AMENDMENT TO FEDERAL POWER ACT

(ANTITRUST REVIEW)

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

S. 3136

A BILL TO FACILITATE THE PROVISION OF ADEQUATE, ECONOMICAL, AND DEPENDABLE ELECTRIC SERVICE FOR THE PRESENT AND FUTURE NEEDS OF THE PUBLIC AND THE PROPER AND TIMELY INSTALLATION AND USE OF THE PRODUCTS OF ADVANCING TECHNOLOGY IN THE GENERATION OR TRANSMISSION OF ELECTRIC ENERGY

JULY 12 AND 13, 1966

Serial No. 89–71

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE
67-170 WASHINGTON : 1966

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TUESDAY, JULY 12, 1966

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee met at 10:15 a.m. in room 5110, New Senate Office Building, Hon. Warren G. Magnuson, chairman of the committee, presiding.

The CHAIRMAN. The committee will come to order.

Several other Senators will be coming. They are tied up in other committees, but they will be along. We have a substantial list of witnesses, and we should get started.

This morning's hearing is on S. 3136, a bill to amend the Federal Power Act to empower the Federal Power Commission to review and in appropriate cases, exempt from the operation of antitrust laws, contracts dealing with the sale or exchange of electricity, interconnections or power pooling arrangements. The basis for approval or disapproval would be whether the contract will "unduly restrain competition."

The Legal Advisory Committee of the National Power Survey said, on the antitrust exemption question:

> So far as we are aware, there has been no concerted attempt to determine the extent to which Federal and State antitrust statutes should be applicable to electric utility operations in light of present-day technology.

And the report went on to say:

> * * * we believe that a thorough-going study should be made in which all points of view could be considered and evaluated.

These hearings are the beginning of such a study.

In their most general form, the antitrust laws provide for two possible courses of action—either action by the Federal, State, or local authorities, or action by private citizens.

A recent Wall Street Journal article began as follows:

> The nation's antitrust legislation—to some businessmen just so much Government interference in private enterprise—is coming into increasing favor among other businessmen as a potent tool for furthering corporate ends.
>
> More and more companies are invoking the Federal Sherman and Clayton antitrust laws to push their own private battles against an ever-widening list of adversaries, including competitors, suppliers, would-be owners, unions, and industry associations.

The November 9 and 10 blackout shows the need for the strongest pools and interconnections that technology permits. It is important that the pools are not weakened as a result of speculation on what the law may or may not permit to be done with the technology.

Staff counsel assigned to this hearing: Donald Brodie.

This generally is the basis of the broad background of the introduction of the bill.

(Text of S. 3136 follows:)

[S. 3136, 89th cong., 2d sess.]

A BILL To facilitate the provision of adequate, economical, and dependable electric service for the present and future needs of the public and the proper and timely installation and use of the products of advancing technology in the generation or transmission of electric energy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in section 202 of the Federal Power Act, add a new subsection 202(g) to read as set forth below:

"(g) To encourage voluntary interconnection and coordination in the interest of economy and dependability, the Commission, in addition to such authority as it may otherwise have over such contracts under sections 202 and 205–207 of the Act, shall, upon the motion of any party thereto or any interested entity or person and may upon its own motion, review any contract, and any amended contract, hereafter submitted to the Commission for filing pursuant to subsection 205(c) of this part which contract provides, or is one of several contracts which provide, for the sale or exchange of electric energy or the interconnection, pooling, or coordination of power systems or for the joint use of facilities for the generation or transmission of electric energy. After notice and opportunity for hearing, the Commission shall grant an order of approval of any such contract which it finds will not unduly restrain competition when considered in relation to the purposes of the Act; if it finds the contrary, it shall disapprove such contract and further performance thereof by a public utility shall be unlawful.

If the Commission grants an order of approval of any such contract, any public utility or other entity (including all persons and entities referred to in subsection 201(f) of this Act) which is a party thereto, and its officers, directors, agents, and employees shall be exampt and relieved from the operation of all Federal, State, and municipal antitrust laws in the negotiation and execution of such contract and in the performance thereof, as approved by the Commission. The authority conferred on the Commission by this subsection shall be exclusive and plenary, and all orders entered hereunder shall be final and conclusive as to all persons (including all persons and entities referred to in subsection 201(f) of this Act), subject only to review as provided in section 313 of this Act.

The Commission shall have authority to enforce the provisions of this subsection 202(g) by the imposition of any or all sanctions provided for in part III of this Act.

The CHAIRMAN. Our first witness is the Chairman of the Federal Power Commission, Mr. Lee White.

STATEMENT OF LEE C. WHITE, CHAIRMAN, FEDERAL POWER COMMISSION

The CHAIRMAN. You have a short statement and we will be glad to hear from you.

Mr. WHITE. I have abridged it considerably, Mr. Chairman.

The CHAIRMAN. Tell us as much as you think is appropriate and we will put the whole statement in the record.

Mr. WHITE. Very good. We have also submitted to the committee a formal report on the bill and I assume that, too, would be incorporated in the record.

The CHAIRMAN. That is in form of a letter to the chairman of July 7. We will put that in the record in full.

(The document follows:)

FEDERAL POWER COMMISSION,
Washington, D.C., July 7, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In response to your request of March 8, 1966, we enclose thirty copies of the report of the Federal Power Commission on the subject bill.

The Bureau of the Budget advises that while there is no objection to the submission of this report, it believes that the subject matter of the bill has far reaching implications that it requires further intensive study and that the need for such legislation has not yet been demonstrated.

Sincerely,

LEE C. WHITE, *Chairman.*

REPORT ON S. 3136

A BILL To facilitate the provision of adequate economical and dependable electric service for the present and future needs of the public and the proper and timely installation and use of the products of advancing technology in the generation or transmission of electric energy

S. 3136 would give to the Federal Power Commission the authority to exempt from all antitrust laws contracts submitted for filing with the Commission which provide for the sale or exchange of electricity, the interconnection, pooling or coordination of power systems, or for the joint use of facilities for the generation or transmission of electricity. The bill raises several questions of statutory interpretation which are set out in the detailed analysis of the meaning and legal effect of S. 3136 appended hereto.

The bill seeks to encourage coordinated action by independently-owned electric utility systems without sacrifice of their separate ownership by extending antitrust immunity in cases of joint action approved by the Commission as not unduly restraining competition. It would not, however, provide immunity for Commission approval transactions by public utilities arising under Section 203 of the Act involving the acquisition by public utilities of facilities, the stock of other utilities or the merger or consolidation of a public utility's facilities with those of any other person.

This Commission is charged with the responsibility, among others, of encouraging the voluntary interconnection and coordination of power systems in the interests of assuring an abundant supply of electric energy in the United States, Federal Power Act, subsection 202(a), 16 U.S.C. 824a. We believe that to the extent necessary to accomplish this purpose, the Commission should be given the power to exempt from the antitrust laws fully coordinated power pools operating in interstate commerce which encourage participation by all segments of the industry.

It should be noted that public policies favoring competitive arrangements are now a factor to be considered in the administration of the Commission's responsibilities under Part II of the Federal Power Act. For example, in exercising its authority under sections 205 and 206 of the Act, the Commission has recently found to be unjust and unreasonable certain provisions in the wholesale power supply contracts of the utility which restricted the competitive position of its distribution-system customers. *Georgia Power Co.*, 35 FPC ——, Opinion No. 487, issued March 30, 1966. The Commission under existing law probably has fully adequate authority to eliminate unduly anti-competitive practices by utilities subject to its jurisdiction in their relationships with other electric utility systems. The Commission does not, however, have any explicit authoirty to immunize electric utility arrangements which it finds to be in the public interest from independent scrutiny by other agencies and the courts under the antitrust laws. This contrasts with the explicit authority to immunize of the Civil Aeronautics Board, the Federal Maritime Commission, and the Interstate Commerce Commission.

Few litigated cases have sought to apply the antitrust laws against electric utility industry practices and it is not clear to what extent such laws would apply. As advancing technology increases the interdependence and joint planning and operation of electric utility systems, the antitrust uncertainties become more acute. We believe that power pooling arrangements which achieve increases in efficiency and dependability (and the negotiations leading up to such arrangements) should be encouraged by withdrawing the possibility of antitrust litigation and we therefore support the basic principle and objective of the bill.

There are a number of particulars in which we believe the bill should be improved to perform its objective more effectively. We enumerate our proposed improvements below:

1. The bill applies to virtually every contract filed pursuant to subsection 205(c) and requires the Commission to make an antitrust immunity determination whenever a party applies for one. There are now some 3,000 rate schedules with related contracts on file under subsection 205(c); all of these are subject to the Commission's sweeping powers of review under section 206 of the Act to determine

whether the rates, charges or classifications under these rate schedules and contracts are unjust, unreasonable, unduly discriminatory or preferential, and, if the Commission so determines, to fix in their place the just and reasonable rate or contract to be thereafter observed and enforced. Under present law, however, the Commission is not required to conduct a proceeding under section 206 whenever application is made to it; such proceedings may be initiated only at the Commission's discretion. In practice, the Commission gives weight to the relative importance of cases and issues in deciding whether to institute a proceeding under section 206, or whether to resort to informal negotiations, or whether to forego any review whatever. In order that S. 3136 not impose an excessive administrative burden, with the attendant possibilities for delay and the creation of unmanageable backlogs, we urge that the Commission be authorized to prescribe rules and regulations governing the kind of cases in which it would make antitrust immunity determinations and we also suggest that the scope of the bill be further narrowed. The bill now applies to three classes of contracts, (a) bilateral contracts for the sale or exchange of electric energy, (b) contracts for the interconnection, pooling or coordination of power systems, and (c) contracts for the joint use of facilities for the generation or transmission of electric energy. We believe that the first class of contracts could be eliminated from the scope of the bill without impairing realization of its objectives in any way.

2. We believe it would be wise to amend S. 3136 so as to make it clear that the Commission could grant approval of a contract subject to changes making the contract conform to the public interest and that the Commission would not have to disapprove every contract which it could not approve in the form submitted. The power of conditional approval is normally implied under such statutes, but it would be helpful to spell this out in the bill. We similarly believe that the bill should expressly spell out the implied power of the Commission to reconsider at a later date prior approval or disapproval orders. The Commission should obviously have such power both upon application by an interested party and upon its own motion, since changes in technology and industry conditions might well call for different competitive arrangements from time to time. Thus, the Commission might, in appropriate cases, find it necessary to direct a power pool to admit an additional utility system to membership, or modifv the terms upon which a particular system has been permitted to participate.

3. The expression "approval" used in the bill could be confusing since the Commission would be empowered to consider (and approve or disapprove) the same contracts either under the existing provisions of the Act or under the proposed new subsection 202(g). Rather than referring to an order of approval, we suggest that the bill refer to an order of immunity.

4. The term "antitrust laws" should be spelled out in the bill (See e.g. 15 U.S.C. 12). Specifically since many public utilities are also licensees of the Commission, it should be made clear whether the exemption would also apply to the prohibitions of Section 10(h) of the Federal Power Act.

The bill now provides that disapproval of a contract by the Commission would render further performance illegal. While concurring in the foregoing views of the Commission, Commissioner Bagge holds the separate view that in the absence of broader immunity legislation extending also to mergers approved by the Commission pursuant to Section 203 of the Act, withholding of antitrust immunity should be the only disability arising from denial of an order sought under the provisions of the bill. Commissioner Bagge would permit the contract to remain in effect subject to any antitrust proceeding which might be filed and, of course, to the continuing authority of the Commission over the contract under Section 206 of the Act.

In summary, the Commission supports the objectives of S. 3136, and would offer no objection to its enactment if amended consistent with the foregoing comments.

LEE C. WHITE, *Chairman.*

DETAILED ANALYSIS OF S. 3136—89TH CONGRESS

S. 3136 would add a new subsection to section 202 of the Power Act to empower the Federal Power Commission to exempt from the operation of all antitrust laws most of the contracts now subject to filing with the FPC under subsection 205(c). More specifically, the Commission would be authorized to review certain jurisdictional contracts dealing with a sale or exchange of electricity, interconnections or power pool arrangements, and, after notice and opportunity for hearing, to determine whether they will "unduly restrain competition when considered in relation to the purposes of the [Power] Act." If the Commission determined

that the contract would not so restrain competition it would be directed to grant an order of approval of the contract, thereby exempting it from the antitrust laws. If the Commission determined that the contract would "unduly restrain competition" when considered in relation to the purposes of the Power Act, the Commission would be directed to disapprove the contract; and further performance under the contract by any public utility would then be unlawful.

This power to exempt from the antitrust statutes would be separate from and in addition to the Commission's other authority over such contracts under sections 202, 205, 206 and 207.

EFFECT OF COMMISSION ACTION

A Commission order of approval would exempt and relieve parties to such a contract (and their agents, directors, officers, and employees), whether or not such parties were otherwise under the jurisdiction of the Commission, from the operation of all Federal, State, and municipal antitrust laws in the negotiation and execution of such a contract and in its performance, as approved by the Commission. The bill would specifically grant antitrust immunity to public agencies exempt from Commission jurisdiction and their agents, if the agency were a party to an approved contract. The bill would not, however, withdraw the present exemption of such agencies from the regulatory provisions of Part II of the Act. The bill does not precisely specify the antitrust laws to which it applies.[1]

MEANING OF THE STANDARD OF THE BILL

The Commission would be directed to decide whether such contract "will not unduly restrain competition when considered in relation to the purposes of the [Power] Act". This is a balancing standard and not an antitrust standard. It is clear from Supreme Court interpretations of similar exemptions from the antitrust laws that the bill would not give the FPC the duty to enforce the antitrust laws as such; rather it would assign to the FPC the exclusive responsibility to weigh and consider the competitive or anti-competitive aspects of a contract with other factors related to the purposes of the Power Act under one combined standard. In interpreting the similar standards[2] of the Interstate Commerce Act for mergers, the Supreme Court has stated:

"Thus here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action . . .

"The Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the antitrust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy . . .

"And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws . . .

"In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against this background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy . . .

"The Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices . . .

[1] In particular, the bill does not specify but probably is intended to include subsection 10(h) of the Federal Power Act as an "antitrust law". Section 10(h) prohibits hydroelectric licensees from entering into combinations, agreements, arrangements or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service. The language of the section closely follows the language of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1–7, and, therefore establishes an antitrust standard of conduct for licensees of the Commission.

[2] Similar standards are prescribed by section 5(1) and 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(1) and 5(2)(b). See *Minneapolis & St. Louis R. Co.* v. *United States*, 321 U.S. 67, 86.

"Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the antiturst laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy." [3]

In the case of S. 3136, the policies of the Federal Power Act, including subsection 202(a) promoting coordination of electric facilities to assure abundant and economical power, would be considered jointly with policies favoring competition.

ON WHOSE MOTION WOULD THE COMMISSION ACT

The Commission would be authorized to act on its own motion, and be required to act on the motion of any party to such a contract or on the motion of any "interested entity or person". Although "person" is defined in Part I of the Federal Power Act as an individual or corporation, excluding municipalities, the Supreme Court has held that under Part II a person may include municipalities. *United States* v. *P.U.C. of California*, 345 U.S. 295. The use of the phrase "interested entity" as well as "person" is probably unnecessary but seems to assure that interested non-federal public bodies would be entitled to invoke review of a utility contract under the bill. We believe it is clear that Federal agencies with antitrust responsibilities, such as the Department of Justice, would be "interested persons" within the meaning of the bill. Action could also be initiated under the bill by electric utility systems, whether participants in the contract or not, if they had an economic stake in either the performance or modification of the contract. This is in contrast to complaints of discrimination or unreasonableness under section 206 of the present Act which does not entitle a complainant to a determination.

CONTRACTS ON WHICH THE COMMISSION MAY ACT

The Commission's power would apply to [4] contracts submitted to it for filing pursuant to section 205(c) after enactment of the bill if they provided for

(a) the sale or exchange of electric energy, or
(b) the interconnection, pooling, or coordination of power systems, or
(c) the joint use of facilities for the generation or transmission of electric energy.

These categories encompass practically all types of contracts which are filed with the Commission pursuant to section 205(c), including contracts which have no relation to "power pooling" or power system coordination arrangements. The bill states that it applies to "any contract, and any amended contract hereafter submitted to the Commission for filing pursuant to subsection 205(c) . . ." This language would not appear to permit the Commission to act on contracts now on file with the Commission as the qualification "hereafter submitted to the Commission" modifies both "any contract" and "any amended contract". Consequently, contracts now on file with the Commission would have to be amended and resubmitted for filing pursuant to section 205(c) before the Commission could act. As a practical matter, existing contracts now on file could readily be amended in such a way as to permit review. (112 Cong. Rec. 6398, March 25, 1966.)

Subsection 205(c) refers to the filing of "schedules" showing rates together with "all contracts which in any manner affect or relate to such rates . . ." The term "contracts" must probably be read to have a slightly broader meaning in S. 3136 than in subsection 205(c) since some of the essential documents governing a power pool may technically be classified as "rate schedules" rather than as "contracts which . . . affect . . . rates" under present law.

The bill does not apply to those contracts not submitted for filing pursuant to section 205(c), as for example, merger agreements or consolidation proposals, which are submitted for Commission approval under section 203. That is, the Commission could exempt from the antitrust laws a comprehensive planning and coordination system agreement between two utilities which preserved their independence, but could not exempt a merger designed to carry out the same result.

[3] *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80, 85-87.

[4] The Commission would not be required to review every eligible contract hereafter submitted to the Commission under 205(c), but would be required to do so on request and is authorized to do so on its own motion.

POWER TO ATTACH CONDITIONS

The bill does not specifically give the Commission the power to attach conditions to an order of approval. It states only the two alternatives, that the Commission "shall grant an order of approval" if it finds the contract will not "unduly restrain competition when considered in relation to the purposes of the Power Act" and "shall disapprove" if it finds the contrary. However, the provision on exemption from the antitrust laws states that the parties shall be exempt from all antitrust laws in the performance of such contracts "as approved by the Commission". This indicates that the Commission's approval could be a conditional sanction of a somewhat different contract than that prepared by the parties.

Moreover, the statutory power to approve normally implies the power to approve conditionally unless the statute expressly declares otherwise. Thus the Natural Gas Act was interpreted to give the FPC the power to issue a conditional certificate of public convenience and necessity at a time when that statute was silent as to power to impose conditions. *Arkansas Louisiana Gas Co.* v. *F.P.C.*, 113 F. 2d 281. (The Act has since been amended to state expressly that the Commission could attach conditions. Natural Gas Act, section 7(c), 15 U.S.C. 717 f(e).) It should also be noted that the same contracts to which the bill would apply are also subject to review under section 206 of the Act which authorizes the Commission after a hearing to determine and fix by order the just and reasonable contract to be observed.

EXCLUSIVE NATURE OF COMMISSION JURISDICTION

The bill states that the Commission's authority under the subsection shall be exclusive and plenary. This is probably intended to permit a defendant in an antitrust suit involving a pooling agreement to prevent any court action until the FPC passes upon his application for an antitrust exemption. See *United States* v. *Borax Consolidated, Ltd.*, 141 F. Supp. 396.

WHEN THE COMMISSION MAY ASSERT THE POWER TO REVIEW

There is no time period in the bill within which the Commission must act on a contract filed pursuant to subsection 205(c), nor is there a requirement that every such contract be reviewed by the Commission for purposes of exempting it from the operation of antitrust laws. Consequently, the Commission would not automatically issue an order of approval or disapproval for all eligible contracts. The Commission would review such contracts when requested or on its own motion whenever an antitrust question arose. This could occur at any time after a contract was filed with the Commission, either before or after performance under the contract commences.

Under the bill the Commission would be authorized to review again for prospective approval contracts which it had previously reviewed, notwithstanding the absence of any express provision respecting a second review, should changed circumstances or other factors lead the Commission to believe a reexamination would be appropriate. It is the general rule of administrative law that orders of this type are subject to agency reexamination at any time. The rule is thus summarized by Professor Davis: [5]

"When the purpose of reconsideration of an order is one of regulatory action, as distinguished from merely applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions."

The fact that the Commission would have continuing jurisdiction to review again an order of approval or disapproval would not give to a party or interested entity or person a second review as a matter of right. The language of the bill that such orders "shall be final and conclusive as to all persons [including public agencies]", is probably intended to prevent one entitled to a review in the first instance from forcing the Commission to institute a new review of the original contract.

Approval or disapproval orders would be final in that they would be appealable, even without this specific language. Such orders would also be conclusive to the extent that they would prevent collateral attack on such an order. No Commission order, however, prevents persons from later petitioning the Commission in its discretion to institute a new investigation of an existing contract.

[5] Davis, Administrative Law, §18.09. Continuing jurisdiction is commonly found despite the absence of explicit statutory provision therefor. E.g. *Brougham* v. *Blanton Mfg. Co.*, 249 U.S. 495 (1919), *Wilbur* v. *United States ex rel. Kadire*, 281 U.S. 206 (1930). *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420 (1930).

Mr. WHITE. Accompanying me here at the table is Mr. Richard Solomon, the Commission's General Counsel, who appropriately enough has spent a good number of his many years in the Government working for the Justice Department in the Antitrust Division. He is especially well qualified to participate in this particular discussion.

Also present in the room, who may be called upon for help, are Mr. William Lindsay, the Chief of the Division of Rates and Corporate Regulation of the Commission, Mr. David Bardin, Assistant General Counsel, and Mr. Thomson Von Stein of his Office.

Basically, the Commission supports the principle of S. 3136, but it does urge certain amendments.

The electric utility industry is unique in the challenges and opportunities confronting it. Through technological developments in generation and transmission, the American consumer can realize tremendous benefits in the form of reduced costs and reliable service. These developments involve the use of large units which reduce the unit cost of generating electric energy and the use of new, extra-high-voltage transmission lines which substantially cut the cost of transmitting this energy and permit more extensive transmission.

The Nation's rapidly expanding use of electricity is expected to more than double and perhaps triple by 1980, thus creating many opportunities to achieve great economies in cost. Growth and intersystem coordination are interrelated, however, and if we are to achieve the fullest benefits from one the other is a necessity. Coordination is a vehicle by which groups of electrical systems through common action can obtain the benefits of economy of size in the planning and development of the sources of power supply and of transmission. Coordination requires extensive intersystem planning and joint agreements between the interconnected systems.

One result of the Commission's National Power Survey, issued in late 1964, was to suggest to the industry the possibilities for further coordination in planning the large expansions of our power systems in the decades ahead while retraining the benefits of a pluralistic ownership pattern. Technology has reached the stage where closer coordination of the construction plans and operations of individual systems is not only feasible but necessary if the consuming public is to receive the benefits of lower cost electricity which technology now makes possible. The need for effective coordination is not limited to the major utility systems; on the contrary, the many small systems, especially those now operating in virtual isolation, also have much to gain from coordination, if they can join together or with large systems in the construction of the necessary facilities.

By 1980 the Nation might well require more than 500 million kilowatts of capacity. When one considers that every 1-percent-capacity reduction made possible by increased coordination reduces the capital investment required by $500 million, the savings from increased coordination are great indeed. Translated into potential benefits to the Nation's consumers, at stake by 1980 are possible savings of as much as $11 billion a year.

This figure was developed in the National Power Survey.

In section 202(a) of the Federal Power Act, Congress properly established full coordination of the Nation's electric power systems as national policy.

The CHAIRMAN. I want the record to be clear here, Mr. White. When we talk about the National Power Survey, I don't want anyone to think that this was one person's idea or just the idea of the Federal Power Commission.

Mr. WHITE. Correct.

The CHAIRMAN. This was a coordinated effort, authorized by the Congress, and carried out by the Power Commission and all phases in the power industry.

Mr. WHITE. Although it was done before I came to the Commission, Mr. Chairman——

The CHAIRMAN. I want the record to be clear.

Mr. WHITE. It is clear as a bell that there was complete cooperation from all segments of the electric industry and encouragement from the Congress.

The CHAIRMAN. And Congress financed it.

Mr. WHITE. They financed it. Without these necessary funds, it would not and could not have been undertaken.

The importance of this mandate of section 202(a) has never been greater than it is today. Recently the Congress recognized this itself in appropriating the funds necessary for the major interregional interconnection in the Pacific Northwest-Southwest Intertie.

The benefits of increased coordination are not related solely to cost, however. The unfortunate blackout which occurred in the Northeastern United States and parts of Canada last fall vividly illustrates the direct relationship between effective interconnection and coordination and reliability of the Nation's bulk power supply system. Isolated systems and weakly coordinated systems are not well adapted to modern service needs. System stability and freedom from outage hazard can be achieved only when internal transmission systems and intersystem interties are strong.

Yesterday in my native State of Nebraska, there were a series of outages of major proportions affecting up to two-thirds of the State. We have checked with the people of Nebraska, who are operating that system, and find that to some extent, by using existing interconnections the damage has been eased and the shortage has been made less than it would have been. But it is also true that when there is a much stronger network connecting Nebraska with systems to the west, outages of that character are likely to be minimized, as are the number of occurrences and their intensity and duration. We repeatedly see such graphic illustrations of the need for stronger and more effective coordination of our power system in this country.

Coordination is thus the sine qua non of modern power systems operation. When independent utilities seek to coordinate their systems, however, antitrust law considerations must be taken into account and may serve to inhibit coordination and thus deprive their consumers of the benefits of integrated operation.

Why this is true requires initially an appreciation of the existing structure of the industry. We tend to think of electric utilities as peculiarly monopolistic and of course this is largely true at the local retail distribution level. But the industry is at the same time pluralistic in character and is made up of a number of distinct segments. First in order of size, accounting for about 75 percent of the Nation's generation and a roughly equivalent amount of retail sales are the vertically integrated investor-owned utilities—some 185 of them

falling within our class A category of companies which have annual revenues in excess of $2½ million, the largest which has annual electric revenues of $650 million. These utilities, with few exceptions, generate, transmit, and sell electricity at retail in fairly well defined territories.

Operating alongside of these major private utilities are some 3,000 municipal, cooperative, and small investor-owned utilities, some of which generate all or most of their own power, but most of which are largely or entirely distribution systems securing their bulk energy from the major private utilities, from the Federal generating systems or, in the case of distribution cooperatives, from federated G. & T. cooperatives. Since economies of scale referred to earlier are largely in the generation and transmission areas, given reasonable access to a cheap and dependable bulk power supply, local distribution systems can offer economical service to their customers. But if anything like the present industry structure is to be maintained—and we believe there are compelling reasons to do so—it is clear that complex arrangements will have to be worked out both on the horizontal level between adjoining generating and transmitting systems—public and private—and vertically between the major sources of bulk power and the smaller systems which are dependent on those sources. It is reasonable to expect that many of the most useful arrangements will involve agreements which in the nonregulated sphere might well raise serious questions under the antitrust laws.

Some of these antitrust law considerations were raised 3 years ago by the National Power Survey Legal Advisory Committee created by the Federal Power Commission to study legal impediments to full coordination of the Nation's electric systems. The Legal Advisory Committee submitted a series of hypothetical questions to the Justice Department about the potential impact of the antitrust laws on coordinating arrangements.

The Advisory Committee posed the case of a proposed power pooling arrangement among several companies which included an agreement that each participant would serve only specified areas or specified customers and not others. In view of the local monopoly characteristics commonly ascribed to electric utility operations, the Legal Advisory Committee might well have expected the Justice Department to agree that the hypothetical market-sharing arrangement would not present any serious antitrust question. The Department, however, took a substantially different view. The then Assistant Attorney General in charge of the Antitrust Division, Judge Loevinger, advised that power pooling provisions would "tend to raise a serious antitrust problem" to the extent that they restrict end use, allocate service areas or allocate customers.

Relying on the Supreme Court's 1962 decision concerning a merger of interstate natural gas pipeline companies (*California* v. *F.P.C.*, 369 U.S. 482) Judge Loevinger indicated that this would be true even of provisions and agreements filed with and approved by the Federal Power Commission or a State regulatory agency. He emphasized that under the Supreme Court's opinion, "absent express statutory authority, regulatory agencies cannot immunize utilities from the federal antitrust laws."

Senator LAUSCHE. Mr. Chairman, you speak of the Legal Advisory Committee. Will you identify its composition?

Mr. WHITE. We will supply it for the record, sir. This was basically a group of individuals appointed by the Federal Power Commission during its National Power Survey to inquire into all of the legal problems that presented themselves during the course of the Commission's Survey.

Basically these were lawyers representing all segments of the power industry in the United States.

(The following material was subsequently submitted:)

FEDERAL POWER COMMISSION,
Washington, D.C., August 8, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This letter will answer the question raised at the hearing on S. 3136 on July 12, 1966, on page 25 of the transcript of the hearings regarding the composition and status of the Legal Advisory Committee of the National Power Survey. I am attaching the Commission order of March 22, 1962, which established the National Power Survey Advisory Committees. The members of the Legal Advisory Committee were:

Herbert B. Cohn [1] [2]	American Electric Power Service Corp.
Herbert Squires [1]	Pennsylvania Public Utilities Commission.
Alan P. O'Kelly [1]	Paine, Lowe, Coffin, Herman & O'Kelly.
Lawrence Potamkin [1]	Wise & Potamkin.
F. T. Searls	Pacific Gas & Electric Company.
David K. Kadane	Long Island Lighting Company,
Frank Ryburn, Jr	Burford, Ryburn & Ford.
William E. Torkelson	Wisconsin Public Service Commission.
E. Kendell Davis	Sacramento Municipal Utility District.
Ralph Koebel	Rural Electrification Administration.
Curtis H. Bell	Department of the Interior.
Franklin Hollis	Sulloway, Hollis, Godfrey & Soden.
Irvine Fane	Spencer, Fane, Britt & Browne.
James B. Liberman	Berlack, Israels & Liberman.
Northcutt Ely	Ely, Duncan and Bennett.

I hope this information fully answers the question.

Sincerely,

LEE C. WHITE, *Chairman.*

[1] Members of the subcommittee which prepared the chapter on problems arising from the antitrust statutes.
[2] Chairman of the subcommittee.

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., and Charles R. Ross.

ORDER ESTABLISHING NATIONAL POWER SURVEY ADVISORY COMMITTEES AND PRESCRIBING PROCEDURES

(Issued March 22, 1962)

The Federal Power Commission is directed by Section 202(a) of the Federal Power Act (16 U.S.C. 792–825r) to promote and encourage voluntary interconnection and coordination of the nation's electric power facilities in the interest of economy and conservation, and is authorized by Section 311 of the Act to conduct broad investigations covering all aspects of the entire power industry. In order to accomplish these objectives more effectively and in accordance with Executive Order No. 11007 of February 26, 1962 (27 FR 1875) relating to the Formation and Use of Advisory Committees, we have concluded that it is in the public interest that National Power Survey Advisory Committees be, and they hereby are, established.

1. *Purpose.* The Committees shall advise and make recommendations to the Commission in planning and carrying out the Commission's proposed national power survey.

2. *Selection of Committee Members.* All Committee members and alternates shall be selected by the Chairman of the Commission.

3. *Conduct of Meetings.* The Chairman of the Commission, or in his absence, the Vice Chairman of the Commission, or any other full-time employee of the Commission designated by the Chairman of the Commission, shall act as Chairman of Committee meetings and shall be responsible for opening and conducting meetings and for adjourning meetings when, in his judgment, adjournment is in the public interest.

4. *Minutes.* The Chairman of the Commission having made a finding that maintenance of a verbatim transcript would be impracticable and not in the public interest, there shall be kept by the Secretary of each Committee, in lieu thereof, a record of persons present, a description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Committees.

5. *Secretary of the Committee.* The Chairman of the Commission shall appoint a Secretary of each Committee from among the members of the Commission staff who shall be responsible for preparing summary minutes of all Committee meetings, preparing agenda, notifying members of the meetings, and maintaining all records related to organization, membership and operations of the Committees. The Secretary shall be present during all meetings and shall certify the accuracy of all minutes.

6. *Location and Time of Meetings.* Meetings will convene at the call of the Chairman of the Commisssion at the Office of the Federal Power Commission, located at 441 G Street, N.W., Washington 25, D.C., unless otherwise directed. Ordinarily, these meetings will be held during the regular working hours of the Federal Power Commission.

7. *Advice and Recommendations Offered by the Committee.* The advice and recommendations of the members of the Committees may be presented to the Commission at Committee meetings either orally or in written form. The advice of all Committees shall be limited to matters relating solely to the planning and carrying out of the national power survey and ultimate decisions based on the Committees' advice or recommendations are reserved to the Federal Power Commission.

8. *Duration of the Committee.* All Committees shall terminate not later than two years subsequent to their date of establishment, unless the Commission determines in writing, not more than 60 days prior to the expiration of such two-year period, that continued existence of a Committee is in the public interest. A like determination by the Commission shall be required not more than 60 days prior to the end of each subsequent two-year period to continue the existence of each Committee thereafter.

By the Commission.

GORDON M. GRANT, *Acting Secretary.*

Senator LAUSCHE. The advisory committee was a creature of the Federal Power Commission, is that correct?

Mr. WHITE. Yes, although I think it is probably more accurate to note that it operated as one of the industry groups set up to conduct the National Power Survey with guidance of the Commission and assistance of its staff.

Senator LAUSCHE. And who set up that group?

Mr. WHITE. The Federal Power Commission.

Senator LAUSCHE. Thank you very much.

Mr. WHITE. But we will submit, sir, for the record a list of those people who participated on that advisory committee.

One of the most pressing antitrust concerns of the electric utility industry at the present time relates to the division of markets discussed by the legal advisory committee.

Might I say for the benefit of Senator Lausche, attached to my statement is an excerpt from the Commission's National Power Survey report and this excerpt includes the report of the legal advisory committee, together with the correspondence with the Justice Department, on this point.

Because of the heavy investment the electric power business requires, it is economically wasteful to duplicate local distribution facilities. Thus investor-owned, municipal, and rural electric systems commonly believe that monopolistic service areas are desirable. In some States, a regulator agency is authorized to establish service areas. In the absence of State action, utilities have no choice but to compete, often wastefully, or to agree among themselves on service areas. If they pursue the latter course, however, the danger of antitrust litigation may be a serious obstacle.

I understand that on occasion large systems have refused to enter into service area agreements with smaller neighbors on the basis of possible antitrust litigation.

A new and more challenging aspect of this problem seems likely to arise as two or more groups of utilities attempt to coordinate. The development of the Pacific Northwest-Southwest intertie involves such coordination on the largest scale yet attempted in this country. As Chairman Magnuson has noted, the creation of the intertie seems to have brought to the fore some of the latent antitrust problems involved in this sort of complex coordination.

Under the Federal Power Act the coordination agreements are not filed with the Commission until after they have been executed by the parties. However, it is not difficult to visualize the kinds of problems which may well arise in these arrangements.

To the extent that each of two interconnected power pools falls under single ownership, and their relationship does not affect their dealings with third parties, there appear to be no antitrust impediments. On the other hand, it is not at all clear that power pools consisting of independently owned systems—public and private—can enter into the same arrangements without risking antitrust litigation accusing them of conspiracy to fix prices or divide markets. Even though these coordinating arrangements of independently owned systems are subject to FPC review and revision, to the extent that they involve public utilities—as defined by section 201 of the Federal Power Act—and interstate commerce, court decisions, as indicated earlier, suggest that FPC regulation does not immunize them. This potential vulnerability to the restraint-of-trade provisions of the antitrust laws is one of the factors which may tempt independently owned members of a power pool to give up their independence and merge or affiiliate within a single holding company system. The spate of important electric utility mergers and consolidations in the last few months makes this hearing on S. 3136 particularly timely.

S. 3136 does not promote merger which is another way of achieving the benefits of coordination; it attempts instead to facilitate those coordinating arrangements through which independently owned utilities are enabled to retain their separate organizational integrities and which are determined to be in the public interest. Specifically S. 3136 would do two things:

First, it would concentrate in the Federal Power Commission responsibility for evaluating anticompetitive dangers and other factors involved in electric utility coordination agreements. This would take jurisdiction initially to pass upon the competitive effect of a transaction from the Federal district courts throughout the country, but not eliminate the role of the Department of Justice. As Chairman Magnuson explained, in introducing the bill, the Justice

67-170—66——2

Department, as well as interested private parties and State agencies, could request and participate in hearings before the Federal Power Commission under S. 3136. A private litigant would also be required to bring his complaint before the Federal Power Commission, and private antitrust litigation, I should note, now seems at least as serious a potential problem as Justice Department litigation.

Moreover, while the bill transfers original jurisdiction to consider the competitive problems from the district courts to the Commission, it does not preempt the appellate courts since any FPC determinations under the bill would be subject to judicial review by the U.S. courts of appeals and the Supreme Court of the United States.

Second, S. 3136 would apply only to contracts required to be submitted to the Commission under section 205(c) of the Federal Power Act for filing and review under our general regulatory powers. While we are now authorized to revise these contracts, if the public interest requires, and must give consideration to competitive factors, S. 3136 would make explicit, that in evaluating anticompetitive problems connected with coordination agreements filed with the Commission, the standard to be applied in deciding their propriety is a broad-gaged view of the public interest. In making this determination, the bill would require us to weigh the values arising from competition against other values prescribed by Congress, such as the public interest in an abundant and economical supply of electricity, in the efficient coordination of facilities, and in the reliability of service.

The bill represents a common method of avoiding conflict between the concepts of public control of business through the antitrust laws and through the direct regulation of the prices and practices of public utilities. As our report indicates, there are parallel provisions for regulation and antitrust immunity of analogous agreements in the Federal Aviation Act, the Interstate Commerce Act, and the Shipping Act.

Let it be clear that we could not support the principle of antitrust exemption for electric power coordination arrangements if we believe it would provide a device behind which electric utilities could hide and take unfair advantage of or "freeze out" other electric utilities in any of the segments of this most complex industry in the planning and operation of power pools.

The Commission currently considers anticompetitive factors in its review of the rates and practices of the companies under its jurisdiction under sections 205 and 206 of the Federal Power Act and, in a recent case, the Commission ordered a utility to eliminate wholesale contract provisions which restricted the competitive position of their distribution-system customers.

Although I do not believe S. 3136 adds to this regulatory jurisdiction, it would make crystal clear that competitive considerations are properly a matter for the Commission and would require the Commission expressly to focus upon the competitive problem in any order granting immunity.

The standard of S. 3136 would facilitate a reasonable balancing of these factors. It would instruct the Commission to determine whether a contract would "unduly restrain competition when considered in relation to the purposes of the Power Act" as the basis for granting antitrust immunity.

Senator LAUSCHE. Mr. Chairman—will you illustrate what occurred in this case?

Mr. WHITE. Yes. I think that our general counsel, Mr. Solomon, here to my right, is probably in a better position to give you the specific facts of that case. It was somewhat involved and frankly had been pending before the Commission prior to my arrival there.

Senator LAUSCHE. Permission to go ahead?

The CHAIRMAN. Has the case been decided?

Mr. SOLOMON. Yes; the case has been decided by the Commission. It is pending in the fifth circuit court of appeals at the present moment.

It concerns Georgia Power Co., and involves contract provisions that the company had with most of its municipal customers. The provision in question restricted the municipals from selling to any industrial company within their franchised area with more than a certain fixed amount of electric demand.

The Commission determined that this restriction was unwarranted and ordered Georgia Power to eliminate this restriction.

Senator LAUSCHE. Now will you point out what the adverse impacts were that caused the Commission to decide that the restriction was unwarranted?

Mr. SOLOMON. Well——

Senator LAUSCHE. The economic impact?

Mr. SOLOMON. The economic impact on the communities was that they had municipal electric systems trying to attract new industries. They couldn't provide assurances to the industries they were trying to bring in, that they could provide electricity under their municipal rates. They had to say, "Go speak to the Georgia Power Co." This is the type of problem, but if you wish, we can submit the whole decision for the record.

Senator LAUSCHE. No; that is ample.

The CHAIRMAN. All right.

Mr. WHITE. I think, Senator, that does represent the type of problem that not often, but occasionally does get to the Commission, where there are aggrieved parties who feel that their suppliers are taking unfair advantage of their size and that at the negotiating table they feel that they are outweighed. The Commission feels a responsibility to examine these contracts under the existing authority that it possesses.

Mr. SOLOMON. Senator Lausche, I should also point out that in the *Georgia Power* case, a problem had come up with respect to territorial arrangements between the company and its cooperative customers. Originally there had been a form of unilateral restriction on territorial arrangements, which the Commission questioned.

The matter was finally settled by an agreement between the cooperatives and the company, where they did agree to territorial arrangements between the two of them, which the Commission allowed to go into effect, but which were more of a bilateral nature in which both sides got protection from one another.

The CHAIRMAN. Do most State regulatory bodies have the authority to issue territorial restrictions? Do most States or is it just a few States?

Mr. WHITE. I would say we will supply for the record a complete list.

My own understanding is, Mr. Chairman, that it is a comparatively small number of States that authorizes State regulatory bodies to make

this type of a division. Without speaking for my fellow members of the Commission, I can say that I personally see nothing inherently evil with territorial division. It could be set up in such a fashion that it would be contrary to the public interest; but personally, I see nothing that says that the public interest is not served by an appropriate type of territorial division.

(Pursuant to the above discussion the following information was received for the record:)

FEDERAL POWER COMMISSION,
Washington, August 9, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter replies to your inquiry during my testimony at the hearings on S. 3136, July 12, 1966, on the authority of the various states to issue territorial restrictions for electric utilities (p. 33 of the transcript of the hearings).

There is no uniform pattern among the states as to their method of permitting electric utilities to operate, and consequently no short completely accurate answer on the number of state commissions with power to issue "territorial restrictions." This nonuniformity is due to several factors.

State laws frequently provide different treatment for privately owned utilities, utility districts, cooperatives, and municipalities. Frequently, municipalities require the electric utility to obtain a franchise in addition to the certificate from the state. These franchises themselves may be for a fixed period or indeterminate and also may or may not give exclusive territorial rights. In those states where the state regulatory agency does not issue certificates, municipalities issue franchises, in almost all cases.

This variance among state laws is complemented by the variance of state commission practice acting within their statutory authority. That is, a Commission may or may not permit competition or it may certificate competing utilities in overlapping areas but establish special rules for such areas.

A 1960 survey indicates that thirty-three states and the District of Columbia require certificates of public convenience and necessity before an electric utility can operate. In some cases these certificates are for an indeterminate period of time although in 28 states the certificates are for a fixed period of time. In addition, Michigan requires a certificate where competition is involved and Iowa requires a certificate for service outside city limits.[1] The differences and practices described above make it impossible to generalize with complete accuracy.

In general, twenty-four states have the power to issue certificates of public convenience and necessity with territorial restrictions,[2] although, once again, the differences and practices described above make it impossible to generalize with complete accuracy.

I hope this information will be helpful to you in considering the bill. If I can be of further service, please call on me.

Sincerely,

(Signed) LEE C. WHITE,
Chairman.

The CHAIRMAN. I suppose that in a distribution system, if any private citizen or any group decided that the setting up of territories was detrimental to the rates, or public interest, they would have ample opportunity in those States that allow it, to come into the Commission and state their views?

Mr. WHITE. Yes.

The CHAIRMAN. In most cases, I think you will find that the regulated rates are better for everyone, public and industry, if it is handled right, than if they allowed duplicatory systems.

[1] State Commission Jurisdiction and Regulation of Electric and Gas Utilities, PFC, 1960, p. 28–29.

[2] Alabama, Arizona, Arkansas, California, Illinois, Kansas, Maine, Maryland, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermonth, Virginia, West Virginia, Wisconsin. List compiled from State Commission Jurisdiction and Regulation of Electric and Gas Utilities, FPC, 1960, p. 28–29 and Moody's Public Utility Manual, 1965, pp. A161–2.

Mr. WHITE. The basic reason for regulating these industries is that it just is not in the public interest to have duplicatory systems. We can't have two power systems competing in the same area, just as we have two drug stores or two department stores. This is the underlying rationale for Federal Government or any government undertaking regulation.

The CHAIRMAN. In times past it used to be very desirable where the private and the public power competed together. We found the rates went down at all times. But I say "in times past", technologically now, it is a little different story.

Mr. WHITE. Yes, but we still find a very high level of competitive impact in every segment of the industry which wants to demonstrate it can do a better job and more efficient job and I think this does redound to the public interest to have them on the alert. This goes back to the yardstick theory that was so popular in the early 1930's, when TVA was getting started and I believe that there is still a considerable merit to that type of competitive thrust.

In the field of coordinated utility action, where there are demonstrable benefits to the consumer, it does not make any sense for antitrust law to prohibit outright certain types of conduct without inquiring into their reasonableness in the particular utility context. And if such an inquiry is to be made as to reasonableness, that is, if coordinated activities are not automatically to be deemed antitrust violations per se, it makes better sense to have the one agency, with responsibility for understanding the technology and economics of the electric industry, pass on all aspects of the public interest involved in the intercompany behavior of electric utilities and to draw the line between cooperation and collusion. It is more appropriate that the Federal Power Commission, with specialized experience in the electric power field, perform this function rather than a court of general jurisdiction.

In supporting the principle of S. 3136, I do not propose that Congress interfere with any decision of the courts or immunize any particular transactions from pending litigation. Quite frankly, I am not aware of any existing lawsuits which S. 3136 is aimed at resolving. The bill, rather, seeks in the best legislative tradition to anticipate a problem when it is still but a small cloud upon the horizon and to provide a serviceable public remedy for use when needed.

The Senate Commerce Committee is making a valuable contribution by focusing public interest on the problems of antitrust impediments to coordination. S. 3136 would bring particular coordinating arrangements out in the open, for a systematic public review, balancing the public interests of cooperation and of competition. Under the provisions of S. 3136 this function would be regularly performed by the Federal Power Commission with the assistance of the parties appearing before it.

While we support the principle of S. 3136 our report lists specific recommendations which we believe will clarify some features of the bill and provide for smoother administration of it.

First, we urge that the Commission be authorized to prescribe rules governing the kinds of contracts in which it would be required to make an antitrust immunity determination. There are hundreds of contracts, not connected with power pools or joint ventures between two or more generating utilities, filed with the Commission which under the bill as it now reads would be entitled upon demand to an

antitrust determination. To avoid a burdensome backlog, we urge that the Commission be empowered to control the flow of filings under S. 3136 as it presently does under existing sections of the act. By such regulations, we could focus appropriate attention on the most significant contracts, where the danger of conflicting antitrust action appears most likely. The purpose of the bill can best be served by permitting the Commission to concentrate its resources to develop sound policies for the most substantial matters.

Second, we urge amendment of the bill to make clear that the Commission would have the power to attach conditions to its approval. It would be a most unfortunate restriction of the Commission's reasonable discretion in the public interest were the bill interpreted to give the Commission only the choice of saying "approved" or "disapproved."

Third, we urge additional language making it entirely clear that the Commission could reconsider at a later date an arrangement previously approved in the light of experience or changed circumstances. While such power is implicit in the present bill, it is, of course, essential to permit the Commission to fulfill its responsibilities in the public interest as circumstances change and thus it would be desirable to spell this out expressly. Changed circumstances could well necessitate the inclusion of an additional member in a power pool or the modification of the terms of member participation. The other regulatory statutes conferring antitrust immunity generally authorize the regulatory agency to reconsider the orders and to revise them where necessary and we fully endorse a similar amendment for S. 3136.

Fourth, to avoid confusion with "approval" of a contract under the other regulatory sections of the power act—which would not be affected by the bill—we suggest that the orders referred to be called "orders of immunity."

Last, we recommend that the particular antitrust laws referred to in the bill be spelled out, specifically to indicate that section 10(h) of the power act is an "antitrust law" in the contemplation of the bill.

We would, of course, be ready to assist the committee in the preparation of suitable amendatory language.

The CHAIRMAN. I think it would be very helpful if the general counsel and your people gave us specific language.

Mr. WHITE. We will do so.

(Pursuant to the above discussion the following material was submitted for the record:)

FEDERAL POWER COMMISSION,
Washington, August 25, 1966.

Re S. 3136, 89th Congress.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter submits our specific language to amend S. 3136 which you requested during my testimony on July 12, 1966. I enclose also, for your convenience, a copy of the bill marked to show these specific changes.

First, we recommend that the bill give the Commission authority to determine the kinds of cases for which it would consider requests for antitrust immunity determinations. As I explained, this would allow the Commission to concentrate its efforts on the most important kinds of cases out of the 3,000 rate schedules now filed and to avoid the creation of administrative backlogs. We originally suggested also that the bill be amended to delete the category of bilateral contracts for the "sale or exchange" of electric energy (page 2, line 6) from the reach of the bill. We are still of the opinion that, at least initially, it would be

better to devote our efforts under such legislation to multi-lateral interconnection, pooling, coordination and joint use agreements; and we should expect to employ any rulemaking authority to so limit the kinds of cases we would at first consider. However the statements presented by the proponents of S. 3136 and others now convince us that it may be unwise to exclude permanently from the reach of the bill the ordinary, bilateral sale or exchange contracts. It may well be that after the Commission has had some experience in administering the legislation, and after consultation with all segments of the electric utility industry, the state regulatory bodies, and, of course, the Department of Justice, that it would prove appropriate to extend antitrust immunity to some such bilateral contracts. Accordingly, we now suggest that this class of contracts not be deleted from the coverage of the bill but that the matter be deferred instead through reliance on agency discretion. To accomplish these purposes we suggest that on page 2, line 1 the following be substituted for the word "shall": "and under such rules and regulations as the Commission may prescribe, may"

In order that our rules not create a jurisdictional vacuum between FPC and the courts, we suggest addition of the following phrase on page 2, line 25, after "plenary": "unless and until the Commission waives jurisdiction under this subsection."

Second, in order that the power to grant a conditional order of immunity be clearly spelled out, we suggest addition of the following sentence at the end of the first paragraph on page 2, line 15: "The Commission may grant such order of immunity upon such terms and conditions as it finds necessary or appropriate in the public interest."

Third, we recommend that the bill spell out the necessary power to reconsider an order of immunity previously issued and, to that end, suggest that the following sentence be added immediately after our recommended sentence spelling out the conditioning power: "The Commission may, upon reconsideration of orders under this subsection, after notice and opportunity for hearing, and for good cause shown, attach such further terms and conditions as may be necessary or appropriate in the public interest."

Fourth, to eliminate confusion between orders under the proposed subsection and orders of approval under sections 205 and 206 of the Act, we recommend that orders under the proposed subsection be called orders of "immunity" and, therefore, suggest that "approval" be changed to "immunity" on page 2, lines 11 and 16.

Fifth, we recommend specific enumeration of subsection 10(h) of the Federal Power Act as an antitrust law and suggest insertion of the phrase: "including subsection 10(h) of this Act." after the word "laws" on page 2, line 21.

Commissioner Bagge, consistent with his separate views expressed in our original report to you on this bill, recommends that:

1. The last word on line 15 of page 2 be deleted;
2. The phrase "subject to all Federal, State, and municipal anti-trust laws" be added after the word "be" on line 15 of page 2;
3. The clause "or refuses to grant such order of immunity upon terms and conditions acceptable to the parties to such contract" be added after the word "subsection" in our suggested addition to line 25 of page 2.

Going beyond our own recommendations, if the Committee wishes to relieve the remote possibilities suggested by some that the bill might somehow impinge upon statutes other than the antitrust laws (such as the Public Utility Holding Company Act) we would suggest addition of the following phrase on page 2, line 23, after the word "Commission": "but shall not be relieved from the operation of any other statute."

We hope these suggestions will assist the Committee. Please call upon us if we may be of further service.

Sincerely,

LEE C. WHITE, *Chairman.*

[S. 3136, 89th Cong., 2d sess.]

(Marked with amendments suggested by the Federal Power Commission)

A BILL To facilitate the provision of adequate, economical, and dependable electric service for the present and future needs of the public and the proper and timely installation and use of the products of advancing technology in the generation or transmission of electric energy

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in section 202 of the Federal Power Act, add a new subsection 202(g) to read as set forth below:

"(g) To encourage voluntary interconnection and coordination in the interests of economy and dependability, the Commission, in addition to such authority as it may otherwise have over such contracts under sections 202 and 205-207 of the Act, ~~shall~~, *and under such rules and regulations as the Commission may prescribe, may* upon the motion of any party thereto or any interested entity or person and may upon its own motion, review any contract, and any amended contract, hereafter submitted to the Commission for filing pursuant to subsection 205(c) of this part which contract provides, or is one of several contracts which provide, for the sale or exchange of electric energy or the interconnection, pooling, or coordination of power systems or for the joint use of facilities for the generation or transmission of electric energy. After notice and opportunity for hearing, the Commission shall grant an order of ~~approval~~ immunity of any such contract which it finds will not unduly restrain competition when considered in relation to the purposes of the Act; if it finds the contrary, it shall disapprove such contract and further performance thereof by a public utility shall be unlawful.

The Commission may grant such order of immunity upon such terms and conditions as it finds necessary or appropriate in the public interest. The Commission may, upon reconsideration of orders under this subsection, after notice and opportunity for hearing and for good cause shown, attach such further terms and conditions as may be necessary or appropriate in the public interest.

If the Commission grants an order of ~~approval~~ *immunity* of any such contract, any public utility or other entity (including all persons and entities referred to in subsection 201(f) of this Act) which is a party thereto, and its officers, directors, agents, and employees shall be exempt and relieved from the operation of all Federal, State, and municipal antitrust laws *including subsection 10h of this Act* in the negotiation and execution of such contract and in the performance thereof, as approved by the Commission *but shall not be relieved from the operation of any other statute.* The authority conferred on the Commission by this subsection shall be exclusive and plenary, *unless and until the Commission waives jurisdiction under this subsection,* and all orders entered hereunder shall be final and conclusive as to all persons (including all persons and entities referred to in subsection 201(f) of this Act), subject only to review as provided in section 313 of this Act.

The Commission shall have authority to enforce the provisions of this subsection 202(g) by the imposition of any or all sanctions provided for in part III of this Act.

Mr. WHITE. The efficient coordination of electric utility operations by two or more separately managed utilities is at best a difficult and challenging undertaking. It is not made any easier by the imposition of legal restraints that do not serve useful purposes. With the amendments along the lines we have proposed, we believe enactment of S. 3136 would further the coordination of electric utility systems and, thereby, enhance the economy and reliability of America's bulk power supply.

The CHAIRMAN. Thank you very much.

We will put in the record the appendix referring to the appropriate sections of the Legal Advisory Committee.

(The prepared statement of Mr. White and the report referred to by the chairman follow:)

PREPARED STATEMENT OF LEE C. WHITE, CHAIRMAN, FEDERAL POWER COMMISSION

Mr. Chairman, I am pleased to present the Commission's views on S. 3136, which would authorize the Federal Power Commission to exempt from the antitrust laws certain contracts found to be in the public interest.

We have previously submitted our formal report, which includes a detailed analysis of the legal effect of the bill. I presume the report will be incorporated in the record.

In summary, the Commission supports the principle of S. 3136, but urges amendment in a number of particular respects.

The electric utility industry is unique in the challenges and opportunities confronting it. Through technological developments in generation and transmission, the American consumer can realize tremendous benefits in the form of reduced costs and reliable service. These developments involve the use of large

units which reduce the unit cost of generating electric energy and the use of new, extra-high-voltage transmission lines which substantially cut the cost of transmitting this energy and permit more extensive transmission.

The nation's rapidly expanding use of electricity is expected to more than double and perhaps triple by 1980, thus creating many opportunities to achieve great economies in cost. Growth and intersystem coordination are interrelated, however, and if we are to achieve the fullest benefits from one the other is a necessity. Coordination is a vehicle by which groups of electrical systems through common action can obtain the benefits of economy of size in the planning and development of the sources of power supply and of transmission. Coordination requires extensive intersystem planning and joint agreements between the interconnected systems.

One result of the Commission's National Power Survey, issued in late 1964, was to suggest to the industry the possibilities for further coordination in planning the large expansions of our power systems in the decades ahead while retaining the benefits of a pluralistic ownership pattern. Technology has reached the stage where closer coordination of the construction plans and operations of individual systems is not only feasible but necessary if the consuming public is to receive the benefits of lower cost electricity which technology now makes possible. The need for effective coordination is not limited to the major utility systems; on the contrary, the many small systems, especially those now operating in virtual isolation, also have much to gain from coordination, if they can join together or with large systems in the construction of the necessary facilities.

By 1980 the nation might well require more than 500 million kilowatts of capacity. When one considers that every 1 percent capacity reduction made possible by increased coordination reduces the capital investment required by $500 million, the savings from increased coordination are great indeed. Translated into potential benefits to the nation's consumers, at stake by 1980 are possible savings of as much as $11 billion a year. In Section 202(a) of the Federal Power Act Congress properly established full coordination of the nation's electric power systems as national policy. The importance of this Congressional mandate has never been greater than it is today. This has been recently recognized by the Congress itself in the appropriation of the funds necessary for the major interregional interconnection in the Pacific Northwest-Southwest Intertie.

The benefits of increased coordination are not related solely to cost, however. The unfortunate blackout which occurred in the northeastern United States and parts of Canada last fall vividly illustrates the direct relationship between effective interconnection and coordination and reliability of the nation's bulk power supply system. Isolated systems and weakly coordinated systems are not well adapted to modern service needs. System stability and freedom from outage hazard can be achieved only when internal transmission systems and intersystem interties are strong. If we are to increase service reliability, the trend toward stronger interconnections must be accelerated and systems must closely coordinate planning and operation. This need was recognized in the specific recommendations contained in our initial report to the President on the Northeast failure.

Coordination is thus the *sine qua non* of modern power systems operation. When independent utilities seek to coordinate their systems, however, antitrust law considerations must be taken into account and may serve to inhibit coordination and thus deprive their consumers of the benefits of integrated operation.

Why this is true requires initially an appreciation of the existing structure of the industry. We tend to think of electric utilities as peculiarly monopolistic and of course this is largely true at the local retail distribution level. But the industry is at the same time pluralistic in character and is made up of a number of distinct segments. First in order of size, accounting for about 75 percent of the nation's generation and a roughly equivalent amount of retail sales are the vertically integrated investor-owned utilities—some 185 of them falling within our Class A category of companies which have annual revenues in excess of $2½ million and the largest which has annual electric revenues of as much as $650 million. These utilities, with few exceptions, generate, transmit and sell electricity at retail in fairly well defined territories.

Operating alongside of these major private utilities are some 3,000 municipal, cooperative and small investor-owned utilities, some of which generate all or most of their own power, but most of which are largely or entirely distribution systems securing their bulk energy from the major private utilities, from the federal generating systems or, in the case of distribution cooperatives, from federated G&T cooperatives. Since economies of scale referred to earlier are largely in the gen-

eration and transmission areas, given reasonable access to a cheap and dependable bulk power supply, local distribution systems can offer economical service to their customers. But if anything like the present industry structure is to be maintained—and we believe there are compelling reasons to do so—it is clear that complex arrangements will have to be worked out both on the horizontal level between adjoining generating and transmitting systems (public and private) and vertically between the major sources of bulk power and the smaller systems which are dependent on those sources. It is reasonable to expect that many of the most useful arrangements will involve agreements which in the nonregulated sphere might well raise serious questions under the antitrust laws.

Some of these antitrust law considerations were raised three years ago by the National Power Survey Legal Advisory Committee created by the Federal Power Commission to study legal impediments to full coordination of the Nation's electric systems. The Legal Advisory Committee submitted a series of hypothetical questions to the Justice Department about the potential impact of the antitrust laws on coordinating arrangements.

The Advisory Committee posed the case of a proposed power pooling arrangement among several companies which included an agreement that each participant would serve only specified areas or specified customers and not others. In view of the local monopoly characteristics commonly ascribed to electric utility operations, the Legal Advisory Committee might well have expected that the Justice Department would agree that the hypothetical market-sharing arrangement would not present any serious antitrust question. The Department took a substantially different view. The then Assistant Attorney General in charge of the Antitrust Division, Judge Loevinger, advised [1] that power pooling provisions would "tend to raise a serious antitrust problem" to the extent that they restrict end use, allocate service areas or allocate customers. Relying on the Supreme Court's 1962 decision concerning a merger of interstate natural gas pipeline companies (*California* v. *F.P.C.*, 369 U.S. 482)[2] Judge Loevinger indicated that this would be true even of provisions and agreements filed and approved by the Federal Power Commission or a state regulatory agency. He emphasized that under the Supreme Court's opinion, "*absent express statutory authority, regulatory agencies cannot immunize utilities from the federal antitrust laws.*"

One of the most pressing antitrust concerns of the electric utility industry at the present time relates to the division of markets discussed by the Legal Advisory Committee. Because of the heavy investment the electric power business requires, it is economically wasteful to duplicate local distribution facilities. Thus investor-owned, municipal, and rural electric systems commonly believe that monopolistic service areas are desirable. In some states, a regulatory agency is authorized to establish service areas. In the absence of state action, utilities have no choice but to compete, often wastefully, or to agree among themselves on service areas. If they pursue the latter course, however, the danger of antitrust litigation may be a serious obstacle. I understand that on occasion large systems have refused to enter into service area agreements with smaller neighbors on the basis of possible antitrust litigation.

A new and more challenging aspect of this problem seems likely to arise as two or more groups of utilities attempt to coordinate. The development of the Pacific Northwest-Southwest Intertie involves such coordination on the largest scale yet attempted in this country. As Chairman Magnuson has noted, the creation of the Intertie seems to have brought to the fore some of the latent antitrust problems involved in this sort of complex coordination. Under the Federal Power Act the coordination agreements are not filed with the Commission until after they have been executed by the parties. However, it is not difficult to visualize the kinds of problems which may well arise in these arrangements.

To the extent that each of two interconnected power pools falls under single ownership, and their relationship does not affect their dealings with third parties, there appears to be no antitrust impediments. On the other hand, it is not at all clear that power pools consisting of independently owned systems (public and private) can enter into the same arrangements without risking antitrust litigation accusing them of conspiracy to fix prices or divide markets. Even though these coordinating arrangements of independently owned systems are subject to PFC review and revision to the extent that they involve public utilities (as defined by

[1] The materials appear in FPC, *National Power Survey Report—Part II* (1964), pages 367-369. Attached to this prepared statement is the entire text of Chapter 4 of the Legal Advisory Committee's report entitled "Problems Arising Under Antitrust Statutes".

[2] In 1952, the Supreme Court had expressly reserved this question of the relationship of the Federal Power Act to the antitrust laws. *Pennsylvania Water and Power Company* v. *Federal Power Commission*, 343 U.S. 414.

Section 201 of the Federal Power Act) and interstate commerce, court decisions, as indicated earlier, suggest that FPC regulation does not immunize them. This potential vulnerability to the restraint of trade provisions of the antitrust laws is one of the factors which may tempt independently owned members of a power pool to give up their independence and merge or affiliate within a single holding company system. The spate of important electric utility mergers and consolidations in the last few months makes this hearing on S. 3136 particularly timely.

S. 3136 does not promote merger which is another way of achieving the benefits of coordination; it attempts instead to facilitate those coordinating arrangements through which independently owned utilities are enabled to retain their separate organizational integrities and which are determined to be in the public interest. Specifically S. 3136 would do two things:

First, it would concentrate in the Federal Power Commission responsibility for evaluating anti-competitive dangers and other factors involved in electric utility coordination agreements. This would take jurisdiction initially to pass upon the competitive effect of a transaction from the Federal District Courts throughout the country, but not eliminate the role of the Department of Justice. As Chairman Magnuson has explained, the Department, as well as interested private parties and state agencies, could request and participate in hearings before the Federal Power Commission under S. 3136. A private litigant would also be required to bring his complaint before the Federal Power Commission, and private antitrust litigation, I should note, now seems at least as serious a potential problem as Justice Department litigation. Moreover, while the bill transfers original jurisdiction to consider the competitive problems from the District Courts to the Commission, it does not preempt the appellate courts since any FPC determinations under the bill would be subject to judicial review by the United States Courts of Appeals and the Supreme Court of the United States.

Second, S. 3136 would apply only to contracts required to be submitted to the Commission under Section 205(c) of the Federal Power Act for filing and review under our general regulatory powers. While we are now authorized to revise these contracts, if the public interest requires, and must give consideration to competitive factors, S. 3136 would make explicit, that in evaluating anti-competitive problems connected with coordination agreements filed with the Commission, the standard to be applied in deciding their propriety is a broad-gaged view of the public interest. In making this determination, the bill would require us to weigh the values arising from competition against other values prescribed by Congress, such as the public interest in an abundant and economical supply of electricity, in the efficient coordination of facilities, and in the reliability of service.

The bill represents a common method of avoiding conflict between the concepts of public control of business through the antitrust laws and through the direct regulation of the prices and practices of public utilities. As our report indicates, there are parallel provisions for regulation and antitrust immunity of analogous agreements in the Federal Aviation Act, the Interstate Commerce Act, and the Shipping Act.

Let it be clear that we could not support the principle of antitrust exemption for electric power coordination arrangements if we believed it would provide a device behind which electric utilities could hide and take unfair advantage of or "freeze out" other electric utilities in any of the segments of this most complex industry in the planning and operation of power tools.

PRESENT ACTIVITY

The Commission currently considers anti-competitive factors in its review of the rates and practices of the companies under its jurisdiction under sections 205 and 206 of the Federal Power Act and, in a recent case, we ordered a utility to eliminate wholesale contract provisions which restricted the competitive position of their distribution-system customers. Although I do not believe S. 3136 adds to this regulatory jurisdiction, it would make crystal clear that competitive considerations are properly a matter for the Commission and would require the Commission expressly to focus upon the competitive problem in any order granting immunity. The standard of S. 3136 would facilitate a reasonable balancing of these factors. It would instruct the Commission to determine whether a contract would "unduly restrain competition when considered in relation to the purposes of the [Power] Act" as the basis for granting antitrust immunity.

In the field of coordinated utility action, where there are demonstrable benefits to the consumer, it does not make any sense for antitrust law to prohibit outright certain types of conduct without inquiring into their reasonableness in the par-

ticular utility context. And if such an inquiry is to be made as to reasonableness, that is if coordinated activities are not automatically to be deemed antitrust violations *per se*, it makes better sense to have one agency, with responsibility for understanding the technology and economics of the electric industry, pass on all aspects of the public interest involved in the intercompany behavior of electric utilities and to draw the line between cooperation and collusion. It is more appropriate that the Federal Power Commission, with specialized experience in the electric power field, perform this function rather than a court of general jurisdiction.

In supporting the principle of S. 3136, I do not propose that Congress interfere with any decision of the courts or immunize any particular transactions from pending litigation. Quite frankly, I am not aware of any existing lawsuits which S. 3136 is aimed at resolving. The bill, rather, seeks in the best legislative tradition to anticipate a problem when it is still but a small cloud upon the horizon and to provide a serviceable public remedy for use when needed.

The Senate Commerce Committee is making a valuable contribution by focusing public interest on the problems of antitrust impediments to coordination. S. 3136 would bring particular coordinating arrangements out in the open, for a systematic public review, balancing the public interests of cooperation and of competition. Under the provisions of S. 3136 this function would be regularly performed by the Federal Power Commission with the assistance of the parties appearing before it.

While we support the principle of S. 3136 our report lists specific recommendations which we believe will clarify some features of the bill and provide for smoother administration of it.

First, we urge that the Commission be authorized to prescribe rules governing the kinds of contracts in which it would be required to make an antitrust immunity determination. There are hundreds of contracts, not connected with power pools or joint ventures between two or more generating utilities, filed with the Commission which under the bill as it now reads would be entitled upon demand to an antitrust determination. To avoid a burdensome backlog, we urge that the Commission be empowered to control the flow of filings under S. 3136 as it presently does under existing sections of the Act. By such regulations, we could focus appropriate attention on the most significant contracts, where the danger of conflicting antitrust action appears most likely. The purpose of the bill can best be served by permitting the Commission to concentrate its resources to develop sound policies for the most substantial matters.

Second, we urge amendment of the bill to make clear that the Commission would have the power to attach conditions to its approval. It would be a most unfortunate restriction of the Commission's reasonable discretion in the public interest were the bill interpreted to give the Commission only the choice of saying "approved" or "disapproved".

Third, we urge additional language making it entirely clear that the Commission could reconsider at a later date an arrangement previously approved in the light of experience or changed circumstances. While such power is implicit in the present bill, it is, of course, essential to permit the Commission to fulfill its responsibilities in the public interest as circumstances change and thus it would be desirable to spell this out expressly. Changed circumstances could well necessitate the inclusion of an additional member in a power pool or the modification of the terms of member participation. The other regulatory statutes conferring antitrust immunity generally authorize the regulatory agency to reconsider the orders and to revise them where necessary [3] and we fully endorse a similar amendment for S. 3136.

Fourth, to avoid confusion with "approval" of a contract under the other regulatory sections of the Power Act (which would not be affected by the bill), we suggest that the orders referred to be called "orders of immunity".

Last, we recommend that the particular antitrust laws referred to in the bill be spelled out, specifically to indicate that section 10(h) of the Power Act is an "antitrust law" in the contemplation of the bill.[4]

We would, of course, be ready to assist the Committee in the preparation of suitable amendatory language.

[3] Shipping Act, 46 USC 822. Civil Aeronautics Act, 49 USC 1485(a). Interstate Commerce Act, 49 USC 17b.

[4] Section 10(h) not included in the definition of that term in Section 1 of the Clayton Act, 15 U.S.C. 12. Section 10(h) reads as follows: "That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

The efficient coordination of electric utility operations by two or more separately managed utilities is at best a difficult and challenging undertaking. It is not made any easier by the imposition of legal restraints that do not serve useful purposes. With the amendments along the lines we have proposed, we believe enactment of S. 3136 would further the coordination of electric utility systems and, thereby, enhance the economy and reliability of America's bulk power supply.

FEDERAL POWER COMMISSION, NATIONAL POWER SURVEY, 1964

Report of the Legal Advisory Committee

CHAPTER IV—PROBLEMS ARISING UNDER ANTITRUST STATUTES

Electric utility systems tend to be monopolies within their service areas. Not only do the economics underlying the industry (with the heavy capital investment per dollar of revenue) tend to produce this result, but also the statutes under which state commissions or municipalities grant service area franchises, expressly recognize the fact that duplication of facilities by competing electric utility systems results in added costs which must be borne by electric consumers.

However, the majority of jurisdictions considering the question have held that the mere fact an enterprise is a utility does not wholly exempt it from antitrust policy.

For the purpose of this chapter antitrust problems are considered on three levels:

1. Competition for loads between neighboring utility systems.
2. The validity of contract conditions in pooling agreements designed to remove competition for loads.
3. The effect of a power pool upon the competitive position of non-members of the pool.

1. Competition for loads between neighboring utility systems

With some exceptions, there is no competition for loads between neighboring utility systems, once a particular customer has selected a particular site for its operations. (There is, of course, a great deal of competition between such systems in seeking to induce prospective customers to select sites, such competition frequently being carried out through area development programs.) Competition for loads in many cases does exist between neighboring systems representing different segments of the industry—principally because there is no clearly defined separation between them. Generally such competition centers upon prospective new loads (industries, schools, etc.), rather than existing loads.

This is not to say there are no cases where competition for load exists within the same segment of the industry or that there are not many more potential cases which could, but do not, arise. The fierce competition between railroads which existed in the period of their formation and consolidation had its parallel in the electric utility industry when it was reaching a degree of maturity prior to the depression of the 30's, and vestiges of that competition still remain.

The potential competition between systems within the investor-owned segment of the industry seems to have been minimized by a variety of factors, including:

(a) During the depression years, most systems found it difficult to meet the capital requirements of the areas they were already serving, let alone those of new areas;

(b) The restrictions on materials during World War II made it difficult to attempt to serve new areas;

(c) The exigeant requirements of the immediate post-war period and the attendant capital requirements directed energies toward service to existing load areas, rather than new ones;

(d) By the time that the post-war load growth rate had declined to levels which did not impose as difficult capital requirements, the service area boundaries between investor-owned systems had tended to stabilize, even where they had not been prescribed by statute. Exceptions do crop up, of course, in which particular customers of their own volition or by inducement, seek service from one investor-owned company rather than another, but such exceptions are rare;

(e) Unquestionably the development of rate-making standards has tended to suppress competition for new service areas between investor-owned companies. The identity of cost characteristics, plus such rate-making, cast

a serious damper on reaching for load by seeking to extend service area boundaries. There is also greater recognition of the higher costs and the chaos which would be involved in the unlimited duplication of facilities. Acquisition of direct load and opportunities for load development by corporate acquisition of distribution companies (by merger or purchase) is not infrequent even today, but mutual respect by investor-owned companies of their respective service area boundaries—even where ill-defined or where one company is large and the other small—is the rule, rather than the exception.

The lack of competition within the local public agency segment of the industry is generally explicable on the basis of the area functions which such agencies were created to serve—e.g. municipalities, boroughs or other governmental boundary areas. They, too, generally have a historical sense of the unfortunate results of unbridled competition in an industry where capital costs are so large a proportion of total cost of service.

The potentialities for conflict within the rural electric cooperative segment of the industry are superficially much greater. In most states, the cooperatives are not restricted to geographical service areas and one can envisage the possibility of a great deal of competition between two cooperative systems. However, since both have historically applied to the same source for their capital funds—the REA—the potential competition between cooperatives has been largely eliminated.

The result is that the most striking examples of competition within the industry are between the various segments, with competition between for example, a cooperative system on the one hand and an investor-owned or local public agency system on the other hand. Thus, when the service areas of an investor-owned system and of a cooperative system have no clearly defined boundaries, competition for new loads often occurs. In many such situations, particularly where the investor-owned system supplies power to the cooperative system, attempts are made to eliminate the competition for loads by contracts defining service areas in specific geographic terms or by reference to areas adjacent to the facilities of each. Such agreements do not necessarily work to the detriment of either system; in fact, both systems often insist upon them, but they may work to the possible disadvantage of particular consumers. Several reported cases have held that such agreements violate public policy. *Montana-Dakota Utilities Co.* v. *William Electric Cooperative* (CA8, 1959) 263 F. 2d 431, 70 ALR 2d 1318 and annotation 70 ALR 2d 1326. See however, the recent case of *Alabama Tennessee Natural Gas Company* v. *City of Huntsville*, 275 Ala. 184, 153 So. 2d 619 (1963).

A different problem arises when a power supplier limits the size of load or end use of its product in the hands of its resale customer in order to prevent such resale customer from using the power so supplied to it to compete with the supplier for large loads.

2. Contract conditions in pooling agreements designed to eliminate competition for loads.

For the same reasons as under 1. above, pooling agreements solely between investor-owned systems or pooling agreements solely between cooperative systems have been and are being consummated without conditions designed to prevent competition. When systems from different segments of the industry attempt to organize a pool, however, all such systems may want to reach one or more formal agreements which have the effect of eliminating competition for loads. This is particularly the case whereever there is the possibility that a participant who is also a competitor may use the advantages derived from a pooling arrangement to undercut and take over the present or potential customers of one or more other participants. In such circumstances, there will necessarily be a hesitancy to enter into such a pooling arrangement unless there is assurance that it will not worsen established competitive positions.

If the participants have different costs and are subject to different regulation, the need for such assurance is clear. In such a case, it is likely that the feasibility of the pooling arrangement may be dependent on the assurances which can be given—and the validity of such assurances under the antitrust statutes—with respect to end use, customers and areas to be served.

In the course of considering this matter, a meeting was held with representatives of the Department of Justice to discuss the validity of agreements which might be made by utility systems, in the context of a pooling arrangement, relating to end use, customers and areas to be served. At such meeting, representatives of the Department indicated a reluctance to prepare any general memoranda on these problems but did state that the Department would be willing to consider and give its views on the answers to hypothetical questions. Accordingly

hypothetical questions were prepared and submitted. The following letter, dated June 7, 1963, was received from the Department:

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., June 7, 1963.

Re hypothetical questions submitted by Subcommittee III of Legal Advisory Committee on FPC National Power Survey.

HERBERT B. COHN, Esq.,
Vice President and Chief Counsel,
American Electric Power Service Corp.,
New York, N.Y.

DEAR MR. COHN: On behalf of the Subcommittee, your letter of March 29, 1963, submitted four questions based on a hypothetical case involving electric utility companies. In the hypothetical case, it is assumed that the companies would be unwilling to enter into a proposed power pooling arrangement unless it contained "provisions under which the participants would agree not to serve specified areas or specified customers" and "provisions defining the permissible end use for the electric power derived from the * * * arrangement". In answering the four questions submitted, we assume that the proposed arrangement would deal with matters having enough of an impact on interstate commerce to raise a federal question.

1st question: Would the provisions relating to service to particular areas and particular customers and end use of the electric power be in violation of the antitrust laws?

In the absence of specific factual detail, it is difficult to give an unequivocal answer, but provisions restricting end use would certainly tend to raise a serious antitrust problem. *Dr. Miles Co.* v. *John D. Parks & Sons Co.*, 220 U.S. 373 (1911). And provisions allocating areas and customers would likewise tend to raise a serious antitrust problem. *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593: (1951).

2d question: Would the answer be different if the agreement were filed and approved by the Federal or State regulatory agency having jurisdiction?

California v. *Federal Power Commission*, 369 U.S. 482 (1962), dealt with utilities transmitting natural gas, but would seem to apply with equal force to utilities transmitting electricity. The problem arose when El Paso Natural Gas Company, after having acquired the stock of the Pacific Northwest Pipeline Corp., applied to the Federal Power Commission on August 7, 1957, for authority to acquire the assets pursuant to § 7 of the Natural Gas Act, 15 U.S.C. § 717f(c), as follows

> (c) No natural-gas company * * * shall * * * acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * * [T]he Commission shall set the matter for hearing and shall give * * * reasonable notice * * *; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly * * *.

Cf. 16 U.S.C. § 824b(a) dealing with electric utilities as follows:

> (a) No public utility shall sell, lease, or otherwise dispose of * * * facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or * * * merge * * * such facilities * * *, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so * * *. After notice and opportunity for hearing, if the Commission finds that the proposed disposition * * * will be consistent with the public interest, it shall approve the same.

In the cited case, even though a § 7 antitrust suit had been filed against the merger on July 22, 1957, the Commission proceeded to approve the merger and its action was affirmed by the D.C. Court of Appeals. In reversing, the Supreme Court said that the Commission had undertaken "to make a finding reserve to the courts by § 7 of the Clayton Act". *The opinion would indicate that, absent express statutory authority, regulatory agencies cannot immunize utilities from the federal antitrust laws.*

In its opinion, the court undertook a general review of the authority of administrative agencies to immunize transactions from the antitrust laws:

> Immunity from the antitrust laws is not lightly implied. The exemptions of agricultural cooperatives from the antitrust laws granted by § 6 of the Clayton Act and § 1 and § 2 of the Capper-Volstead Act of 1922 became

relevant in *Milk Producers Assn.* v. *United States*, 362 U.S. 458. While § 7 of the Clayton Act gave immunity to "transactions duly consummated pursuant to authority given by * * * the Secretary of Agriculture under any statutory provision vesting such power in such * * * Secretary", we held that the only authority of the Secretary was to approve "marketing agreements" (*id.*, 469–470) and not other types of agreements or restraints, typically covered by the antitrust laws. Accordingly, we held that the District Court was authorized to direct the cooperative to dispose as a unit of the assets of an independent producer that had been acquired to stifle competition and restrain trade. We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one. See *United States* v. *Borden Co.*, 308 U.S. 188, 198–202. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *Id.*, at 198. Here, as in *United States* v. *R.C.A.*, 358 U.S. 334, while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity" (*id.*, at 351), there is no "pervasive regulatory scheme" (*ibid.*) including the antitrust laws that has been entrusted to the Commission. And see *National Broadcaating Co.* v. *United States*, 319 U.S. 190, 223. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved "shall be and they are hereby relieved from the operation of the antitrust laws * * *." See *McLean Trucking Co.* v. *United States*, 321 U.S. 67 [pp. 485–6]

The court went on to say that "there is no comparable provision under the Natural Gas Act" [p. 486.] And we are not aware of any comparable provision under the statutes governing the authority of the Commission over electric utilities.

3rd question: Would the answer be different if the agreement were filed and approved by the Federal or State regulatory agency having jurisdiction and there was legislation specifically authorizing the regulatory agency in question to certify territory, customers and the like to be served by regulated electric utilities?

Here, again, we may look for guidance to *California* v. *Federal Power Commission*, *supra*, in which the court distinguished between the two basic types of regulatory statutes material here. The court pointed out that, when approved under the Interstate Commerce Act—

> * * * mergers * * * have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved "shall be and they are hereby relieved from the operation of the antitrust laws. * * * [p. 485]

In contrast, the court pointed to the statutes governing the Federal Power Commission, saying:

> * * * Here, as in *United States* v. *R.C.A.*, 358 U.S. 334, while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity" * * *, there is no "pervasive regulatory scheme" * * * including the antitrust laws that has been entrusted to the Commission. [*Id.*]

It is conceivable, however, that if a federal statute provided a "pervasive regulatory scheme" to be administered by the regulatory agency having jurisdiction, an agreement such as the one in question might be successfully defended against antitrust attack. Thus, if there were a comprehensive federal statute authorizing regulation of entry, rates, end use of electricity, terms and conditions of service, territory and customers to be served, et cetera—so as to permit the creation of fully regulated monopolies—then an antitrust challenge might be held incompatible with such a regulatory scheme when an agreement such as the one in question had been approved by the regulatory agency pursuant to the statute. It should be noted, however, that notwithstanding the comprehensive regulation to which certain industries are subjected by federal agencies, Congress has deemed it necessary to provide specifically for exemption of approved pooling agreements or agreements allocating territory, customers, and the like. 49 U.S.C. § 5(11) and § 1382.

4th question: Would the answers to any of the foregoing be different if one of the participating utility systems were not a regulated public utility?

The answers to the first and second questions above would not appear to be affected by the status of any of the participants. The answer to the third question would depend to a considerable extent on the precise language of the statute

"specifically authorizing the regulatory agency in question to certify territory customers, and like."

We trust that these answers will be of assistance to the Subcommittee.

Sincerely yours,

LEE LOEVINGER
Assistant Attorney General,
Antitrust Division.
(s) Joseph J. Saunders
By: JOSEPH J. SAUNDERS,
Chief, Public Counsel Section.

The Department of Justice's response appears to be concerned only with federal antitrust laws. Although State antitrust laws vary, it would appear that similar problems would be raised under most such State laws. While the subject is one in which it is not possible to give categorical answers, and while we do not necessarily agree with all of the conclusions in the Department of Justice's response, it does appear from such response and from our own evaluation that the validity of agreements with respect to customers or service areas may be open to question under the antitrust laws of some jurisdictions.

3. The effect of a power pool upon the competitive position of nonmembers of the pool

Pooling transactions may be very simple (providing solely for interchange of economy energy), or extremely complicated (providing for the joint planning and use of generating capacity, including reserves and transmission facilities). The greatest advantages in terms of efficient use of natural resources and lower costs generally are derived from agreements which fully integrate the operations of the participating systems. For a variety of reasons, at this stage of electric technology and predictably for some time in the future, there will be systems interconnected with such pooling systems, in adjoining and often in the same area, which are not participants in the integrated pool. Because of the complex nature of a fully intergrated pool of systems and the necessity for joint dispatching and for uniformity and simplification of recording and billing transactions between pool members, outside systems will often find that they cannot deal with individual members of the pool but must deal with the pool itself.

At this stage, it is not clear whether the courts will analogize such pooling arrangements to agreements to divide markets and fix prices or will, on the other hand, accord greater recognition to such elements as the fact that interconnected and coordinated operations with non-members require complex cooperative regulation of generation by all pool members. In this area, the careful balancing of societal needs involved between pooling arrangements on the one hand and maintenance of competition on the other presents problems which remain to be explored in dimension and in depth.

* * * * * * *

So far as we are aware, there has been no concerted attempt to determine the extent to which federal and state antitrust statutes should be applicable to electric utility operations in the light of present-day technology. Compare Shipping Act of 1916, 46 U.S.C. 814 (39 Stat. 734, as amended by 75 Stat. 764); Federal Aviation Act of 1958, 49 U.S.C. 1384 (72 Stat. 770); Interstate Commerce Act, 49 U.S.C. 5(11) (41 Stat. 482, as amended by 48 Stat. 220 and 54 Stat. 908). In the case of the electric utility industry the issue is sharpened, as discussed above, by the ploralistic institutional organization of the industry and the different costs and regulatory considerations affecting the individual segments of the industry. Likewise, the rapidly changing technology leads in the direction of increased pooling while the need for self-protection by individual systems tends in the direction of agreements or substitutes therefor to eliminate or limit competitive disadvantages arising from such pooling agreements.

While those directly involved in the electric utility industry recognize generally the policy considerations underlying the federal and state antitrust statutes, they are inclined to subordinate such considerations in the light of the inherent monopoly characteristics of the industry. In recognition of the fact that our own views tend in this direction, and that we may therefore not be adequately equipped to evaluate fully the competing antitrust considerations, we have concluded not to recommend any specific solutions for these problem areas. Instead, we believe that a thoroughgoing study should be made in which all points of view could be considered and evaluated. Possibly such a study could be initiated by the Federal Power Commission jointly with the National Association of Railroad and Utility Commissioners or with individual state commissions having a direct inter-

est in and familiarity with the problem. Without prejudging the results of such study, we would not be surprised if the conclusion were reached that some selective and carefully hedged basis for exemption from antitrust statutes should be adopted. by Congress and state legislatures in which regulatory agencies at the state or federal level were entrusted with the assignment of directing or approving guidelines or agreements dealing with these problems which would adequately protect consumer and other public interests and at the same time sanction restrictions on potential competition for loads between systems so as to remove such barriers to their pooling arrangements.

The CHAIRMAN. The National Power Survey recommended a study on this question by the Federal Power Commission and the National Association of Railroad and Utility Commissions. The Bureau of the Budget, as I understand it, recommends further study.

What direction would you think these studies should go, which way?

Mr. WHITE. Well, Mr. Chairman, I would say that the FPC has looked at this bill, and as you can tell from the statement we are prepared to see such legislation enacted into law today.

As to the specific types of problems that would arise and develop, it seems to me that the FPC would necessarily be compelled to make its own studies consulting with all of these groups, in formulating standards to act on specific contracts that were submitted to it for an order of immunity.

The CHAIRMAN. If the bill were passed, do you think there would be any impediment to the State laws in this same field?

Mr. WHITE. No, sir. It seems to me there would be, if anything, some assistance to the State regulatory bodies. The Commission, characteristically, goes through very involved and complicated contracts, makes determinations on them, and it seems to me this is a function that we are prepared to absorb without much difficulty, and I would expect that to be of considerable assistance to the State agencies that have responsibilities in this area.

The CHAIRMAN. Now on page 2, you say, "The Commission under existing law probably has fully adequate authority to eliminate unduly anticompetitive practices by utilities subject to its jurisdiction." Could you, for the record, elaborate on the use of the word "probably"?

Mr. WHITE. That is on page 2 of the Commission's formal report?

The CHAIRMAN. Yes. It is not your statement. This is your report.

Mr. WHITE. I see. This is the Georgia Power Co. case that has just been discussed by Mr. Solomon and the language which you have read, "The Commission under existing law probably has fully adequate authority," is just a—on a lawyer's caution. The matter is pending before the courts. The Commission has already concluded that it has this authority and I think our lawyers want to make sure that we don't find ourselves in the position of predicting what a court will do. We are very confident the court will sustain this and the word "probably" is really supercaution.

The CHAIRMAN. I think that defines the word very well. But there is always some other lawyer that will pick that word up and use that some other way.

Mr. WHITE. I am glad you gave us a chance to make it clear there is no doubt in the Commission's mind about it.

The CHAIRMAN. Now this bill, as you pointed out, goes largely to protecting pools and interconnections. Many utilities, however, are merging. Would this bill have any impact on that situation?

Mr. WHITE. Certainly it would have no legal impact, authority over mergers would be the same. As to whether or not it would encourage companies contemplating merger to use this alternative path to the same end of coordination, it is very difficult to predict.

The CHAIRMAN. Your report and your statement also mentioned a suggested amendment, a reconsideration of contracts in light of changed circumstances.

The industry is doubling about every 10 years, so this would indicate almost constant review, would it not, or at least authority for the Commission on their own initiative at any time they saw fit to reconsider and review the case?

Mr. WHITE. Yes. This is one of the concerns we have. In addition to the Commission acting on its own initiative or motion, of course, we would assume that if there are parties who regard themselves as aggrieved they, too, would petition the Commission for some review of contracts of this type.

The CHAIRMAN. Would that review be stimulated from the parties themselves or by the Commission itself or by third parties?

Mr. WHITE. It seems to me that——

The CHAIRMAN. Or a combination?

Mr. WHITE. Combination. Wherever the public interest is involved we would listen to complaints. I would hope that the Commission would not respond to a frivolous complaint in the sense that it would continually keep the contracts in jeopardy.

Obviously one of the purposes——

The CHAIRMAN. That is what I was thinking, that people in this industry, public, private pools, or interchanges, in order to live up to their responsibilities for service to the consumers, have got to make some plans. And these plans have got to be projected for some period of time, financially and otherwise, and that they should have reasonable assurance that once you have approved a contract and it was in the public interest, that review wouldn't be hanging over their heads month to month or year to year, unless there was some strong evidence that you needed to review it.

Mr. WHITE. I think you have characterized it just right. I would expect that if this legislation were enacted and the Commission made a finding that a particular contract should be immunized, that it would take an exceedingly strong case to get the Commission to reverse itself, and I would expect, too, that the parties would be able to have considerable freedom of negotiation and discussion.

The CHAIRMAN. We would rely upon the good sense and discretion of the Commission in this case.

Mr. WHITE. We would hope we merit that confidence.

The CHAIRMAN. That varies from time to time. [Laughter.]

Mr. WHITE. I will refrain from asking how we stand at the moment, Mr. Chairman.

The CHAIRMAN. At the moment I guess you stand all right.

Now, you suggest that the bill would encourage voluntary interconnections. Could you elaborate a little on that?

Mr. WHITE. I think it goes to the basic point that the Legal Advisory Committee raised the question to which the Justice Depart-

ment gave an answer. The lawyers who advise those who make decisions in the electric power industry are a little fearful about how far they could and should go without running afoul of expensive and time-consuming litigation.

As a consequence, were this to be enacted, there would be an avenue, a means by which these problems could be resolved and permit them to engage in certain types of arrangements, which we believe should be encouraged.

The CHAIRMAN. Wouldn't it be true that this sort of legal cloud, that now exists, might have the tendency to hamper voluntary interconnections that may be in the public interest?

Mr. WHITE. Yes, although in fairness we would have to say that many pooling arrangements have been worked out and satisfactorily.

Had the Legal Advisory Committee gotten a different answer or had they not asked the question, lawyers might not be counseling their managements to be so cautious. But because the investments are great, there is indeed some cloud, as you have said, and this would help to dispel that.

The CHAIRMAN. What effect would the passage of this bill have on publicly owned utilities, if any?

Mr. WHITE. Presumably the publicly owned utilities are in the same situation. In many of the pooling arrangements, they are parties of interest, just the same as a privately owned or cooperatively owned company, and as far as I am aware they are not exempt from the antitrust laws. They are exempt from most provisions of the Federal Power Act, but would be eligible for immunity under the bill where they enter a pooling contract with a jurisdictional utility.

The CHAIRMAN. Out in my country the Bonneville pool has been very satisfactory to the consumers because we have been able to concentrate technologically and every other way, to make the best potential use of our own power resources.

But, and I am thinking out loud here a little bit, but were it not for the Bonneville Act in the law, I am afraid this might not have happened.

Mr. WHITE. Well——

The CHAIRMAN. I mean a pool as integrated as it is.

Mr. WHITE. I am sure that it has helped tremendously, because of the fact that it has put under a single management a large volume of power and there have been evolved in that area very satisfactory relationships with all of the elements of the industry, privately, and publicly owned as well.

The CHAIRMAN. Now there are up to 20 times as many private antitrust suits as Government-inspired suits in the Federal courts. Do you think this bill would reduce the number of private utility antitrust suits brought by private parties?

Mr. WHITE. Well, I am no expert on this——

The CHAIRMAN. I never realized this figure was that great, but it is.

Mr. WHITE. I think that really relates to the whole sweep of antitrust laws. In the industry there have been comparatively few, practically no actions.

The CHAIRMAN. I think we ought to differentiate, because in this industry, this ratio would not exist at all?

Mr. WHITE. Clearly.

The CHAIRMAN. Thank you. I have no further questions.

Senator Lausche?

Senator LAUSCHE. Yes; I would like to ask a question or two.

I assume that you understand that any time you begin tinkering with the antitrust laws there arises a veritable wave of protest, and I anticipate that regardless of the merits of this bill such protest will arise on the floor of the Senate.

Now, having that in mind, I would like to ask a few questions. When did the Power Commission first undertake actively to explore the good that could come to the general consuming public if interconnections coordination were fostered?

Mr. WHITE. Well, if I can separate the question—the first part relates to when did the Commission first realize the large benefits that come from coordination, both in reliability and economy. That really was congressional mandate. The Congress itself, in amending the Federal Power Act in 1935, first put into the act section 202, which is a clear mandate to encourage and promote interconnection and coordination of systems.

As to the second part of the question, Senator, about when did we first focus on the impact of antitrust laws, if any, on the ability to achieve coordination, that really came from the national power survey which started in 1962 and concluded in 1964.

At that point this Advisory Committee began to raise the questions, and most recently the Commission reported on the chairman's bill, and in the process of preparing that report the Commission went through many deliberations.

The CHAIRMAN. We will insert in the record at this point, section 202(a).

SEC. 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Senator LAUSCHE. That is the Congress made a declaration in 1935, but not until the last 3 years did it become acute insofar as a consideration of the antitrust laws were concerned; is that correct?

Mr. WHITE. I say that is probably a fair statement, although I would not want to leave the impression that all of a sudden a switch was turned and there was trouble where before there had not been trouble.

Obviously lawyers are always concerned about the impact of the antitrust laws on the activities that the management they advise contemplate. There had been no significant legal action in this field. I think lawyers were more or less relaxed about the matter, and the National Power Survey focused attention on the increasing technology

and increasing capacity or ability or capability to interconnect. Then these questions arose.

Senator LAUSCHE. To put it a different way, what precipitated the need for this bill?

Mr. WHITE. I think the Chairman, who introduced the bill, perhaps could give you a good answer. I can give you my best guess. My best guess, Senator, is that the response from the Justice Department to the Legal Advisory Committee raised a considerable cloud and prompted many who were involved in the desirable coordinating and interconnecting of systems to see some legitimate way that this cloud could be dissolved.

Senator LAUSCHE. Do you discuss that matter in your paper? On page 7, the then Assistant Attorney General in charge of the Antitrust Division, Judge Loevinger, involved that power pooling provision would tend to raise serious antitrust questions.

Mr. WHITE. Yes, sir, that is precisely it.

Senator LAUSCHE. When was that, in 1962?

Mr. WHITE. 1964.

Senator LAUSCHE. 1964. All right.

The CHAIRMAN. I want to say that the bill has been introduced by request and part of the reason for it was since we have established the intertie, from the Pacific Northwest to the Southwest, many feel that some of these legal questions were seriously raised.

Senator LAUSCHE. All I am trying to do is establish the time when the question became acute.

Mr. WHITE. You have done so, Senator. It is when the National Power Survey report was published in 1964.

Senator LAUSCHE. It was then decided that you had to have some law that would prevent the use, by the Antitrust Division of the Department of Justice, of its prosecuting powers; is that correct?

Mr. WHITE. Whether it was quite that flat a fear or whether it was just the natural caution and prudence of lawyers, I can't say.

Senator LAUSCHE. You have answered the question.

Mr. WHITE. Certainly it was a factor.

Senator LAUSCHE. Are you a lawyer?

Mr. WHITE. Yes, sir.

Senator LAUSCHE. You never can get a direct answer. [Laughter.]

The CHAIRMAN. He is also an electrical engineer. He is a rare bird in that respect.

Senator LAUSCHE. Well, now, I am reading from your paper. Do you speak in behalf of the whole Commission?

Mr. WHITE. Yes, sir.

Senator LAUSCHE. The views expressed in this paper are the views of the whole Commission?

Mr. WHITE. Yes, sir.

Senator LAUSCHE. There is no dissent?

Mr. WHITE. No, sir.

Senator LAUSCHE. And the whole Commission recommends to the Congress that the adoption of this bill is advisable?

Mr. WHITE. Yes, sir; with the amendments we outline.

Senator LAUSCHE. And you do so because you believe that if it is adopted economic benefits will come to the general public?

Mr. WHITE. Yes, sir, and the additional benefits of coordination; namely, reliability of service.

Senator LAUSCHE. All right. Now you say:

Through technological developments in generation and transmission, the American consumer can realize tremendous benefits in the form of reduced costs and reliable service.

Mr. WHITE. Yes, sir.

Senator LAUSCHE. That is if they are allowed to coordinate. Without such coordination being declared to be a violation of the trust law per se, but subject to the safeguards which the Commission will impose before it gives approval this will inure to the benefit of the power consuming public. Is that correct?

Mr. WHITE. Yes, sir.

Senator LAUSCHE. Now, then, you further state:

These developments involve the use of large units which reduce the unit cost of generating electric energy and the use of new extra high voltage transmission lines which substantially cut the cost of transmitting this energy and permit more extensive transmission.

Is there involved in this statement impliedly the statement that duplication is costly and eventually must be paid for by the consumer and that if you can eliminate duplication you can reduce the cost to the consumer?

Mr. WHITE. Yes, sir. There is no misunderstanding about that, Senator, and I think this is accepted throughout the industry and by the public, that the nature of the electric industry is such that duplicatory facilities are simply wasteful.

Senator LAUSCHE. Now, you state that by 1980, "The consumption of electricity is expected to more than double and perhaps triple."

Mr. WHITE. Yes, sir.

Senator LAUSCHE. Is it in view of that huge increase in the consumption of electricity that you have concluded that duplication must be eliminated and that coordination will produce reduction in prices that will benefit the public?

Mr. WHITE. Well, it is all tied together. It is very difficult to pinpoint quite that precisely. I would say that duplication would be bad even if we didn't increase by one iota our needs in the future. Our country simply must have the most efficient system. The fact that our demand is increasing and will continue to increase aggravates or increases the need to prepare for it.

Senator LAUSCHE. Now, it is the view of each of the members of your Power Commission that coordination is a vehicle by which groups of electrical systems through common action can obtain the benefits of economy of size in the planning and development of the sources of power supply and transmission.

Mr. WHITE. Yes, sir; unmistakably.

Senator LAUSCHE. Now, then, you further state:

One result of the Commission's National Power Survey issued in late 1964 was to suggest to the industry the possibilities of further coordination in planning, the large expansions of our power system in the decades ahead while retaining the benefits of pluralistic ownership pattern.

Did the Commission on its own initiative recommend the coordination of services so as to reduce prices to the consuming public?

Mr. WHITE. Yes, sir. First of all, in response to the congressional mandate of 1935 we spoke about, and secondly in the extra impetus given to it by the very exhaustive study that culminated in the National Power Survey in 1964. And I think there is virtually no

disagreement about it, about the benefits of coordination anywhere in the electric industry.

Senator LAUSCHE. Now, you speak of retaining the pluralistic ownership pattern. That is when they coordinate, it means that the ownerships of the individual plants are not changed?

Mr. WHITE. That is correct. They remain an independent organization, whether owned by stockholders or owned by the public or owned cooperatively by the consumers. And when they join together in contracts, as they have, in many sections of the country, they retain their individual identities.

Senator LAUSCHE. You said about 1980 the Nation might well require more than 500 million kilowatts of capacity. Then you further state:

> When one considers that every one percent capacity reduction made possible by increasing coordination, reduces the capital investment required by 500 million, the savings from increased coordination are great indeed.

Translated into potential benefits to the Nation's consumers you state by 1980 there are possible savings of as much as $11 billion a year.

Who made that study?

Mr. WHITE. That was a conclusion of the National Power Survey itself. As the chairman pointed out, this had congressional blessings, support, encouragement, and financial backing. And it had the cooperation of all segments of the industry and was indeed a notable accomplishment by the industry and by the Federal Power Commission. And it is the survey which produced this $11 billion figure of predicted savings that is possible, if there is maximum use of all of the technological improvements and coordination and interconnection that is possible.

Senator LAUSCHE. That is coordination, which according to Loevinger might be in violation of the antitrust law.

Mr. WHITE. In fairness to the Justice Department, which will testify, and to Judge Loevinger, who is no longer there, I will state that his letter ought not to be construed to mean that all coordination contracts are per se invalid. I think he simply responded to a question and said that they do indeed raise serious problems. His use of that word "serious" problem, or "serious" question, I think, is what has raised the cloud that Chairman Magnuson has referred to.

I don't honestly believe that the Justice Department holds the view, nor does Judge Loevinger, that every contract for coordination must be tainted with illegality and therefore shouldn't be undertaken.

Senator LAUSCHE. Back during World War II there was a coordination of power companies in the supply of electricity in the Ohio River Valley and a plant was established at Kyger Creek. I think the total capital involvement was about $150 or $160 million. How was that coordination effected without being charged with violating the antitrust law? Maybe you are not prepared to answer that at this time?

Mr. WHITE. I don't think that we are in a position to give you a report right at the moment, Senator. But let us check it. I don't know whether this was ever challenged by either the Justice Department or by any private party and, of course, if it is not challenged, then it stands. But I do recall, in fact I was working at TVA at the time, that OVER was created and a similar arrangement in southern Illinois where four or five privately owned utilities grouped together to produce half of the energy at the Joplin plant, as I recall.

So, there are some of these situations where there have been arrangements worked out; and as far as I know they have not been challenged.

But if it will be helpful we will be delighted to insert at this point in the record a report on it.

Senator LAUSCHE. I wish you would.

(Pursuant to the above discussion the following material was submitted for the record:)

FEDERAL POWER COMMISSION,
Washington, August 11, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter replies to the question raised at the hearings on S. 3136, July 12, 1966, on the Kyger Creek generating plant in the Ohio Valley (p. 63 of the transcript of the hearings).

The Kyger Creek generating station is one of the two plants of the Ohio Valley Electric Corporation. It was organized and is owned by ten electric utilities. In order of their stock holdings, they are, The American Electric Power Company, Ohio Edison Company, West Penn Electric Company, The Cincinnati Gas and Electric Company, Louisville Gas and Electric Company, Dayton Power and Light Company, Columbus and Southern Ohio Electric Company, Toledo Edison Company, Kentucky Utilities, and Southern Indiana Gas and Electric Company.

The Kyger Creek plant was built in 1955 to supply electric energy to the Atomic Energy Commission to which it delivers virtually all its output.

As some of the sponsoring companies were registered public utility holding companies, its organization was under the jurisdiction of and approved by the Securities and Exchnage Commission which, in the order approving the financing of the utility, stressed the interests of national security in supplying the needs of the A.E.C. *Ohio Valley Electric Corp., et al.* 34 S.E.C. 323 (1952).

Neither the Justice Department nor, to our knowledge, private litigants have ever challenged its organization, ownership, or operation as a violation of the antitrust laws.

As I indicated in my testimony, there are very few cases so far applying the antitrust laws to electric utilities. The *Penn. Water* litigation, *Pennsylvania W. and P. Company* v. *Consolidated* G. E. L. and P. Company, 184 F. 2d 552 (1950) cert. denied, 340 U.S. 906 (1951), 194 F. 2d 89 (1952), and *Pennsylvania W. and P. Company* v. *Federal Power Commission*, 193 F. 2d 230 (1951), cert. denied, 343 U.S. 963 (1952), is probably the most prominent example.

I hope this information will be of some use to the Committee.

Sincerely,

(Signed) LEE C. WHITE,
Chairman.

Senator LAUSCHE. I think the necessity of the war at that time produced pressure on the power industry and acceptance by the general public and by public officials of the need of coordinating.

The CHAIRMAN. Thank you, Mr. White. We appreciate your coming.

Mr. WHITE. If I may, Mr. Chairman, for the record, in response to a question Senator Lausche asked about the unanimity of the Commission on these points, I would like to just read the next to final paragraph in our report.

There is one comparatively minor point where one member of the Commission holds a different view. I think in fairness to him I should read it. I don't believe that it really affects the substance of my response to you, but in complete fairness I should read it.

The bill now provides that disapproval of a contract by the Commission would render further performance illegal. While concurring in the foregoing views of the Commission, Commissioner Bagge holds a separate view that in the absence of broader immunity of legislation, extending also to mergers approved by the Commission pursuant to

section 203 of the act, withholding of antitrust immunity should be the only disability arising from denial of an order sought under the provisions of the bill.

Commissioner Bagge would permit the contract to remain in effect subject to any antitrust proceeding which might be filed, and, of course, to the continuing authority of the Commission over the contract under section 206 of the act.

Senator LAUSCHE. Is there any private organization, as distinguished from individuals, that you know of that is opposing this measure?

Mr. WHITE. I am not personally aware, sir. I believe there may be some witnesses scheduled.

The CHAIRMAN. We have some witnesses scheduled from Florida, one municipal light plant in Massachusetts, and a city attorney from Fayetteville, N.C., that have asked to appear, and the National Rural Electric Cooperative Association.

I don't know whether they are all opposed to the bill, but they have some suggestions to make about it. They are probably opposed to some features of it, and maybe some are opposed in total.

Mr. WHITE. I do not know.

The CHAIRMAN. The Colorado River Basin Consumers' Organization is sending a statement in opposition to the bill. The fellow called me late last night and said he couldn't get here and so I said drop it in the mail. We will put it in the record. But there are some witnesses, but none of the major companies. The Department of Justice will be here.

Thank you, Mr. White.

Mr. WHITE. Thank you.

The CHAIRMAN. All right, Mr. Cohen, Chairman of the SEC is here to testify.

STATEMENT OF MANUEL F. COHEN, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION; ACCOMPANIED BY LEONARD LEIMAN, EXECUTIVE STAFF; ROGER FOSTER, SPECIAL COUNSEL, OFFICE OF POLICY RESEARCH; AARON LEVY, ASSISTANT DIRECTOR, DIVISION OF CORPORATE REGULATION; AND WALTER NORTH, ASSOCIATE GENERAL COUNSEL

The CHAIRMAN. The next witness is Manuel F. Cohen, Chairman of the Securities Exchange Commission.

We will be glad to hear from you, Mr. Chairman.

Mr. COHEN. Good morning, Chairman Magnuson and Senator Lausche.

Mr. Chairman and members of the committee: I am Manuel F. Cohen, Chairman of the Securities and Exchange Commission. I have been requested to testify on S. 3136. With respect, I should also note that I, too, am a lawyer.

I have been requested to testify on S. 3136. At the outset, however, I would like to identify the people, who have come here with me today.

On my right is Mr. Walter North, Associate General Counsel of the Commission. And behind us are Mr. Roger Foster, who is Special Counsel in the Office of Policy Research, and, for many years, was concerned with implementation of the provisions of the Public Utility

Holding Company Act of 1935, as well as being General Counsel for the Commission.

In addition, Mr. Aaron Levy, who is Assistant Director of our Division of Corporate Regulation, and is responsible for our everyday implementation of the provisions of that statute.

And, finally, Mr. Leonard Leiman, my executive assistant.

I have a very brief statement, Mr. Chairman.

The CHAIRMAN. All right. We will be glad to hear it.

Mr. COHEN. The purpose of S. 3136 is to encourage voluntary interconnection and coordination by electric utility companies of their operations and facilities in the interests of economy and dependability. To this end, the bill provides for approval by the Federal Power Commission of any contract which provides "for the sale or exchange of electric energy or the interconnection, pooling, or coordination of power systems or for the joint use of facilities for the generation or transmission of electric energy," upon a finding that the contract will not unduly restrain competition when considered in relation to the purposes of the Federal Power Act. If the Federal Power Commission approves such a contract, then the parties thereto are to be exempt from all Federal, State, and municipal antitrust laws with respect to the contract. The bill further provides that the authority conferred on the Federal Power Commission "shall be exclusive and plenary."

The only possible way in which S. 3136 could impinge upon the functions and activities of the Securities and Exchange Commission is in connection with our administration of the Public Utility Holding Company Act of 1935, and I understand that this is the question to which you wish me to address myself.

I do not believe that, as a practical matter, there is any conflict or duplication between our administration of the Holding Company Act and the functions which would be conferred upon the Federal Power Commission under S. 3136. Our jurisdiction under the Holding Company Act extends only to public utility holding companies and their subsidiaries and affiliates. Even as to these companies, the principal impact of the Holding Company Act is in the area of securities transactions, financing, intercorporate relationships and the structure of holding company systems. Our jurisdiction does not normally extend to such matters as contracts for the purchase and sale of electricity or pooling arrangements as such. Furthermore, there is usually no significant problem where certain aspects of a particular transaction are subject to our jurisdiction under the Holding Company Act, but other aspects are subject to the jurisdiction of the Federal Power Commission under the Federal Power Act. Such situations are not uncommon. For example, a public utility subsidiary of a holding company may require a license from the Federal Power Commission to construct certain generating of transmission facilities, and at the same time, the financing of this operation would be subject to our jurisdiction under the Holding Company Act.

If, however, S. 3136 were to be enacted in its present form, it might create some uncertainties as to its effect on the administration of the Holding Company Act which, I think, it would be advisable to resolve. Arrangements of the type contemplated by S. 3136 might be part of a larger transaction subject to our jurisdiction under the Holding Company Act to the extent that they involved either the issuance of securities or the sale or acquisition of utility assets by a registered

holding company or its subsidiaries. Thus, under section 9(a)(1) of the Holding Company Act, a subsidiary of a registered holding company may not acquire any securities or utility assets or any other interest in any business without the approval of the Commission, subject to certain exceptions, and under sections 6 and 7 of the act, the approval of the Commission is required before any holding company or subsidiary may sell or issue any security of such company, again subject to certain exceptions. Section 12(d) deals with the sale of assets.

In some instances groups of utilities, including registered holding companies or their subsidiaries, have arranged for the construction and joint use of generating plants and related facilities by forming a separate company to construct and operate such facilities, this company being financed by the sale of securities to the sponsors and the public. These arrangements are subject to our jurisdiction under the Holding Company Act and the Commission has approved certain of them upon the basis of findings that they are consistent with the geographic integration provisions of section 11 of the Holding Company Act, and has also approved the financing arrangements. The Commission, in these cases, considered the power contracts of the sponsors but only as they related to the feasibility of the proposed or contemplated financing. In this connection, reference might be made to two cases decided by the Commission, the first being *Yankee Atomic Electric Company*, 36 SEC 553, decided in 1955, and *Electric Energy, Incorporated*, 38 SEC 658, decided in 1958.

As above noted, the last sentence on page 2 of the bill provides that "the authority conferred on the Commission (Federal Power Commission) by this subsection shall be exclusive and plenary * * *". The probable purpose of this provision is to prevent collateral attacks in antitrust suits on Commission orders of approval under the bill. The wording is, however, broad and general, and it is possible that it might be interpreted as exempting sales and acquisitions of utility assets and securities issues incident to contracts so approved by the Federal Power Commission from the jurisdiction of this Commission, that is the SEC, under the Public Utility Holding Company Act. Section 318 of the Federal Power Act, as added by title 2 of the Public Utility Holding Company Act of 1935, provides, in effect, that if any issuance and sale of a security or acquisition or disposition of any security and facilities or any other subject matter is subject both to a requirement of the Public Utility Holding Company Act or of a rule, regulation, or order thereunder and to a requirement of the Federal Power Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act shall apply unless the Securities and Exchange Commission grants an exemption from the Public Utility Holding Company Act, in which event the Federal Power Act applies.

The CHAIRMAN. Mr. White dealt with the fact that the bill should provide that the Federal Power Commission should be allowed to make conditions. Is that correct?

Mr. COHEN. Yes, sir.

The CHAIRMAN. And, in this case, that would allow them to separate this authority in these particular cases; would it not?

Mr. COHEN. I think it would; yes, sir.

The CHAIRMAN. But, under the bill, as it is written, interpretation might be that it was merely approved or disapproved, and that would be it?

Mr. COHEN. That is right; and it might raise a question as to our jurisdiction, and it is this area that I believe should be——

The CHAIRMAN. That might cause some trouble?

Mr. COHEN. Can be and should be easily clarified.

Senator LAUSCHE. Pursuing the question the chairman just asked about, under the proposed amendments of Mr. White, one of them said that the Commission should be granted the authority to fix conditions that must be complied with before the application will be approved.

Let us assume that the Commission refused to add a condition, giving your Commission its authority, the exercise of its authority; what would the situation be?

Mr. COHEN. Well, I would like to answer that at some length.

Senator LAUSCHE. Do you have that in your paper? Do you understand what I have in mind?

Mr. COHEN. Yes, I do; and I can answer it this way: the Commission's jurisdiction under the Holding Company Act relates essentially, as I pointed out, to the sale or purchase of assets and securities and other matters.

Now, where the transaction is subject to the SEC's jurisdiction under the Holding Company Act, it is not supplanted in any way by the Power Commission, under its statute, as we view the current situation.

We are raising this issue because of the rather broad language that appears in the last sentence on page 2 of the bill, in order to avoid by the use of such language, which I think is intended for another purpose, the creation of problems of the kind to which Chairman Magnuson adverted.

And we think that this can be taken care of promptly, and I don't believe that the Power Commission has any problem with this at all.

Senator LAUSCHE. You do have, in your statement, a suggestion?

Mr. COHEN. Yes, sir; we do.

Senator LAUSCHE. Proceed, then.

Mr. COHEN. The Commission, that is to say, the SEC, does not seek the authority to be conferred by S. 3136 on the Federal Power Commission to grant antitrust exemptions, and we do not think that section 318 should be so interpreted. We think, however, that the "exclusive and plenary" jurisdiction clause in the bill should be modified, and I now repeat what I said in response to your question, to avoid any possibility that a decision of the Federal Power Commission to grant an antitrust exemption, upon the basis of a finding that a particular arrangement will not unduly restrain competition, would exempt that arrangement from the entirely distinct requirements and policies of the Public Utility Holding Company Act with respect to sales and acquisitions of utility assets and securities issues related to such contracts.

The CHAIRMAN. Right there, I would suggest that your statement might be good language in the bill.

Mr. COHEN. If the chairman wishes, we will supply the precise legislative language.

The CHAIRMAN. Supply a specific amendment for us.

Mr. COHEN. I think the last paragraph of my statement simplifies it somewhat.

The CHAIRMAN. Go right ahead.

Mr. COHEN. It would, of course, be highly anomalous to permit public utility holding companies and their subsidiaries to disregard the salutory provisions of the Holding Company Act with respect to the issuance and sale of securities, the acquisition or disposition of securities and utility assets and the integration and simplification of public utility systems, merely because the Federal Power Commission had found that the transaction would not unduly restrain competition and that consequently an antitrust exemption was appropriate. Nor do we believe this was intended by the bill. Furthermore, if the "exclusive and plenary" clause of S. 3136 were interpreted as having that effect, it would create an undesirable incentive for persons subject to the Public Utility Holding Company Act to seek to bring their transactions within the scope of S. 3136 not primarily in order to acquire an antitrust exemption, which might not be needed, but merely in order to avoid compliance with the Public Utility Holding Company Act.

Accordingly, we believe that if S. 3136 were to be enacted, it would be desirable to provide that the approval of any contract pursuant to the bill would not relieve any person from compliance with any requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder which might otherwise be applicable to any aspect of the transaction contemplated by any such contract.

The CHAIRMAN. And you will submit for the committee that language that you think would accomplish what you are suggesting in your testimony?

Mr. COHEN. Yes, sir. Indeed.

(The following material was submitted:)

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., July 25, 1966.

Re S. 3136.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On the occasion of my testimony on the above bill I agreed at your request that we would submit proposed wording for an addition to the bill which would forestall the possibility that the new powers which this bill would vest in the Federal Power Commission might be construed as impinging upon the jurisdiction of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. We feel that the above matter could be taken care of adequately by adding, as a separate paragraph at the end of the bill, the following provision:

"Approval or action under this subsection 202(g) shall not have any effect upon the jurisdiction, powers, duties or authority of the Securities and Exchange Commission under any provision in the Public Utility Holding Company Act of 1935."

If we can further assist you or your Committee on this matter, we will be happy to do so.

Sincerely yours,

MANUEL F. COHEN, *Chairman.*

The CHAIRMAN. I have no further questions.

Senator LAUSCHE. No questions.

The CHAIRMAN. Thank you very much.

All right, the next witness is Kenneth Holum, who is Assistant Secretary for Water and Power, and he is accompanied by Charles F. Luce, Bonneville Power Administrator.

I am glad to hear from both of you.

STATEMENT OF KENNETH HOLUM, ASSISTANT SECRETARY FOR WATER AND POWER, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY CHARLES F. LUCE, BONNEVILLE POWER ADMINISTRATOR, DEPARTMENT OF THE INTERIOR

Mr. HOLUM. Thank you, Mr. Chairman.

Certainly, as spokesmen for the Department of Interior, we welcome this opportunity to express our appreciation to you and the members of this committee for arranging these hearings on this tremendously important, complex matter, that is of great importance to the total national interest.

I think there are real opportunities to serve the national interest implicit in the matters that we are considering here today. The Department of Interior is happy to have an opportunity to participate in these discussions. We participate, of course, essentially as that arm of the Federal Government charged with the responsibility of marketing power from hydroelectric powerplants, constructed by the Bureau of Reclamation or the Corps of Engineers.

There have been many exciting developments in the power field of the last 5 years. They have already been discussed in some detail by Chairman White, in his fine presentation of the committee. Among some of the most exciting developments in the power field, if not the most exciting, has been the decision to proceed with the west coast intertie, interconnecting the Pacific Northwest and Pacific Southwest with the longest, most powerful, transmission lines anyplace in the world.

The arrangements that have been negotiated with our good neighbors in Canada, to complete development of the Columbia River, which have made possible the recent congressional approval of construction of a third powerplant at Grand Coulee and the decisions to utilize the energy at Hanford—the Hanford reactors for generation of electric power.

Through all of this period, Charles Luce has been the Administrator of the Bonneville Power Administration. He has been a real leader in putting these arrangements together, and I know that the experiences that he has had during these negotiations will be of tremendous value to the committee.

After I have made a brief statement, and he has reported to you some of the experiences growing out of these and some other negotiations, we shall of course both be available to answer any questions that the members of the committee consider appropriate.

I think it is noteworthy, Mr. Chairman, that the Secretary of the Interior, Stewart L. Udall, in setting forth the broad policies that the Department would observe in carrying out its power programs, said in a statement issued back on February 14, 1961:

> The furnishing of an adequate supply of low-cost power for the homes, farms and industry sufficient to service a dynamic economy is a matter of basic importance to the economic growth of the Nation and is, therefore, a matter of governmental concern. Utility systems of all kinds—Federal, State, municipal, private, cooperative—must carry out their responsibilities to the public welfare.

He went on to say that these "fundamental principles form the foundation upon which we will build a sound power program for the future."

Consequently, we wholeheartedly agree with the objectives of S. 3136, and with their underlying assumption that the rapidly advancing technology in electrical generation and transmission today holds great promise for the public good. These advances are principally in the direction of very large generators and bulk supply transmission lines. For example, a 1-million-kilowatt steam electric generator can produce power at a unit cost of about 30 to 40 percent less than a 100,000-kilowatt generator. A 500-kilovolt transmission line can transmit 1 million kilowatts of power at about 50 percent less unit cost than a 230-kilovolt line transmitting 250,000 kilowatts.

Another development of increasing importance is the interconnection and coordination of separate systems, frequently referred to as "pooling." Such arrangements can produce substantial savings in operating costs and in capital investments to participating members by permitting the sharing of capacity, taking advantage of time-diversity in load peaks, and by sharing reserves.

However, if all power consumers are to realize the advantages of these savings, and if these new developments are to serve fully the general welfare of our Nation, then they must be made available to all power systems irrespective of ownership.

Other consequences of the economics of both scale and interconnection are a reduction in total national capital goods devoted to utility investment, a reduction in the extent of air and water pollution, a minimizing of land occupancy, and conserving nonrenewable fuel resources.

The Federal Government, therefore, has a substantial interest in the encouragement of technological advance and system interconnection. In addition, power-marketing bureaus of the Department of the Interior operate extensive power systems which are interconnected with the systems of others.

It must be noted, however, that efficiencies of scale and interconnection hold a danger as well as a promise. Not all of the Nation's utilities can take advantage of larger sized generating plants and transmission lines for a variety of reasons. They may include inadequate size of system, lack of capital and lack of pooling opportunities. If the new technology and interconnections are available only to a limited number of systems, there is serious question that our pluralistic utility industry composed of many segments, small and large, private and public, can survive. It is, therefore, a proper Federal responsibility to provide guarantees that these benefits will be shared by all segments of the industry, and their customers. We favor legislation which will provide such guarantees. We believe that S. 3136 and these hearings offer a timely opportunity to explore in depth the best method to achieve this objective. As presently drafted, however, we are not certain that S. 3136 provides sufficient assurances that all segments of the industry will share in the benefits from this rapidly emerging technology.

There are undoubtedly many ways that this protection can be written into the bill. We suggest two items of substantial importance for your consideration. First, the bill should provide that no interutility arrangement may be approved by the Federal Power Commis-

sion if any utility has been or may be excluded, where the participation of that utility would be in the public interest. Second, the legislation should guard against the consummation of arrangements that could place any excluded utility at a substantial competitive disadvantage. In essence, we are suggesting that the Federal Power Commission have the tools to foster constructive competition and to minimize monopolization which would be to the consumer's disadvantage.

Also, we believe that this legislation is closely related to a question now before Congress—the scope of Federal regulation over the transmission of electric energy in interstate commerce at high voltage. It is appropriate, therefore, that your committee consider S. 3136 in the context of the total regulatory authority that should be vested in the Federal Power Commission.

We recommend also that if your committee should approve legislation giving the Federal Power Commission added jurisdiction to review interutility arrangements that it be made clear that the legislation does not extend the existing jurisdiction of the Commission to review contracts or programs of other Federal agencies.

Thank you, Mr. Chairman.

(Letter of July 11, 1966, follows:)

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., July 11, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: This responds to your request for the views of this Department on S. 3136, a bill "To facilitate the provision of adequate, economical, and dependable electric service for the present and future needs of the public and the proper and timely installation and use of the products of advancing technology in the generation or transmission of electric energy."

We would support legislation to preserve the independence of electric utilities and the diversity of utility systems by encouraging voluntary interconnection and joint use of electrical generating and transmission facilities. We assume this is a primary objective of S. 3136. However, we cannot favor its enactment as presently drafted because the bill would create a broader exemption from the antitrust laws than present information indicates is necessary to achieve such objective.

The bill exempts from the antitrust laws certain agreements among electric utilities if such agreements have been filed with and approved by the Federal Power Commission pursuant to subsection 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d). The agreements subject to exemption are contracts which provide for:

(1) the sale or exchange of electric energy or;
(2) the interconnection, pooling or coordination of power system or;
(3) the joint use of facilities for the generation or transmission of electrical energy. The bill permits the Commission to grant orders approving such contracts which, after notice and opportunity for hearing, the Commission finds "will not unduly restrain competition when considered in relation to the purposes of the Act." The exemption applies to all Federal, State, and municipal antitrust laws.

The electrical utility industry has changed substantially since 1920, when the Federal Power Act was enacted. The use and demand for electricity, the size of utilities and the diversity of systems have vastly increased. The use of interconnections between neighboring utilities has greatly expanded. These interconnections serve many purposes, providing emergency sources of power as well as stronger connections to make use of noncoincidental periods of supply and demand. Formal inter-utility contracts for the sale or exchange of energy are common and may be extremely complex, and arrangements have been developed in recent years for the joint use of facilities for generation and transmission of energy. All of these trends may be seen in the industry today; their existence

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is well documented in the National Power Survey recently completed by the Federal Power Commission.

It is not at all uncommon to find different utilities vying with one another for customers. These utilities may be public or private, Federal or non-Federal. Although the electric utility industry is regulated, there exist certain competitive factors which have contributed substantially to a generally high standard of service to the public.

It has been claimed that S. 3136 will protect the smaller utilities by permitting them to join together in cooperative arrangements designed to achieve the economies of scale inherent in the operation of large generation and transmission facilities which would be beyond the capability of any single utility. This Department strongly favors the preservation of the pluralistic character of the industry by measures guaranteeing the smaller utilities a right to participate in the benefits of new technology. We are concerned, however, that the bill, as drafted, may not accomplish this meritorious objective.

To what extent the antitrust laws impede smaller companies from participation in joint operations is not at all clear. The report of the Legal Advisory Committee of the National Power Survey (Page 353, Volume 2, National Power Survey, 1964) indicated merely that the existence of antitrust laws may in some fashion inhibit the development of the industry and urged "that a thorough-going study should be made in which all points of view could be considered and evaluated" (page 370). However, this same report concluded that there were no existing insuperable legal barriers to pooling, and noted the substantial amount and variety of pooling in existence (page 355).

We are hopeful that the hearings to be held by this Committee will prove of great value in determining the precise kind of antitrust exemption needed.

The bill presents in broad measure the question of the proper jurisdiction of the Federal Power Commission over the electric utilities, participating in an industry with rapidly growing technology. It is important that the FPC be in a position to review arrangements between utilities in order to assure that the industry as a whole will not suffer thereby. Similar control should be considered for the Commission over the construction of non-Federal EHV transmission lines and bills to provide that control have been introduced and are presently pending before this Committee. This Department generally favors a national policy of achieving an electric utility network of adequate capacity and efficiency within the industry. In order to achieve this objective there must be joint or coordinated planning, construction, use, and operation of facilities by each of the different segments of the utility industry.

Because the proposed bill is clearly designed to bring the benefits of new technology to the general public through the companies which serve it, we recommend that the bill provide specific safeguards to secure these benefits for customers of smaller companies. This could be achieved by amending the bill to provide that the FPC shall not approve any contract submitted to it pursuant to the Act if it finds that any utility has been excluded from the contract and that:

(a) participation of that utility in the contract would be economically feasible or that

(b) exclusion from that contract would put that utility at a substantial competitive disadvantage.

We also recommend that if your Committee should approve legislation giving the Federal Power Commission jurisdiction to review inter-utility arrangements that legislation should make it clear that it does not in any way extend the existing jurisdiction of the Commission to review contracts or programs of other Federal agencies.

The Bureau of the Budget has advised that, while there is no objection to the submission of this report, it believes that the subject matter of the bill has far-reaching implications, that it requires further intensive study, and then that the need for such legislation has not been established.

Sincerely yours,

KENNETH HOLUM,
Assistant Secretary of the Interior.

The CHAIRMAN. Mr. Secretary, in your first suggestion you say the bill should provide no arrangement may be approved if any utility has been or may be excluded where the participation of that utility would be in the public interest.

I wonder how would you write that in the bill?

Mr. HOLUM. Mr. Chairman, I don't have any specific wording available now.

The CHAIRMAN. I think that all of us agree that we wouldn't want this to happen, but shall we rely upon the discretion of the Power Commission that they would not do this, or should we make it specific in the bill?

I think it might be difficult to spell out.

Mr. HOLUM. Mr. Chairman, as I listened to Chairman White presenting the views of the Federal Power Commission and the conditions that he talked about the Commission imposing upon these arrangements, it occurred to me this is one procedure that might be followed.

I would think, however, and I will be happy to prepare specific language, that it will be more appropriate if those conditions were spelled out in the act because we consider this the essence, the all important feature of maintaining pluralistic system that we think should be maintained in this country.

The CHAIRMAN. If the Federal Power Commission approves of an arrangement, say, with three or four groups, and there was a fifth group that was going to be put at a disadvantage, it would seem to me that should be looked at very closely.

Mr. HOLUM. We think, Mr. Chairman, the essence of pluralistic system is the freedom of choice that people now have to choose whether they want to be served by utility owned by others or one that they own themselves, and in many instances, these are small utilities speaking now of the public side. The same thing is true on the private side. I think we are anxious that both the small private utilities and the small publicly owned utilities have the opportunity to share in these technological advantages.

The CHAIRMAN. Of course, we necessarily would hope that, and I think the bill would provide, ample scope for them to be a part of any discussion or hearings to add to the evidence or facts that would give the Federal Power Commission an adequate basis for any decision it made.

I can see in the first case that comes up, there will be plenty of people involved. It won't be just the three or four that may want to have this interconnection, or pooling arrangement, there will be others, and we want them to have every opportunity to add to the evidence which might ultimately make the decision.

Mr. HOLUM. We are completely confident, Mr. Chairman, that this is your objective as we pointed out in our testimony and in our report on the bill, certainly this has been the objective of the Department of all of these negotiations to see to it that these benefits are available to all, because I think it is important to all segments of the industry, the big utilities as well as the small.

The CHAIRMAN. Primarily your basis of endorsing the bill is that we are going to need to have some guarantees in the future to meet this tremendous increase in power demand, to integrate and to do as we do in the intertie or tried to do in the intertie, so that the public can take advantage not only of coordination, but of better service and more reliable service.

Mr. HOLUM. Mr. Chairman, I think it would be shamefully wasteful and not in the national interest at all if we do not find appropriate ways to utilize for the benefit of all of the citizens of this country the

technology that is available. And it isn't just the technology itself, but it is the opportunities that this technology develops, when you can interconnect areas in the southern part of the country that have high summer peaks because of air conditioning loads and areas of the country in the northern part of the country, that have winter peaks, because of the long winter seasons, to take advantage of these diversities—daily diversities and seasonal diversities.

The CHAIRMAN. That is one of the real justifications for the intertie.

Mr. HOLUM. Absolutely.

The CHAIRMAN. Any questions?

Senator LAUSCHE. Just one question. Paragraphing on the first page of the bill reads:

> To encourage voluntary interconnection and coordination in the interest of economy and dependability, the commission in addition to such authorities that may otherwise have offered such contracts under section 202 and 205 and 207 of the act shall upon the motion of any party thereto or any interested entity or person and may upon its own motion review any contract and any amended contract hereafter submitted to the commission for filing pursuant to subsection 205.

My question is, wouldn't an outside party which felt that it ought to become a part of the pool have the right to become a party by application to the commission?

Mr. HOLUM. I would think that is probably the case, Senator. I think that our concern goes to the point that we feel that it ought to be the responsibility of the Federal Power Commission, rather than the responsibility of the small utility to make sure that its interests are protected.

Senator LAUSCHE. I think the bill in substance seeks to achieve what you are talking about, but you think it ought to be spelled out in more specific terms.

Mr. HOLUM. Yes, sir.

The CHAIRMAN. And if you have language you think you can submit, we will be glad to consider it either for the bill or the report. Sometimes in legislative processes, it is even more effective to interpret a word or sentence in a bill by the report than it is to try to put it in the bill.

Mr. HOLUM. We will be happy to develop our ideas and submit them for either alternative that the committee considers appropriate.

The CHAIRMAN. I have no further questions. Now Mr. Luce, do you have a short statement you want to make to the committee? Mr. Luce is the Bonneville Power Administrator.

Mr. LUCE. Thank you, Mr. Chairman.

In the Pacific Northwest, we have achieved a higher and more sophisticated degree of coordination and cooperation between all elements of the electric industry than in any other region in the country. I have been asked by Secretary Holum and by the chairman of the committee to describe for the committee some of the practical problems we have encountered in coordination arrangements that indicate the need for legislation of the type that is now being considered by the committee.

At the present time, in the Pacific Northwest, almost all of the generating utilities are parties to a coordination contract for the duration of some 40 years, whereby more than a hundred generating plants owned by 12 or 15 separate and independent utilities, are operated in many ways as though they were owned by one for the

purpose of getting the most efficient use of the waters of the Columbia River power system, and making available to the consumers of the region the economies that result from that efficiency.

Before describing some of the practical antitrust problems that we have run into, in achieving this high degree of coordination, I would like to make one or two preliminary observations. First, we would not have achieved this high degree of coordination for the benefit, as we think, of all of the consumers of the region—and soon to be the consumers of the Southwest as well—without the support and encouragement of the chairman of this committee. He has been instrumental at critical points of decision throughout the history of the development of this high degree of coordination in bringing the parties together and making sure that we plan and operate this system in the most efficient and equitable manner.

The second preliminary observation I would like to make is that this bill now before the committee, as I view it, does not involve an issue of public versus private power. In the Pacific Northwest, where we have had a great deal of experience with coordination, I think it is significant that the support for the legislation is broadly based and includes major public distributors as well as the major private utilities. The problems the bill attempts to attack are not unique, in other words, to any one segment of the industry, nor is the solution to antitrust problems proposed by this bill intended to favor one segment of the industry over the other.

Now to get down to some of the practical problems that we have encountered in the Pacific Northwest which indicate some type of legislation similar to this bill now before the committee would be useful and helpful.

The first type of problem has to do with territorial divisions. We have found that it is advantageous for the Bonneville Power Administration under certain circumstances to serve customers by wheeling our power over the lines of other utilities. For example, a case before the Congress only a year or two ago, involved an application by the city of Blaine, Wash., a small municipality on the Canadian boundary, for electric service from the Bonneville Power Administration. Our lines and substation facilities were not immediately available at Blaine, but they could be made available with the investment of a considerable sum of money. However, there were lines and substation facilities of the Puget Sound Power & Light Co. then serving the city of Blaine, which were in turn connected with BPA lines. The Bonneville Power Administration asked the Puget Sound Power & Light Co. if it would allow us to lease a portion of the capacity of its facilities to deliver power to the city of Blaine. The company took the view that it was willing enough to do that, but first it wanted an agreement from the city of Blaine defining the territory which the city of Blaine would serve and the territory which the company would serve. The company's position was that it did not wish to lease its facilities to wheel BPA power to Blaine that would be used, as it believed unfairly, to take customers away from the company. The problem was aggravated by the fact that the cost of money to the city was different, and that the city was not subject to utility rate regulation and the company was. So the rate structures might be different.

Our position, that is the position of Bonneville Power Administration, was similar to that indicated by Chairman White of the Federal Power Commission here today; namely, that there is nothing inherently wrong in territorial divisions provided that they are fairly arrived at and provided that they are reciprocal as between the parties to the agreement.

Well, in any event, the parties initially were not able to get together on a division of territory, that is, the city of Blaine and Puget Sound & Power were not able to get together, and so Bonneville came to the Congress to ask for money to construct what would be duplicatory facilities.

Happily, before the Congress completed action on our appropriation request, the parties did get together and agreed upon a division of territory that appears to us to be fair division, and is a reciprocal division, that is, the company is excluded from serving in the city's area, as well as the city being excluded from serving in the company's area. It is a two-way street.

Now, as desirable a solution as we think that was, nevertheless it does raise antitrust questions. The opinion of Judge Loevinger to the Legal Advisory Committee, which has been made of record in this proceeding, indicates such territorial arrangements raise serious antitrust questions, which haven't been thoroughly litigated. Some courts have held them per se void. Other courts have held that if they are reasonable they will sustain them, despite the fact that in a sense, it is a monopolistic agreement, that is, an agreement where two suppliers of electricity divide up the territory and each agree to stay out of the other fellow's territory.

Now these problems of territorial division, I might say, are not peculiar in our experience at Bonneville, to conflicts between public power and private power. We find that the conflicts occur just as often and sometimes in even a more difficult context to settle between a public utility district and a city, or between an REA cooperative and public utility district, or between a city and an REA cooperative. We feel, therefore, that some sort of administrative review such as proposed by this bill would be very useful in examining these proposed divisions of territory. It would give the parties a forum in which to argue, if they think one party or other to the bargain has been unduly harsh, and further would give both parties to the bargain some assurance that they are not going to be in violation of the antitrust laws if they sign and perform an agreement.

Well, that is one type of a very practical antitrust problem that we run into in the Pacific Northwest. It has been solved simply so far by the parties taking the risk that they may be hauled into court by someone in either criminal or civil proceedings for violation of the antitrust laws. But we don't think that is a very good solution. We think the parties are entitled to some more definite settlement of their legal position than they now have.

Another series of problems that we have run into regarding possible violations of the antitrust laws center around the Pacific Northwest-Pacific Southwest intertie.

There we had a proposal to build various transmission lines connecting the predominantly hydroelectric systems of the Northwest, with the predominantly steam electric systems of the Pacific Southwest.

There were many ways that you might have gone at this intertie problem. Each utility in the Northwest which has surplus power in the summertime, when our rivers are running high, might itself have built its own transmission lines. That would have been very wasteful, very expensive, because none of them could have built the big efficient line, but would build lines that were too small.

Another way you might have gone at it is to have one utility build all of the lines and take all of the California markets unto itself, so long as it had any surplus power to sell. Certainly this solution wouldn't involve an antitrust question because it would just involve a utility building a line to sell its surplus power in a new market.

We didn't think either of those solutions was good. The first solution was inefficient, because you built the wrong kind of lines, built too small lines, and too expensive lines. The second solution would have had just one utility taking priority to the whole market of California while all other utilities in the Northwest were spilling power and could not get access to the market.

So in putting together the intertie proposal we in effect divided the market in California between the utilities in the Pacific Northwest in proportion, roughly, to the surpluses that they have at any given time. Thus, if in the first week of July, five or six utilities in the Pacific Northwest, are spilling power, we divide up the available market in California roughly in proportion to the amounts of power that each is spilling.

This seemed to us to be a very fair way to do it, and yet, clearly, if we were all private parties and there wasn't the Federal Bonneville Power Administration looming rather predominantly in all of this, there would be very, very serious antitrust questions arising out of this kind of dividing up of a market.

When we went to finance the Canadian Treaty, we similarly ran into what would have been antitrust problems, but for the fact that Bonneville Power Administration was involved and the fact that we did disclose to the Congress what we were doing, and got implied approval, at least, from the Congress.

This was the situation with respect to Canadian Treaty. We had in order to finance the Canadian dams to buy all of the power to which Canada was entitled for its one-half of the downstream benefits, more than 1 million kilowatts, resulting from the construction of three storage dams in Canada. The Northwest utilities had to get on the dotted line to buy that power for a period of 30 years, some 40 utilities from the Northwest, but they didn't need the power for the first 5 or 10 years. So what could they do with it? Well, these 40 utilities in the Northwest had to find a market for it, and the market lay in California over the new intertie lines.

How then would you go about having 40 utilities, each having bought a fractional share of a million kilowatts from Canada, sell that power in California? Well I suppose under the antitrust laws they shouldn't have gotten together in Northwest and agree they would make that offering in California as a group and at a certain price, and yet that is what we did and the Bonneville Power Administration took the lead in this. If we hadn't done this, if we hadn't organized the market, and proceeded on this kind of basis, I am confident that we never would have put together the financing for the Canadian Treaty and so we probably would not have had a Canadian Treaty for joint development of the Columbia River.

The CHAIRMAN. How many million?

Mr. LUCE. $315 million. We had to raise that sum by the sale of this block of power for a term of 30 years. Well these are some of the practical antitrust type problems that we have encountered in the intertie. There are others, but those are examples.

Now, looking to the future, when the Pacific Northwest is faced with the end of the development of hydro——

Senator LAUSCHE. May I ask a question at this point, Mr. Chairman?

The CHAIRMAN. Yes, sir; sure.

Senator LAUSCHE. How did you pool or coordinate these interests under the existing antitrust provision?

Mr. LUCE. I think the answer, Senator Lausche, is by main force and strain. The Bonneville Power Administration took from each of the 40 some purchasers of this Canadian power, an assignment that gave us in effect a power of attorney to go down to California and sell this power at the same price that the 40 utilities were paying Canada for the power. No California purchaser then could deal separately with any seller in the Northwest for this power.

Now, it happened that the price that the Northwest Utilities paid Canada for this power was an attractive price to California. But at the same time, the California utilities were well aware that this power was surplus to the needs of the Northwest, and consequently, if each of the 40 utilities in the Northwest had gone down to try to peddle its share of the Canadian power for the 5- or 10-year period it did not need it, it is obvious it would have had a very serious bargaining disadvantage, because the California utilities would have known that this was a distress market, that the utility that was offering the power in California, if it couldn't sell it in California, would have to waste it, but nevertheless, have to pay for it.

Senator LAUSCHE. Did you have any problem with the Department of Justice?

Mr. LUCE. Well, no, we did not, because of this——

Senator LAUSCHE. Was any question ever raised about the legality?

Mr. LUCE. Oh, yes, sir; question was raised.

Senator LAUSCHE. Was it litigated?

Mr. LUCE. No; it was not litigated. Question was raised, and we had a request from the Department of the Interior to review these contracts and they have reviewed the contracts and it is my understanding that they are going to recommend no action, in other words, impliedly approve them. But our argument——

Senator LAUSCHE. Recommend no action to whom, to the Department of Justice?

Mr. LUCE. Department of Justice will recommend to the Interior Department that we can sign all of these contracts without a violation of the antitrust laws.

Now, of course, that it just today's opinion.

Senator LAUSCHE. Yes, sir; some opinion later may be different.

Mr. LUCE. It is legally possible some Attorney General in the future might have a different point of view.

Senator LAUSCHE. That is all.

Mr. LUCE. The case that we made before the Justice Department for these contracts not violating the antitrust laws was that we had disclosed the substance of all of these arrangements to the Congress

at the time that the Bonneville marketing area bill was passed, at the time the appropriations were made for the intertie, at the time the treaty was ratified. So the Congress in effect, impliedly at least, had put its blessing on all of this. But I can't help think that you could have a repetition of all of these circumstances, or similar circumstances, in other parts of the country, where you had no Federal power marketing agency like the Bonneville Power Administration taking the lead, or you had no review by the Congress as in the intertie proposal or Canadian treaty ratification.

Senator LAUSCHE. I think you are putting your finger right on the core of the possible future problem.

Mr. LUCE. And in such an event, should not the parties have some tribunal to which they could take these contracts and get some assurances that they were not going to be prosecuted under the antitrust laws in the future? That is what this bill is intended to provide as I understand it.

Well, now, to conclude my remarks by looking to the future——

The CHAIRMAN. Can I ask one question?

It not only involved the situation that you outlined here, but it also involved the possibility that when the power got to California, that there might be some necessity of some coordination in pooling between power companies?

Mr. LUCE. That is right. I am glad you brought that out. We had the problem also of dividing up the market down there, because there was a limited amount of this Canadian power. The price was attractive and consequently, how do you decide who gets the power? Well you have somehow to arrive at a division of the available resources. You don't have enough for everybody to satisfy all of these needs, and so you arrive at an equitable, what you hope is an equitable, division of the available resources. Finally——

The CHAIRMAN. But in all of these cases, I think it should be clear there was never any attempt or any suggestion, where it involved let's say private or public utilities, that there be any change in the independence of the operation of that particular company or any interchange of directorships or anything of that kind.

Mr. LUCE. That is correct, Mr. Chairman.

The CHAIRMAN. Or if they were to merge, as the Securities and Exchange Commissioner said, no attempt to discuss that at all or even think about that. That was a separate matter.

Mr. LUCE. That is correct, Mr. Chairman. In fact, it has been my experience over the last 5 years, that this type of cooperative arrangement, voluntary pooling and coordination, is really one important answer to the ever increasing problem of merger of smaller utilities into larger and larger units, and thereby the elimination of independent units either public or private.

The CHAIRMAN. This is going to be my second question.

I think as the law now stands, it is encouraging mergers more than it is discouraging them.

Mr. LUCE. I would agree with the chairman, and cite as evidence the statistics of the Federal Power Commission which reveal the diminishing number of electric utilities in this country year by year. There are more and more mergers, whereby the advantages of technological scale of large plants, and large transmission lines, are being achieved through companies losing their independence and becoming

merged companies, rather than through this voluntary pooling and interconnection whereby each company retained its independence.

We feel, as a matter of policy, as Secretary Holum said, it is important in this country to keep independent companies and agencies, both public and private.

Now if I may take a brief look at the future as we see it in the Northwest and how this relates to the bill before the committee. In the early 1970's, the Pacific Northwest is no longer going to be able to rely exclusively upon the development of hydroelectric resources as we have in the past to meet new base energy loads. Rather, we are going to have to supplement the hydro production with steam-generated electricity. Now, the most efficient steam electric plants today, are of a size of a million kilowatts or more. Just recently TVA let contracts for two atomic units, each 1,100,000 kilowatts, so that you have a total of 2,200,000 kilowatts in this one atomic powerplant. I might say, parenthetically, that in the Northwest we are not suggesting that the Federal Government build these steamplants. We realize that the Bonneville Power Administration, because we have the backbone grid in the region, will be involved in transportation of each of this power and will have to provide reserves and backup. For this service, we hopefully will acquire a share of the output of some plant. But the financing in all probability is going to be done by the private companies and by the public agencies of the region.

But here comes the problem. There isn't a single one of these private companies or public agencies in our region that on its own, and alone, and without cooperating very closely with other utilities, getting them into the financing, getting them into the purchase of a share of the output of the plant, and so forth, can finance, build, and operate one of these huge million-kilowatt atomic plants. It is just beyond their capability.

We do not see how the necessary parties can enter into the kind of joint venture that is going to be necessary between public agencies, between private companies, and we hope also between public and private agencies without raising very serious antitrust questions. For example, one of the parties to the agreement may wish some assurance, if this plant is to be built in the territory of, we will say, one of six parties, that the other five parties aren't going to take the output of that plant and serve in its territory. It may want some territorial protection. Or even if it doesn't ask for that, you may have this kind of a problem arise. In order to finance the jointly built plant, each of the participants will have to agree to pick up the share of the other participants in the event of default. You can't sell the bonds otherwise.

Thus, if there are five utilities in a joint venture, and each has taken one-fifth of the output of the plant, and put up one-fifth of the security, if there is any default by one of those five, the other four, in order to finance that plant, are going to have to agree to pick up the defaultor's share.

Now, suppose some other utility, not a party to this joint enterprise, wants to pick up that share? And suppose this outside utility says, "Well look, this is a preferential purchasing arrangement and violates the antitrust laws, so we are going to sue for treble damages because we think we ought to be able to buy that share of power that the defaulting utility has put on the market."

It would raise very serious antitrust questions.

Well, very——

The CHAIRMAN. Strangely here, the paradox seems to be that you can merge in many cases and become bigger, without violating the antitrust laws, whereas if they try to retain their independence by some pooling arrangements to give better service to the public, they may be in violation?

Mr. LUCE. You have stated it precisely, Mr. Chairman, and that is the paradox of the law as it now stands.

Well, I could go on and list other antitrust problems. I have just tried to give some practical examples of what we have run into in our everyday working relationships among the 120 or so utilities that serve in the Pacific Northwest.

Thank you, Mr. Chairman.

The CHAIRMAN. Any questions of the Administrator?

Senator LAUSCHE. No.

The CHAIRMAN. Senator Hartke, do you have any questions?

Senator HARTKE. No.

The CHAIRMAN. Thank you very much, both of you.

The hearings will resume tomorrow at 10 o'clock. The Department of Justice will be the first witness.

(Whereupon, at 12:15 p.m., the hearing was adjourned, to reconvene at 10 a.m., Wednesday, July 13, 1966.)

AMENDMENTS TO FEDERAL POWER ACT (ANTITRUST REVIEW)

WEDNESDAY, JULY 13, 1966

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee met at 10:22 a.m. in room 5110, New Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

The Chair has a short opening statement.

This morning's hearing is the second meeting on S. 3136 which would authorize the Federal Power Commission to review and, in appropriate cases, exempt from the operation of antitrust laws contracts dealing with the sale or exchange of electricity, interconnections, or power pooling agreements. I reemphasize this because there was some question yesterday about how the bill evolved and why it was here and why it was introduced.

The bill is a product of the experience negotiating the Pacific Northwest-Southwest intertie. The utilities involved in the intertie have indicated that their continuing voluntary efforts to secure practical pooling agreements are inhibited by the possibility of prosecution or litigation under a strict application of the antitrust laws. S. 3136 represents their suggested solution to the problem.

Yesterday's witnesses were generally favorable to this approach to the problem, although there were several perfecting amendments recommended, which will be submitted to the committee for their consideration.

Our first witness this morning is Mr. Donald Turner of the Antitrust Division, Department of Justice.

Mr. Turner, you have a statement prepared. We will be glad to hear from you.

STATEMENT OF DONALD TURNER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. TURNER. Yes, Mr. Chairman. Thank you very much.

I appreciate the opportunity to discuss with you a bill now being considered by this committee, S. 3136. This bill allows the Federal Power Commission to review contracts that provide for the sale or exchange of electricity, for the interconnection, pooling, or coordination of power systems or for the joint use of facilities for generating or transmitting electricity. If the Commission finds that any such contract will not unduly restrain competition when considered in relation to the purpose of the Federal Power Act, the Commission may

immunize from the operation of the antitrust laws all activities of parties to the contract in negotiating it and in carrying it out. The purpose of allowing the Commission to grant antitrust immunity is presumably to encourage power companies to pool and to coordinate the use of their power resources and to build and to use jointly power generating or transmitting facilities.

After a thorough review of the arguments advanced in support of the bill, the Department of Justice does not believe that a case for its enactment has been made out. Moreover, of course, we are opposed in principle to legislation that provides for exemptions from the antitrust laws unless the need for this type of legislation is clearly shown. And, we fear that overly broad language in the bill, if enacted into law, may have harmful consequences. For these reasons, we are opposed to the enactment of this bill.

1. The Power Commission believes—and I have no reason to doubt—that power companies should arrange to pool many of their power producing and transmitting facilities and that they should arrange to interconnect their power lines, because pooling and interconnection often provide the only ways by means of which these companies can enjoy the benefits of advanced technology and economies of scale. While pooling and interconnection may often be highly desirable, I do not believe that it has been shown that an exemption from the antitrust laws is necessary in order to encourage companies to enter into this type of joint arrangement.

It cannot be claimed that the antitrust laws themselves prohibit this type of desirable cooperation. Under the antitrust laws, pooling and other similar arrangements are tested by a "rule of reason." They are legal unless they unjustifiably restrain competition. Thus, pooling arrangements necessary to secure substantial economies of scale or similar substantial benefits would normally not violate the antitrust laws. Moreover, ancillary agreements are legal if they are necessary to carry out a legitimate primary agreement. Thus, while agreements to refuse to deal with competitors or to divide sales territories are normally illegal, if the parties can show that they are necessary to secure the benefits of a desirable pooling arrangement, their agreements will probably not be invalid under the antitrust laws.

In fact, I might add, parenthetically, that such restrictive agreements would usually be difficult to justify on the ground that they are necessary to encourage joint investment or pooling for, normally, if parties can be persuaded to invest money only by allowing them to increase prospective profits by entering into agreements that restrict competition, it is better for the economy that the proposed investment not be made. In a generally competitive economy investment funds are allocated most efficiently if investments are made where they will generate the highest profits in the absence of competitive restrictions. And, if, in the absence of such restrictions, profits are not sufficiently high to attract investment into electric power, it may be better that no investment take place. It may be, however, that because of special circumstances, competitive restrictions are justified in the electric power industry when they would not be in other industries. And, if such justification can be shown for a restriction, it would not be illegal.

It may be claimed, however, that even though the antitrust laws themselves do not make reasonable agreements illegal, it is nonetheless

uncertain exactly how the antitrust laws apply to a particular case, and this uncertainty discourages firms from entering into joint arrangements. I do not believe that the way in which the antitrust laws operate is so uncertain. Antitrust lawyers are familiar with their operation and may be consulted by power companies. Moreover, any firm may ask the Department of Justice to indicate what its position would be concerning a particular proposed arrangement. It need only submit relevant information to the Antitrust Division under our business review procedure, and ask for a statement of the Division's enforcement intent. It is doubtful that Power Commission approval can provide much more certainty than can Justice Department approval under the business review procedure.

That the existence of possible antitrust liability has not deterred the growth of coordinated power pools and interconnections is strongly suggested by the fact that during the past few years independent utilities in increasing numbers have joined together to form pools or planning groups, to coordinate their capital spending programs, to provide each other with emergency assistance, to share surplus capacity and to cooperate in numerous other ways.

The last three annual reports of the Federal Power Commission provide much evidence of the rapid growth in recent years of pooling, planning groups, and interconnections. See 1963 annual report, pages 29 and 59; 1964 annual report, pages 59–62; and 1965 annual report, pages 90–92. Today, there are 19 such pools, and, these 19 pools account for about 50 percent (ibidem, p. 5) of total American generating capacity.

Not only have independent companies joined to form pools, but also groups of pools have interconnected to join larger networks of truly nationwide scope. Late in 1962, three existing pools interconnected to the world's largest synchronous network. It covers 41 States, and two provinces, and has a total generating capacity of 146 million kilovolts. See 1963 annual report, FPC, page 59. Moreover, the 1963 annual report of the Federal Power Commission predicts a "tremendous upsurge" in high voltage planning, which will result in "pooling arrangements" entailing construction of several thousand miles of "extra high voltage lines."

With the use of extra-high-voltage transmission lines, independent utility companies are able to interconnect over a much broader geographical area than was previously possible. A very good case in point is the Pacific Southwest-Pacific Northwest intertie. The intertie serves to interconnect two areas which are 880 miles apart. It involves the participation of at least 10 non-Federal entities as well as several Federal ones and includes 4 extra-high-voltage transmission lines (1963 FPC Reports at 29).

The 1964 FPC report cited four pooling agreements as typical of the "many * * * announced" that year. These pools alone involved the participation of 12 individual companies and the entire American Electric Power Co. system (p. 61).

The 1965 FPC report indicated in that year four new pools and coordinating groups were announced, in addition to a number of proposals for extending and strengthening existing pools. Further, large numbers of power companies have joined planning groups, in which they plan and coordinate their programs for future plant capacity. Of the 8 principal planning groups in the United States,

4, with a combined membership of nearly 90 utilities, have been formed since January 1, 1963. (Speech, F. Stewart Brown, p. 6, and table II.) And two new atomic generating plants, Yankee Atomic, and Connecticut Yankee, are owned by power companies that wished to "pool" the risks and high costs of entering this technologically advanced field.

This substantial record of growth has taken place with no immunity from antitrust laws.

2. Since a need has not been shown for this bill, I oppose its enactment, for as the Commission has recognized, the competitive standard contained in the bill is far weaker than that contained in the antitrust laws, and I do not believe it wise to create exceptions to the antitrust laws without a clear showing that they are necessary to serve the public interest. The reason for my position is a simple one. The antitrust laws are designed to promote and to maintain competition. Competition exerts pressure upon firms that leads to more efficient methods of production, to better products, and to lower prices. As our past history and present wealth amply demonstrate, a competitive economy is likely to be a most efficient and productive one. Thus, we should be very careful when considering legislation that may lessen competition. Antitrust exemptions may well lessen competition, for the scope of any written exception to the antitrust laws is inevitably vague. Such an exception surely will affect competition in numerous unpredictable ways, perhaps eliminating it where it is quite desirable. Because we cannot be certain that a proposed exception to the antitrust laws will not harm competition seriously in the future, the proponents of any such exception should bear a heavy burden of proving its necessity.

The fact that an industry is regulated does not, in itself, show that the firms within the industry should be excepted from the application of the antitrust laws. Regulation and competition may both help to achieve efficiency and productivity. In industries with certain technical characteristics—such as the electric power industry—regulation may be both necessary and desirable to insure an efficient allocation of resources. But, competition may still play an important role in insuring that such industries operate efficiently. After all, where there is regulation and no competition, firms may become lazy, for they may feel that they are, in effect, guaranteed a profit. On the other hand, if regulated firms also face some competition, they may work harder to keep costs down, to improve the quality of their service, or to devote sufficient resources to research and innovation. Thus the antitrust laws apply to many regulated areas of the economy such as insurance, banking, communications, fuel and agriculture.

At the present time the power industry is just beginning to feel the competitive spur. Many of the same technological advances that make pooling and interconnection possible also make possible new forms of competition. For example, a firm with surplus energy or extra generating capacity can attempt to sell and transport electricity to an area with a power deficit, and, in doing so, it may compete with other firms also having surplus energy or extra generating capacity to sell. Similarly, companies may compete to exchange power with areas that have offsetting peak periods. Competition in the industry will probably become more, rather than less, important. It would be

unfortunate if an antitrust exemption allowed power firms to stifle this growing competition unjustifiably—and we run a substantial risk that just this will happen if an antitrust exemption is enacted.

Even if this bill did not weaken the antitrust standards to be applied to power company contracts—and I believe it probably would—I would be opposed to it, for I do not believe it wise, again, without a clear showing of necessity, to proliferate the number of governmental bodies enforcing antitrust standards. Whenever different bodies enforce the same law, different enforcement approaches are almost certain to occur and to persist despite the theoretical capacity of the courts to enforce eventual reconciliation.

Moreover, it is our belief, based on past experience, and I say this respectfully, that regulatory agencies entrusted with the duty of assessing "competitive effects" often give competition insufficient regard. As you know, the Department of Justice on many occasions has appeared in court in opposition to actions of agencies such as the Interstate Commerce Commission on such matters as merger and new entry, where we feel convinced that the agency has greatly undervalued the contribution that competition makes to the public interest.

These considerations of course to not show that regulatory agencies should never administer antitrust standards. They simply suggest that before legislation is enacted empowering an agency to do so, a strong and convincing case should be made showing that the legislation is necessary.

3. The present bill illustrates why we should grant antitrust exemptions with the greatest care. The bill would require approval of any contract that "will not unduly restrain competition when considered in relation to the purposes" of the Federal Power Act. It thus substitutes a new and untried standard for antitrust standards, which, while hardly crystal clear, have at least had the benefit of 75 years of articulation in court opinions. The Commission considers the standard in the bill a "balancing" standard rather than an "antitrust" standard—thus suggesting a weaker standard than that contained in the antitrust laws. But to what extent is it weaker? How will it be interpreted? Will the Commission adopt antitrust rules and practices? For example, in determining whether a division of sales territories is legal under the antitrust laws, the courts will consider not only whether such an agreement will help carry out the purposes of a desirable pooling arrangement. They will also consider whether the agreement is more restrictive than necessary to carry out the pooling arrangement's legitimate purposes; they will ask whether the parties might have produced the same end result in a less restrictive way. Will the Power Commission also ask whether ancillary agreements are more restrictive than necessary? I simply do not know, but there is always the risk that this new standard will be interpreted in such a way that competition is unjustifiably restrained.

Moreover, under the bill, once the Federal Power Commission has approved a contract, not only is the provision itself immune from antitrust attack but also the parties' activities in negotiating the contract may not be attacked, and their activities in executing it are similarly immune. The fact that activity is subject to the antitrust laws may plan a valuable role when a contract is being negotiated. It may, for example, prevent unlawful collusive agreements among power companies not to submit various alternative and more competi-

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tive proposals to the Power Commission. Antitrust jurisdiction may also prevent conspiracies between firms negotiating a contract that would unreasonably and harmfully exclude other firms from their proposed pool or that would lessen competition in other ways.

Further, the immunity granted pooling arrangements or arrangements for joint use of transmission facilities might be construed to allow power companies to refuse subsequently to transmit power produced by competitors even when such refusals would be illegal under the antitrust laws. The extent to which approval of a contract would immunize these activities from the antitrust laws is at best unclear. At worst, the bill may impose upon the Commission the dilemma of either refusing to approve a desirable contract or immunizing many undesirable restrictive activities taking place during contract negotiations or in the contract's execution.

In sum, my reasons for opposing the bill are the following: First, I do not believe sufficient reason has been given for the bill's adoption. The antitrust laws do not forbid desirable joint activities and they do not seem to have deterred companies from engaging in them. Second, I oppose in principle granting an exemption from the antitrust laws without a strong showing of a need for it because it is difficult to know just what effects such exemptions will have. They may lead to less efficient and less productive industries. Finally, the exception written into the present bill may sweep within its general language anticompetitive activities for which there is no justification. Moreover, there is reason to believe it particularly inopportune to provide an antitrust exception at the present time, for an antitrust exception means lessened competition and competition is beginning to be a factor of growing importance in the electric power industry.

The Department surely does not intend to launch a major antitrust effort in the electric power industry. It simply fears the possible future effects of this bill, effects which are unclear and for which no important justification has been shown. For these reasons, the Department of Justice opposed the enactment of S. 3136.

I may add, the Bureau of the Budget advises that while there is no objection to the submission of this report, it believes that the subject matter of the bill has far-reaching implications, that it requires further intensive study, and that the need for such legislation has not yet been demonstrated.

That concludes my prepared statement, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Turner.

Did the Director of the Bureau of the Budget authorize you to make this statement?

Mr. TURNER. I was out of town.

The CHAIRMAN. I shouldn't pick on you because it has been included in all agency comments.

Who discussed this with the Bureau of the Budget in the Department of Justice?

Mr. TURNER. Our channel is up through the Deputy's office, Deputy Attorney General, and we are informed by the Deputy that this came back from Budget.

The CHAIRMAN. He went to the Budget with the bill?

Mr. TURNER. With my statement, that is correct.

The CHAIRMAN. Has Budget looked at the bill?

Mr. TURNER. I assume that they have.

The CHAIRMAN. Is there any financial matter involved in the bill?

Mr. TURNER. Well, sir, my understanding is that the Bureau of the Budget is administration coordinator.

The CHAIRMAN. I understand what the Department's understanding is, but I just want the record clear. Is there any money involved in the bill?

Mr. TURNER. Not to my knowledge.

The CHAIRMAN. I would like to have a memo of who discussed this with the Budget and who in the Budget agreed to this and whether the Budget looked at the bill or not. I imagine that they did. I would just like to know, because if they are opposed to this bill, they ought to come up here and say so.

Mr. TURNER. I would be happy to get some more details to supply you with.

The CHAIRMAN. I think all departments do what you folks do.

The CHAIRMAN. There are a lot of things in your statement that I would like to discuss.

What do you consider to be competition in the electric power industry? You mention competition a great deal in your statement.

Mr. TURNER. By and large there is not and could not practically be at any one time competition in the retail distribution of electricity. You would get——

The CHAIRMAN. All of this is ultimately to see that the consumer gets the best possible service and lowest cost power where available.

Mr. TURNER. Right. But there does seem to be considerable room for competition and it is taking place, according to my understanding. I don't pretend to be an expert in electric power field, but wholesale distributors, or people who are generating power surplus to their own needs, if they also have some distributional facilities, will compete for the opportunity to supply power to local retail distributors and——

The CHAIRMAN. Do you agree as a general proposition that the meaning of competition, as we know it in the electrical power industry, is a little bit different than the case of two banks here competing for my deposits or two people competing for my purchase of some one thing?

Mr. TURNER. Yes, sir.

The CHAIRMAN. Obviously it would be very impractical, I would think, and I think all of the testimony will bear this out, that you would have two power companies both trying to serve the same block.

Mr. TURNER. That is correct.

The CHAIRMAN. And having one of them having five customers and the other having five. You feel competition exists more at the wholesale level.

Mr. TURNER. In addition, too, sir, there are of course developing areas, and also other situations where companies are abutting each other and there may be a scrap over the opportunity to serve retailing areas that are just developing. So you can compete for that.

The CHAIRMAN. What I am trying to say is that this is a different situation than in many other industries.

Mr. TURNER. Oh, yes; the fact that you have as extensive regulations as you do, Federal and State——

The CHAIRMAN. So that we get into a different field here.

Now following that through, you say that you have some fears that the Federal Power Commission would not adopt the certain rigid standards that the Department of Justice would in hearing these cases?

Mr. TURNER. Let me restate my point, Mr. Chairman——

The CHAIRMAN. Maybe I put it wrong.

Mr. TURNER. We feel, and I have tried to be honest about this, we feel that there probably would be some difference in the approach taken by the Power Commission and ours. However, I do not think it appropriate to characterize the antitrust approach as a rigid one. Indeed, it is not in the problems of this kind, even if you are talking about areas subject to no regulation.

The CHAIRMAN. I have great respect for the Antitrust Division, and I don't mean "rigid" in that sense. But, you feel that the same standards, let's put it that way, may not be applied?

Mr. TURNER. That is correct.

The CHAIRMAN. You mentioned the ICC. Because the Anti-trust Division felt since they were not applying the standards that you thought should be applied in merger cases, you have intervened in some of these cases?

Mr. TURNER. That is correct.

The CHAIRMAN. Do you have any reason to feel that you would not be able to intervene in the power cases if you felt that they were not going the right way?

Mr. TURNER. No, my understanding is that we would be able to intervene.

The CHAIRMAN. You would not?

Mr. TURNER. We would, that is right, and so the question comes down again to one of whether the appropriate way of dealing with matters of this kind is to vest jurisdiction in the Power Commission to grant immunity with the right of the Antitrust Division to appeal, the Department of Justice to appear before them, to raise any issues that the Department sees fit to raise or whether independent court jurisdiction under the antitrust laws should be maintained.

That is really the issue, and we believe that a pretty good case, a very strong case should be made for moving it over into the Commission's jurisdiction, and we don't think it has been.

The CHAIRMAN. Your statement is clear that under any interpretation of the bill you could appear, such as you do in interstate commerce competition?

Mr. TURNER. That is my understanding, and if it were not so, I take it you would do that.

The CHAIRMAN. If it were not so, we would surely have it that way.

Mr. TURNER. That is right.

The CHAIRMAN. And you feel that is not as effective as you initially taking the case yourself?

Mr. TURNER. Let me put it this way, we believe and we think history will bear us out, that antitrust considerations would, as a practical matter, be given less weight, going that route, than it would if we bring the case, because as you know——

The CHAIRMAN. You make a good argument for the bill there, when you say it is a "practical" matter. I am not so sure that the Antitrust Division wouldn't be even more effective on a violation of the spirit of the law if the Antitrust Division were appearing as an independent party in a power case than taking it on all themselves. I think the

Federal Power Commission knows more about it, and they should know more about it.

Mr. TURNER. Indeed they do know more about the power industry than we do. I would hasten to add, however, that I think we do a pretty good job of finding out about an industry when we have to——

The CHAIRMAN. I wonder if you don't think coming in as an independent party, friend of the court, or whichever way you want to put it, you might even be much more effective.

Mr. TURNER. I think I can honestly say I don't believe so, Mr. Chairman. Let me try to explain why. In the first place, insofar as results are concerned, the Commission, any regulatory commission can listen to us, but if they don't like the sound of the music they don't take it into account. And if we then take the case to court, we take it in a posture in which the decision of the agency is likely to be upheld unless it appears, in the eyes of the oourt, that the agency has gone completely wild.

Now, to go back again, then, if we feel in a particular case that a particular contract should not receive immunity, and we make an appearance before the Commission and urge our cause, and they refuse to agree to our arguments, we are then in a very difficult position, and we are in a much more effective position when we are operating independently.

The CHAIRMAN. Now, a great deal of your testimony was devoted to the bill as written. I like to think of bills as working papers to achieve objectives, and I was going to suggest if the Department has any suggestions to make the bill more palatable to the Department by the way of amendment, we would like to have them.

Mr. TURNER. Well, I have no doubt that we could revise the language of the exemption a great deal to make it more palatable than it now is, but——

The CHAIRMAN. It is my understanding that the Department has a real, I think, maybe a serious objection to the section that makes "all orders entered hereunder final and conclusive." Is that correct?

Mr. TURNER. I hadn't focused on that particular language. This is, I think, normal statutory language on agency procedure, and I don't think there is anything unusual about that.

In other words, if this is the avenue——

The CHAIRMAN. What I was thinking about, suppose in the Federal Power the bill was passed and the Federal Power Commission made a decision and you in Justice felt that this was the wrong decision, that it violated the spirit and the whole intent and the purposes of the antitrust laws, that you might want to even suggest that you go into court with them or take it to court, or have somebody take it to court?

Mr. TURNER. Well, even this language, of course, permits court review, as is ordinarily available of administrative agency determination. The only alternative to that, you could have something analogous to what you have with ICC determinations, and that is the right on our part to initiate an original action in a district court to upset the determination, but——

The CHAIRMAN. What has been your experience on mergers down at the ICC? Have they allowed you to appear to present your case?

Mr. TURNER. Oh, yes, and we have opposed them in court, that is, where they have approved some.

The CHAIRMAN. The Department opposed in the New York Central-Pennsylvania merger, did they not?

Mr. TURNER. We have opposed that both before the hearing examiner and before the ICC, and we now have under consideration what action to take, if any, on the basis of the Commission's determination. We opposed the Atlantic Coast Line and Seaboard Railroad merger. That is still in litigation, and we, I think, have opposed some others in the past. My recall of history isn't too good.

The CHAIRMAN. On page 11 of your statement, you say you oppose enactment because the competitive standards contained in the bill are far weaker than contained in the antitrust laws.

Now, I am a little confused about that, because I thought the language in the bill incorporated at least in spirit or intent that the competitive features should be one of the major considerations in any hearing before the Power Commission. And if the language doesn't do that, we ought to make it so.

Mr. TURNER. I think the language here would leave the Commission room to apply a rather wide range of approaches. They could conceivably, in fact, on the basis of language of this kind——

The CHAIRMAN. Competition has been stressed by all of the witnesses. This was a very important thing. Only when the public interest is best served in other ways should competition become secondary.

Mr. TURNER. It is quite possible the Commission under language of this kind could come out the same way you would in antitrust case.

The CHAIRMAN. Actually there is no absolute virtue in competition in some cases any more than there is an absolute virtue in low bidding. Sometimes it might work just the other way. Generally speaking there is a greater virtue.

Mr. TURNER. I think one of the principal points we have been trying to make is that the antitrust laws are quite capable of accommodating considerations of this kind, indeed, always have, and we have classically with regard to joint ventures taken into account the argument and demonstration that this kind of a joint venture, this kind of arrangement, is necessary to achieve certain efficiencies which could not otherwise be obtained.

The CHAIRMAN. How many of these pooling arrangements that you cited here on page 5, that are now in operation, came to the Department of Justice for a prejudgment?

Mr. TURNER. I can't answer that question.

The CHAIRMAN. Would you find that out and put that on the record?

Mr. TURNER. Yes, I will. Of course a lot of this took place before I came in. I don't personally know, but I can get that.

The CHAIRMAN. But you stress the fact that this can be done now.

Mr. TURNER. It can always be done.

The CHAIRMAN. You say that 19 pools act for 50 percent of the total American generating capacity. Apparently those are pooling arrangements now in existence.

Mr. TURNER. That is right.

The CHAIRMAN. And I would think it would be very pertinent to this inquiry as to how many of them went to the Department of Justice and laid out the plan and said here is what we are going to do, and the Department of Justice said, all right.

Mr. TURNER. I would be happy to get that information. I might add that if it turned out that none of them did, it seems to me that this would make our point even stronger, that they just felt it was so clear, they didn't think there was any necessity of checking with the Department.

The CHAIRMAN. Now, they have to go to the Power Commission too, don't they?

Mr. TURNER. Some kinds of arrangements, yes. I am not fully conversant with the dimensions of the FPC's jurisdiction on the matters of this kind, but a good many arrangements do have to receive their approval.

The CHAIRMAN. We will ask the Power Commission to put in the record the amount.

Mr. TURNER. We may have gotten involved not through that route, that is through direct approach by the companies concerned, but some of these matters may have been referred to us as, for example, Pacific intertie was by the Department of the Interior.

Incidentally, Mr. Chairman, you prefaced the session this morning with some comments on that, and if I may, I would just like to put into the record a very brief summary of what our concern and activity with that was. As you know——

The CHAIRMAN. I was going to ask you, and I am a great believer in this process that you have, but on page 4, you say opinions can be given under your business review procedure.

Mr. TURNER. That is right.

The CHAIRMAN. And the question was, do these opinions prevent subsequent action by the Department of Justice? This fear was expressed here by many of the witnesses.

Mr. TURNER. Let me put it this way. In theory, the Department of Justice can never give a legal answer that binds itself. As a practical matter, if a particular plan of this kind were submitted to us and we said we would have no present intention of proceeding, that would certainly block, as a practical matter, any subsequent suit attacking the initial inception of the contract, it would a fortiori block any criminal suit. Nobody would think of bringing one.

It might be that future developments might make an arrangement that previously seemed all right, now seem not all right, and if such developments took place, the Department would, of course, be free at that point to call people in and say, now we think at this point you ought not to continue to carry on this particular agreement or this particular restriction. But that would, as I say, operate prospectively only and nobody would dream of filing an antitrust suit——

The CHAIRMAN. I think as a practical matter it would be a little difficult for someone later on to change the policy although don't apply that rule to the Internal Revenue Service.

Now that brings me to this point. In the Pacific Northwest intertie matter, where it looks like all of the factors point to it being in the public interest, the legal advisers have a great fear that they might be in technical violation of the antitrust laws.

Mr. TURNER. I don't know what the phrase "technical violation of the antitrust laws" mean.

The CHAIRMAN. They want somebody to make the decision for them and make it final and conclusive so they can proceed with their plans, such as the intertie, because this is a big business. It requires a

lot of planning, a lot of capital investment to give the people the service they need at the lowest cost. If there is any legal cloud, it makes it very difficult to proceed.

Mr. TURNER. I would respond, I think, to that as I indicated in my statement that these legal clouds as a practical matter can almost always be eradicated by advance clearance with the Department. And in good many of the situations, I am quite sure that sophisticated antitrust lawyers don't even have to come to the Department, they can advise their power company clients on the basis of what they have and what they think is all right.

The CHAIRMAN. I think we all understand each other about the situation here. I think you would agree with me that we were dealing with a little different problem in the electric power industry and the question of pooling and mergers, than we are in the usual case of competition as we think of it in the business world in the United States.

I note you refer to the overly broad language of the bill on page 2. You just refer to the term:

> And we fear that the overly broad language of the bill may have harmful consequences if enacted into law.

May I suggest that you might give us some ideas of how you think the broad language might be improved, if we pass it into law?

Mr. TURNER. We would be happy to do so, Mr. Chairman, although I think as you are quite aware, when somebody is opposed to a bill, they may have some reluctance to help out getting it passed by watering it down.

The CHAIRMAN. That is what departments are for, that is why we asked for report on the bill. Otherwise we wouldn't consult you at all.

Mr. TURNER. I prefaced my remarks by saying we would be happy to.

The CHAIRMAN. You have helped us out many times to improve a bill you didn't like. Two weeks ago in here you did, yes. It made it a little better, a little more sensible.

The Department of Agriculture report states the following:

> The problems of the rural electric systems are compounded by the practices of some of their wholesale power suppliers. These suppliers are able to impose dual rates and other restrictive provisions in the wholesale power contracts.

Does this type of contract seem to raise an antitrust question?

Mr. TURNER. I am not familiar with it but dual rates, if by that they suggest somebody is saying we charge one rate for you if you will do this, and another rate if you don't, this may raise some antitrust questions. I mean if different rate differentials are being used to coerce people into some noncompetitive course of behavior——

The CHAIRMAN. That is one of the complex problems involved.

Now just one more question for the record, the report of the Legal Advisory Committee of the national power survey is 3 years old.

What I want to get in the record is whether or not your opinion, in light of new technological advances and complexities we have been talking about, has changed?

Mr. TURNER. Mr. Loevinger wrote a letter in response to certain questions.

The CHAIRMAN. You received a report and you were looking at it. Now 3 years has passed and am I to understand from your statement that your position has not changed in 3 years——

Mr. TURNER. Let me say this, my position is as I reflect in my statement today. Let me make a couple of comments on the letter that was submitted by the Antitrust Division to that power survey committee. In substance the letter suggested that the divisions of territories and the like raise serious antitrust questions. Indeed they do.

The CHAIRMAN. You were submitted those questions.

Mr. TURNER. Of course they raise serious antitrust questions. I would however like to amplify somewhat the response to two questions, both in substance asking whether approval by regulatory agencies had any impact on antitrust laws.

The letter that was sent 2 or 3 years ago replied, and quite accurately——

The CHAIRMAN. For the record the letter was signed on June 7, 1963, and signed by Mr. Loevinger.

Mr. TURNER. That is right. Mr. Loevinger replied to two of these questions quite accurately that under the law as it now stands, approval by regulatory agencies would not immunize particular contracts from the impact of the antitrust laws.

What I would go on to add to that response is this. While of course, as Mr. Loevinger pointed out, there is no immunity, we are dealing with an area in which peculiar needs of the industry are highly relevant and it seems to me quite clear that approval by the Power Commission, even without the right to immunize under the antitrust laws, would be given a great deal of weight in any deliberations by the Department of Justice because that is a reflection of what an expert agency thinks the needs of the occasion are.

Now I might also note, in all of these years, we have brought no antitrust proceedings against arrangements of this kind.

The CHAIRMAN. I think without going in and burdening the record with details, we do have this letter from 3 years ago in response to certain questions. What I was trying to make clear is whether or not the Department's position on this matter—would the answer be different today?

Mr. TURNER. I would not think so, sir; no.

The CHAIRMAN. Well, you take a look at them, and if you think so, you can put them in the record.

Mr. TURNER. As I said, I have read the letter and all I say is I would make a somewhat more complete answer. I think, in other words, my statement and Mr. Loevinger's statements are not inconsistent. I would consider mine an amplification of some issues which weren't fully put to him, I don't think, at that time.

The CHAIRMAN. Of course, all of this gets down to a simple question. The Department of Justice has never in my time in Congress agreed to any change, any amendment to the antitrust laws that I know of. They were passed some years ago and changing conditions might give a little justification to the thought that maybe they do not quite apply now as we intended at the time we passed them.

But I admire your persistence. [Laughter].

Mr. TURNER. Well, I guess everybody likes to consider himself as a guardian of the public interest. I might add, however, in response to this latter statement, I recently signed the Special Committee on Telecommunications Report recommending to the Congress the Federal Communications Commission's authority to approve mergers

in international telecommunications field, that they be granted authority which they do not have and which would carry antitrust immunity.

The CHAIRMAN. What we are trying to evaluate here is whether or not exemptions to antitrust law would produce results that original antitrust laws intended to produce anyway, or whether it would not. Sometimes there may be some justification, technologically, or advancement of industry, that maybe would warrant changes.

Mr. TURNER. I would like to say that what we are really saying is that all legitimate consideration, bearing on the appropriateness of arrangements of this kind are in fact be taken into account applying the antitrust laws, and it has not been demonstrated to us as yet that there are situations in which a restriction that we feel would violate the antitrust laws would in fact be so much in the public interest that the Power Commission ought to be able to immunize it. That is really what our position is.

The CHAIRMAN. Congress has to make a decision whether or not you can handle this situation—this very complex situation—better than the Federal Power Commission. Isn't it as simple as that?

Mr. TURNER. If you put it that way, my response would be——

The CHAIRMAN. I don't think we are letting you out, I think even if this bill were passed as it is written, some amendments, some good ones have been suggested, and I still think that you have a very important role in this thing.

Mr. TURNER. You can rest assured, Mr. Chairman, that if this bill passed, we would certainly be making our appearances in these cases.

The CHAIRMAN. I know the Department has been very helfpful on merger cases when we transferred part of this to the ICC and I think this is a question for Congress to decide.

And thank you very much. We appreciate it.

(The following material was subsequently submitted:)

DEPARTMENT OF JUSTICE,
Washington, July 22, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your request for further information, I should like to add the following to my testimony on S. 3136:

First, you referred to a paragraph in my testimony stating "the Bureau of the Budget advises that while there is no objection to the submission of this report it believes that the subject matter of the bill has far-reaching implications, that it requires further intensive study, and that the need for such legislation has not yet been demonstrated." You wished to know who discussed this bill with the Budget, who in the Budget agreed to this paragraph and whether or not the Bureau looked at the bill.

Under established procedures we forwarded our proposed testimony to the Bureau of the Budget for advice as to the relationship of that testimony and the bill to the Administration's program. The above-quoted advice was received from the Bureau in the Office of the Deputy Attorney General Ramsey Clark, as is customary, and was included in my statement as is done in such cases under prescribed procedures.

The Bureau informs us that the advice was based on consideration of the legislation and the background facts and the differing points of view expressed in the various agency reports, that similar advice was given to several other agencies and included in their reports, and that the Assistant Director for Legislative Reference, Wilfred H. Rommel, authorized it. The Bureau was not asked by the Committee to report on the bill.

Second, you asked how many of the 19 power pools mentioned on page 5 of my statement requested advice under the Antitrust Division's business review pro-

cedure. None of the power companies involved in these pools used this procedure. This fact reinforces our belief that companies have not been deterred from forming or joining pools because of uncertainty as to the meaning of the antitrust laws.

Third, you asked whether the current position of the Antitrust Division concerning the legality of various agreements by power companies differs from that expressed by former Assistant Attorney General Lee Loevinger in his letter to the Legal Advisory Committee to the National Power Survey dated June 7, 1963. As I pointed out in my testimony, while I believe the statements made in the letter are accurate, some amplification of the views expressed there may be helpful. In particular, Mr. Loevinger indicated that approval of an agreement by the Power Commission would not be sufficient to protect the agreement from attack under the antitrust laws. Strictly speaking, this is true, for without statutory authority, a regulatory commission may not grant antitrust immunity. As a practical matter, however, the Power Commission's reaction to an agreement may play an important role in determining the enforcement policy of the Department of Justice. As I indicated in my prepared statement, reasonable agreements are not unlawful and the views of the Power Commission would be of considerable help in determining whether an agreement is reasonable or unreasonable.

Yours sincerely,

DONALD F. TURNER,
Assistant Attorney General, Antitrust Division.

The CHAIRMAN. The next witness is Gordon Culp, who is appearing here on behalf of the Pacific Northwest Generating Utilities.

I will be glad to hear from you.

STATEMENT OF GORDON CULP, ON BEHALF OF PACIFIC NORTHWEST GENERATING UTILITIES

Mr. CULP. Mr. Chairman and members of the committee:

First of all, Mr. Chairman, we want to thank the committee for making this time available to us. We appreciate the opportunity to appear to discuss this question, which the generating utilities in the Northwest consider of utmost importance.

I speak in support of S. 3136 on behalf of the following Pacific Northwest generating utilities:

Eugene, Oreg., Water & Electric Board; city of Seattle, Wash., Department of Lighting; city of Tacoma, Wash., Department of Public Utilities; Public Utility District No. 1, of Chelan County, Wash.; Public Utility District No. 1, of Cowlitz County, Wash.; Public Utility District No. 1, Douglas County, Wash.; Public Utility District No. 2, of Grant County, Wash.; Public Utility District No. 1, of Pend Oreille County, Wash.; Pacific Power & Light Co.; Portland General Electric Co.; Puget Sound Power & Light Co.; the Montana Power Co.; and the Washington Water Power Co.

I might say, Mr. Chairman, we had hoped and tried to have representatives of all of these organizations here. We have some in the room available to answer questions. The ones that are absent just absolutely couldn't make it with the airline strike in effect, and have asked me to express their regrets to the committee.

The national power policy encourages maximum cooperation among utilities in order to secure the economies of modern, large-scale facilities and obtain the dependability afforded through mutual assistance. This policy is enunciated in the Federal Power Act and has recently been explained in the national power survey which was prepared by the Federal Power Commission with the cooperation of all segments of the industry.

I might add, this policy and its effects have been eloquently discussed by the witnesses testifying yesterday and I wouldn't think it necessary for me to go into it any further.

The generating utilities for whom I speak support the national policy of cooperation, realize its values, and have instituted many cooperative programs which confer, we believe, large and lasting public benefits. Rapid scientific advances now make it technically possible to engage in further and more productive cooperative arrangements, and we consider it our duty as well as our desire to enter into such arrangements.

The major impediment to productive joint efforts among utilities is now legal in nature rather than physical. A strict application of the antitrust laws, as they have been interpreted by the courts primarily for the guidance of unregulated industries, might preclude some of the very kinds of cooperation that the public interest now demands. But there is no machinery available to secure a lasting determination as to whether or not an agreement for cooperative action will be in the overall public interest. Utilities must have a way to establish before the fact and with reasonable certainty whether or not an arrangement for cooperative action—typically a pooling agreement—is consistent with the balanced public interest and will be valid if later challenged under the antitrust laws.

We believe that S. 3136 provides a workable method for testing such agreements by the relevant requirements of national policy and, in proper cases, granting the necessary assurances of validity.

There is a special reason why advance, dependable assurances must be made available to the electric industry. If the decisions must abide the event, the event will not occur. In many cases, pooling and coordination arrangements will determine the time and nature of large capital expenditures and control long-term planning for power supply; and leadtimes to secure large, alternative sources of power range from 5 to 10 years. If a group of power suppliers were to rely on such an arrangement and it were later ruled to be invalid under the antitrust laws, the results to the participating utilities and the public to which they are responsible could be disastrous. Therefore, absent dependable advance assurances of validity, responsible executives and careful lawyers may be forced to recommend legally safer, though technologically inferior, plans for power production and management.

S. 3136 is needed urgently because cooperative arrangements of various kinds and complexity are in planning stages right now in various parts of the country. An example from the Pacific Northwest may help to illustrate this urgent need. The extra-high-voltage interties between the Pacific Northwest and the Pacific Southwest are now being built through cooperative arrangements and large capital expenditures by the U.S. Government, and public agencies and private power companies on the Pacific coast. When completed the interties will represent a total investment of about $700 million. One of the main values of the intertie lines is to permit the use in the Southwest of large quantities of summertime energy which is now wasted for lack of Northwest markets, thus allowing the broadest public benefit from public and private investment in generating facilities. To accomplish this purpose, power organizations in both geographic areas must have access on an equitable basis to trans-

mission capacity for the sale and exchange of such secondary energy. In order to create a usefully predictable supply of such energy and a proper market for its use, the energy must be marshaled from all available sources, and all available markets must be taken into consideration. The supply, demand, and transmission capacity will never come out even. Therefore, to have an equitable and workable arrangement, the parties will be required to agree on allocation of supply among those requiring energy, allocation of market among those having surplus energy and allocation of transmission capacity to serve the needs of all; and prices will have to be established for the energy and the transmission services. All of these elements involve considerations which historically have been the subject of antitrust concern. S. 3136 is needed now to supply a method by which all of the equities and benefits of such an agreement as well as all of its anticompetitive aspects can be considered together in order to find a dependable answer to the single ultimate question: Is the agreement as a whole consistent with the overall public interest?

The bill would authorize the Federal Power Commission to review each contract now required to be filed under section 205(c) of the Federal Power Act and to weigh its effect in view of antitrust policy together with its contribution to the national power policy. If, after this balancing process, the Commission finds that the contract does not unduly restrain competition, it will be approved, and all parties executing and performing the contract as approved will be relieved from the operation of the antitrust laws.

If the Commission finds that it does unduly restrain competition, it will be disapproved and further performance under it will be unlawful. All interested parties and agencies, including the Federal Power Commission, the Department of Justice, and other Federal and State governmental agencies and authorities, as well as nongovernmental parties, will be entitled to cause a hearing to be held and to participate in it. An order of approval will carry an exemption for all contracting parties and their representatives, whether or not they are within the jurisdiction of the Commission for purposes of regulating rates and other practices; and the order will exempt them from State and municipal, as well as Federal, antitrust laws. The order will be final subject only to court review in the manner presently provided for other orders of the Federal Power Commission.

It is to be expected that the Commission will, in some cases, conclude that a contract will unduly restrain competition unless changed in some respect. The parties would then have the alternative of agreeing to such changes or abandoning the contract as submitted and working toward a different arrangement that will be acceptable.

As you will recall, this subject matter was discussed at some length yesterday by the Chairman of the Federal Power Commission.

It is necessary, and is provided by S. 3136, that the conclusions reached by the Commission, unless disapproved by the courts on review under section 313, be conclusive and binding though later challenged by any person or authority in any court or other forum. Unless the contract as once approved and its performance remain exempt from invalidation under the antitrust laws, the reliability necessary to permit and encourage valuable pooling agreements will be lost.

This bill does not extend the regulatory jurisdiction of the FPC to any party which is not already subject to such jurisdiction, nor does it require those within FPC jurisdiction to file any agreements in addition to the ones already required to be filed. Neither does it expand the requirements of the antitrust laws as they presently apply to utilities. It does not impose obligations with regard to competition on any party which is not already subject to such obligations under the antitrist laws. What it does is constitute the Federal Power Commission the sole and responsible U.S. agency to consider, apply and police both the national power policy and the antitrust policy as they relate to the contracts described in the bill; and it authorizes and requires the Commission to reach a balanced decision after weighing all factors bearing on either field of public policy.

The CHAIRMAN. Right there, for the record, there may be some confusion when we talk about contracts described in the bill. We are not talking about mergers of companies.

Mr. CULP. That is correct.

The CHAIRMAN. Nor violating antitrust laws, or stifling the competition by virtue of mergers?

Mr. CULP. That is correct.

The CHAIRMAN. We are talking about independent companies retaining their independence, no shift of directors or shares, or finances, or anything else, merely getting to go to pool, or contract to pool.

Mr. CULP. That is absolutely correct, Mr. Chairman.

The CHAIRMAN. When two power companies want to get together and buy each other's stock, or exchange stock, that is another story. That isn't involved in here at all.

Mr. CULP. That is correct.

The CHAIRMAN. Also involved in here are public bodies who can't merge with anybody that want to, but go out and make contracts to use the power to take care of their needs.

Mr. CULP. That is right. With regard to public bodies who may now be exempt from the Federal Power Commission's jurisdiction over regulation of rates, and so on, nothing in this bill would extend regulatory jurisdiction to such public bodies or any other entities that are not already under such jurisdiction.

However, any contracts that they enter into in order to secure these advantages that you have described will be filed with the Commission in instances where a jurisdictional public untility is one of the parties. Therefore, such a contract can be approved in proper cases, and, if it is so approved, the immunity that would follow would also apply to public bodies that are parties to the contract and their representatives.

The CHAIRMAN. Or it can be disapproved.

Mr. CULP. Yes.

The CHAIRMAN. Or it can be approved or disapproved with certain conditions, which the Power Commission, in its discretion, or wisdom, thinks will be in the public interest.

Mr. CULP. That is right. It is assumed by this bill that the Commission has implied power in this type of situation to condition their approval.

The CHAIRMAN. And if the Department of Justice thinks that there is something that might violate the broad and basic concepts of the antitrust laws with this, they can come in and be a potent factor in the decision in the matter?

Mr. CULP. They can, and no doubt will.

The CHAIRMAN. They will be invited to come in?

Mr. CULP. Certainly.

The CHAIRMAN. All right. Go ahead.

Mr. CULP. Neither the proposed new subsection 202(g) nor any action taken under it could affect the legality or illegality of any arrangement other than a contract which is filed under section 205(c) and is therefore open to public scrutiny.

It should be noted that the other provisions of the Federal Power Act are unaffected by an order under the proposed new subsection 202(g). For example, the rates charged for energy or services under an approved pooling agreement remain subject to review and revision under the other provisions of the act, and the powers of the Commission to compel interconnections under subsection 202(b) remain intact.

The electric power industry has some special characteristics which should be taken into account when considering the proper application of national policy. Utilities usually operate under the law as monopolies in areas defined in greater or lesser detail by various exercises of public authority. Electricity is a product needed and used by virtually every person in the country. The electric utility industry is the largest capital requirements industry in the country. Yet the industry is characterized by its pluralism. There are about 3,600 independent entities of all kinds providing electric service throughout the United States, but only a very few of the privately owned corporations in the utility industry, for instance, rank among the really large corporations of the country. Generally speaking, this huge industry providing a homogenous product is composed of relatively small, rather fiercely independent organizations.

Also, utilities are required to be prepared to serve all of their customers' demands at the time the demands occur. They cannot, like an ordinary industrial organization, wait until a market demand exists and then decide when, how, and whether to participate in serving the market.

All of these characteristics are important in the dilemma which creates a present need for S. 3136.

The CHAIRMAN. If they did wait, they not only would run afoul of the Federal Power Commission, but they probably would get hit by the local State public utility commission.

Mr. CULP. By the State commissions, by State law, by the Federal Power Commission, and by every customer they serve.

The CHAIRMAN. And by the city government, by county government, by everybody involved.

Mr. CULP. This element of decision, as to whether to participate in a market, just is not available in the electric utility industry. They must make their decisions and they must make them far enough in advance to know that when the switch is flipped, the lights will go on.

The CHAIRMAN. All right.

Mr. CULP. The most reliable and economic electric service can now be provided through the use of facilities which are too big and too expensive to be attainable by any but the few very largest individual utilities. But all utilities must secure some kind of dependable power supply and must plan and finance it many years ahead of the demand.

The utility size and financial strength necessary to acquire the best modern facilities can be marshaled either through mergers or cooperative efforts. This bill does not affect the laws relating to mergers, or relating to any way to the nature of utility ownerships. It is intended to make the advantages of cooperative large-scale installations an emergency assistance available to consumers, whether the utility serving them be large or small, public, private, or Federal.

For these reasons, Mr. Chairman, the organizations for which I speak support S. 3136. We urge that action be taken on the bill as soon as possible so we may proceed with confidence and undertake the cooperative efforts which will best serve the public interest.

That concludes the written statement, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Culp.

Senator Morton, do you have any questions?

Senator MORTON. No, I have no questions.

The CHAIRMAN. Thank you very much.

The next witness is Robert Marritz, of the National Rural Electric Cooperative Association. We will be glad to hear from you.

STATEMENT OF ROBERT O. MARRITZ, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Mr. MARRITZ. Thank you very much, Mr. Chairman. We too appreciate very much the opportunity to appear here today to testify on S. 3136. I am uncertain about whether to feel intrepid or just foolish at being the only national trade association representative to appear to testify on the bill.

We do not wish this testimony to be construed as representing any position taken by our membership. It does not, simply because S. 3136 was introduced after the 1966 NRECA annual meeting and our members were unable to consider it. However, the potential impact of the bill upon the electric power industries is so great, that we believe it desirable to comment on it at this time.

Now at the outset, I would like to make clear——

The CHAIRMAN. Let's make it clear just who you are appearing for then.

Mr. MARRITZ. We are appearing——

The CHAIRMAN. For yourself?

Mr. MARRITZ. No indeed, we are appearing for our membership, but——

The CHAIRMAN. But you say you do not wish this testimony to be construed as representing any position taken by the membership.

Mr. MARRITZ. What I mean to say is we have no resolution on the bill.

The CHAIRMAN. How do you know what your membership thinks about it?

Mr. MARRITZ. From time to time, naturally——

The CHAIRMAN. I hate to use this word. Do you think you represent the consensus?

Mr. MARRITZ. Yes, sir; at the risk of using that word.

The CHAIRMAN. Have you communicated with them? Who has told you to come?

Mr. MARRITZ. Well, sir, we have discussed it informally among the staff and identified the interest of our members as taking it——

The CHAIRMAN. What basis do you have to suggest that this is the interest of your members? Have you communicated with them or do you have letters in or telegrams or have you had meetings, or what?

Mr. MARRITZ. No; there has been little time for any of this.

The CHAIRMAN. I know it is too late for your convention, but how do you arrive at this consensus?

Mr. MARRITZ. I suppose the membership hires us to make decisions like this in between——

The CHAIRMAN. Oh, I see, you are a little like a Member of Congress, aren't you? [Laughter.]

Mr. MARRITZ. Without the salary.

The CHAIRMAN. In other words, this is your best opinion?

Mr. MARRITZ. That is right.

The CHAIRMAN. All right. Let's get the record straight.

Mr. MARRITZ. All right.

The CHAIRMAN. I don't say that we don't value your opinion, because you are very knowledgeable in this field.

Mr. MARRITZ. I appreciate that, sir. I would like to make it clear that the rural electric systems have long advocated power pooling and power pooling at a national basis. Our general manager, Mr. Ellis, has long been a spokesman for interconnection.

The CHAIRMAN. I have plenty of opportunity to talk to him about his opinion. He talks with me, and we get along fine.

But I want your honest opinion about this bill and its effect.

Mr. MARRITZ. We are concerned about——

The CHAIRMAN. Go ahead and read your testimony.

Mr. MARRITZ. We are concerned about this bill because the benefits which were discussed yesterday as hopefully flowing from the advanced technology of the industry, calculated at roughly $11 billion per year by 1980, we are concerned that this goes to the consumer and we think this bill has a marked influence.

The CHAIRMAN. Read your statement and we will get right on with it.

Mr. MARRITZ. I am not going to read it exactly. I have added some parts and subtracted some others.

The CHAIRMAN. I think the important thing you have to contribute here is on page 2, when you discuss the regulations which you say, the regulation gives no antitrust immunity. This is one of the problems we have to decide.

Mr. MARRITZ. That is right, that is one of the areas I was going to omit from my oral testimony.

The role of rural electric cooperatives in the electric power industry is largely that of a consumer, and partly that of a small supplier. But in either role they are susceptible to being damaged by actions of investor owned or even larger publicly owned utilities. Consequently, any proposal to extend immunity to such entities from "all Federal, State, and municipal antitrust laws" as is contained in S. 3136, is of the greatest concern to our membership.

Now in the section you pointed to, I will just say briefly that the courts have not generally held that the mere existence of a regulatory statute indicates a legislative intent to exempt a subject industry from antitrust laws. And total weight of the case law does not establish that the industry is exempt from antitrust laws, but neither, we believe, should it give the industry cause for alarm, nor should it cause

the industry to alter or abridge its technical growth for fear of running afoul of the antitrust laws.

It seems appropriate to observe here that no apparent genuine need for this legislation has yet been demonstrated within the electric industry. Plainly, the technical maturity of this utility industry is not being impaired by any threat of antitrust litigation. The numbers and projected plans of power pools which have been announced in the past several years are most impressive. The already operative PJM pool, anticipates a peakload of 22 million kilowatts by 1970. The MAPP pool anticipates a peak demand of 23 million kilowatts by 1980. The WEST pool envisions the construction of 36 million kilowatts of new capacity alone by 1985. No power pool has yet encountered difficulty as a result of any antitrust laws, nor, so long as such pools are operated in a manner not inconsistent with these laws, is there anything for them to fear. To advocates of this bill we would ask: What do you want to be able to do that you can't do now?

And as further evidence that this bill is not needed at this time, we note the fact that the electric utility industry, certainly the investor-owned portion of it is very scantily represented here, and I would like to note that this is in sharp contrast to the hearings on the other side of the capital involving the rural electric bank bill, which drew 40 power company witnesses in opposition to that bill.

The CHAIRMAN. Now you are employed by the REA, are you not, in Washington?

Mr. MARRITZ. Yes, sir.

The CHAIRMAN. And part of your job is to watch the status of legislation that might affect your industry?

Mr. MARRITZ. That is right.

The CHAIRMAN. When was this bill introduced?

Mr. MARRITZ. 3136?

The CHAIRMAN. Yes, sir.

Mr. MARRITZ. Just a second.

The CHAIRMAN. I will tell you, March 25. Now you have known it all of this time, haven't you?

Mr. MARRITZ. Yes, sir; we have.

The CHAIRMAN. Proceed.

Mr. MARRITZ. So, I assume, has the investor-owned industry.

The CHAIRMAN. I think everybody in the whole industry knows about this bill. If they don't, some of their hired hands ought to get fired.

Mr. MARRITZ. I am glad I am here. [Laughter.]

The CHAIRMAN. But you belabor the point that there is no representation. We are open for anybody that wanted to come.

Mr. MARRITZ. I didn't mean to imply that any secret was being made of this bill, but rather to point out the fact that the lack of attendance by the investor-owned industry indicated either lack of interest or some fear about the bill. I don't know which.

The CHAIRMAN. What fear would they have?

Mr. MARRITZ. Well, I can best answer that when and if the bill is marked up.

The CHAIRMAN. Why do you use it, you can't answer it; you say they must have some fear, fear of what?

Mr. MARRITZ. Well, that would depend upon whether any legislation is reported by the committee, sir.

The CHAIRMAN. I think you shouldn't use the term unless you can identify what fear they may have. I think everybody in the industry has known about this problem. And I don't think they have any fear about it. I think they have a desire to see if we can't solve it.

Mr. MARRITZ. I am simply puzzled by the lack of attendance by the investor-owned industry, and I was merely remarking on that.

The CHAIRMAN. I didn't hear you.

Mr. MARRITZ. I was merely remarking on that; it was simply conjecture as to what kept them away. I can't answer that.

The CHAIRMAN. What do you think kept them away?

Mr. MARRITZ. I would rather not conjecture.

The CHAIRMAN. Why do you mention it, if you can't answer it?

Mr. MARRITZ. Senator Magnuson, I didn't mention it as this or that had this effect. I was simply wondering why they were not here and trying to characterize this as indicative of the lack of support possibly for this bill within the industry.

The CHAIRMAN. Maybe you should have used the word "apathy" and not "fear."

Mr. MARRITZ. Possibly.

As far as what the bill would do, the first of the contractual categories encompassed by the bill involves the sale or exchange of electric energy and is of interest to rural electric systems both as consumers and suppliers of electric power. Among the anticompetitive practices which may be urged upon these cooperatives in such contracts are dual-rate provisions, prohibitions upon resale to certain size or type loads, limitations upon service area or extension of new service, and prohibitions against dealing with other suppliers.

Rural electric systems would also be interested in such contracts possibly as nonparties to them, in that a tacit or explicit refusal of one utility to serve the co-op could limit the co-op to servicing by itself the existing supplier and thereby restrain competition.

It is also likely that a rural electric generation and transmission cooperative would be disadvantaged by the anticompetitive effect of being excluded from advantageous energy exchange effected among other utilities within the area in which it served.

Contracts arising out of the interconnection, pooling, or coordination of power systems would principally concern G. & T. cooperatives. It is clear that any refusal of parties to pooling agreements to admit rural electric cooperatives having the desire and physical capability to participate in such ventures would seriously harm the cooperatives. Any concerted action to deny them participation in such pools would seem, therefore, to violate at least sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. 1, 2).

The final category of contracts mentioned by S. 3136, involving joint use of facilities for generation or transmission, would also concern rural electric systems in the event that co-ops were excluded from such contracts. The inability of G. & T. cooperatives to participate in joint ventures for the construction of large scale, efficient generating plants would deny them the ability to produce energy for their wholesale consumers at a competitive cost. Their inability to share capacity in transmission lines would have the manifold effect of denying or curtailing service to potential or existing consumers; would preclude

a variety of economies available through the exchange of excess or economy energy; and would seriously limit the G. & T.'s ability to participate in the pooled sharing of reserve capacity.

The CHAIRMAN. By G. & T. you mean generation and transmission?

Mr. MARRITZ. Generation and transmission.

Relative to the latter two categories of contracts—concerning pooling and joint use of facilities—we view the struggle for the Pacific Northwest-Pacific Southwest intertie, mentioned several times yesterday, as illustrative of some of the pitfalls which face the small rural cooperative or municipal electric systems. No one can detract from the great achievement which construction of the intertie represents, but there were several points during its evolution at which it appeared that the interests of the small power distributors—and the public interest—might be subordinated.

We recall that the plan initially proposed would not have interconnected the Bonneville power system with the Bureau of Reclamation's Central Valley projects; and that the direct current line from Bonneville to Hoover Dam was not firmly committed for construction. Only because a large block of Congressmen and Senators took a steadfast position in support of these provisions, were these lines made part of the intertie "package."

In this case preference customers of the Central Valley and lower Colorado systems of the Bureau would have been severely disadvantaged by the plan initially proposed by the Department of the Interior. Had a political solution been unattainable, antitrust action would probably have been the only relief available, though concededly not a desirable one.

Pools, or interconnections, or joint ventures, per se, do not violate antitrust laws. It is the way in which they may be put together—to favor one, or to harm another—that may run afoul of the law.

As to what relief S. 3136 would afford, we note that the Federal Power Act demonstrates a commendable concern for "assuring an abundant supply of electric energy * * * with the greatest utilization and conservation of natural resources" for rates which are "just and reasonable"; and about "any rule, regulation, practice, or contract * * * (which is) * * * unjust, unreasonable, unduly discriminatory or preferential." But nowhere in the general regulatory machinery of the act is there to be found language which commits the Commission to a fostering of competition, or which directs it to prevent anticompetitive practices. Nor does the subject bill, S. 3136, provide a very helpful standard which the Commission might follow in this regard.

I was relieved to hear Mr. Culp's comments that he interprets this legislation to give the Commission the power to conditionally approve contracts, which I was uncertain about and have some comment on.

The CHAIRMAN. I think Mr. White testified to that, too.

Mr. MARRITZ. We think an indispensable feature of this type of exempting legislation not now present in S. 3136 would be the power of the Commission to maintain continuous surveillance of any contracts previously approved and immunized. Many facts and the circumstances of contractual parties may change after approval of a contract.

Also, it seems to us that "any interested entity or person" should have the right to have the Commission reexamine an order under this legislation at any time, upon a prima facie showing that the facts or circumstances under which approval was first granted have changed

significantly. Under the present bill, all such orders would be "final and conclusive as to all persons."

The standard provided by S. 3136 that no contract to be approved should "unduly restrain competition" is not rooted in any body of antitrust case law and seems too general to provide a firm guideline either for the Commission or jurisdictional entities. It is our strong conviction, if FPC must be given the grave responsibility of declaring the foundation contracts of the electric utility industry to be immune from all antitrust laws, that it should be given detailed, encompassing, and affirmative standards upon which to act.

In this respect, I would like to say that some of the language proposed by both Chairman White of the Federal Power Commission and Secretary Holum yesterday, seems to us to go in the right direction.

The CHAIRMAN. I think Secretary Holum and Mr. White suggested the same thing, as you are suggesting here.

Mr. MARRITZ. I'm not sure we would arrive at the same language.

The CHAIRMAN. And the continuing review and the fact that—well, go head and finish your statement.

Mr. MARRITZ. It is our belief, however, and again I want to stress and I want to make clear our members have expressed no opinion on this legislation—I guess I needn't repeat it—that S. 3136 should not be reported at this time or in its present form.

We agree completely with the sentiment of the Bureau of the Budget, as expressed in the July 7, 1966, letter from Chairman White to the chairman of this committee that the subject matter of the bill has far-reaching implications, that it requires further intensive study and that the need for such legislation has not yet been demonstrated.

Mr. Chairman, that concludes my formal statement.

The CHAIRMAN. Well, as far as the study is concerned, that is just what we are doing right now.

Mr. MARRITZ. That is right.

The CHAIRMAN. Now, let's get back to fear again. I hope that you don't have the fears that this Congress or this committee would pass a bill that would not allow participation of a cooperative on a matter that is presented to the Commission.

Mr. MARRITZ. Mr. Chairman, I don't think this committee would do that or the Senate or the Congress necessarily, but the Federal Power Commission would have to deal with the legislation that was passed, if any, and we don't think that this bill is specific enough to insure that this Commission or future Commissions, could necessarily view the inclusion of small systems, whether——

The CHAIRMAN. Why not? What restriction or prohibition is there now or in the bill that wouldn't allow that?

Mr. MARRITZ. There is no prohibition in the bill to it at all. What we want to see in the bill is some assurance of the inclusion of these systems.

The CHAIRMAN. Have you some language to assure that?

Mr. MARRITZ. We can supply some.

The CHAIRMAN. Supply that. We will be glad to assure that. I can't think of any case where the Federal Power Commission wouldn't allow you people or a cooperative that might be on the fringe or something like that to come in and be part of the case.

Mr. MARRITZ. I don't mean to be part of the case, I mean to be part of the pool.

The CHAIRMAN. Well, all right, part of the pool, if the facts justified and the Federal Power Commission could so rule.

Mr. MARRITZ. They could, but we would like to see an affirmative guideline which would——

The CHAIRMAN. I think we can satisfy you on that.

Mr. MARRITZ. Thank you, sir.

The CHAIRMAN. Sure, they could so rule, if it was in the public interest.

Mr. MARRITZ. I agree.

The CHAIRMAN. I can see cases where a small cooperative or one on the edge might be left over here unless something was done like that.

Mr. MARRITZ. It might be right in the center.

The CHAIRMAN. That is all you are complaining about really; isn't that so?

Mr. MARRITZ. Well, there is more than that, but I'm loath to get into that area right now. It does involve generally having another forum for the small utility business in which to seek redress of problems.

The CHAIRMAN. And cooperatives are an integral part of what we are talking about, along with the whole problem of electrical energy for the future.

Mr. MARRITZ. There are cooperatives now participating in pools.

The CHAIRMAN. The Senator from Kentucky and I would be the last to think of a bill that would suggest they wouldn't be an integral part. And if there is some language you have that might allay your fears, why, please submit them.

Mr. MARRITZ. We will submit that for the record.

The CHAIRMAN. Do you think the Federal Power Commission is adequate and knowledgable enough to handle these matters, generally speaking?

Mr. MARRITZ. Well, I'm sure they have all of the expertise in the field and they are the agency generally entrusted with the protection of the public interest in this field.

The CHAIRMAN. Do you think they can do it just as well as the Department of Justice?

Mr. MARRITZ. They would do it with a somewhat different viewpoint, just as well——

The CHAIRMAN. I'm only speaking of the pooling in this. There is no exemption for other things, only for contracts on pooling, marketing, and division of territories.

Mr. MARRITZ. Again, I think they have great technical expertise in the area, but——

The CHAIRMAN. In other words, isn't that what they were created for?

Mr. MARRITZ. Certainly it is.

The CHAIRMAN. Sure.

Mr. MARRITZ. We just have some——

The CHAIRMAN. Thank you. If you have anything to add for the record, we will be glad to have it.

Mr. MARRITZ. We will be glad to do that.

The CHAIRMAN. You can define and elaborate on the fears of the electrical power industry. I would sure be glad to read it because I have never known that industry to have any fear about anything or any place——

Mr. MARRITZ. From now on I will be silent about the psychology.

The CHAIRMAN (continuing). Particularly when it comes to dealing with cooperatives.

Mr. MARRITZ. You are right.

The CHAIRMAN. All right, Mr. Joseph Tally, Jr., city attorney, Fayetteville, N.C.

We will be glad to hear from you.

STATEMENT OF JOSEPH TALLY, JR., CITY ATTORNEY, FAYETTEVILLE, N.C.

Mr. TALLY. Mr. Chairman, and gentlemen, I am J. O. Tally, Jr., lawyer, Fayetteville, N.C.

I represent the North Carolina Municipally Owned Electric Systems Association. NCMOESA is composed of some 73 cities and towns in North Carolina which own and operate their electric systems and facilities to distribute electricity at retail to their citizens and to neighboring rural customers. In my State we serve some 750,000 of our people electrically.

In North Carolina we have had, over the years, in the electric industry and service, balanced proportions of private utility companies, REA's, and municipals. Each of these has increased in scope and size. All have prospered. Our people have been served.

Accordingly, as citizens and concerned officials, we have sought to keep our perspective upon these balanced proportions. There is room for and need for the three sources and parts of our electric industry—private utilities, REA's, and municipals. We have opposed any aggression of one part against other parts. We have opposed any unfair or undue advantage given one part against other parts.

In this perspective and for these reasons we appeared last year before this committee to oppose S. 218 and similar bills that would have deprived the Federal Power Commission of jurisdiction over wholesale electric rates charged by most private electric utility companies to municipals and REA's and small private power companies. We said then that we needed the Federal Power Commission as our umpire and protector over these rates. We said then that vital investigations and proceedings were, at that time, being contemplated to engage the supervisory and regulatory functions of the FPC to achieve fair and lawful wholesale electric rates for our cities and our citizens.

The CHAIRMAN. Mr. Tally, as I recall, the committee thoroughly agreed with you in that respect.

Mr. TALLY. Yes, sir; we were grateful. Since then these matters have been underway.

A broad investigation is in progress. A formal case to challenge and examine wholesale electric rates has been brought by my city before the FPC.

In short, the vital regulatory function of the FPC for the maintenance of which we then fought has been needed and is being used.

We come today to fight for the preservation of an equally needed safeguard—the supervision of the courts over the antitrust aspects of the electric utility business.

It is my thesis, as I hope to show it has been our history, that we need both the FPC and the courts to keep the vast electric industry part of our national economy healthy, free, fair, and growing.

Mr. Chairman, a bill like S. 3136 can be conceived and introduced in the most sincere spirit. It can be believed to be fair. It can be expected to be workable.

Nevertheless, it can, in fact, be, as this bill is, wholly wrong and utterly dangerous.

The danger lies in delusion.

The concept of this bill is that there is conflicting control by both courts and the Federal Power Commission over power pooling arrangements by private and also public power companies.

And therefore, the conflict should be eliminated and the control given to the Commission alone.

This seems a simple solution. In fact, it is so simple that it is not a solution. It is, rather, a disaster.

Solomon's proposed solution of the conflicting jurisdictional dispute over the baby would have terminated in a simple way the legal question involved, but it would have terminated the baby as well.

It is always dangerous and delusive to hunger after a simple solution for a complicated problem.

And the adequate supervision and therefore the adequate protection of the public in respect of the electric power industry is one of the most complicated problems in our complicated national economy.

Let us note, first, that generations of Americans and scores of successive Congresses have established, examined, reexamined, and approved supervision by our courts of the antitrust aspects of the electric power industry.

Unfortunately, we often overlook the long and honorable history of antitrust legislation and court jurisdiction and the part it has played in making the greatest economy the world has seen neither piratical or state owned, but, rather, entrusted to private enterprise under rules of fairplay.

The antitrust laws of this country have been in effect much longer than the laws of most administrative commissions like the FPC, and during these generations these laws have been used by the courts to lay down some of those rules of fairplay without which our people could not have been protected.

And what is there in history to argue to you that we should now deprive our courts of this power to protect our people? The proponents of this bill cannot show to you or to the people that the courts have abused this power or that they have been wrong in their specific decisions.

On the other hand, we who want to preserve the jurisdiction of the courts can point to case after case where monopoly and other practices in restraint of trade have been curbed by the courts. In our own Fourth Circuit Court of Appeals, the circuit of the States which adjoin the District of Columbia, the *Penn Water* cases of a generation ago demonstrated a vicious kind of attempt at monopoly control and restraint of trade by a private power company. In those cases the FPC had approved the rates concerned and had declined

to take any action about or have its action affected by the antitrust aspects of the cases. The court, therefore, alone, was available to protect the rights involved, and did so protect them.

Again this year I come before you to say that we are dealing not just with history but with current events. There are situations today oppressing our people in my State and elsewhere in this fourth circuit that include, in our opinion, violations of the antitrust laws. We contemplate possible actions under these laws, and soon, to pursue our rights. We ask you not to deny us access to our courts. But, suppose it is granted, as is true, that the history of antitrust legislation and court enforcement is an ancient and useful history. Suppose as granted, as it is true, that this antitrust history has been as bipartisan as any large area of legislation policy in our history, approved and supported by Democratic and Republican administrations and Congresses.

Can it still be argued that the regulation of FPC and courts over pooling arrangements of private power companies conflict, and that the private power companies should not be harassed by such conflict, and the exclusive umpiring over this area should be given to the FPC?

The answer is that, properly understood, there is no conflict. And, further, there is a distinct job to be done by FPC and another distinct job to be done in the courts, and neither is equipped to or can be equipped to do the job of the other. We need both FPC and the courts.

This committee is aware that, in certain businesses and activities, regulated by certain commissions and boards, the Congress has written into the statutes concerned exemption from antitrust court actions for those businesses and activities. In effect, this has give those commissions and boards sole jurisdiction over these business activities, and it may be argued that the same should be done here.

Again this analogy is simple; but it may be simply untrue.

First, because we cannot conclusively prove a negative, we cannot say that the public would not have been better served if these business activities, also, had had the scrutiny of both commission and courts.

Second, Congress was aware then as it should be today, that the electric utility industry is quite a different and vastly larger and more intricate affair than other so regulated activities.

The chief difference to note is that the electric industry—though sometimes superficially referred to as a regulated monopoly—is a highly competitive industry. This brings both the blessings and the evils of competition. The industry competes among various sources of energy to serve the consumers—electricity, oil, gas, and new ones on the horizon. Private power companies compete with each other in rates and therefore for business. Each private power company, in its own territory, competes, also, with REA's and municipals.

And often, in a most sensitive situation, a private power company competes with its own customers; namely, municipals and REA's which buy power at wholesale from the private utility company, and retail that power to citizens and other individual and business consumers.

It should be immediately apparent—as an intensive investigation of this field will show—that a regulatory commission like the FPC is

needed to establish and maintain fair wholesale rates in interstate commerce in this intricate field, and that only a specialized agency can have the expertise to do that job, and that, by the same token, the broad law and equity powers of a district court are needed here more than in most fields to apply the antitrust laws in the classic way they were intended. A commission cannot do that job or do it with due process.

It is easy to understand why private electric utility companies want the district courts deprived of their jurisdiction over such companies. These companies want no jurisdiction by any court or commission that can really control them.

That is why these giant, privately owned electric companies can, without any crisis of conscience or feeling of inconsistency, come before you one year to ask for you to excuse them from real control by the FPC and come before you the next year, now, and ask you to excuse them from real control by the courts.

They want you to excuse them from any and all effective control by anybody.

But you gentlemen of the Congress don't belong to these giant companies. You are of, by, and for the people of America and their best interests. History has shown that these giant companies have pooled and prospered, that they are pooling more and more and prospering more and more. They have not been hurt. They have been helped. The far more likely finding is that the people have needed more court control of utility pooling and combinations than they have had.

Don't take away the minimum safeguards we now have in commission and courts.

These giants seeking to avoid the traditional court administration of our antitrust laws say that the vast interstate electric power industry needs only an umpire, and the FPC should be that one—last year they were going to send him to the showers.

But remember that the umpire behind the plate is there to call the balls and strikes; and he cannot see and call, and only the other umpires can see and call the plays at bases and in the field.

Fairplay needs full umpiring.

The CHAIRMAN. Mr. Tally, do you agree that we have some problems to be met in order to realize the full utilization of our electrical industry? Let's take the testimony you may have heard about the intertie and all of this. Do you agree with that?

Mr. TALLY. Mr. Chairman, I do not agree that they have a real problem.

The CHAIRMAN. Maybe they ought to hire you then as their lawyer.

Mr. TALLY. No, sir; may I specify?

The CHAIRMAN. Yes, sir.

Mr. TALLY. This is a full-page ad from the Wall Street Journal of July 1, 1966, introducing the Northeast Utilities. Three vast electric utilities in the Northeast have announced that they have gone into a holding company by which they now will be, in effect, one vast pool for the Northeast.

They are not frightened of the antitrust aspects of this thing in pooling per se, because pooling is a technical accomplishment and if that pooling is not misused to oppress others, they have no real fear of antitrust violation.

The CHAIRMAN. Your contention is that there is a problem, a serious one, and of course you are speaking about private electric utilities. But, our problem down in our country, this involves all kinds of public utilities, municipals, private, PUD's, REA's, everybody involved in the whole thing.

Mr. TALLY. But of course the development you speak of, I think, is going to be our pattern in the future. We are going to be concerned with all of these and pooling is inevitable and pooling as pooling has been efficient.

The CHAIRMAN. In effect, what you are saying is that they don't need this bill?

Mr. TALLY. Well, sir, they certainly do not need to be exempted from court scrutiny of the antitrust aspects of pooling. And we, the public, do need that protection still.

The CHAIRMAN. I hope you realize there is no suggestion that there is any other exemptions involved at all?

Mr. TALLY. No, sir.

The CHAIRMAN. The merger of companies, the interlocking directorates, or the exchange of stock, et cetera. We are just merely talking about pooling arrangements and it is an important factor, territorial arrangements, which you have yourself in your outfit?

Mr. TALLY. Yes, sir, and I think you can see——

The CHAIRMAN. You have a territorial arrangement, don't you?

Mr. TALLY. In North Carolina?

The CHAIRMAN. Yes, sir.

Mr. TALLY. We have one that was fostered and foisted upon us by others.

The CHAIRMAN. But it is there.

Mr. TALLY. Actually, sir, it is not a comprehensive scheme of territorial arrangement and therefore——

The CHAIRMAN. It is not defined as that, I can understand.

Mr. TALLY. You see in the simplest illustration of a pool, number of companies, public and/or private, may use that pool to pool themselves in and pool others out, for example.

The CHAIRMAN. I am not talking about what might happen. Of course that could happen.

You could put this in the courts and you could put in the Federal Power Commission, you could put it in the Department of Justice, or in the Senate Committee on Commerce, and still all of these things might happen.

Mr. TALLY. And they will happen in a number of cases and the question then becomes: How are the rights of the litigants and public best protected? And it is our belief——

The CHAIRMAN. I think we want to protect them.

Mr. TALLY. I know you do, sir, and I think history will demonstrate that they have been best protected by having these two avenues. I mention the *Penn-Walter* cases, this was a very recent case in which the Federal Power Commission had ample——

The CHAIRMAN. If you let the courts in, just how would you do that? Supposing you took this bill and instead of the final and conclusive decision of the Power Commission, you would eliminate that and allow an appeal to the courts?

Mr. TALLY. That would not be substantially helpful, sir——

The CHAIRMAN. What more can you do. You are talking about Power Commission and courts. What more do you want to do?

Mr. TALLY. Sir, I don't want to do any more. I want to do it exactly the way it is done now. I want my city and group of cities to be able to bring an antitrust case in the district court and not to have that jurisdiction denied to us. When we think——

The CHAIRMAN. I am suggesting that it wouldn't be denied, that you could bring an antitrust suit on a pooling arrangement approved by the Power Commission.

Mr. TALLY. Your bill would provide that we would have to bring that before the Federal Power Commission.

The CHAIRMAN. I understand that, but supposing we changed the bill and allowed you to bring an action?

Mr. TALLY. In a Federal district court.

The CHAIRMAN. Or any place you want.

Mr. TALLY. Well, sir, if you allow us to bring it in a Federal district court, that will be substantially what we have now and what we want. But as you now provide formal review of the Federal Power Commission's determination in an appellate court, the circuit court level, that would not be broad enough to give us protection.

The CHAIRMAN. I suppose a review would be limited to whether the Power Commission had the authority to do what they did?

That is usually the case.

Mr. TALLY. Very limited review and would not give us the protection we now have of a full trial in a district court.

The CHAIRMAN. Supposing we passed the bill, with amendments to give you the authority to go into court and review the whole thing?

Mr. TALLY. Well, if it were a true de novo review, then of course that would be——

The CHAIRMAN. Not limited to just the authority of the Commission to do it.

Mr. TALLY. Yes, sir; if it were a true de novo review, it might be essentially what we have now.

The CHAIRMAN. You would have what you have now.

Mr. TALLY. But that brings me to my point, sir——

The CHAIRMAN. Let me finish and then you can tell me if I am wrong.

You would have what you have now with the exception that the Power Commission would review these arrangements rather than no one now reviewing them, or the Department of Justice reviewing.

Wouldn't that be the difference?

Mr. TALLY. I would hope that is what you have in mind, sir. It seems to me that the Federal Power Act as it is now written asks the Federal Power Commission to encourage these interconnections and other cooperative arrangements, but it does not, as it were, place upon them a positive duty and the will and the expression and policy of the Congress to review all of those things carefully, encourage them positively, and be certain that they are open for all entities, public and private, that might want to join a pool.

That is very vital. If the bill did that, it would seem to me to be a positive bill, instead of being, as it is now, a negative bill in negating because removing the jurisdiction of the Federal courts to pass on the antitrust aspects. I just don't think that is good at all.

The CHAIRMAN. In effect, it does for a certain sector of the antitrust act.

Mr. TALLY. That is true, sir, but that is the heart of what we are talking about right now. For example, in my own city, we have only one possible source of supply, Carolina Power & Light Co.

The CHAIRMAN. Why don't you submit us an amendment to put the courts in the procedure?

Mr. TALLY. Well, sir, I am not going——

The CHAIRMAN. That ought to make you satisfied, because that is all you have talked about in your testimony.

Mr. TALLY. No, sir; I am not going to take the tack of the Antitrust Division——

The CHAIRMAN. You are a good utility lawyer; you must be.

Mr. TALLY. We are opposed utterly to the principle of exemption from court review of the antitrust aspects.

The CHAIRMAN. I am suggesting you submit language that gives you——

Mr. TALLY. Sir, that would be a different bill altogether.

The CHAIRMAN. Fine.

Thank you very much.

Mr. TALLY. Thank you, sir.

The CHAIRMAN. Now the mayor of Gainesville, Fla, Mr. Richardson, and Mr. Cunningham, the vice president of the Municipal Utilities Association.

All right.

STATEMENT OF HON. JIM RICHARDSON, MAYOR, GAINESVILLE, FLA.

The CHAIRMAN. You both have statements.

Mayor RICHARDSON. I have a statement, Senator.

The CHAIRMAN. Which one wants to testify first, Mr. Richardson?

Mayor RICHARDSON. I will go first, Senator.

My name is James G. Richardson. I am mayor-commissioner of the city of Gainesville, Fla., a city of some 60,000 people, located in north-central Florida. We have been in the electric generating and distribution business since 1912. Professionally, I am a member of the staff of the College of Business Administration of the University of Florida, where I have been teaching finance, management, and economics, including the economics of public utilities, during the past 20 years. I represent over 17,000 electric utility customers served by our consumer-owned system. I feel sure that I also speak for hundreds of thousands more citizens who are served by small municipally owned systems such as ours.

We are here to oppose passage of S. 3136, under which the Federal Power Commission would be empowered to exempt electric public utilities and their officials from all antitrust laws upon Federal Power Commission approval of contracts for interconnection, pooling, coordination, or joint facilities use in generating or transmitting electric energy. We oppose it because we consider that the bill will impede municipal utilities from obtaining full and fair participation in the pools established by investor-owned utilities.

In any event, we do not see how the bill can be passed unless it is amended to give explicit and plenary authority to the Federal Power Commission to require the pool to interconnect with, and provide participation rights to excluded systems such as ours.

It is necessary to look at regional details in order to appreciate the thrust of the foregoing. In Florida, for example, there is a pool among the three major investor utilities: Florida Power & Light Co., Florida Power Corp., and Tampa Electric Co., in which there is also participation by two large municipal electric systems, Jacksonville and Orlando. The city of Gainesville, which operates its own isolated electric system in competition with Florida Power Corp., both within and without the city limits, has found itself unable to obtain interconnection into the pool.

Florida Power & Light Co. has declined to interconnect with Gainesville on the claim that Gainesville is in Florida Power Corp.'s territory, although F.P. & L. serves within Alachua County some 15 miles from Gainesville. Florida Power Corp. also refuses to interconnect.

We have filed a complaint with the Federal Power Commission seeking an order requiring Florida Power Corp. to interconnect and to exchange power and energy with us. Florida Power Corp. has filed a motion to dismiss on the grounds that the Commission lacks the authority to take this action. The Commission has deferred the motion, but nevertheless this remains the position taken by many investor-owned utilities and it will probably need to be decided in court some years hence if the city can afford the necessary long and costly court process. I might add that the Florida Power & Light Co. is contesting the Federal Power Commission jurisdiction over its operations.

I understand yesterday the examiner ruled on that and they do have jurisdiction.

The CHAIRMAN. The members of the committee are quite familiar with that situation down there.

Mayor RICHARDSON. Yes, sir; I appeared here on 218 also.

The CHAIRMAN. Yes.

Mayor RICHARDSON. It should be of interest for the Congress to take cognizance of certain policies and situations that the city of Gainesville has found existing during unsuccessful negotiations in attempts to gain admittance into the Florida Power Pool, and at subsequent discovery hearings before the Federal Power Commission held last month in Florida.

During 1965, when I served as chairman of the negotiating team of the city of Gainesville in its meetings with the Florida Power Corp. to secure a power intertie, the Florida Power Corp. stated that it was not interested in an intertie with us because they serve the University of Florida, which is located within the city limits of Gainesville, Fla. They stated that if we were intertied into the Florida pool, it would strengthen Gainesville's competitive position in our attempt to sell the University of Florida electric energy.

I might state that the city of Gainesville in January of this year unsuccessfully attempted to secure a contract with the University of Florida to serve them electric energy. Florida Power Corp. was awarded the contract. One of the principal arguments used by the Florida Power Corp. in our competitive battle for this business was that the city of Gainesville was an isolated system and could not guarantee continuity of service to the university. If denying us access to this power pool did not substantially weaken competition, I don't believe I will ever see competition weakened. To have access to the Florida pool through the Florida Power Corp. or through the

Florida Power & Light Co. would have materially strengthened the competitive position of the city of Gainesville in furnishing low-cost electricity to the University of Florida.

In more recent negotiations, as well as prior negotiations, in an attempt to settle this matter outside the jurisdiction of the Federal Power Commission, and upon the informal recommendation of the trial examiner, the city has found itself being strangled by the huge power companies.

Only last week at a meeting with the president of the Florida Power Corp., he stated that the company would be glad to intertie with us provided the city would sign a rigid noncompetitive territorial agreement which would restrict our future growth, and not allow us to compete with them in the lucrative suburban market contiguous to our city limits where we furnish many other municipal services.

This is the most flagrant type of agreement in restraint of competition and trade. It further would violate our city charter which prohibits the city from entering into territorial agreements with power companies. Furthermore, it is a violation of public policy as set forth in the National Power Survey as set forth on page 273:

> The recent expansion of the Federal Power Commission's electric rate regulation staff, the Commission's intensified interest in wholesale rate regulation and the recent clarification by the Supreme Court in the "Colton" decision of the scope of the Commission's wholesale rate jurisdiction, offer promise of effective regulation for the future. Effective regulation would mean that the small distributor need not accept excessive rate levels or agree to unfair contract terms. Such a distributor could buy power at wholesale in the reasonable expectation that the seller would recognize his right to exist, would not invade his territory, would share fairly the economies of low cost power sources, and would cooperate in meeting the purchaser's long-term load growth. The small system would have assurance that a wholesale power contract with a large neighboring system would not impair its competitive position. Given the assurance of an impartial forum, the small distributor could explore wholesale purchases as a future power supply source with confidence, and a more rational power supply structure would be within reach.

In what appears to me to be a violation of the antitrust laws and of the total concept of the function of a public utility to serve the public, is a policy which was adopted by the board of directors of the Florida Power Corp., June 16, 1960, and is still in full force and effect. It reads as follows:

> *Resolved*, That it is the sense and intention of the Board of Directors and of the officers of the Company, that the policy of the Company be reaffirmed to the extent that the Company will not supply wholesale power to any municipality other than those heretofore served under contract, and the President and the officers of the Company here hereby authorized instructed and directed to carry such policy into effect and to notify any new municipality of this policy.

How this company, a "public utility," could so blatantly and boldly misuse economic power is almost beyond the comprehension of fair and reasonable men. This company and the private sectors of this industry, that the public has granted the right of eminent domain, exclusive franchises, and many other noncompetitive and valuable rights and privileges, is now seeking the right and privilege to be exempt from the antitrust laws, one of the most basic and fundamental laws in our entire legal and economic system. Laws by which we hope to keep competition alive and democracy strong by not crushing the small producer with the economic power of monopoly in the hands of a few of the mighty.

The Florida investor-owned utilities appear to be adamant in their refusal to provide pool benefits to municipals other than Jacksonville and Orlando. In addition to the refusal to admit Gainesville, Florida Power Corp. has refused to discuss interconnection arrangements with the Wauchula municipal system despite a study made by the Federal Power Commission staff recommending that consideration be given to such interconnection.

Moreover, there are territorial agreements among the investor-owned utilities which purport to limit the interconnection choice by a municipal. Both Florida Power Corp. and Florida Power & Light Co. have publicly stated policies against connecting with municipals for the purpose of selling wholesale power. Finally, there are provisions in Florida Power Corp.'s wholesale contracts limiting the customer's right to interconnect with other electric utilities.

We feel that the type of combinations agreements, and understandings emerging in Florida is a part of an overall problem which may ultimately need to be determined under the standards and concepts of the antitrust laws. The pooling arrangement is only one aspect of the problem, but the Commission's immunity bath for the pooling could disrupt the ability to deal with the total problem under the antitrust laws.

While we are seeking to obtain relief by application to the Federal Power Commission, it must be recognized that Federal Power Commission's power in the electric field is limited. It lacks certificate authority over generation and transmission and therefore cannot assure that the design and location of facilities serve the public benefit of all electric utilities in the area. Moreover, its authority to require pool admission is seriously questioned. We hope it certainly has under section 202(b).

It seems clear that Congress must grant the Federal Power Commission this broadened authority if it is to give the Federal Power Commission authority to provide immunity under the antitrust laws.

However, with this broadened authority, we question whether the Federal Power Commission is the appropriate agency to determine the nationwide makeup of the electric utility industry, or whether there are problems here which involve the byplay of many factors, regional, political, and economic, which should be allowed to work themselves out under the generally salutary limitations and policies of the Antitrust Acts.

Finally, I want to thank this committee, and you, Senator, for the privilege of allowing us, a small political and economic unit, to present our views on this issue, and we trust that the Congress will not grant immunity from the antitrust laws to huge electric power combines, but rather will continue to allow these basic laws to protect the consumer, the small producer, and the small and growing city that daily faces problems undreamed of a generation ago.

Thank you.

The CHAIRMAN. You seem to need a bill pretty bad, with your problems.

Mayor RICHARDSON. We have had some serious ones.

The CHAIRMAN. Some kind of legislation would be helpful.

The only thing I would question is that you seem to believe that the Federal Power Commission wouldn't be the proper agency to resolve these questions.

Mayor RICHARDSON. We would hope so, sir, but——

The CHAIRMAN. I think your suggestion on the bill is good, that the Commission have broader authority to require certain things to be done. Maybe in your case they would have to do that. It seems to me you have to go some place to resolve these questions.

Mayor RICHARDSON. To date, I know of no case where the Federal Power Commission has ordered a public utility to intertie directly with a municipal system.

The CHAIRMAN. That is past experience, but supposing legislation would allow them to do so?

Mayor RICHARDSON. We hope it has that authority now, but we are testing this.

The CHAIRMAN. I don't know whether they do or not.

Mayor RICHARDSON. We hope they do.

The CHAIRMAN. Of course, we don't want to weaken, in any way, the broad aspects of antitrust laws. You might be better off if the FPC had the authority mentioned in the bill, to give you a forum to go to.

Mayor RICHARDSON. The thrust here that we are concerned with primarily is that they are using pool access, which they are willing to give to us, provided we agree to certain restrictive practices.

The CHAIRMAN. These are some of the problems that we are facing and we are trying to arrive at some kind of practical solution where you people, if you felt there was an injustice, would have some place to go to get a decision.

Mayor RICHARDSON. The territorial arrangement is a very significant one here, you see, and as I understand it, as I read the bill, I am not sure where we would stand on this as currently written.

The CHAIRMAN. You have no place to go but up now.

Mayor RICHARDSON. We hope if we do not get proper satisfaction at the Federal Power Commission, we intend——

The CHAIRMAN. I have known about your problem down there so long, that is why I talk this way about it. It seems to me that there ought to be some procedures where you could resolve your case without a costly, long, trial that could go on and on and be very costly.

Mayor RICHARDSON. It is about to break us now. But, we plan to pursue this through the Federal courts, if necessary, if we do not get relief.

The CHAIRMAN. It is a long, costly situation. Many municipalities similar to yours, throughout the country, have had to go through the same thing.

Mayor RICHARDSON. It is very expensive being a pioneer.

The CHAIRMAN. All right, Mr. Cunningham, we will be very glad to hear from you.

STATEMENT OF MAC H. CUNNINGHAM, EXECUTIVE VICE PRESIDENT, FLORIDA MUNICIPAL UTILITIES ASSOCIATION

Mr. CUNNINGHAM. My name is Mac H. Cunningham. I am the executive vice president of the Florida Municipal Utilities Association, which represents the 34 municipal electric utilities in Florida.

My request to appear before this committee is pursuant to a directive of the board of directors of the Florida Municipal Utilities Association, which opposes the enactment of Senate bill, S. 3136.

Our municipal association believes that the record of more than 40 years of growth of interconnections and pooling of commercial power systems belies the purported need now to enact a basic change in the Federal Power Act, and to exempt these interconnected systems from the possibility of antitrust action.

On the contrary, as statewide and area power pools continue their present trend of merging into vast regional multistate operating groups, we believe the need grows correspondingly greater to safeguard and protect the public interest, rather than to diminish and strip away such protection, which we believe would be the result of the enactment of S. 3136.

We understand the avowed purpose of S. 3136 is to encourage voluntary interconnection, but we are convinced that not only is S. 3136 not necessary to further promote what now exists in tremendous measure as an accomplished fact, but it may well affect profoundly and adversely present Federal Power Commission authority and jurisdiction over matters of vital interest and concern to systems which are not now members of power pools.

Since almost all, if not all, of the economic power sector of the electric industry enjoys the economic and other benefits of interconnections and pooling arrangements, it follows that most systems not now receiving any of these benefits are the smaller systems in the Nation, and those of particular concern to our association are the municipal systems.

Recent events relative to possible or proposed interconnections between municipal generating systems and the Florida Power Corp. underscores our apprehension concerning the substitution under S. 3136 of "voluntary" agreements for interconnection in lieu of authority of the Federal Power Commission to require such interconnections in the public interest.

The city of Gainesville, Fla., which generates its power requirements, was not successful in negotiating an interconnection with the Florida Power Corp., a member of the Florida pool, which includes Tampa Electric Co. and the Florida Power & Light Co., and is also interconnected with Georgia Power Co. and Alabama Power Co., which are members of the southern company pool, which includes Gulf Power Corp. and the Mississippi Power Co.

The city of Gainesville, Fla., then filed a complaint with the Federal Power Commission to obtain the interconnection.

Hearings have not been completed and no decision has been reached by the Federal Power Commission, but it is completely obvious that if the city of Gainesville eventually obtains an interconnection, it will be the result of action of the FPC, and not the result of any voluntary action on the part of the Florida Power Corp.

In January 1966, the Federal Power Commission released a report of its study of benefits of an interconnection between the small generating system of the city of Wauchula, Fla., and the Florida Power Corp.

The study was made by the FPC on its own initiative pursuant to its responsibility to encourage voluntary interconnections, and coordination of electric systems.

Although the report pointed out advantages of an interconnection to the Florida Power Corp., as well as to the city, the power company exhibited no interest in an interconnection, but instead offered, as a "solution," to purchase the city's municipal power system.

Another example of power company interest in "voluntary" cooperation with small municipal systems seeking to negotiate an interconnection is the action finally taken after failure of negotiations by the Crisp County Power Commission, Crisp County, Ga., in filing a complaint with FPC to obtain an interconnection between its generating system and Georgia Power Co.

The Georgia Power Co. opposed the interconnection, although an FPC staff study showed significant savings, amounting to hundreds of thousands of dollars, which would accrue to both systems over a 3-year period.

In April 1966, the Federal Power Commission ordered the interconnection on a temporary basis, pending final settlement of an interchange agreement.

Under the Federal Power Act, as amended by S. 3136, neither the city of Gainesville, nor the city of Wauchula, nor the Crisp County Power Commission, nor any other similar isolated system would have recourse to FPC authority to obtain the benefits of interconnection with the vast pooled resources of the private power companies, and there can be no doubt of the companies' attitude toward extending these benefits "voluntarily" to the many small generating municipal systems.

Florida is one of the fastest growing States in the Union, and the 34 municipal systems in Florida average doubling their power sales at about 7-year intervals. Consequently, as municipal systems grow rapidly, significant changes in solutions to economical power supply most certainly will occur.

Some systems which purchase wholesale power soon may find that because of load growth, investment in generating equipment is warranted.

Little encouragement exists to believe subsequent efforts to obtain interconnections and interchange agreements with members of commercial power company pools would be successful, and under the Federal Power Act, as amended by S. 3136, there would be no recourse against arbitrary and discriminatory exclusion from interconnection agreements.

Where then is the basis for the stated purpose of S. 3136, to improve prospects for interconnection over the existing law by encouraging "voluntary" interconnections and by placing the vast, interconnected private power industry in the role of both judge and jury to decide, without let or hindrance and beyond threat of recourse, whether or not any system is to be admitted to the privileged fraternity of interconnected systems?

We submit that this is a matter of gravest concern to the small municipal generating systems of this Nation, and we hasten to point out that even the largest generating municipal systems are small indeed compared to the gargantuan interconnected operating groups within the private power sector of the electric utility industry.

Since it is the intent of S. 3136 to encourage voluntary interconnections, it is in order to examine the growth of interconnection and pooling arrangements under the present Federal Power Act.

The question obviously arises, as to whether or not the growth of pooling arrangements and realization of the benefits accruing therefrom, have been hampered by existing Federal statutes to such extent that the public interest actually would be protected and promoted by exempting the participating interconnected power companies from any possible antitrust action.

An alternative question would be whether or not growth of such pooling arrangements has been hampered in any manner whatsoever under existing Federal law.

We find not a single shred of evidence to support such a contention.

On the contrary, the record is replete with examples of growth of interconnection and pooling arrangements, both existing and proposed, as described by high officers of power companies, and by industry publications, on a scale which staggers the imagination.

The following is quoted from a report published by the Edison Electric Institute, entitled "1964—A Year of Record Achievement for Electric Utilities," by Walter L. Cisler, president, Edison Electric Institute and chairman of the board of the Detroit Edison Co.

Transmission and Interconnection.—Vast networks of power transmission lines today cover the United States. In 1964 nearly all of the nation's major electric power systems—providing 97 percent of the country's requirements of electric energy were members of one of several major interconnected groups. The largest of these groups—operating in 39 States in an area extending from the Rocky Mountains to the Atlantic Ocean, and from Canada to the Gulf of Mexico, is the world's largest inter-regional system in which all power plants operate interconnected.

In 1964 the U.S. portion of this entire group had an estimated combined generating capability of nearly 162 million kilowatts. This was approximately equal to the total capability of the six European Common Market nations, and about 1.5 times that of the entire Soviet Union.

With the addition of the Canadian portion, this Interconnected Systems Group had capability totaling 178 million kilowatts.

Mr. Cisler then proceeds to describe plans involving investment of billions of dollars to implement on a regional basis vast pooling arrangements, and he notes the initiation of a study of this subject by the Edison Electric Institute on a nationwide basis.

We believe Mr. Cisler's remarks clearly indicate the ability of the electric power industry to function under existing Federal law, as he further states:

Interconnection and pooling agreements among power suppliers provide a firm basis for further planning and building of power supply on an area or regional basis, with maximum savings for customers—who continue to receive the benefits of local utility service.

Through the introduction to their systems of larger and larger generating units and power lines operating at higher and higher voltages, investor-owned electric companies have played the leading role in building the nation's power networks.

During the 1960–1970 decade, the investor-owned electric companies are building about 100,000 miles of additional backbone transmission lines, at an expected cost of about $8 billion. The new transmission lines will include the nation's first 500,000 volt lines, which investor-owned companies now have under construction.

Plans for building more than 4,500 miles of 500,000 volt transmission lines have been announced—of which investor-owned companies plan to put in service the first several hundred miles in 1965.

Even as these lines are planned and built, plans for lines of 750,000 volts are being made.

Agreement was reached in 1964 on a transmission system to link the Pacific Northwest and the Pacific Southwest. Participants in the plan include both investor-owned and non-investor-owned systems.

The intertie will consist of four lines: two alternating current lines and 50,000 volts, and two direct current lines at 750,000 volts.

Most of the AC lines will be built by investor-owned systems, while the DC lines will be built by the Federal Government and the other by the City of Los Angeles.

Also included in the plan are connections from Hoover Dam to Los Angeles and Phoenix. Total expenditures for the undertaking are expected to be about $700 million.

During 1964, electric utility companies in various parts of the nation announced far-reaching programs for the coordination of power supply. Among these were plans for the world's two largest regional power pooling networks—MAIN and WEST.

Though its members have been cooperating informally for over a year, the Mid-American Interpool Network (MAIN) was announced formally in November, 1964. With a combined generating capacity of approximately 27 million kilowatts, MAIN members serve more than 7.5 million customers in ten States. By 1980, it is estimated that the group's combined capacity will exceed 70 million kilowatts. MAIN members estimate that expenditures for new generating and transmission facilities by 1980 will exceed $7 billion.

Interconnections with neighboring regional power pools—the MAPP (Mid-continent Area Power Planners) group, and the MOKAN (Missouri-Kansas) group—would extend the scope of the combined systems still further.

A group of ten investor-owned electric companies announced in 1964 the formation of the Western Energy Supply and Transmission Associates (WEST.) The 20-year, $10.5 billion program encompasses all or part of nine southwestern States, an area about equal to one-fifth of the Continental United States.

The WEST program calls for building some 36 million kilowatts of new generating capacity, more than three times the present capacity of the Tennessee Valley Authority, and an extra-high-voltage transmission network interconnecting WEST members.

While local government-owned power suppliers have been invited to become WEST members, no Federal tax money will be used in the program.

In keeping with the coordinated approach to future planning and operations among electric power systems, the Edison Electric Institute has a National Load Diversity Study now under way.

While many electric utilities make use of diverse peak loads among themselves, the EEI study—with the cooperation of many segments of the industry—will result in the first computerized examination of the subject on a nationwide scale.

In view of these plans for gigantic pooling operations, is it logical to believe the industry is ready to invest billions of dollars if there is danger of interference under existing antitrust laws?

It seems to us significant indeed that Mr. Cisler included not a single comment concerning need to modify any Federal statute to enable the electric industry to achieve the full benefits of existing pooled operations, or to promote the accomplishment of a vast implementation of power pooling.

He states with obvious pride as an achievement of the industry that nearly all of the Nation's major electric power systems, providing as of January 1, 1965, 97 percent of the Nation's requirements for electric energy were members of one of several major interconnected groups. Obviously enactment of S. 3136 is not necessary to promote an accomplished fact.

Actually, the history of interconnected systems is far older than the Federal Power Act, which S. 3136 would modify fundamentally.

The Edison Electric Institute in its publication "Report on the Status of Interconnections and Pooling of Electric Utility Systems in the United States," dated May 1963, states:

> Over a period of forty years, utilities have developed and are continuing to develop the techniques and tools of interconnected operations. Their experience provides a solid base upon which to build for the future. The ability to operate in parallel groups has already offered utilities major benefits. For the future, the problems will be the further refinement and improvement of integrated operations.

Again, there is no mention of a need to modify any Federal statute to obtain these benefits, and there is recognition of the solid base of extensive experience upon which to build future and greater integrated operations.

On page 11 of this same report are listed the major power system groups operating in parallel or interconnected, this portion of the report states:

GROUP OPERATING IN PARALLEL

The electric power systems of the country can be divided into the following groups operating in parallel:

I. CANUSE–PJM–ISG (145,417,000 kw—1962 capability of group).
   1. Canadian-United States-Eastern Interconnection (30,117,000 kw).
   2. Pennsylvania-New Jersey-Maryland interconnection (16,772,000 kw).
   3. Interconnected Systems Group (98,528,000 kw).
      a. Northeast Region (27,266,000 kw).
      b. Northwest Region (23,338,000 kw).
      c. Southeast Region (34,942,000 kw).
      d. Southwest Region (12,982,000 kw).
II. Pacific Southwest Interconnected Systems (18,990,000 kw).
III. Northwestern Interconnected Systems (16,573,000 kw).
   1. Northwest Power Pool (14,619,000 kw).
   2. Rocky Mountain Power Pool (1,954,000 kw).
IV. Texas Interconnected System (9,421,000 kw).
V. Southwestern Public Service Company System, (977,000 kw).
VI. New Mexico Pool (766,000 kw).

The combined capability of these groups is about 97 percent of the total generating capability in the country.

From the foregoing reports of Mr. Cisler and the Edison Electric Institute, it appears that systems representing only about 3 percent of the Nation's power supply remain not interconnected with other systems.

If this be so, is it the intent of S. 3136 to encourage this 3 percent of the Nation's power resources which includes many small generating municipal systems to develop interconnections on a voluntary basis by removal of a presumed danger of antitrust action?

Surely this would be a high price indeed for these small systems and the Nation as a whole to pay, as enactment of S. 3136 would, for these small systems, exchange recourse to the Federal Power Commission against discriminatory practices of pooled groups of systems for the nebulous advantage of "voluntary" interconnections, where under application of S. 3136 the right to such interconnections may be summarily, finally, and without recourse, refused.

It is indeed pertinent and straight to the point to ask where is there evidence to support any contention that the major power systems of this Nation are interested in voluntary interconnections with the relatively much smaller generating municipal systems, for we know of no such evidence.

Though enactment of S. 3136 would remove much of the protection now afforded small generating systems by the FPC, our association views as perhaps a greater adverse effect on the public interest the removal of practically all private power companies in the nation from possibility of antitrust action, arising from pooling arrangements.

Though public spokesmen state that the industry is almost completely interconnected in several major pools, other industry spokesmen have indicated that the industry itself may be undergoing other and basic changes.

Recently Mr. Donald C. Cook, president of the huge American Electric Power System, in an interview in the New York Times, alluded to the possibility of utility mergers and consolidations as being the waves of the future, and he predicted:

I believe we shall see a shakedown to about a dozen or 15 integrated systems throughout the United States in perhaps 50 years or maybe even less.

The following is a summary of Mr. Cook's interview as reported in the June 10, 1966, issue of the American Public Power Association's weekly newsletter.

He said the successful operation of such holding company systems as the Central & Southwest Corp., Middle South Utilities, Inc., the Southern Co., and AEP itself "was part of the reason why the New England companies found it wise to form their own holding companies." The supposed disadvantages of being a part of a holding company system "have all been proven untrue," he added.

There has been a change in attitude on the part of the regulatory bodies too, Mr. Cook said.

Such agencies used to believe that the Public Utility Holding Company Act of 1935 stood in the way of large holding companies, "but now they see how wrong they were for all these years."

He declared that regulation has improved since the 1920's, "and it has been demonstrated that it is easier to regulate a small number of large companies than a large number of small companies." In fact, commented Times Reporter Gene Smith, FPC's national power survey gave mergers "strong backing."

Mr. Cook expressed the view that the Securities and Exchange Commission knows more about the necessity for mergers in the power industry than the FPC and reported he expects no problem in securing regulatory approval of the Michigan Gas & Electric acquisition, if the necessary shares are secured.

He was also quoted as seeing little possibility of Justice Department opposition to giant power systems, "since the existence of natural monopolies is well recognized as lawful." The American Telephone & Telegraph Co. was cited as an example.

Mr. Cook called the trend toward consolidation of smaller companies "our best answer to the public power people."

He exampled:

Whenever something happens to an investor-owned company, they use it in every way possible to show that our industry is not progressive, even though failures on public power systems have been greater and worse than our side. Remember, the November blackout in the Northeast originated not only in another country but on a public power system in that country.

Why is there a sudden interest in power company mergers?

The New York Times reporter declared:

The obvious answer is that in order to achieve the benefits of technological advances, particularly in the electric industry, the smaller utilities are left with no alternative. The giant size and efficiencies of steam turbine generators make it virtually impossible for smaller utilities to offer rates competitive with those of the larger integrated systems. Without low-cost power, there is little incentive for companies to locate in such areas.

Mergers and consolidations are increasing in number, so much so that the FPC has expressed concern and has announced that in the future major utilities will merge only after being subjected to full-scale public hearings, which will consider, among other factors, "the overall

requirements of the Federal Power Act relating to the general advantages and disadvantages of corporate integration."

We have noted the proposed merger of Central Illinois Electric & Gas Co. into Commonwealth Edison Co., the offer of American Electric Power Systems to buy 103,000 shares of the 204,362 outstanding shares of Michigan Gas & Electric Co.; the affiliation of Connecticut Light & Power Co., the Hartford Electric Light Co., and Western Massachusetts Electric Co.; the proposal of Central Maine Power Co. to acquire Maine Consolidated Power Co.; and the affiliation being considered by Philadelphia Electric Co., Atlantic City Electric Co., and Delaware Power & Light Co., as indicators of the trend stated by Mr. Cook toward more centralized control of the industry by a few giant systems.

If indeed it is the objective of the industry to promote centralized control reminiscent of the time prior to the enactment of the Public Utility Holding Company Act, when about the same number of holding companies, 15 to 20, controlled the industry, then we should be doubly on guard against any effort such as S. 3136 to weaken the Federal Power Act, and exempt these giant corporations from antitrust statutes.

We consider it unthinkable to remove from the American people the protection of antitrust laws as related to the electric power industry, when its aim seems so clearly indicated to be a consolidation and concentration of absolute control of the Nation's power resources.

Recently we have noted great efforts, supported invariably by the private power companies and many State regulatory commissions, to weaken and, in effect, emasculate the Federal Power Act.

The Holland-Smathers bills S. 218 and S. 3036, the similar Miller bill (H. Rept. 2972, 80th Cong., 1st sess.) and H.R. 3608 and H.R. 5955 all had this objective.

We are grateful that none of these bills passed, and that the need and value of the Federal Power Act has been abundantly proven over the past 30 years.

We urge this committee to defeat this bill, S. 3136, which would destroy a vital part of the Federal Power Act, and which we are convinced would serve to promote a concentration of vast power within the commercial power industry similar to that of the days of the holding companies.

We are in agreement that voluntary interconnections should continue and expand, and that the small electric utilities should be given the opportunity to join in these interconnections without jeopardizing their existence, due to their small size.

However, it is our opinion that S. 3136 will not accomplish this, but on the contrary will open the gate to large-scale mergers of utilities, resulting in a few monopolizing the electric utility industry in this Nation.

The CHAIRMAN. Thank you, Mr. Cunningham. This concludes our hearings on S. 3136. The record will remain open for 2 weeks for anyone wishing to submit additional information. The committee will recess subject to the call of the Chair.

(Whereupon, at 12:40 p.m., the committee was recessed, subject to the call of the Chair.)

(The statements submitted follow:)

STATEMENT OF SACRAMENTO MUNICIPAL UTILITY DISTRICT

Mr. Chairman and members of the committee, the Sacramento Municipal Utility District (SMUD) is a political subdivision of the State of California. It provides electric energy to California's capital city and surrounding area. Its service area comprises over 650 square miles embracing a population of some 600,000. By 1970, it is estimated that this population will increase to about 800,000 and by 1975 to well over 1,000,000. In 1965, the peak demand within the District's service area was 576,590 kilowatts. The energy consumption during that year was about 2.5 billion kilowatt-hours. It is estimated that by 1970, the District's peak demand will have risen to 1 million kilowatts and the energy consumption to about 4.2 billion kilowatt-hours.

The District's generation and transmission facilities are physically connected with the U.S. Bureau of Reclamation and the Pacific Gas and Electric Company. These two systems in turn are intertied. After completion of the construction of the Northwest-Southwest Intertie within the next few years, constructed in part by these two entities, they will be directly interconnected with all of the major power systems on the West Coast. This will mean that, in effect, SMUD too will be a part of this great transmission pool. Additionally, the operation of SMUD's generation is integrated with PG&E and is dispatched so as best to meet the area load requirements.

With this background, the Committee will understand the District's interest in S. 3136 which is designed to provide a vehicle under which the District, along with other public agencies and private utilities, can secure advance approval from the Federal Government for future pooling and interconnection arrangements and thus avoid the present uncertainty as to whether such an arrangement may be considered in violation of the antitrust statutes.

It is generally agreed throughout the power industry that further pooling and integration is the way of the future. Only through such coordination can customers be assured of maximum dependability and lowest cost—the goal of the entire power industry. This can best be achieved through voluntary agreements rather than through Government decree. The ever-present danger that such agreements will be determined to be a violation of antitrust laws constitutes a major deterrent. There is little or no precedent indicating court attitude on the subject. However, it seems clear that the fact that the utility business is by nature, and often by law, a monopoly is not considered a defense. Moreover, the views of the Department of Justice on any particular arrangement cannot be formally ascertained. Even if this were possible, the parties would have no assurance that these views would not change. Normally pooling arrangements are tremendously expensive and call for transmission and generation facilities requiring many years to construct. Faced with these uncertainties, power agencies are hesitant to proceed.

We believe that future pooling would be given a significant spur forward if the agencies involved could present their plans to a federal agency such as the Federal Power Commission to determine in advance whether, in the opinion of the Federal Government, the proposal would "unduly restrain competition." If approval is given, the participants could then safely proceed without facing the possibility of criminal prosecution by the Government and possible treble damage actions through civil proceedings.

We feel that the Federal Power Commission is the one federal agency having the expertise to thoroughly and intelligently examine proposed pooling arrangements. We think the Commission is best equipped to carefully balance the needs of society involved between pooling arrangements on one hand and the maintenance of competition on the other.

For the reasons set forth, the Sacramento Municipal Utility District respectfully urges the Committee to adopt S. 3136.

STATEMENT OF MUNICIPAL ELECTRIC ASSOCIATION OF MASSACHUSETTS

My name is Michael F. Collins, and I appear here in behalf of the Municipal Electric Association of Massachusetts, of which I am Secretary-Treasurer. I am also manager of the Wakefield, Massachusetts, Municipal Light plant.

Our association is opposed to S. 3136 because we feel that the municipal Electric utilities in Massachusetts need the full protection of the anti-trust laws, and we do not believe that Commission approval of interconnection and pooling arrangements is an adequate substitute.

It is argued that possibility of prosecution or litigation under the anti-trust laws inhibits voluntary arrangements. (Note Mr. Magnuson's statement of March 25, 1966.) It is difficult to understand how a pooling arrangement among utilities, which lets in on a fair and reasonable basis, all utilities in a region, would subject the participants to a fear of prosecution or litigation. Rather, it would appear that the fear is present when a group seeks the benefits of pooling for themselves, but would exclude others. We think it best that such fear remain, even if the Federal Power Commission is given explicit and full power to require the pool to desegregate, and allow in municipal members.

If a group of utilities is planning and combining together against other utilities, be they investor-owned, cooperative-owned, or municipal-owned, in a manner that violates the anti-trust laws, the approval of their pool agreement should not insulate them from the responsibility for their acts.

In short, the main case in which companies would need immunity from anti-trust violations are cases in which the pool is not open to all parties. Presumably, under S. 3136 FPC would either not approve the pooling arrangement, or it would condition it upon admission of the other members. In either case, if the pool companies remain adamant, the excluded utility would not get in, but the pool would be dissolved to the detriment of the customers of the pool companies.

Accordingly, as a minimum, the Bill must be amended to give the Commission explicit and plenary power to control the pool and its admission procedures.

Even this, however, does not obviate the need for continuation of anti-trust protections because there may still be a broad area beyond FPC reach.

For example, in New England there is the Electric Coordinating Council of New England which describes itself as an informal association of individual chief executives of investor-owned electric utilities. There are 19 members of this Council. The coordinated planning of generation and transmission for New England as a whole, purportedly on a "single system" basis is accomplished through this Council, and arrangements are made whereby ownership and power allocations are divided up between the members as to future facilities.

Although Massachusetts municipal electric utilities, if considered as a system acting through their association represent the third largest Massachusetts electrical system, they are not represented on this Council. They have never been asked to join, and their request for membership has been pending unanswered for some 2½ months. Yet, obviously the municipals have a stake in the combinations, understandings and agreements which emerge from the Council, and have the same business-like need to develop bulk power supplies which are coordinated and integrated into a regional plan and network.

The Municipal Electric Association of Massachusetts expects to work this matter out amicably with the Council, and we are not saying that these have been violations of law. It must be recognized, however, that this is the kind of combination of opposition which could be abused and converted into an instrument hostile to the excluded utilities. This is the kind of a problem that the Federal Power Commission, even with vastly expanded authority over the electric utility industry, is not too well equipped to handle. It is the kind of problem with which the Federal Trade Commission and the Anti-trust Division of Justice is familiar, and the nature of this problem does not change much whether the combination is one of electrical equipment manufacturers or electric utility companies, if the purpose of the combination is inimical to the anti-trust laws.

We think it important, in an industry with mixed forms of ownerships, where a certain amount of misunderstandings and even hostilities develop between the segments, that the coverage of anti-trust laws be retained in full force. The mere existence of this coverage has a healthy deterrent on the industry and prevents the emergence of abuses which require frequent utilization of the anti-trust laws.

STATEMENT BY W. BERRY HUTCHINGS, PRESIDENT, COLORADO RIVER BASIN CONSUMERS POWER, INC.

Mr. Chairman and Members of the Committee:

My name is W. Berry Hutchings. It is a privilege to submit a statement to you as President of the Board of Directors of Colorado River Basin Consumers Power, Incorporated, of Salt Lake City, Utah.

The Colorado River Basin Consumers Power, Incorporated, is an organization representing the interests of the consumers having preference in the purchase of power under Reclamation Laws in the area served by the Colorado River Storage Project of the Bureau of Reclamation. This area comprises the States of Wyo-

ming, Utah, Colorado, New Mexico, and Arizona, and the southern part of Nevada, and a small fringe along the eastern border of California. The preference-type customers supply electric service to about 30 percent of the people in this area.

We have noted with a great deal of apprehension the introduction of S. 3136 which would place within the authority of the Federal Power Commission the right to exempt from the antitrust proceedings any combination of utilities who might enter into an agreement for the interconnection, pooling or coordination of power systems. This appears to us as a backward step in the attempt to make it possible for smaller utilities and non-profit operators to secure some portion of the economies that are made possible by large central station developments and system interties.

It appears that the proposed legislation is for the primary purpose of relieving any of the utilities involved in the Northwest-Southwest Intertie from danger of prosecution under antitrust laws. The utilities involved in this interconnection have refused to allow the smaller municipalities and REA Co-ops to participate in the benefits from this intertie and we fear that the proposed legislation would make it easier to refuse such participation to such smaller users in any contemplated future developments of like nature.

Our agency is opposed to any subterfuges which would tend to discriminate against small users of any category in gaining benefits from large interconnections and central power plants and wishes to express its objection to the passage of S. 3136.

We respectfully request that this statement be entered into the record of the hearings on S. 3136.

STATEMENT OF GUS NORWOOD, EXECUTIVE SECRETARY, NORTHWEST PUBLIC POWER ASSOCIATION

Mr. Chairman and members of the Committee, my name is Gus Norwood. For the past 19 years I have served as Executive Secretary of the Northwest Public Power Association comprising 125 public and cooperative electric systems of Alaska, British Columbia, Washington, Oregon, Idaho and Montana.

Consumer-owned electric systems serve about 51% of the regional population, own about $3 billion in electric plant and have about $1.6 billion of new plant under construction generate about five million kilowatts and pay about $45 million per year into the United States Treasury for power from federal dams.

STATUS OF TESTIMONY

Because S. 3136 was so recently introduced our Association has no resolution specifically on S. 3136.

In a related area our Association successfully opposed the Potter Amendment S. 2643 before the Senate Committee on Commerce at hearings ten years ago on April 17, 1956 and May 24, 1956 to change the definition of public utility so as to exempt combinations or syndicates of electric utility companies to jointly build nuclear generating stations. We did not oppose joint ownership or construction but we did oppose exemption of such plants and syndicates from public regulation.

We consider our testimony on S. 3136 to be consistent with previous policies of our association in this area.

STATEMENT OF POSITION

We wish to state two positions regarding S. 3136.

First as to timing, we urge a thorough public hearing followed by publication of the hearing record so it can be available for detailed study by our electric systems and by the industry generally. This will provide time for our Association and all parties to develop policy positions by the time the next Congress convenes.

Accordingly we urge that no action be taken on this bill during the present Congress.

Second, we respectfully suggest that the lack of previous showing of a need for legislation such as S. 3136 and the gravity of any action to tamper with the antitrust laws is so great, that we must respectfully oppose enactment of S. 3136 in its present form at this time.

In any event we urge the most thorough study of the problems which are alleged to exist and to test the possibly grave consequences of broad exemption from the antitrust laws.

Our further comments are in support of the above recommendations for careful study and the granting of at least a six-month period for review of the hearing record.

NATURE OF S. 3136

The fundamental purpose of S. 3136 is to set aside the antitrust laws and to exempt electric utility companies from all Federal, State and municipal antitrust laws in connection with contracts "for the sale or exchange of electric energy or the interconnection, pooling, or coordination of power systems or for the joint use of facilities for the generation or transmission of electric energy."

EXPERIENCE REVEALS NO NEED FOR EXEMPTION

The electric utility industry generally dates from the inauguration of the Pearl Street Station in New York City in 1882.

The Sherman antitrust law was enacted July 2, 1890.

Thus the electric utility industry and the Sherman Act have lived together for more than 76 years.

Apparently no case is on record of an antitrust action being brought against an electric utility at any time in the 76 year history.

This long period of history would suggest that no problem exists. At least this long record suggests a heavy burden of proof as to whether a special exemption from the antiturst laws is now needed.

It is recognized that the era of power pooling does not go back to 1882. However, many decades of experience exists with transmission interties, power pooling and intersystem sales and exchange contracts. Probably hundreds of such contracts now exist and up to this time apparently none have been challenged on antitrust grounds.

SHIFT IN CRITERIA

An obvious area of concern is the criteria set forth in S. 3136 that electric power pooling, interconnection or coordination contracts shall be completely exempt from the antitrust laws if they do "not unduly restrain competition."

Restraint of competition is a new word of art. It is a minor, narrow criteria compared to the board standard of the antitrust laws, namely "not in restraint of trade." This could be a case of horse-rabbit stew, or a case of throwing out the baby with the bath water. In other words merely meeting the minor criteria "to not unduly restrain competition" does not warrant exemption from the entire body of anti-trust laws.

SHIFT IN JURISDICTION

The findings and judgment even as to the narrow, limited criteria "not unduly restrain competition" is not to be made by the Department of Justice which is the normal, traditional expertise agency in this field.

On the contrary S. 3136 strips the Department of Justice of its present jurisdiction and transfers jurisdiction to the Federal Power Commission.

Furthermore the FPC is limited to a perfunctory, ministerial role whereunder FPC must approve the contract unless the FPC can prove that the contract does restrain competition. This is a difficult burden of proof in an area which by nature is a natural monopoly. Thus in effect there is no criteria and FPC must automatically approve the contracts.

We oppose such transfer of jurisdiction and we oppose the substitution of a narrow, limited criteria for the present broad guidelines of the antitrust statutes.

LACK OF STUDIES

S. 3136 is a new bill. It has not previously been before Congress and no previous hearings have been held.

No studies exist and no literature exists to indicate a problem or indicate need for such a drastic solution.

On the contrary, the Report of the Legal Committee published as part of the National Power Survey of the Federal Power Commission (pages 355–387) did discuss power contracts which might limit service area or permissible loads. The Legal Committee received the comments of the Department of Justice and concluded that no new legislation was needed. In other words the Legal committee at that time did not suggest exemption from the antitrust laws.

WEST COAST INTERTIES

Suggestion has been made that S. 3136 is needed in order to make legitimate the sales and exchange contracts in connection with the West Coast Interties.

The answer to this suggestion should be obvious. The legislative history of the West Coast Interties is detailed and meticulous with respect to offers, counter-offers and a spelling out of the role of each of the parties, public and private. The Congress has approved these arrangements in approving the West Coast Interties. To relate S. 3136 to the West Coast Interties would be in effect saying that the Congress in approving the West Coast Interties has violated the anti-trust laws and the purpose of S. 3136 is to exempt Congress from the antitrust laws. Obviously such an interpretation is absurd. It is equally absurd to suggest that the agreements on which the West Coast Interties were premised are illegal despite approval by Congress of the West Coast Interties.

However, if, for the sake of argument, it appears that contracts in connection with the West Coast Interties require a further sanction from Congress, might this not more easily be done by direct legislation confined to the West Coast Interties?

URGE CAREFUL STUDY

In urging the most careful study by the Senate Commerce Committee, the Senate Antitrust and Monopoly Subcommittee, and the Department of Justice, I must call attention to the latest declarations published by the private electric corporations relative to public and cooperative electric systems.

SELL OUT ALL CO-OPS

Mr. Robert T. Person of Public Service Company of Colorado and President of the Edison Electric Institute recently told the House Agriculture Committee that Congress should put an end to the rural electrification program and that all rural electric systems should be sold to the power companies.

ELECTRICAL A.T. & T.

The May 29, 1966 New York Times quotes Donald C. Cook, President of the seven-state American Electric Power System, "Over a period of years, I believe we shall see a shakedown to about a dozen or fifteen integrated systems . . ."

He foresees little possibility of Justice Department opposition in the future to giant power systems "since the existence of national monopolies, such as American Telephone and Telegraph Company, is well recognized as lawful."

These private electric corporation executives make no idle threats. Dozens of municipal and rural electric systems are being pressured to sell their electric systems, and some are being sold.

PRELIMINARY TESTIMONY

Up to this point no evidence has been presented that S. 3136 is necessary or desirable. When any such evidence is available, our Association and its individual member systems may wish to testify in the light of such evidence.

CONCLUSION

Accordingly we respectfully recommend that S. 3136 not be enacted but that it be laid over at least to the next Congress.

Thank you.

STATEMENT BY AMERICAN PUBLIC POWER ASSOCIATION

American Public Power Association, a national trade organization representing representing 1,400 local public power systems—mainly municipally-owned electric utilities—in 45 States and Puerto Rico, has taken no position in favor of or in opposition to S. 3136, a bill to permit the Federal Power Commission to immunize from local, state, and federal antitrust laws contracts of electric utilities which the FPC finds do not "unduly restrain competition." These comments are submitted to the Senate Commerce Committee for the purpose of outlining specific points and problems which the Committee may wish to take into account in its consideration of this legislation.

S. 3136 was considered by the APPA Legislative and Resolutions Committee at its most recent meeting in Boston on May 8, 1966. In recognition of the com-

plexities and ramifications of the bill, the APPA committee approved the formation of a special task force to study the bill and to report its recommendations at a subsequent meeting. A 20-member group, including representatives of local public power systems in all sections of the country, has now been appointed to carry out this assignment.

It is pertinent to note that the 1964 report of the Legal Advisory Committee on the FPC's National Power Survey in discussing the relationship of antitrust statutes to the electric industry recommended that "a thoroughgoing study should be made in which all points of view could be considered and evaluated." The Legal Advisory Committee suggested that such a study might be initiated by the FPC joint with the National Association of Railroad and Utility Commissioners; a study of this type has not been undertaken to date. This month the Bureau of the Budget indicated its view that the subject matter of S. 3136 has far-reaching implications, that it requires further intensive study, and that the need for such legislation has not yet been demonstrated.

TECHNOLOGICAL ADVANCES ALTER INDUSTRY

Interests of APPA members in S. 3136, while varied, spring from a similar source: The changing character of the electric industry and the opportunity to obtain cost savings by use of technological advances.

Three facts about today's electric industry indicate the nature of the changes which are occurring and help place in perspective some of the problems associated with S. 3136:

(1) Size of individual generating units has increased markedly in recent years with the effect of (a) making possible substantial reductions in power production expenses and (b) encouraging joint action among utilities to take maximum advantage of the economies of scale.

(2) Transmission voltages are rising rapidly permitting easier and less costly movement of large blocks of electricity over long distances.

(3) While the number of local public power systems and rural electric cooperatives in the United States has remained fairly stable over the last two decades, the number of private power companies has steadily decreased, mainly through merge and acquisition, leaving fewer but larger investor-owned systems.

The charts at the conclusion of this statement indicate graphically these trends.

The FPC's National Power Survey has suggested that by taking advantage of the economic advantages of new technology, annual savings to consumers of as much as $11 billion a year could be realized by 1980. This anticipated potential saving was based on the premise that cooperative arrangements necessary within the industry to achieve this result can be accomplished, and that this should be done in a fashion which will not fundamentally disturb the pluralistic structure of the industry. The Commission—as did the Legal Advisory Committee—found no "insuperable barriers" to obtaining the "full benefits of a system of power supply in which the separate and independent ownership of individual systems is preserved, but their facilities are nevertheless coordinated in large power pools, interconnected on a nationwide basis to achieve maximum economies."

BENEFITS OF PLURALISTIC STRUCTURE NOTED

The Commission noted that: "The industry's pluralistic institutional structure, while perhaps inhibiting coordinated operations, has proven a powerful competitive stimulus to management improvement and cost reduction." The National Power Survey did not deal with questions involving "controversial areas of public policy" related to the industry's success in lowering power costs, asserting that:

"The question of the proper scope of government in regulating or conducting economic affairs is one of the root problems in a democracy. We do not attempt to resolve it in this report."

S. 3136 reaches at one of these "root problems," just as did S. 218, which was considered by the Senate Commerce Committee last year. The issue is again how to best preserve the values of "competition by comparison" provided by the existence of consumer-owned and investor-owned electric systems and to realize simultaneously the advantages of cooperative endeavors utilizing advanced methods, machines, and material. As the Federal Reserve Bank of Boston pointed out recently:

Long ago State legislatures and the Congress recognized that electric utilities were natural monopolies "clothed with a public interest," and they have been regulated—more or less—ever since. There is justification for the belief that, in general, commission regulation of rates and service has been neither very effective

nor very positive in the past. There are many exceptions, of course, but too often the incentive to reduce costs has not been present, cost reductions have not meant rate reductions, and assured markets have not fostered efficiency and aggressive innovations. For the bold expansion that the future demands, many feel that another tool—regulation by competition—may better serve the region. Competition or even the prospect of it is healthy. The absence of competition, less than ideal regulation, and a limited view of the public interest, may mean a sacrifice of efficiency. But in a natural monopoly situation, competition too may come at some sacrifice in efficiency.

A basic problem in reaching the dual goal of competition and cooperation is imbalance in the bargaining position of different utilities. This is a question primarily of size, not ownership, although there are proportionately more small consumer-owned than small investor-owned electric systems. Tables at the conclusion of this statement indicate the number, geographic distribution, size, and power source of small systems in the United States.

SMALL DISTRIBUTION SYSTEMS AS EFFICIENT AS LARGE

The trend toward bigness is of special significance to the municipal electric systems, because they are relatively small by comparison with the private power companies. There are more local public power systems (about 2,000) than any other type of electric utility. However, the average private power company has some 17 times the number of customers, 20 times the gross electric revenues, 15 times the kilowatt hour sales and 21 times the installed generating capacity as the average municipal or other local publicly owned electric utility.

The National Power Survey, like other studies which preceded it, pointed out that the small distributor of electricity can distribute energy fully as economically as a large utility. However, the economies of scale in the fields of generation and transmission place small electric systems at an economic disadvantage in the production of electricity. It is in this area where policy difficulties lie.

Small electric systems may obtain their bulk power supply in either or both of two ways: Purchase from a wholesale supplier or self-generation.

Nearly 1,000 local public power systems but their power requirements from private power companies subject to the jurisdiction of the FPC, which has responsibility to insure that wholesale rates and conditions of services of these companies are not unreasonable or unfair. As the National Power Survey points out, there has been an "absence of consistently effective regulatory surveillance of wholesale power contracts" by the Commission—a failure which the FPC "is now attempting to redress." Although the Commission's record of wholesale rate regulation has generally been good in recent years, the question of whether or not the Commission's current efforts will result in continuity of reform can be judged only by subsequent history.

Meantime, of course, the antitrust statutes may provide another approach to eliminate inequities in dealings with private power company suppliers. Although there is a paucity of cases squarely on this point, this alternate approach has been employed recently by the Michigan Gas & Electric Company, a privately-owned utility, which on June 8, 1966, filed with the United States District Court for the Southern District of New York a complaint charging price discrimination and asking $15 million in treble damages from American Electric Power Company and Indiana & Michigan Electric Company for alleged overcharges of $400,000 to $500,000, annually since 1946. S. 3136 would permit the FPC to immunize a utility against a suit of this type.

INCREASING CONCENTRATION OF CONTROL IN PRIVATE SECTOR

While an additional protection to small systems might be the opportunity to purchase from a second source, with respect to private power company suppliers such chances are continually decreasing. In some areas formal service area limitations or "gentlemen's agreements" may prevent such action, but concentration of control is also making steady inroads into this option.

The Legal Advisory Committee report states that while there were at one time as many as 4,000 separate investor-owned electric utilities in the United States, there are now about one-tenth of that number. Of the 400 companies counted by the committee, about half are reported to be vertically integrated, with each company taking the responsibility for generating and transmitting the power it requires for its distribution market. Of this number, FPC statistics indicate that 20 of the largest companies account for about 45 percent of the net

generation of all privately owned electric companies in the 50 States and approximately 35 percent of the net generation from all sources in the United States.

Indications are that concentration of control among private companies will increase. Donald C. Cook, president of the seven-State American Electric Power System, suggested recently that electric utility mergers are "the wave of the future." He predicted that: "Over a period of years, I believe we shall see a shakedown to about a dozen or 15 integrated systems throughout the United States. Perhaps in 50 years or maybe even less." (The Legal Advisory Committee noted that in 1929—immediately preceding the passage of the Federal Power Act and the Public Utility Holding Company Act—about 60 percent of the total generation of electric energy was provided by utility companies controlled, directly or indirectly, by seven holding companies.)

It should be noted, as pointed out by the FPC, that S. 3136 does not apply to merger agreements or consolidation proposals which are submitted for Commission approval under Section 203. Under S. 3136, the FCC could exempt from the antitrust laws a coordination system agreement between two utilities but could not exempt a merger designed to carry out the same result.

DIRECTION OF FEDERAL POWER PROGRAM CHANGING

Some 400 local public power systems buy power at wholesale from Federal power marketing agencies. Under existing Federal law, publicly-owned electric utilities are preference customers for power generated at Federal dams; this Congressionally-established policy was enacted as an anti-monopoly measure.

Availability of Federal power has frequently enabled municipalities, public utility districts, and other public agencies to obtain—either by direct purchase or the "yardstick" effect on other sellers—a low-cost source of electricity which would otherwise be inaccessible.

However, today the character of the Federal power program is changing. Projects currently contemplated for Federal construction are frequently designed for peaking operation, i.e., to shave the tops off the utility load curve, rather than for production of firm power to be used for base load purposes. These peaking plants are expected to be integrated with non-Federal thermal plants. One result will be a diminishing of the additional increment of firm power which the Federal power marketing agencies will add annually to its marketable total. Thus, preference customers who have relied in the past on purchase of Federal power to fill their requirements, to the extent that the Federal government cannot handle their load growth through integration agreements with owners of non-Federal steam plants, must obtain power by purchase from non-Federal suppliers or self-generation. This type of transition is already occurring in the Pacific Northwest, the Southwest, and the Missouri River Basin. In each area, joint action by consumer-owned systems presents the possibility of construction of large thermal stations to supplement Federal hydro power, but the success of these ventures is not yet assured and not all local public power systems in each region are encompassed in the possible benefits.

Dealing with private power companies is complicated by a number of factors insofar as local public agencies are concerned. For instance, vertically integrated companies, which produce and sell electricity at retail, may also sell at wholesale to a municipal distributor which serves an adjacent area. Problems arise when the wholesaling company, which is the source of supply, has economic power which enables it to disadvantage the buyer through denial of supply, predatory pricing, or restriction on the end use of power. Such practices have been commonplace. Many of them continue, although since 1961 the FPC has made inroads, particularly with respect to unreasonable rates and unfair contract conditions.

Joint generation proposals—which pose prospects for significantly reducing power production prices—represent another area where difficulties face consumer-owned systems. It may be perfectly feasible for a consumer-owned system—or a group of such systems—to participate in the construction of a large generating station by purchasing a portion of the plant capacity. However, if the other potential participants decline to deal with the consumer-owned entity for anti-competitive reasons, it is possible that a remedy might have to be sought through the antitrust laws since the FPC does not have certification authority over construction of thermal generating stations.

ARGUMENTS RAISED PRO AND CON

Supporters of S. 3136, which include local public power generating systems in the West, urge passage of this bill on the grounds that the possibility of strict application of antitrust statutes to electric utilities is an inhibiting factor which

discourages utilities from entering into arrangements which could result in cost reductions for the mutual benefit of affected parties and the public. They suggest that this is a problem which is enhanced by use of larger generating units and EHV transmission, and that a firm and final answer as to anti-competitive aspects of proposed agreements must be obtained in advance before utilities will be willing to commit the large amounts of capital required to implement major projects which may involve multiple parties. Without such an immunization against future litigation under antitrust statutes, optimum development will not occur, it is argued. Construction of the $700 million Northwest-Southwest interconnection system by Federal and non-Federal interests, and related marketing of power, is cited as an example of the type of proposal which requires pre-determination of future competitive effects and a decision as to whether or not the participants will be given permanent protection against a legal attack based on antitrust grounds in any jurisdiction.

Proponents of the bill do not assert that the arrangements already entered into or contemplated with respect to the intertie could be considered as contrary to local, state or federal antitrust statutes but express concern that others not party to the agreements, or public officials, could take the issue to a court, which might find the agreements unlawful. They also note that there have been few court cases directly related to the problem which they foresee.

Local public power systems who oppose S. 3136, including systems in Florida, Massachusetts, North Carolina, and the Colorado River Basin, declare that municipal electric systems and the public need the protection of the antitrust laws and that FPC approval following a finding that utility contracts do not "unduly restrain competition" is not an adequate substitute. Opponents suggest that any pooling agreement which allows full and fair participation by all electric systems in a region could not be the subject of successful attempts to overthrow it on the grounds of violation of antitrust statutes, and that fears expressed concerning the possibility of future prosecution or litigation based on such a charge must be founded in efforts to exclude certain potential parties. If an exclusion effort is the basis for the fears, and utilities are in fact combining to prevent participation by others, those fostering the agreement should be held responsible for their acts, opponents assert.

Those opposed to the bill argue that at the minimum, the bill should be amended to give the FPC explicit and plenary power to control the pool and its admission procedures, but that even then antitrust protections should be available to deal with problems which are beyond the reach of the FPC. They note that FPC lacks certificate authority over generation and transmission facilities, and cannot assure that design and location of facilities serve the public benefits. The Justice Department and the Federal Trade Commission are familiar with antitrust problems and should continue to hold responsibility for enforcement of these statutes, it is stated, and the mere existence of this coverage has a healthy effect on the industry in discouraging abuse of antitrust policies. This is a matter of particular importance to smaller consumer-owned systems, it is pointed out, who have experienced difficulty in gaining entrance to power pools and access to interconnections which help make possible cost economies.

Antitrust Provisions Applied Specifically to Utilities.

In addition to whatever application general antitrust laws may have, Congress has enacted several statutes containing antitrust provisions directly related to utility operation. For instance, the Federal Power Act provides in Section 10(h) with respect to licensing of hydroelectric projects that "combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain or increase prices for electrical energy or service are hereby prohibited." The Natural Gas Act states in Section 20 that: "The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings."

The Atomic Energy Act of 1954 provides specifically in Section 105 that nothing in the act relieves any person from operation of Federal antitrust statutes, and permits suspension or revocation of a reactor license upon violation; the Atomic Energy Commission is required to report to the Attorney General information regarding possible violations of antitrust policies, and to seek a determination from the Attorney General as to whether or not proposed activities of an applicant for a commercial reaction license "tend to create or maintain a situation inconsistent with the antitrust laws."

Because it is pertinent to discussion of S. 3136 to point out past patterns established by Congress to deal with similar problems, it is also significant to note that under the Public Utility Holding Company Act of 1935 the Securities and Exchange Commission is prohibited from approving acquisitions of securities or utility assets where such acquisition "will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers." (SEC must also find that the acquisition "will serve the public interest by tending toward the economical and efficient development of an integrated public-utility system.")

FPC asserts in its report on S. 3136 submitted to the Senate Commerce Committee that: "The Commission under existing law probably has fully adequate authority to eliminate unduly anti-competitive practices by utilities subject to its jurisdiction in their relationships with other electric utility systems." The reports cite the Commission's recent decision finding unjust and unreasonable certain provisions of the wholesale power supply contracts of Georgia Power Company which restricted the competitive position of its municipal customers by imposing limitations on the size of loads which would be served on resale.

FPC ENDORSES PURPOSE OF BILL, ASKS IMPROVEMENTS

Noting that the FPC is charged with the responsibility of encouraging the voluntary interconnection and coordination of power systems in the interests of assuring an abundant supply of electric energy, the FPC's report asserts that "to the extent necessary to accomplish this purpose, the Commission should be given the power to exempt from the antitrust laws fully coordinated power pools operating in interstate commerce which encourage participation by all segments of the industry."

The FPC suggest amending the bill to eliminate bilateral contracts for the sale or exchange of electric energy, to make it clear that the Commission could grant approval of a contract subject to changes or conditions making the contract conform to the public interest, to allow the Commission to reconsider at a later date prior approval or disapproval orders, and to spell out the terms "antitrust laws."

Of particular pertinency to smaller systems is the Commission's statement that: "* * * the bill should expressly spell out the implied power of the Commission to reconsider at a later date prior approval or disapproval orders. The Commission should obviously have such power both upon application by an interested party and upon its own motion, since changes in technology and industry conditions might well call for different competitive arrangements from time to time. Thus, the Commission might in appropriate cases, find it necessary to direct a power pool to admit an additional utility system to membership, or modify the terms upon which a particular system has been permitted to participate."

Also of significance to local public power systems who are not parties to an agreement, but are affected by it, is the Commission's interpretation of S. 3136 as providing for initiation of FPC review of contracts by municipalities and the Department of Justice, and for petition of a new investigation of an existing previously-approved contract.

FPC authority to condition approval, to retain jurisdiction over the contract and to initiate review upon request by affected parties are all features which would add protection for small electric utilities, regardless of ownership.

RESPONSIBILITIES IMPOSED ON FPC

S. 3136 would give the FPC the power to "balance" the objectives of antitrust statutes against the aims of the Federal Power Act. The United States Supreme Court has declared in commenting on a similar standard contained in the Interstate Commerce Act that the statute "is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices * * *" In the case of S. 3136, the FPC has stated that the "policies of the Federal Power Act, including subsection 202(A) promoting coordination of electric facilities to assure abundant and economical power, would be considered jointly with policies favoring competition."

In considering S. 3136 it would seem appropriate for the Senate Commerce Committee also to consider proposals before the Committee which would give the FPC certification authority over extra-high voltage interstate transmission lines.

S. 3136 adds nothing to the Federal Power Act beyond the opportunity to immunize electric utilities from possible antitrust prosecution, based on the belief that such action may encourage desirable interconnection and power pooling. In recent years these activities by utilities have been greatly accelerated. The Legal Advisory Committee pointed out that there are "no insuperable legal barriers to pooling" and that "generally one means or another can be found to implement a particular pooling arrangement which two or more systems desire."

The main thrust in recent years in the area of inter-connection and pooling has been to improve and strengthen technical and administrative arrangements—a goal which was substantially enhanced by the experience of the Northeast blackout of November 9, 1965. Because of this fact, S.3136 might well be amended to better achieve its aims by incorporating an affirmative responsibility on the part of the FPC to insure that extra-high voltage interstate transmission lines—a key to inter-connection and power pooling—are planed, built, and operated in a fashion which will most benefit the public interest.

CONTROL OF TRANSMISSION SIGNIFICANT

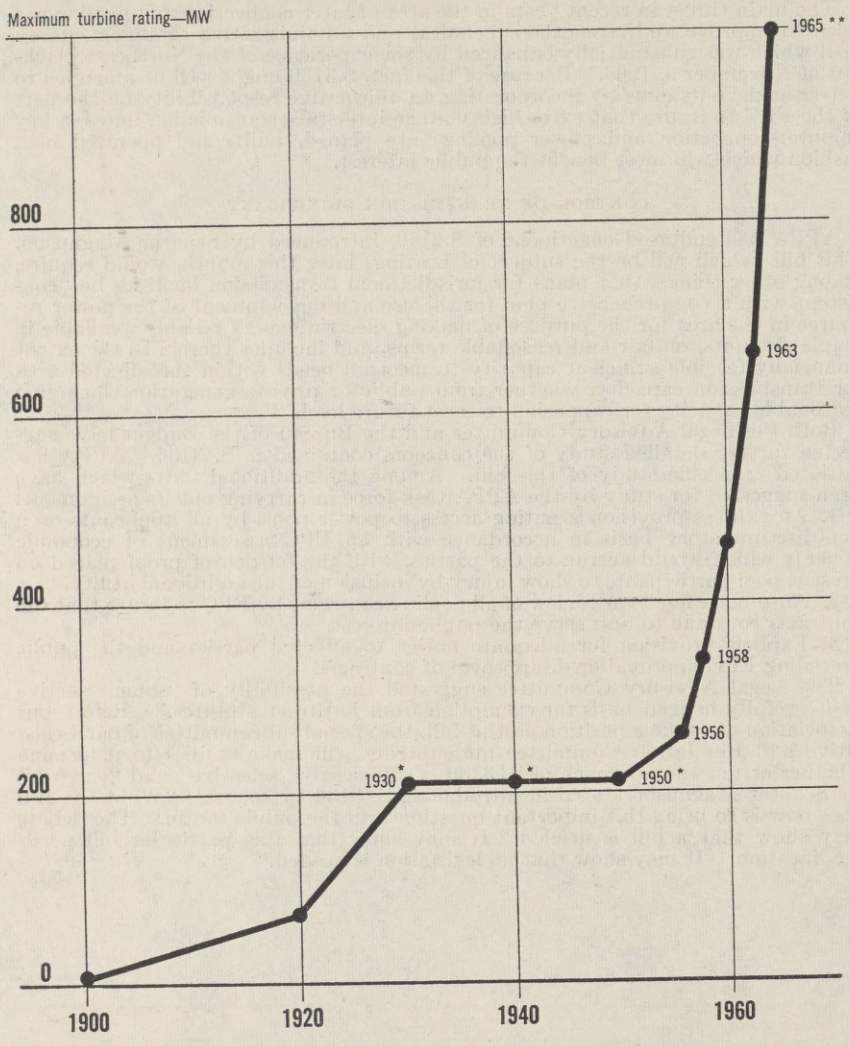
APPA has endorsed enactment of S.2140, introduced by Senator Magnuson. This bill, which will be the subject of hearings later this month, would require, among other things, that plans for jurisdictional transmission facilities be "consistent with a comprehensive plan for the use and development of the power resource in the area for the purpose of making electric energy reliably available in ample amounts, on fair and reasonable terms, and includes therein to the extent financially feasible sufficient capacity to meet all needs within the affected area for transmission capacity, whether from public or private generation, including reasonable capacity for expansion to meet future loads."

Both the Legal Advisory Committee and the Bureau of the Budget have suggested further detailed study of the concepts contained in S. 3136. APPA has initiated a specific study of this bill. Among the additional ideas which have been suggested for study by the APPA task force in carrying out its assignment:

1. An express provision granting access to power pools by all applicants on a non-discriminatory basis in accordance with an FPC assessment of economic benefits which would accrue to the parties, with the burden of proof placed on present pool participants to show injury by inclusion of the additional utility.
2. Automatic five-year review of all pooling contracts by FPC to insure that the contracts continue to best serve the public interest.
3. Explicit provision for adequate notice to affected parties and the public preceding FPC approval or disapproval of contracts.

The Legal Advisory Committee suggested the possibility of "some selective and carefully hedged basis for exemption from antitrust statutes." Before our Association can take a position on this bill, the special subcommittee of our Legislative and Resolution Committee undoubtedly will make studies to determine whether or not the approach of S. 3136 is sufficiently "selective" and "careful." As Senator Magnuson stated in introducing S. 3136 by request: "What the Bill does now is to bring this important question into the public forum. The debate may show that a bill is needed. It may show that this particular bill needs modification. It may show that no legislation is needed."

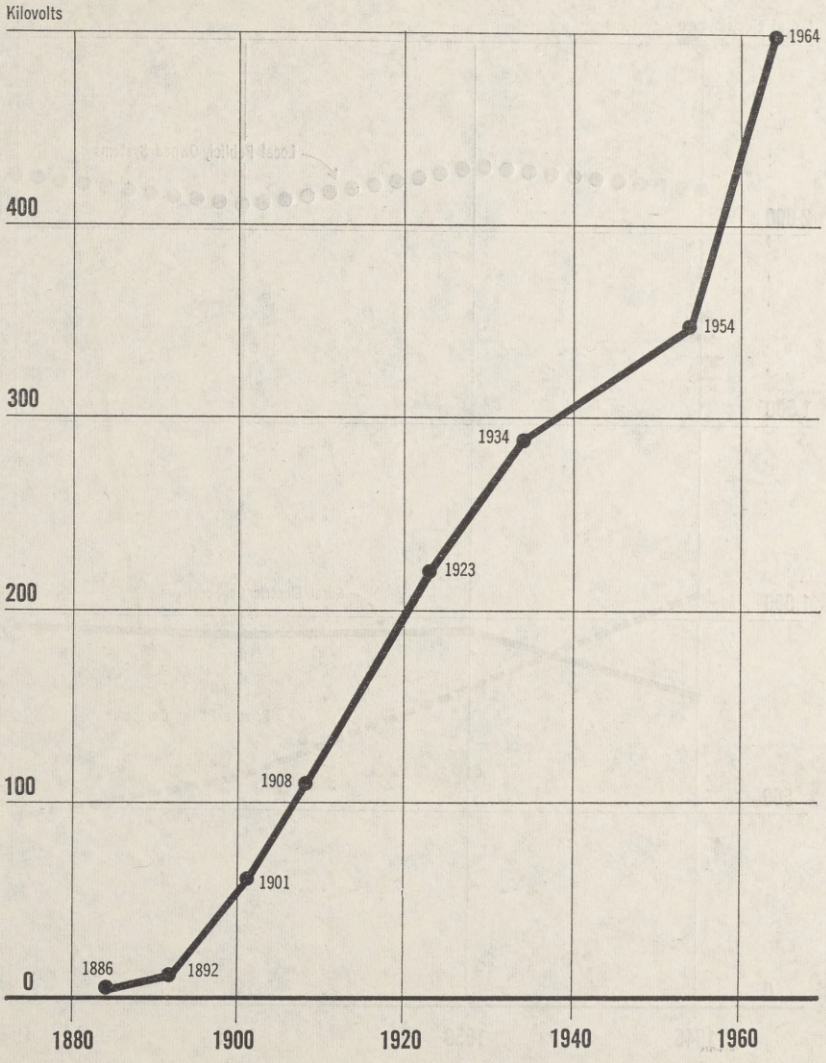
Maximum Sizes of Generating Units in the United States (In megawatts—one megawatt equals 1,000 kilowatts or 1,000,000 watts)



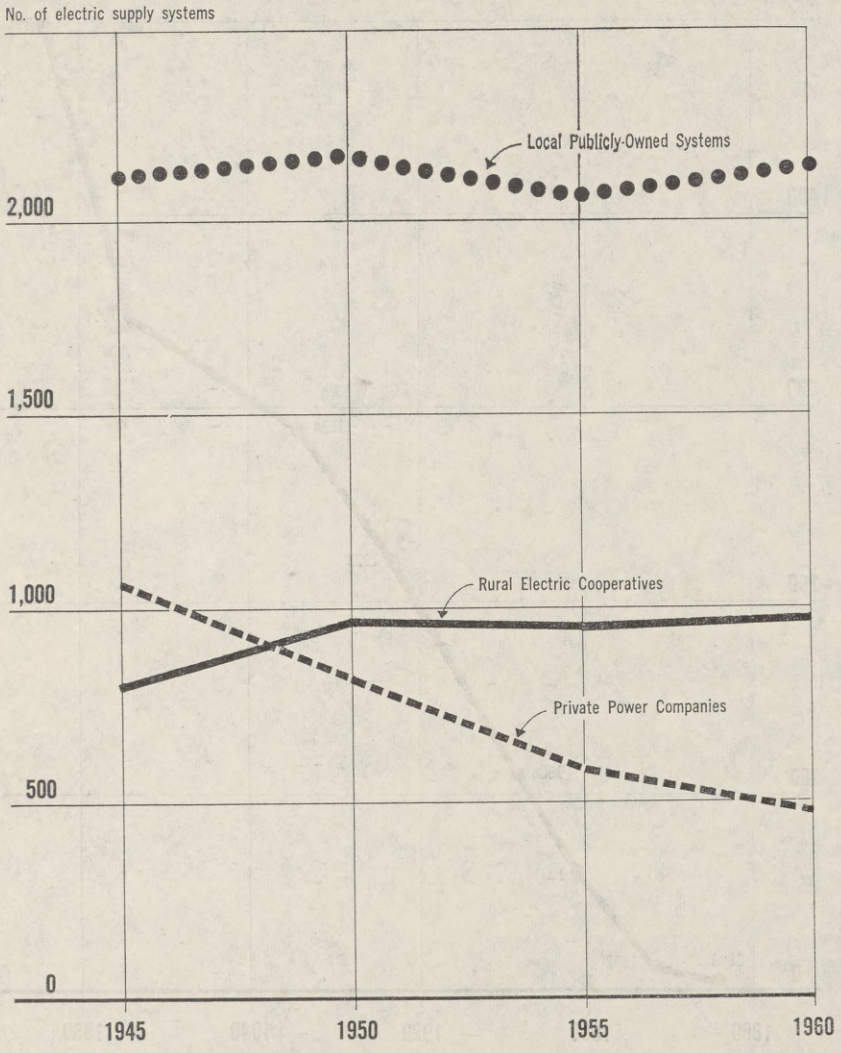
* Represents a single unit. More typically, maximum prevailing sizes were 75 mw in 1930, 100 mw in 1940, and 175 mw in 1950

** Under construction

Maximum Transmission Voltages in the United States



Electric Supply Systems by Class of Ownership, 1945-1960



Source: Statistical Abstract of the United States, 1965

Number of U.S.[1] electric utility systems by size, geographic distribution, and ownership as of Dec. 31, 1962

Region	Number and distribution of principal electric utility systems [2]				Number and distribution of small electric utility systems [2]				Total number of systems, large and small
	Investor owned	Publicly owned	Cooperatives	Total	Investor owned	Publicly owned	Cooperatives	Total	
I. Northeast	47	9	1	57	70	188	27	285	342
II. East central	24	10	3	37	23	261	106	390	427
III. Southeast	17	61	29	107	18	272	166	456	563
IV. North central	34	8	10	52	52	478	195	725	777
V. South central	32	22	11	65	51	370	209	630	695
VI. West central	13	8	7	28	21	298	117	436	464
VII. Northwest	15	27	3	45	21	94	70	185	230
VIII. Southwest	9	26	1	36	33	36	14	83	119
Total	191	171	65	427	289	1,997	904	3,190	3,617

[1] Excludes Alaska and Hawaii.
[2] Principal systems are defined as class I systems with net energy for system of more than 100,000,000 kilowatt-hours per year, and class IV systems with either net energy for system or net energy for load or net generation of more than 100,000,000 kilowatt-hours per year. All other systems are listed in the small electric utility system group.

Number and size of small electric utility systems in the United States [1] as of Dec. 31, 1962

1962 kilowatt-hour output (millions)	Number of systems by ownership					Total	
	Investor-owned	Municipal	Federal	Other public [2]	Cooperatives	Number	Percent
Systems generating all or part of their requirements:							
20 to 100	28	170	2	7	19	226	7.1
5 to 20	22	286	1	8	17	334	10.5
Less than 5	41	286	4	----	8	339	10.6
Subtotal	91	742	7	15	44	899	28.2
Systems purchasing their entire requirements:							
20 to 100	33	234	----	24	531	822	25.8
5 to 20	37	326	1	22	260	646	20.3
Less than 5	79	570	1	3	64	717	22.4
Subtotal	149	1,130	2	49	855	2,185	68.5
Systems engaged primarily in sales for resale or sales to industrials:							
20 to 100	14	5	17	11	3	50	1.6
5 to 20	6	7	2	1	1	17	.5
Less than 5	29	8	1	----	1	39	1.2
Subtotal	49	20	20	12	5	106	3.3
Grand total	289	1,892	29	76	904	3,190	100.0

[1] Excludes Alaska and Hawaii.
[2] Includes State authorities, irrigation districts, utility districts, etc.

EPHRATA, WASH., *July 11, 1966.*

Hon. WARREN G. MAGNUSON,
Senate Office Building, Washington, D.C.:

Because of airline strike representatives of Grant County PUD will not attend Senate hearing on S. 3136. We are supporting passage of S. 3136 as being in the best interests of full utilization of Nation's electrical resources. Gordon Culp will present statement on behalf of this district.

R. W. GILLETTE,
Manager, Public Utility District of Grant County.

TACOMA, WASH., *July 12, 1966.*

Senator WARREN G. MAGNUSON,
Chairman, Senate Commerce Committee,
Senate Office Building, Washington, D.C.:

Regret that due to unforeseen transportation difficulties I will not be able to personally appear before your committee to state the city of Tacoma's interest in S. 3136. Please be assured that the statement to be presented by Mr. Culp on behalf of the various northwest utilites including the city of Tacoma utilities properly states the substantial need for this legislation in the best public interest. If we can be of any further assistance to the committee, please advise.

C. A. ERDAHL,
Director, City of Takoma Department of Public Utilities.

SEATTLE, WASH., *July 11, 1966.*

Senator WARREN G. MAGNUSON,
Chairman, Senate Commerce Committee,
Senate Office Building,
Washington, D.C.:

The airplane strike makes it impossible to attend your committee hearing on July 12 and 13 to lend support to Senate Bill 3136. I understand Mr. Culp will read a prepared statement in which statement we concur.

JOHN M. NELSON,
Seattle City Light.

NORTHEAST PUBLIC POWER ASSOCIATION,
Wakefield, Mass., July 29, 1966.

Whereas, the antitrust laws, both state and federal, have helped build a nation whose competitive structure is premised on economic freedom from monopoly and restraint of trade, and

Whereas, the maintenance of basic competition in the electric power industry results in lower power costs to the consumer, and

Whereas, the antitrust laws act as a deterent to anticompetitive activities, and offer a source of relief for electric utilities, public and private, suffering from anticompetitive activities, and

Whereas, S. 3136 provides antitrust immunity for participants in contracts for pooling and interconnection, sales and exchange, or joint use of facilities after approval by the Federal Power Commission on a finding that such contracts do not "unduly restrain competition,"

Now, therefore, be it resolved: That the Northeast Public Power Association is opposed to the enactment of S. 3136 as an unnecessary and undesirable weakening of our antitrust laws.

JAMES E. BAKER,
Chairman, Northeast Public Power Association.

STATEMENT OF ANGUS MCDONALD, DIRECTOR OF RESEARCH, NATIONAL FARMERS UNION

Mr. Chairman and members of the committee. The National Farmers Union over a period of many years, in resolutions of County, State and National Conventions, has gone on record for strict enforcement of the antitrust laws. We call attention to the fact that the Sherman Act was passed in 1890 to prevent the big five meat packers, in conjunction with activities of the railroads, from discriminating in prices pertaining to cattle and other livestock.

The Clayton Act was passed because the Sherman Act did not reach incipient monopolies and prevent agreements and activities from dominant groups which in time would lead to industrywide combinations and monopolistic situations.

The Federal Trade Commission Act had somewhat the same purpose. It attempted to prevent monopolies from becoming so powerful that they could only be contained by massive government attacks.

The Robinson-Patman Act later attempted to outlaw all forms of discriminatory pricing which might substantially lessen competition.

The National Farmers Union has opposed any attempt to weaken these laws and has supported over the years many amendments which would strengthen them. The National Farmers Union opposed the so-called Bulwinkle Act which exempted the railroads, and it opposed legislation similar to this which would legalize activities of several large power companies in the Northwest.

We oppose this legislation for the same reason. We see no need for the legislation. Power companies have never been brought before government tribunals in regard to violation of the antitrust laws. The Federal Power Commission has sufficient authority at the present time to approve pooling arrangements providing they are not destructive of competition. This legislation, it would appear from language on page 2 of the bill, line 6 thru 9, would go far beyond its intended purpose. It would legalize any kind of contract that has to be filed with the Federal Power Commission. Once the Federal Power Commission had approved an agreement for a pooling arrangement its hands would be tied in regard to any activity whatsoever which was authorized by the pooling arrangement even though activities and situations not thought of before might endanger and destroy competition at the wholesale level.

There is no machinery in the bill to protect the rights or economic opportunities of relatively small municipal or rural electric groups. Large power companies could conspire to destroy wholesale competition and ultimately put out of business nonprofit utilities. There is no remedy in the bill which would give rural electric or municipal utilities to obtain relief before State Commissions if they were subjected to discrimination or if they were completely left out of the power pool. This point is particularly important. After approval of an agreement the Federal Power Commission under this legislation would abandon its jurisdiction. It could not look into a sale or an exchange of power by private groups.

It seems to us that the private utilities are saying in this legislation, "We are doing nothing illegal now but we might want to do something illegal in the future. Therefore, we would like to obtain an exemption from the Congress from possible illegal acts." We are at a loss to understand what the problem is and why this legislation was introduced unless the private utilities have some ulterior motive. We therefore urge that the Committee disapprove this legislation as expeditiously as possible.

STATEMENT OF BALTIMORE GAS & ELECTRIC COMPANY

Senator Magnuson, at the time of his introduction of Senate Bill 3136, on March 25, 1966, stated that its purposes are "to authorize the Federal Power Commission to be the sole agency to approve or reject pooling agreements and [to] police the competitive practices of utilities signing pooling and interconnection arrangements," and also to "provide a method by which utilities intending to make long term power and management commitments can receive assurances in appropriate cases that such commitments will be free from subsequent antitrust attack."

Baltimore Gas and Electric Company is in accord with the intent to free pooling agreements from attack under the antitrust laws.

Our Company is, however, opposed to the measure as introduced by the distinguished Senator from Washington for the accomplishment of these results, which we believe can be brought about much more simply.

Section 202(a) of the Federal Power Act (16 USCA § 824a(a)) already authorizes the Power Commission "for the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources" to "divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy." Such districts are to embrace areas "which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities." It is the Commission's "duty * * * to promote and encourage such interconnection and coordination" within and between such districts. This Company is already a member of a group of interconnected electric utility companies within Regional District I, established by the Commission.

In addition, Section 202(b) of the Federal Power Act (16 USCA § 824a (b)) already provides that whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, "finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons" for the sale or

exchange of energy. The Commission in addition "may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of costs between them and the compensation or reimbursement due to any of them."

Thus, since the Federal Power Act already provides for both voluntary and Commission-ordered interconnection of electric facilities, the provisions of which must be filed with the Federal Power Commission and which are subject to its regulatory authority, no further grant of authority to the Commission in this area, as set forth in the proposed Bill, is necessary.

Senator Magnuson's Bill would go much further, however, since it authorizes the Commission to review any interconnection agreement heretofore or hereafter made, and either to approve or disapprove it. This would greatly, and quite unnecessarily, increase the work load of the Commission and its personnel. In addition, although Sections 201(a) and 202(b) of the Federal Power Act now exempt the generation of electricity from the jurisdiction of the Commission, Senator Magnuson's proposed amendment would give the Commission jurisdiction over contracts "for the joint use of facilities for the generation * * * of electric energy."

It is the opinion of this Company that Senator Magnuson's stated objective of providing "a method by which utilities intending to make * * * pooling arrangements * * * free from subsequent antitrust attack" can be attained quite simply by a brief amendment to either the Federal Power Act or the antitrust laws (15 USCA §§ 1 et seq.) exempting any public utility, its officers, directors, agents, and employees from the operation of all federal, state, and municipal antitrust laws in the negotiation, execution, or performance of any interconnection or coordination of electric transmission facilities when such interconnection arrangement is filed with and subject to the regulatory authority of the Federal Power Commission, under Sections 202 (a) and (b) of the Federal Power Act.

We wish to thank this Committee for its reception and consideration of this Company's position in regard to this important matter.

Respectfully submitted,

A. E. PENN,
Chairman of the Board and President.

PACIFIC GAS & ELECTRIC CO.,
San Francisco, Calif., July 22, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce,
New Senate Office Building, Washington, D.C.

DEAR SENATOR MAGNUSON: At hearings held last week before the Senate Committee on Commerce on S. 3136, a statement in support of the bill was presented by Gordon C. Culp on behalf of several Pacific Northwest generating utilities.

Pacific Gas and Electric Company supports S. 3136 in its present from for the reasons given by Mr. Culp.

As Charles F. Luce, Administrator of Bonneville Power Administration, pointed out at the hearings, the bill is intended to provide a tribunal to which utilities could take interconnection and pooling contracts "and get some assurances that they were not going to be prosecuted under the antitrust laws of the future."

The Federal Power Commission, now charged by Congress with responsibility for encouraging interregional connections and pooling of power resources, would appear to be the appropriate tribunal to determine, subject to judicial review as provided in the Federal Power Act, the extent to which the national interest requires coordination of power systems without placing an undue restraint on competition.

Very truly yours,

ROBERT H. GERDES.

AFL–CIO, INDUSTRIAL UNION DEPARTMENT,
Washington, D.C., July 28, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce,
Washington, D.C.

DEAR MR. CHAIRMAN: The Industrial Union Department, AFL–CIO, is opposed to the enactment of S. 3136, a bill to exempt certain power company contractual arrangements from application of the antitrust laws.

Our objection to enactment of this legislation is that it does not begin to meet the requirements of a modern industrial society in terms of meeting national power needs. Moreover we doubt that it would have any significant impact on the development of an adequate national power system.

Since 1959, the AFL–CIO had repeatedly urged, in its policy resolutions, the creation of a national power system which could properly utilize the advancing technology in the electric industry to provide this nation with an adequate and reliable power supply at the lowest possible cost.

We believe in the creation of a national power grid, made possible by dramatic advances in large scale generation and high voltage transmission. These advances in technology bring closer the date when we can achieve a national minimum cost power rate. Within such a system, individuals and communities can decide what type of distribution system they choose to serve them, private, public or cooperative, and be assured of an adequate, reliable supply of wholesale power at the same rate such power is available to any other distribution system.

The development of such a power system is of vital importance because only in this way can we make an abundance of electric power available at the lowest possible cost to industry, farmers and individual consumers; reduce the waste of land and vital materials; conserve our supplies of fuel; and reduce the dangers of air and water pollution to a minimum.

The obstacles to the attainment of such a system are not technological but institutional. There has been a marked lack of any sense of urgency on the part of the privately owned power companies, doubtless compounded by their apparent desire to evade regulation by FPC and the lethargic approach many of them have to cost cutting. They appear to have been as much, if not more, concerned with fencing in the municipally owned systems and the rural electric cooperatives than they have been in cooperating in the creation of a national power grid.

Hence, we view this proposed legislation as wholly inadequate to meeting the requirements of the nation, and probably of little or no significance in speeding up development in the right direction. To the extent that this legislation would free the private power companies to increase their control over our most important energy source, without adequate federal regulation, it would only delay the development of a giant power system and deny the potential benefits to individuals and the nation which such a system would make possible.

On the other hand, if the Committee should be persuaded to proceed piecemeal with the approach proposed in the bill, we urge certain modifications in the present bill:

First, we urge that FPC be given continuing jurisdiction and power of review and modification over any contracts "immunized" under this legislation in order that errors may be corrected or changes made in light of later circumstances to the extent that such errors or changes may affect cost to consumers or lessen competition in the industry.

We urge that FPC be authorized to approve or immunize any contractual arrangement only if it can be shown that no electric system has been excluded from participation in a given contract where such participation would be economically feasible or where exclusion from the contract would put any such utility at a substantial disadvantage.

The FPC should be authorized to withhold approval of any contract until stipulated conditions have been met by the contracting bodies, in line with the preceding recommendations. The right to withhold such approval should extend to new authority for FPC to provide that transmission lines are common carriers in the same sense that railroads are held responsible as common carriers.

Enactment of the pending bill with these modifications might well contribute to progress in the creation of a national power system, but in its present form we urge its rejection.

I hope you will make this letter a part of the record of the hearings.

Sincerely yours,

JACK T. CONWAY,
Executive Director.

STATEMENT ON BEHALF OF CENTRAL HUDSON GAS & ELECTRIC CORP.

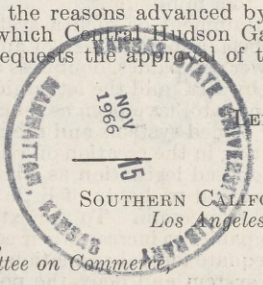
Central Hudson Gas & Electric Corp., a New York corporation engaged in the generation and distribution of electricity and the distribution of gas in the mid-Hudson Valley region, north of New York City and south of Albany, supports Senate Bill S. 3136 and advocates its enactment into law for the following reasons:

Because of the development of the technology of electric power generation by large scale plants and the consequent advantages to be derived from power pools, the development of power pools and large scale interconnections should be encouraged. In the interest of the rate payers of electric utilities, the economies and reliability possible through pooling and coordination among companies must be obtained.

However, as long as pooling and coordination arrangements may be subject to attack on the grounds that they are combinations of separate entities for the purpose of restraining trade, prudent corporate managers may be hesitant to expose their companies and themselves to such undertakings even though they may be in the interest of the consumers. The proposed bill will provide the necessary reassurance without enlarging the jurisdiction of the Federal Power Commission as to types of contracts which will be reviewed by it. In fact, it is believed that the Federal Power Commission now reviews, for antitrust implications, contracts submitted to it and will not approve a contract if it feels that it is unduly restrictive of trade. However, a contract which is approved by the Federal Power Commission carries with it no antitrust protection and is still open to antitrust action, the threat of which may be sufficient to deter managements from considering particular power pooling or coordination arrangements. This situation should be remedied. The approval of the Federal Power Commission should be required to be explicit and when given should provide protection from antitrust attack.

For the above reasons and the reasons advanced by the Generating Utilities in the Pacific Northwest, to which Central Hudson Gas & Electric Corporation subscribes, this Corporation requests the approval of the bill by this committee and its enactment into law.

Respectfully submitted.



DELAN F. SILLIN, Jr.,
President.

SOUTHERN CALIFORNIA EDISON CO.,
Los Angeles, Calif., August 9, 1966.

Hon. WARREN G. MAGNUSON,
Chairman, U.S. Senate Committee on Commerce,
Washington, D.C.

DEAR SENATOR MAGNUSON: With respect to S. 3136 now being considered by your Committee and in the light of your statement at the time of the introduction of this bill, Southern California Edison Company is interested in and supports the principle espoused in the bill, provided that it is effected by means of legislation which conforms to the intent expressed in your statement and does not extend the jurisdiction of the Federal Power Commission.

In view of the possible scope of interconnection and coordination agreements among electric agencies of the type that may be anticipated in the future, it would be most desirable to have some legislative procedure established pursuant to which the parties to such arrangements could obtain for once and for all, by making a filing of the contracts, a determination as to whether or not such arrangements were to be deemed in the public interest. By means of such procedures, agreements which are in the public interest could be implemented inasmuch as the parties could get definite assurances in advance that by performing such arrangements they would not be subject to future prosecution under the antitrust laws.

Because of the significance of the commitments and investments involved in such arrangements, it is, we believe, obvious that such determinations and assurances should be obtainable at the outset before the commitments become binding and the investments are made, and not be subject to later change or modification. The Federal Power Commission would appear to be the logical agency for making such determinations.

Yours very truly,

JACK K. HORTON, *President.*

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