covers power generation, transmission and distribution for the purpose of selling electricity. The definition of public power distribution excludes electricity generation. Public power distribution also involves selling electricity to "several individuals."

a. A U.S. Perspective

Our English language translation did not clearly reveal how many individuals must be served to bring a company within the definition of public power distribution. The second principle uses the phrase "several individuals," while the explanatory paragraph uses the phrase "numerous individuals." The issue of how many individuals to whom a company may sell electricity before becoming subject to regulation as a utility has arisen repeatedly in the United States. It is crucial to have precise definitions both as to the number of entities that may be served and the nature of the entities.

Issues have arisen in the U.S. when an industrial company generates its own electricity and organizes the generation entity as a separate corporate subsidiary. There are valid business reasons for organizing distinct industrial activities as separate corporate entities. However, there appears to be no strong public policy rationale for exposing sales among affiliated companies to public utility regulation. There is certainly no opportunity for the exercise of monopoly power in such a situation. Additionally, if the electric facilities are all located on the premises of the industrial facilities, no issues arise concerning use of public or private lands for electricity transmission or distribution. A restrictive or poorly defined law may result in industrial facilities adopting inefficient corporate structures in order to comply with ill-advised public utility regulation.

b. An EC Perspective

As a general matter, definitions should be clearly set out and, where appropriate, follow EC definitions.

Principle No. 3:

The third principle establishes an obligation for public power supply firms to be licensed. The license is to be awarded by a "state administration body," the organization of which is reportedly addressed in the "National Council Act." We have not received a copy of the National Council Act and have no information concerning its nature.^{14/}

a. A U.S. Perspective

Our translation of the explanatory paragraph accompanying principle no. 3 is unclear in a number of key respects. It appears as though the Republics will be responsible for implementing this part of the law. Thus, it appears that both a Czech and a Slovak state administrative body are contemplated. These would have responsibility for licensing power generation facilities. The explanatory paragraph also suggests that electric distribution licenses should be granted by a lower level of government. Perhaps municipal will assume this responsibility, although the legal relationship between municipal and Republic agencies is unclear.

On another subject, the explanatory paragraph clearly states that all entities involved in public power supply must be licensed. The licensing obligation applies to state companies, private legal entities and individuals. However, the draft bill does not establish any standard for the granting of licenses.

b. An EC Perspective

The grant of licenses will need to be subject to a set of clear, readily applicable and objective criteria. Decisions relating to the grant of licenses must also be subject to appropriate administrative or judicial review mechanisms. Whilst the EC has not adopted specific legislation relating to the grant of power generation and distribution licenses,

^{14/} Principle no. 3 also makes reference to the Small Business Act (zivnostensky rad). An incomplete citation to the Small Business Act indicates that enactment was expected in 1991.

general EC conditions relating to other areas, including transit rights, are relevant and helpful. In respect of transit conditions, for example, conditions are to be:

- non-discriminatory and fair; and
- shall not include unfair clauses or unjustified restrictions (Directive 90/547 (Appendix II, B-5).

In accordance with other areas of EC law, conditions should also be fully transparent and objective.

In respect of pricing and tariffication conditions relating to the grant of licenses, the provisions of Council Recommendation 81/294 (Appendix II, B-1) and Council Directive 90/377 (Appendix II, B-4) should be taken into account.

In respect of environmental conditions attaching to licenses, regard should be given to the relevant EC legislation, including especially Council Directive 84/360 (Appendix II, A-4) and Council Directive 88/609 (Appendix II, A-7).

In respect of ensuring the development of less-favored regions, account should be taken of Council Regulation 3301/86 (Appendix II, A-6).

Principle No. 4:

The fourth principle establishes two types of licenses, generation licenses and distribution licenses. This principle also states that when an individual seeks a license, the individual's qualifications and competence will be reviewed.

The explanatory paragraph accompanying principle no. 4 also states that distribution licenses will be awarded for a specified territory. Distribution licenses will be nonexclusive, although the explanatory paragraph indicates a preference for regional distribution monopolies as the "final goal" of the legislation.

a. **A U.S. Perspective**

No standards are established for granting licenses to legal entities such as partnerships or corporations. The explanatory paragraph indicates that "it is preferable to pass the special requirements of licensing procedure to the statutory regulation." Thus, it appears that the administrative bodies will be granted total flexibility in the establishment of standards for granting licenses when individuals are not involved.

Although this absence of guidance may be the result of a political compromise that delegates power to the Republic level, we believe that certain fundamental principles need to be embodied in the national legislation. The standard might be as simple as a "public interest" standard. Alternatively, the administration body might be directed to review the technical competence and financial soundness of the entity seeking a license, as well as the public's need for the license to be granted.

Without any statutory guidance, the administrative body will have absolute power to grant or withhold licenses. It is difficult to imagine how anyone might challenge the administrative body's decision in the courts in the absence of a standard for decision-making.

b. An EC Perspective

In respect of distribution services, the provisions of Council Directive 90/547 on electricity transit should form the basis of more detailed legislation.

In relation to the allocation of jurisdiction among the various levels of government, it may be helpful to make use of the EC principle of subsidiarity, defined in the Maastricht Treaty under Article 3b as requiring action at the lowest EC level that is practical:

only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the [individual state] and can therefore, by reason of the scale of the effects of the proposed action, be better achieved by the [higher level].

The Principles should ensure that decision-making occurs at the appropriate level, whether federal, Republic, or local.

Principle No. 5:

The fifth principle addresses "promotion of a utility" with an installed capacity of more than 10 megawatts and capacity increases of 10 megawatts or more for existing utilities. The explanatory paragraph indicates that implementation of an energy policy is the fundamental goal of the fifth principle. The approval process for generating projects will make it possible for government authorities to "stop unrealistic and useless projects."

a. A U.S. Perspective

Our English language translation of the fifth principle appears to suffer from a number of ambiguities. The term "promotion" is not defined. Thus, it is unclear how the requirement to have "promotion of a utility" in excess of 10 megawatts approved by the state administration body coexists with the licensing requirements of principles nos. 3 and 4, which appear to apply to all projects regardless of size. Similarly, the text of principle no. 5 applies to a "utility" but this term is not defined. The explanatory paragraph implies that power generating projects, not transmission or distribution, are the subject of this principle. However, a precise definition of terms is required.

In addition to a need for clarification of the terms used here, the fifth principle requires the same statutory specification of regulatory standards that is needed in the fourth principle. For example, what standards will the administrative body apply when it reviews a proposed project? It is inadequate simply to state that implementation of an energy policy is the regulatory goal, because such a standard begs the question of what energy policy would be implemented.

Similarly, the stated goal of stopping unrealistic and useless projects is unlikely to provide much practical guidance. By what standard would the administrative body conclude that a particular project is "unrealistic?" Moreover, virtually any energy project will produce something useful. A "uselessness" standard appears to require denial only of projects that will never be completed or will never operate.

On a practical level, the economic feasibility of any energy project will depend upon the price that is offered for its electrical output. This crucial subject is not addressed in the draft bill.

Several other points pertinent to principle no. 5 are worth noting:

- The text of the fifth principle refers to actions by the "local administrative body" and the "central administration body." Neither term has been defined. The term introduced in the third principle was the "state administration body." The final draft of the electricity bill must clearly define all relevant terms.
- As matters stand, it is not clear what functions are carried out at the federal, the Republic or the local levels of government.
- The text of the fifth principle makes reference to certain "special acts" that are not affected by the need for regulatory approval. The "Construction Act" (Act no. 50/1978 Sb.) appears to govern site and

construction permits. The act on "State Supervision of Nuclear Safety of Nuclear Facilities" (Act no. 28/1984 Sv.) applies to nuclear power plants. Finally, reference is made to "Acts on Administrative Arrangement," although no cites or further information are provided.

b. An EC Perspective

This principle does not really create the legislative framework necessary for developing an energy policy. The principles should be subject to the overriding supremacy of an overall energy policy. The basis for such a policy could be found in the amended EEC Treaty, which will set the parameters of energy policy in all EC member states "within the framework of a market economy."

The legislation also needs to identify clearer administrative arrangements in respect of such an energy policy and identify clearly which body or bodies have jurisdiction over, and the power to regulate, the various energy sectors.

Principle No.6:

The sixth principle addresses a power distribution utility's obligation to serve consumers. The text of the sixth principle notes that under certain conditions "specified under regulations" a power company can break or reduce its service obligation. Principle no. 12 (discussed below) explains that these regulations are to be issued by the central administration body.

The text of the sixth principle lists three classes of electricity consumers for which power distribution companies have no service obligation. The first of these consists of individuals who operate or can operate their own power generating equipment in an economic way.

a. A U.S. Perspective

It appears that the Principles do not obligate power distribution companies to provide backup power to individuals who have their own generating capacity. This would be an extremely bad policy. Electric generators must be taken out of service routinely for planned maintenance. Without a reliable supply of backup power, self-generators will be forced either to abandon self-generation or to provide full backup for their own capacity. Neither course of action is likely to be economical. In the United States, cogenerators are

guaranteed a nondiscriminatory supply of power for forced outages and planned maintenance, as well as for the purposes of supplementing their own generation.^{15/}

The second class of electricity consumers that need not receive utility service under the sixth principle are those that use "equipment extremely demanding in power" consumption. The text makes reference to a "statutory regulation" that identifies this class of customers and equipment. It is not clear what regulations are being referred to here. If these regulations are the responsibility of the central administration body pursuant to principle no. 12, the administrative process appears to be overly centralized. Decisions concerning the types of equipment that might overload a distribution company's system should be made at the same level of government that is responsible for issuing distribution licenses.

The last class of customers for whom there is no service obligation is other power distribution companies. This seems reasonable. Distributors will obtain their power either from generating companies or from the transmission system, depending upon how the industry is reorganized. Distribution companies should not be forced to provide service to other distribution companies.

The text indicates that the provision concerning service to other distribution companies does not include power distribution companies that operate power transmission facilities. The wording of this carve-out is ambiguous. It might be read to mean that power distribution companies operating power transmission facilities do have an obligation to serve other distribution facilities. The goal in this case might be to restrict the exercise of monopoly power originating through control of the transmission system. Alternatively, the text might be read to mean that distribution companies in general have an obligation to provide service to other distribution companies when such companies operate transmission facilities. Although there is no obvious rationale for the second possible reading, the ambiguity should be resolved.

The explanatory paragraph accompanying the sixth principle explains that the statutory regulation for power supply should "guarantee the equality of applicants for connecting and not to allow the power company irregular practices." This is an extremely important point, but it belongs in the statutory text and not in the explanatory paragraph.

^{15/} Our translation of the draft bill states that "individuals" who self-generate need not be served by the utility. It is not clear whether this restriction applies only to natural persons or whether it applies to any self-generator, such as a corporation or partnership. There appears to be no valid policy objective to be served by distinguishing between natural and juridical persons in this context.

Moreover, sharper drafting is required concerning what might constitute an irregular practice.

As a practical matter, utility companies frequently characterize their customers by class of service. Residential customers may be required to comply with certain interconnection and metering requirements, while commercial, light industrial and heavy industrial customers will in all likelihood be treated differently. The law should direct the administrative body to respect the principle of equal treatment for similar service. Individual customers should have a right to petition the administrative body in the event they feel they have been treated unfairly.

b. A. an EC Perspective

No EC comment.

Principle No. 7:

The seventh principle obligates power distribution companies to take power from certain classes of generating facilities. This principle is apparently modeled on the U.S. Public Utility Regulatory Policies Act of 1978, which obligates electric utilities to offer to purchase power from certain classes of non-utility power plants. The text of the seventh principle specifies two classes of facilities that qualify for obligatory purchases: (1) "forced power generation" facilities and (2) small hydroelectric facilities or facilities using alternative sources of energy. The obligation to purchase power from such sources applies only if the purchase does not reduce the distribution companies' long-term profitability or if, in the case of forced power generation facilities, there are no other "serious reasons" for not purchasing the power. Disputes will be resolved by the state administrative body.

a. A U.S. Perspective

At the outset, clear definitions are **needed** of the types of facilities that qualify for mandatory purchases on the part of the utility. The explanatory paragraph notes that the term "forced power generation" means a process in which electricity is a byproduct. This definition is quite inadequate.

The concept of a "byproduct" is much more complex than it first appears. A project that produces both electricity and industrial process steam has two "joint" products. However, it is difficult if not impossible to characterize one of them as the primary product and the other as a byproduct. It would be preferable to define the term "forced power generation" in technological terms rather than economic ones. For example, electric power from combined heat and power facilities would qualify as "forced power generation" where

the thermal output was for an established industrial or district heating purpose. Similarly, the production of electricity from heat that would otherwise be exhausted to the atmosphere could also qualify as forced power generation.

In the case of the small hydroelectric and renewable resource facilities, clear limits need to be set on what is meant by "small"^{16/} and which energy sources fall within the definition of "alternative sources." The law should allow some conventional fuels to be used in thermal alternative fuel facilities since fuel is usually required for start-up, flame stabilization and control purposes. The state administration body should be directed to write rules that will establish eligibility. The law should require that the rules be issued within a reasonable period of time.

b. An EC Perspective

This principle will need to take fuller account of the relevant EC legislation, identified in Section E of Appendix II. It may be useful also to identify more clearly which renewable energy resources are to be encouraged and to consider how, in the context of any applicable competition law, any anti-competitive encouragement of renewable energy sources will avoid legal problems.

This principle also makes clear the difficulty of separating supply-side and demand-side management. In following EC law, both should be integrated into a single set of decision-making and licensing procedures.

Principal No. 8:

The eighth principle addresses the legal rights of distribution companies. The first paragraph of principle no. 8 identifies three such rights. Briefly stated they are: (1) the

^{16/} Under U.S. law, small power production facilities are limited to no more than 80 megawatts. Administration of this statutory limit has been difficult. Some projects appear to have been undersized to satisfy the law, with a loss of project economics. In other cases, large projects have been divided into multiple small projects and sold to different groups of owners. In 1990, the law was amended to remove the size limits for most classes of alternative energy projects. If a proposed project is too big for the purchasing utility to accept the output, this fact will be reflected in the negotiation of the price for the project's electrical output.

right to operate public power distribution systems on private property^{17/}, (2) the right to enter private property during the construction, operation, repair, modification or removal of distribution systems and (3) the right to "cut and lop trees" if necessary for the erection and operation of the distribution system. The second paragraph of principle no. 8 provides that a distribution company's rights arise when the construction permit is issued.

a. A U.S. Perspective

As noted under principle no. 5, the issuance of site permits and construction permits is apparently governed by the Construction Act. Authority to issue such permits appears to reside in an authority that is separate from the administrative body responsible for licensing and perhaps ratemaking. It is not clear what coordination is expected between the procedure for award of a site permit and a construction permit. However, the explanatory paragraph accompanying principle no. 8 makes it clear that property owners and users will be allowed to participate in the site permitting process. We need more detail on the relevant laws.

The text of principle no. 8 also indicates that: "The onus to bear the execution of [the rights of the distribution company] is imposed on the property without being registered in the Property Register." This seems reasonable for most distribution facilities. For example, the electric service to an individual house does not require an easement that is recorded on the deed. However, certain types of distribution facilities, underground lines in particular, may require rights-of-way to be recorded.^{18/}

Principle no. 8 also addresses the need for changes in the distribution system. Property owners or users are obligated to notify the power distribution company when a change in the property's disposition requires a change in, or removal of, distribution facilities. Power companies have two months in which to act after being notified. If a disagreement arises, the body that issued the construction permit for the distribution system

^{17/} Our text indicates that distribution companies are entitled to "promote" and operate facilities on private property "unless substations are not larger than 50m². . . ." This appears to be the opposite of what would be expected. We assume that the intent was to allow substations of 50m² or less to be placed on private property, pursuant to Principle No. 8. For construction of larger facilities, we assume that the distribution company would be required to acquire the necessary property, either through purchase, lease or condemnation. Such actions on the part of the utility are not addressed in the Principles.

^{18/} The concept of a distribution right-of-way is addressed in principle no. 10. We recommend that the text of principle no. 8 be modified to distinguish between distribution facilities that require a right-of-way and those that do not.

will decide the issue. In addition, property owners and users appear to have a right to appeal to the courts in the event the burden placed upon the property outweighs the advantage realized by the distribution company.

A key aspect of principle no. 8 obligates the power distribution company to compensate property owners or users in certain circumstances. The precise nature of these circumstances is unclear from the English translation of the draft. The text speaks of restraints upon the property owner or user. It is especially unclear whether this concept applies to a reduction in the economic value of the property caused by the presence of electrical facilities or to something else.

Principle no. 8 provides that property owners or users must apply for compensation within six months after the power distribution system has been placed in commercial operation. Many jurisdictions in the United States employ a similar "statute of limitations" concept. We recommend that the power distribution company be required to give public notice of when a system is placed into commercial operation. Property owners and users must be made aware of when the clock starts running under the statute.

An over-arching question concerning principle no. 8 is its applicability to transmission systems. By its wording, it appears to apply only to distribution facilities. What process is envisioned for involving the public in decisions regarding the siting and construction of transmission facilities? This subject needs to be addressed.

b. An EC Perspective

Principles 8(b) and (c) raise certain difficulties in relation to Article 1 of the First Protocol to the 1950 European Convention on Human Rights, which provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law.

The Principles will need to ensure that any interference with private property rights is consistent with obligations under the European Convention.

Construction of power plants, in conformity with EC law, will also need to comply with the 1985 Directive on Environmental Impact Assessment and the 1990 Directive on Free Access to Information on the Environment.

Principle No. 9:

The ninth principle addresses damage to property caused by the actions of the distribution company. In such instances, the property owner or user will be compensated. The explanatory paragraph notes that indemnification is limited to assets only. In comparison with the existing law, indemnification will now be extended to include lost profits.

a. A U.S. Perspective

The explanatory paragraph characterizes a distribution company's responsibility for damage to property as an "absolute responsibility." The precise meaning of this term is unclear. Does this absolute responsibility serve to shield third-parties, such as construction companies, from liability in the event of property damage? Also, can the distribution company claim a *force majeure* defense? For example, if a major storm blows a distribution pole onto a house, could the distribution company argue that it should not be liable for the damage, since the facilities were properly designed and constructed and the damage was caused by an "act of God?" We recommend that distribution companies be treated the same as other private business concerning liability for property damage.

b. An EC Perspective

See under principle 8.

Principle No. 10:

The tenth principle addresses "protection zones" for the distribution system.

a. A U.S. Perspective

The concept of a protection zone appears to be similar to the concept of a right-of-way under U.S. law. The technical aspects of this principle appear to be straightforward.

In the fourth paragraph of principle no. 8, however, the state administration body is granted authority to impose fines of up to 100,000 Kcs for damage caused to utility equipment. The fine can be imposed within six months after the state administration body is notified of the damage but no later than one year after the damage occurs. The state administration body is also directed to consider the "gravity, consequences and circumstances" of the offense in assessing the fine.

The authority of the state administration body -- an agency responsible for public utility regulation -- to impose substantial fines upon non-utility businesses and private citizens raises a number of issues. First, what underlying legal authority does the state administration body have to enforce this sort of action? Second, what rights do accused parties have to a fair and impartial hearing? The text of the draft bill does not address these questions. It appears as though an individual might receive a notice of a fine without even being advised that the matter was under consideration. Third, the text of the draft bill indicates that the fine must be paid within thirty days, but what happens if the fine is not paid? Can the state administration body or the utility take any further direct action against an alleged offender? Can the offender's electric power be cut off? Fourth, who bears the burden of proof in a case such as this? Is the alleged offender innocent until proven guilty, or is the utility's version of events presumed to be correct? Finally, what avenues of appeal are available to a person accused of damaging the distribution system?

These issues suggest that the state administration body is infringing on the role of the courts. Rather than "reinventing the wheel," it may be better to have the courts handle such cases. This could be done on behalf of the utility without involving the state administration body. Also, the law should distinguish between criminal and civil offenses. Acts of vandalism or sabotage should be treated as criminal offenses. Accidental or unintentional damage to a utility's facilities would best be treated as a civil matter. If someone damages the utility's equipment, the utility can sue. In this context, there is no need for a fixed penalty. Any payments should be based on the damage that has been done. This would put the utility in the same legal position as any one else who suffers harm as a consequence of the actions of others.

b. An EC Perspective

This principle provides an opportunity to deal more fully with safety, environmental and technical standards. In this context, it should be pointed out that any obligations thereunder should not apply to the interface of the system with the outside world. The site, the plant and both its internal and external consequences should comply with applicable safety, environmental and technical standards.

Principle No. 11:

The eleventh principle addresses "illegal power consumption." Essentially, this means theft of electricity. The draft bill provides two levels of fines for this offense. If an individual takes the power and the power is not consumed for a business or other commercial activity, the state administration body can impose a fine of up to \$20,000 Kcs. If the power is used for a business or other commercial activity, the state administration body can impose a fine of up to \$200,000 Kcs.

General Comments

Ideally, the penalty for theft of electricity should reflect the amount of electricity stolen rather than the use to which the electricity ultimately was put. The distinction between businesses and other commercial activities and other activities may be intended to reflect the approximate magnitude of the diversion of electricity. However, there may be more straightforward ways of assessing the quantity of stolen electricity. For example, the electrical capacity of the circuit, in terms of its voltage and current rating, would determine how much power could be taken over a particular period of time.

Additionally, the involvement of the state administration body in imposing fines raises issues of the kind mentioned with respect to principle no. 10. As in the case of damage to the distribution system, illegal diversion of electricity may best be handled through the courts.

Principle No. 12:

The twelfth principle addresses a variety of administrative matters. This principle consists of five short paragraphs accompanied by the usual explanatory paragraph.

a. A U.S. Perspective

The first paragraph of principle no. 12 addresses power shortages. The text states that: "The Czech Republic Government and the Slovak Republic Government stipulate in their decrees the scope and conditions of power generation and distribution control in case of imminent shortage of power." We need to know whether these decrees have been issued, and, if so, how they are worded.

The second paragraph of principle no. 12 simply states that the enabling regulations required under principles nos. 4, 6 and 10 will be issued by the republic central administration body. Since the term "republic central administration body" has not been defined, we are unable to evaluate the implications of this delegation of authority. If the republic central administration body is a federal agency, this principle will result in a considerable centralization of authority.

The regulations called for under principle no. 4 concern the special requirements for granting power generation or power distribution licenses to individuals. The regulations called for under principle no. 6 concern the obligations of power suppliers to serve their customers. Under principle no. 10, regulations are to be issued concerning the scope of activities allowed or banned within the protection zones of a power distributor. No regulations are called for under principle no. 5; however, the text states that the standpoint of

the central administration body is obligatory for the local administrative body, concerning approvals of generation facilities in excess of 10 megawatts. It appears as though most rulemaking activities addressed in the Principles will be conducted at the level of the central administration body.

If, in fact, the central administration body is a federal authority, the need to centralize authority at this level is questionable in certain cases. In particular, the activities that are allowed or prohibited within the protection zones of a distribution system appear to be a local concern. Such matters as approval of generation projects or the licensing of distributors may be a federal or Republic level concern, depending upon how the electric utility industry is reorganized for privatization.

The third paragraph of principle no. 12 acts to grandfather the public utility status of existing public power suppliers as of the date of enactment of this legislation. The fourth paragraph of principle no. 12 serves to preserve the preexisting rights of utilities to enter private property and the preexisting status of utilities' protection zones. The explanatory paragraph accompanying principle no. 12 and the text of principle no. 13 indicate that these rights of entry onto private property and maintenance of protection zones are codified under § 35 of the preexisting Act on Power Generation (Act No. 79/1957 Sb.).^{19/} For a full evaluation of the appropriateness of the rights that distribution utilities are intended to enjoy, we need to review the text of this section of the preexisting law.

The fifth and final paragraph of principle no. 12 states that the "administration rules" are not applicable to the "approval issuance hearing" for generating facilities under principle no. 5. Such exemption from administrative law would be extremely dangerous. Proposed generating facilities could be summarily disapproved without the protection of due process. The explanatory paragraph suggests that this exemption is for facilities "not exceeding a certain capacity," although this capacity is not stated. In our view, projects of any size need the protection of administrative rules. Small projects may be approved through an abbreviated process and may be allowed to submit less supporting documentation than larger projects. However, we believe that a blanket exemption from administrative rules might bring more harm than good to small projects.

b. An EC Perspective

No EC comment.

^{19/} The explanatory paragraph to principle no. 12 identifies the relevant section as § 34. The text of principle no. 13 and its explanatory paragraph cite the relevant section as § 35. We have assumed that § 35 is the correct section since it is cited twice.

Principle No. 13:

Principle no. 13 lists a set of seven decrees, acts and regulations that are to be abolished.

General Comments

We have not reviewed any of these existing instruments. Although a full review of the existing legal framework for the electric utility industry may not be necessary, we are concerned that no gaps be created when the old structure is abolished and the new structure is put into place. For example, we note that the sixth listed item, Regulation no. 153/196i Sb. on "Changes of High Voltage Lines Protection Zone Width," appears to address a subject not considered in the Principles. As noted under the discussion of principle no. 10, only the protection zones of distribution lines, and not transmission lines, are addressed.

Principle no. 13 might also be amended to provide for details of the relationship between the Principles and other legislation relating to the matters identified in relation to principle no. 1 above.

The final sentence in the text of principle no. 13 states that enactment of the bill is assumed on July 1, 1992.^{20/} Before this legislation can be enacted, it will be necessary to reach decisions on the reorganization and privatization of the electric utility industry. We understand that these events are expected to occur in the spring of 1992. Accordingly, enactment of this legislation on July 1, 1992 may be achievable if everything goes according to plan.

V. CONCLUSION

This report presents a number of observations and recommendations that might be considered in evaluating or redrafting the Principles. The first is that the Principles are not altogether clear as to what is being regulated. In order to facilitate the reader's understanding of the Principles, it may be helpful to reorder the substantive provisions so that the first provision sets forth a section on definitions. This would help the reader to understand the subject matter of the Principles with more precision.

^{20/} We question why this statement was inserted into the text of the bill itself. We assume that this sentence is merely for the aid of the reader and will be deleted in the final version.

A second observation is that the Principles fail to provide a clear description of the administrative agencies charged with implementing the Principles. The role of federal, Republic and municipal agencies is not clearly defined. As a result, it is impossible to judge with any accuracy whether regulation pursuant to the Principles would occur at the proper level of government.

A third observation is that the Principles provide insufficient guidance to the administrative agencies that are responsible for rulemaking activities. Clear standards are needed to assure that the rules reflect the intent of the National Assembly. Without such standards, the actions of administrative agencies cannot be reviewed effectively by the courts.

The Principles also fail to provide adequate protection of individual and corporate entities against abuses by administrative agencies or utility companies. Clearer standards should be drafted to protect the property of natural or legal persons against abuses. Judicial review should also be provided for in such areas as the issuance of licenses and civil fines for interfering with the electrical system. The treatment of self-generators and distribution companies also is not altogether clear.

In addition to matters of administrative law, it must be noted that several key aspects of the electric utility industry have not been addressed by the Principles. The price regulation of retail and wholesale electric service, the operation of the transmission network, imports and exports of electric power, conservation, demand management and the overall structure of the industry need to be addressed.

APPENDIX I

EC SECONDARY ENERGY LEGISLATION^{1/}

There is now a large body of secondary EC legislation that relates to the energy sector. The following list of Community secondary energy legislation is not exhaustive. It excludes Community instruments relating to research and development programs, financial support and nuclear power, as well as number of non-binding Recommendations on various topics.

a. General EC Secondary Legislation

Council Regulation 1056/72 on Notifying the Commission of Investment Projects of Interest in the Community in the Petroleum, Natural Gas and Electricity Sectors (OJ 1972 L120/7)

Regulation 1506/72 requires Member States to convey information to the EC Commission relating to certain energy projects. With regard to investment projects that are planned or in progress, Member States must provide the purpose and nature of the investments, the planned capacity, the date when work is due to begin, the probable date of commission and the type of raw materials used. Information is also to be provided concerning withdrawal from service. Member States must also notify the Commission regarding the construction of conventional thermal power stations (with a capacity of 200 megawatts or more) and hydroelectric power stations, as well as transmission lines with a voltage of 345 KV or more.

Council Regulation 1215/76 Amending Regulation 1056/72 (OJ 1976 L140/1)

Regulation 1215/76 makes a number of minor amendments to the earlier Regulation 1506/72 and sets forth the Council's recommendation that Member States create advisory bodies or committees to be responsible for giving an opinion on measures likely to lead to increased efficiency in the supply of heat for industry and promoting the use of remote supply systems. The Council recommends that Member States do this by:

- centralizing heat production and making greater use of combined heat and power production;

^{1/} This appendix summarizes some of the most important EC Legislation relating to the energy sector. The material described herein is included in Appendix II in full text.

- utilizing the thermal efficiency of power stations by exploitation of their residual heat; and
- improving the efficiency of heat conduits and associated distribution facilities in industrial establishments and in district heating systems.

The advisory bodies created by Member States will consider, *inter alia*, the broadening of cooperation between electric utilities and heat-consuming industries, identification and abolition of legal, administrative and price obstacles to the development of combined heat and power production and the reservation of sites on which the industrial complexes and combined heat and power stations can be built side-by-side.

Council Recommendation 77/714 on the Creation in the Member States of Advisory Bodies or Committees to Promote Combined Heat and Power Production and the Exploitation of Residual Heat (OJ 1977 L295/5)

Recommendation 77/714 proposes the establishment of Advisory Committees to promote the exploitation of combined heat and power.

Commission Decision 85/215 on the Preferential Tariff Charged by Glasshouse Growers for Natural Gas in the Netherlands (OJ 1985 L328/50)

Decision 85/215 concerned the application of Article 92 (prohibiting certain state aids) to preferential tariffs charged to glasshouse growers for natural gas in the Netherlands. By this decision, the Commission determined that the preferential tariff for natural gas supplied in the Netherlands in respect of glasshouse growers was incompatible with the common market under Article 92 and should be discontinued. This marked the first time Article 92 had been applied to the setting of tariffs.

Council Regulation 3301/86 Instituting a Community Program for the Development of Certain Less-Favored Regions of the Community by Exploiting Endogenous Energy Potential (OJ 1986 L305/6)

Regulation 3301/86 was designed to provide funds for the regions within the Community with particularly serious energy problems. Funding is to be made available to support:

- surveys and studies of opportunities for exploiting local energy resources and energy efficiency, and preparing the ground for regional

energy programs contributing to a better balance between regional energy needs and local and national resources;

- the provision of advisory services and technical support; and
- information and publicity campaigns aimed at making potential users aware of local energy resources and energy efficiency opportunities.

Council Directive 90/531 on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors (OJ 1990 L297/1)

Directive 90/531 establishes common procurement procedures for entities operating in, among others, the energy sector. It applies only to certain energy industries within the energy sector. The Procurement Directive specifically applies to:

- the construction or operation of fixed networks that provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat, or the supply of electricity, gas or heat to such networks;
- the exploitation of a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels.

Council Regulation 2008/90 Concerning the Promotion of Energy Technology in Europe (OJ 1990 L185/1)

Regulation 2008/90 provides for grants of financial support for high technology energy projects in Europe. The regulation applies to the rational use of energy, renewable energy sources, solid fuels and hydrocarbons.

Commission Communication to the Council Concerning the European Energy Charter (COM(91) 36)

The European Energy Charter is expected to be signed by EEC Member States and other European countries, including Czechoslovakia, in the second half of December 1991. The final text is not available at this time. However, the earlier drafts identify the principal objectives of the European Energy Charter. These are:

- **expansion of trade in energy, which will be achieved by means of:**
 - (a) a free market in energy;
 - (b) free access to known and future energy resources and exploitation thereof on the basis of long-term profitability;
 - (c) removal of technical and administrative barriers to trade and modernization, renewal and rationalization of the installations for the production, transfer and use of energy; and
 - (d) development of infrastructure.
- **co-operation and co-ordination in the energy field, which will entail:**
 - (a) access to technical and economic data;
 - (b) formulation of laws allowing all concerned to exploit energy resources;
 - (c) harmonization of the technical specifications and safety rules applicable to energy products and installations; and
 - (d) research on technological development and demonstration projects.
- **optimum use of energy and environmental protection, which will imply:**
 - (a) the development of new and renewable energy sources;
 - (b) greater energy savings; and
 - (c) measures to combat pollution.

In order to implement the objectives set out above, the signatories are expected to agree to take joint action in the following fields:

- access to resources;
- exploitation of resources;

- rules on investment;
- free trade;
- technical specifications and rules on security and safety; and
- technological development and innovation.

Specific agreements (in the form of legally binding Protocols) are expected to be adopted in the context of the Charter. The agreements will give priority to:

- nuclear energy and improvements in reactor safety;
- mining and clean coal technologies;
- efficient use of energy;
- development of renewable energy sources;
- use of natural gas, and gas transmission via high-pressure pipelines;
- modernization of power stations, inter-connection of power grids and transmission of electricity;
- transportation of crude oil and refined oil products and modernization of refineries; and
- transfers of technology and encouragement of innovation.

b. EC Secondary Legislation Regarding Electricity

Council Recommendation 81/294 on Electricity Tariff Structures in the Community (OJ 1981 L337/12)

Recommendation 81/294 seeks to ensure that electricity tariff structures are based on the following common principles:

- tariff structures for electricity should allow the application of a rational price policy and should reflect the costs incurred in supplying electric power to various categories of consumers;

- tariff structures should be designed with the rational use of energy in mind, should avoid encouraging unjustifiable consumption and should be as clear and simple as possible;
- the two-part tariff system best reflects the cost structure of electric utilities and thus should be generally used;^{2/}
- promotional tariff structures which encourage unnecessary consumption should be discontinued;
- tariffs based on the use to which electricity is put should be eliminated unless such tariffs conform to the general requirements of first point above and contribute to the achievement of long-term energy policy objectives;
- with the aim of transferring demand to off-peak periods or to allow load shedding, provision should be made for multiple tariffs with differential rates and the possibility of interruptible supplies;
- tariffs should not be kept artificially low, for example, on social grounds or for anti-inflationary policy reasons; and
- tariffs should be formulated so that it is possible to up-date prices at regular intervals.

Electricity prices should be generally characterized by the greatest possible degree of transparency, and the prices to the consumer should be made public.

Council Recommendation 88/611 to Promote Cooperation Between Public Utilities and Auto-Producers of Electricity (OJ 1988 L 335/29)

Recommendation 88/611 proposes that in order to promote auto-production of electricity based on renewable energy sources, waste energy and combined heat and power, Member States should provide a framework for cooperation between public utilities and all Renewable Waste and Combined ("RWC") auto-producers. To facilitate the creation of this framework, standard contract criteria concerning sales of electricity should be introduced, either by voluntary arrangements between the parties concerned, or if necessary through specific legal or administrative provisions.

^{2/} The term "two-part tariff" covers tariff structures consisting of a fixed component and a component which varies with the amount of electricity used.

The Recommendation also urges Member States to ensure that within such legal or administrative provisions:

- utilities should be obliged to offer to purchase those quantities of electricity resulting from RWC auto-production;
- that with regard to quantities, RWC auto-production of electricity is authorized in principle as long as public interest is not thereby infringed; and
- that with regard to prices, reimbursement of electricity sales to the public supply network from RWC auto-production should, *inter alia*, be based primarily on the long-term average costs avoidable by the public utilities in the area of supply.

Council Decision 89/364 on a Community Action Program for Improving the Efficiency of Electricity Use (OJ 1989 L157/32)

Decision 89/364 establishes a Community action program to improve the efficiency of electricity use. The program has two objectives:

- to influence electricity consumers to use efficient appliances and equipment; and
- to encourage further improvements in the efficiency of electric appliances and equipment and of electricity-based processes.

An Annex to Decision 89/364 sets out a summary of the actions which may be taken under the Community action program. Included are: (1) consumer information, (2) technical advice, (3) efficiency of electrical appliances and equipment, and (4) studies and other support activities.

Council Directive 90/377 Concerning a Community Procedure to Improve the Transparency of Gas and Electricity Prices Charged to Industrial End-users (OJ 1990 L185/16)

Directive 90/377 requires Member States to ensure that firms that supply gas or electricity to industrial end-users communicate to the Statistical Office of the European Communities ("SOEC"):

- the prices and terms of sale of gas and electricity to industrial end-users;
- the price systems in use; and
- the statistical breakdown of consumers and the corresponding volumes of electricity used.

Data which might be subject to commercial confidentiality may not be disclosed by the SOEC. Annex 1 of Directive 90/377 sets out the provisions relating to gas and Annex 2 sets out provisions relating to electricity.

Council Directive 90/547 on the Transit of Electricity Through Transmission Grids (OJ 1990 L313/30)

Directive 90/547 obliges Member States to facilitate transmission of electricity between high-voltage grids. Its principal purpose is to contribute to the integration of the European energy market, so as to guarantee an optimum supply of electricity to all the citizens of the Community and improve the living conditions and development potential in underdeveloped regions.

The Directive provides that contracts involving transit of electricity between transmission grids should be negotiated (1) between the entities responsible for the grids, (2) for the quality of service provided and (3) where appropriate, with the entities responsible in the Member State for importing and exporting electricity. The conditions of transit are to be:

- fair and non-discriminatory for all the parties concerned; and
- shall not include unfair clauses or unjustified restrictions and shall not endanger security of supply and quality of service.

Member States are required to ensure that entities under their jurisdiction:

- notify the Commission and the appropriate national authorities of any request for transmission in connection with contracts for the sale of electricity of a minimum of one year's duration;
- open negotiations on the conditions of the electricity transmission requested;

- inform the Commission and the appropriate national authorities of the conclusion of a transmission contract; and
- inform the Commission and the appropriate national authorities of the reasons for the failure of the negotiations to result in the conclusion of a contract. If the reasons for absence of agreement appear unjustified or insufficient, the Commission is to implement the procedures provided for by Community law in respect of breaches of Community regulations.

c. **EC Secondary Legislation Regarding Natural Gas**

Council Directive 75/404 on the Restriction of the Use of Natural Gas in Power Stations (OJ 1975 L178/24) [Repealed by Council Directive 91/148 (OJ 1991 L75/35).]

Directive 75/404 provided that new contracts for the supply of natural gas to power stations, the extension of contracts upon expiration and the construction of new power stations using natural gas must be subject to prior authorization by the authorities of the Member States responsible. Authorization for such contracts was only to be granted:

- if the use of natural gas in a power station was necessary for technical reasons; or
- if the natural gas could not be put to a more profitable use.

Authorization for contracts providing for uninterruptible deliveries of natural gas would only be granted;

- if the use of natural gas in a power station was necessary for technical reasons;
- if natural gas was intended for use in a power station with a capacity of less than 10 MW or was intended exclusively for the production of peak or reserve energy;
- if the gas was used solely to ignite and to maintain the combustion of other fuels and if its total energy contribution was small; or
- if a special environmental reason necessitated the use of natural gas in a power station.

Council Recommendation 83/230 on the Methods of Forming Natural Gas Prices and Tariffs in the Community (OJ 1983 L123/40)

Recommendation 88/230 relates to the fixing of natural gas prices and tariffs in the Community upon the following common principles:

- prices should make it possible to ensure the best possible use of gas supplies and the optimum allocation of this resource;
- the method of forming prices should be designed so as to enable prices to adjust to changes in the competitive situation in the market and to trends in costs;
- prices should not be artificially low in relation to costs, thereby having the effect of subsidizing certain categories of consumption, certain uses or encouraging waste;
- the two-part tariff system, consisting of fixed and variable components should generally be used for domestic use and small industrial users;
- for larger users, for whom fixed costs represent only a small fraction of their overall costs, a single-part tariff should normally be applied;
- in the case of non-tariff sales to large users, prices should be calculated in the light of cost and market conditions; and
- with the aim of transferring demand to off-peak periods or to allow load shedding, provision should be made for special tariffs or prices linked to arrangements for interruptible supplies.

In general, gas prices should be characterized by the greatest possible degree of transparency and the prices and cost to consumers should be made public as far as possible.

Council Directive 90/396 on the Approximation of Laws of the Member States Relating to Appliances Burning Gaseous Fuels (OJ 1990 L 196/15)

Directive 90/396 requires Member States to take the necessary steps to ensure that certain appliances burning gaseous fuels do not compromise the safety of persons, domestic animals and property. The Directive includes provisions on marketing and free movement, Chapter 1, means of certification of conformity, Chapter 2, EC mark of conformity, Chapter 3, and an Annex setting out essential requirements relating to materials, design, construction and procedures for certification of conformity.

Council Directive 91/296 on the Transit of Natural Gas Through Grids (OJ 1991 L147/37)

Directive 91/296 follows the provisions on Council Directive 90/547 (see above).

Council Directive 91/148 Repealing Directive 75/404 (OJ 1991 L75/35)

Directive 91/148 repeals the earlier Directive 75/404, which restricted the use of natural gas in electric power stations.

d. EC Secondary Legislation on Demand-side Programs

Council Recommendation 76/496 on the Rational Use of Energy for Electrical Household Appliances (OJ 1976 L140/18)

Recommendation 76/496 urges the Member States to adopt measures necessary to ensure that:

- the energy consumption of each household electric appliance is indicated on the label;
- the energy consumption figures are used in both consumer information and advertising; and
- an information campaign is undertaken in each country to make consumers aware of the amount of energy consumption for each electrical household appliance.

Council Recommendation 77/713 on the Rational Use of Energy in Industrial Undertakings (OJ 1977 L295/3)

Recommendation 77/713 urges Member States to:

- mount campaigns to provide information and increase awareness relating to energy conservation;
- invite professional organizations to arrange periodic meetings and seminars on energy conservation;

- encourage industrial undertakings to set up an energy department within their organizations and to devote a chapter of their annual reports to energy consumption;
- collate all useful information concerning the results of the energy-saving measures taken by the industrial undertakings; and
- inform the Commission regularly of the measures taken in the field.

Council Directive 78/170 on the Performance of Heat Generators for Space Heating and the Production of Hot Water in New or Existing Non-Industrial Buildings and on the Insulation of Heat and Domestic Hot Water in New Non-industrial Buildings (OJ 1978 L52/32)

Directive 78/170 requires Member States to ensure that all new heat generators for space heating or the production of hot water comply with minimum performance requirements.

Council Recommendation 79/167 on the Reduction of Energy Requirements for Building in the Community (OJ 1979 L37/25)

Recommendation 79/167 urges Member States to pursue policies designed to save energy by improving the thermal efficiency of buildings.

Council Directive 79/530 on the Indication by Labeling of the Energy Consumption of Household Appliances (OJ 1979 L145/1)

Directive 79/530 is designed to provide the public with information, in a comprehensible and standardized manner, on the energy consumption rates of household appliances. Household appliances include water heaters, ovens, refrigerators, freezers, washing machines, television sets, dishwashers, tumble dryers and ironing machines. Annex 1 to Directive 79/530 sets out information concerning the details to be provided on the labels for household appliances.

Commission Recommendation 80/823 on the Rational Use of Energy in Industrial Enterprises (OJ 1980 L239/26)

Recommendation 80/823 recommends that Member States:

- promote, in the context of their programs for the rational use of energy, the establishment of consultation and technical assistance services, particularly for small and medium-sized undertakings;

- promote programs capable of being incorporated into a Community information and evaluation system; and
- invite interested parties to contact the Commission with a view to concluding an agreement.

Council Recommendation 82/604 Concerning the Encouragement of Investment in the Rational Use of Energy (OJ 1982 L247/9)

Recommendation 82/604 provides recommendations concerning the encouragement of investment in the rational use of energy. Recommendations include:

- urging Member States to increase their efforts to achieve a more rational use of energy by (1) enabling economic operators to increase their investments in this area and (2) giving greater consideration to investments in the rational use of energy.
- urging Member States to (1) encourage the energy-savings drive by providing appropriate information, (2) apply energy pricing policies which unite the pursuit of energy objectives with efforts to ensure that prices correspond to market conditions and costs and (3) encourage gas and electricity companies to define and apply a stable tariff structure which corresponds to energy policy objectives;
- improving training and information facilities for economic operators;
- encouraging better financing arrangements for priority projects involving investment in the rational use of energy;
- making maximum use of the Community's market by refraining from adopting laws, regulations and administrative measures, or implementing national standards that hamper the free movement of equipment and services intended for a more rational use of energy;
- simplifying and speeding up the procedures surrounding projects involving new installations, which would enable local alternative energy resources (for example, bio-mass, solar energy and geothermal energy) to be exploited efficiently, subject to safety and environmental protection standards and technical rules;

- encouraging a degree of decentralization in decision-making, since adaptation to local conditions is an important factor in the success of rational energy use programs;
- considering financial and tax incentives to encourage consumers to purchase energy-saving installations and equipment;
- providing financial aid for the renovation of buildings; and
- where appropriate, urging fuel and electricity companies to encourage homeowner to renovate their homes for energy-savings by assistance in obtaining loans and giving advice on equipment.

Council Directive 82/885 on the Performance of Heat Generators for Space Heating and the Production of Hot Water in New or Existing Non-Industrial Buildings and on the Insulation of Heat and Domestic Hot Water Distribution in New Non-Industrial Buildings (OJ 1982 L378/19)

Directive 82/885 amends the earlier Directive 75/170 and establishes a code of practice for testing the performance of certain gaseous fuel-fired heat generators.

Council Recommendation 88/349 on Developing the Exploitation of Renewable Energy Sources in the Community (OJ 1988 L160/46)

Recommendation 88/349 recommends, in relevant part, that Member States:

- introduce, where appropriate and necessary, legislation and administrative procedures that would help overcome, on a non-discriminatory basis, obstacles to the exploitation of renewable energy;
- pursue research and demonstration programs;
- complete national inventories of renewable energy resources and disseminate information concerning those inventories;
- promote cooperation among industries that produce equipment for the exploitation of renewable energy and promote the transfer of technology;
- ensure the provision of information concerning technical standards and regulations;

- encourage contract terms governing sales of electricity generated by private producers from renewable energy sources which facilitate, on a non-discriminatory basis, the economic exploitation of these sources and to ensure that these terms are complied with;
- consideration of measures to support feasibility studies of renewable energy projects;
- ensuring that in public investment the possibility of using renewable energy and energy-saving measures is taken into account;
- consideration of the prospects of the eventual economic viability in promoting a given type of renewable energy;
- establishment of appropriate advisory bodies; and
- communication to the Commission of measures taken or planned and the effects obtained or expected from these measures.

Commission Proposal for a Directive Concerning the Efficiency Requirements for New Hot Water Boilers Fired with Liquid Gaseous Fuels (COM (90) 368) (OJ 1990 C292)

This proposed Directive would establish efficiency standards for new hot water boilers fired by liquid or gaseous fuels with a nominal output equal to or greater than 10 KW but less than 400 KW. Certain appliances are excluded from the Directive.

Commission Proposal for a Directive Concerning Labeling of Energy Consumption of Electrical Domestic Appliances (COM(91) xxx) (OJ C235)

The purpose of this proposed Directive is to harmonize national regulations on labeling and publication of product information on energy consumption for the following household appliances:

- refrigerators, freezers and their combinations;
- washing machines, dryers and their combinations;
- dishwashers;
- ovens;
- water heaters; and
- lighting appliances.

The product information is to relate to the consumption of energy and other essential resources.

Council Decision 91/565 Concerning the Promotion of Energy Efficiency in the Community (SAVE Program) (COM (90) 365) (OJ C301)

Council Decision 91/565 establishes a Community energy efficiency program to last for five years. The program establishes four categories of action on energy efficiency, namely:

- evaluation of data requirements for defining technical standards or specifications;
- support of Member states' initiatives for extending or creating infrastructures concerned with energy efficiency;
- measures to foster the creation of an information network for promoting better co-ordination between national, Community and international activities; and
- implementation of the program for improving the efficiency of electricity use adopted by decision 89/364.