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GAS PIPELINE MERGER

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HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE
UNITED STATES SENATE

NINETIETH CONGRESS

FIRST SESSION

ON

S. 1687

TO AMEND THE NATURAL GAS ACT TO REQUIRE A CERTIFICATE OF PUBLIC CONVENIENCE FOR CERTAIN TYPES OF PIPELINE MERGERS AND TO PROVIDE A NEW METHOD OF ANTITRUST REVIEW

JULY 18, 19 AND SEPTEMBER 20, 1967

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GAS PIPELINE MERGER[1]

TUESDAY, JULY 18, 1967

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. We have a very important list of witnesses and we want to expedite the hearing as much as possible.

This morning's hearing is the first on S. 1687, a bill to amend the Natural Gas Act to require a certificate of public convenience for certain types of pipeline mergers and to provide for a new method of antitrust review of natural gas pipeline company mergers.

The bill has been requested by the Federal Power Commission and has been introduced by the chairman of the committee by request of the Federal Power Commission.

(The bill follows:)

[S. 1687, 90th Cong., first sess.]

A BILL To amend the Natural Gas Act to require a certificate of public convenience and necessity for the acquisition of a controlling interest, through the ownership of securities or in any other manner, of any person engaged in the transportation of natural gas, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of the Natural Gas Act, as amended (56 Stat. 83; 15 U.S.C. 717f), is amended in the following respects:

(1) So much of the material in subsection (c) as precedes the proviso in the first paragraph is amended to read as follows:

"(c) No natural gas company or person which will be a natural gas company upon completion of any proposed construction, extension, acquisition, or other transaction, shall engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire, lease, purchase, or operate such facilities or extensions thereof, and no person shall, in any manner, acquire control of or the power to manage, directly or indirectly, any person engaged in the transportation of natural gas subject to the jurisdiction of the Commission, unless there is in force with respect to such person or natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts, transactions, or operations. The Commission, may by rule or order, exclude from the requirements of this subsection, acquisitions of control by persons who do not engage in or control anyone engaged in the production, transportation, or sale of any fuel or source of energy".

(2) The second paragraph of subsection (c) is amended by changing "subsection (e)" to read "subsections (e) and (i)".

(3) Subsection (e) is amended by deleting the "and" which follows the words "Commission thereunder," and inserting in lieu of the words "convenience and necessity;" the following: "convenience and necessity, and, where applicable, that the adverse effect which the proposed transaction will or may have upon

---

[1] The staff man assigned to these hearings, Donald Brodie, has since left the committee to teach law at the University of Oregon. The staff director, Fred Lordan, and general counsel, Mike Pertschuk, are now handling this legislation.

competition is insubstantial or is clearly outweighed by other public interest considerations;"

(b) Section 7 of such Act is amended by adding at the end thereof the following new subsection:

"(i) If the transaction for which application is made pursuant to the requirements of subsection (c) of this section involves the acquisition, lease, or purchase of the facilities of, or the acquisition of control of or the power to manage, directly or indirectly, any person engaged in the transportation of natural gas subject to the jurisdiction of the Commission, the Commission shall notify the Attorney General of the United States and the Governors of the States in which a natural gas company participating in the transaction operates or does business, in addition to the parties specified in subsection (c) of this section. In such cases the Commission may issue a certificate of public convenience and necessity only if it finds that the adverse effect, if any, of the proposed transaction upon competition is insubstantial or is clearly outweighed by other public interest considerations. If the transaction so authorized by such certificate brings under common control or management natural gas transportation facilities or activities (subject to the jurisdiction of the Commission) of two or more natural gas companies, the transaction shall not constitute a violation of the provisions of the antitrust laws, as defined by section 1 of the Clayton Act (38 Stat. 730; 15 U.S.C. 12), and amendments and Acts supplementary thereto, because of such common control or management. The Commission may define the terms 'control' and 'power to manage' as used in this subsection and in subsection (c) of this section by rule or order, to include, inter alia, the acquisition of securities, the use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, but in no event shall the ownership of less than 10 per centum of the voting securities of a natural gas company be deemed in itself to constitute control."

(c) Subsection (a) of section 20 of such Act is amended by deleting the last sentence and inserting in lieu thereof the following: "The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws not exempted by section 7(i) of this Act to the Attorney General, who, in his discretion, may institute criminal proceedings."

The CHAIRMAN. In lieu of an appearance, the Department of Justice has sent a statement approving in part and objecting in part to the bill. Without objection, a copy of that letter will be made a part of the record.

(The statement referred to follows:)

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., July 17, 1967.

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

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1687, a bill "To amend the Natural Gas Act to require a certificate of public convenience and necessity for the acquisition of a controlling interest, through the ownership of securities or in any other manner, of any person engaged in the transportation of natural gas, and for other purposes."

The bill would amend section 7 of the Natural Gas Act (56 Stat. 83; 15 U.S.C. 717f) by conferring jurisdiction on the Federal Power Commission to approve, by the issuance of a certificate of public conventience and necessity, the acquisition by one natural gas pipeline company of control of another or the acquisition by any other person of control of a natural gas pipeline company. The Commission does not have such jurisdiction under section 7 of the Natural Gas Act now, but does have authority to approve the acquisition by one natural gas company of the assets of another. The bill would also remove from the operation of the antitrust laws any acquisition of control or assets of a natural gas company approved by the Commission. Such acquisitions are presently subject to the antitrust laws.

The origin of the bill may be traced to the decision of the Supreme Court in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). In that case the Supreme Court held that the Commission had not been given the statutory authority, which the Commission erroneously thought it had, to immunize from operation of the antitrust laws a merger of natural gas companies; and that the Commission should not have proceeded to approve the merger of Pacific North-

west Pipeline Company into El Paso Natural Gas Company while a suit by the Antitrust Division to set aside the merger as a violation of section 7 of the Clayton Act was pending in the District Court for the District of Utah.

The Antitrust Division's suit had been stayed by the District Court until completion of the proceedings before the Commission. Following this decision of the Supreme Court, the District Court, after trial, dismissed the Antitrust Division's complaint. The Supreme Court reversed and ordered divestiture. *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964). This litigation is still not terminated. On February 27, 1967, in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company*, 386 U.S. 129, the Supreme Court reversed an order of divestiture entered by the District Court after a second trial and remanded the case with a direction for divestiture without delay, finding that the decree was ineffective to accomplish the divestiture which the Supreme Court had ordered in 1964. New hearings on divestiture will commence later this year.

S. 1687 is designed to accomplish two things:

1. To bring within the jurisdiction of the Federal Power Commission all changes in the control of natural gas pipeline facilities, whether such change in control is brought about through acquisition of the facilities alone, which now requires the prior approval of the Commission, or is brought about through acquisition of control of the corporation which owns the facilities, which the bill would make subject to the prior approval of the Commission.
2. To immunize from the application of the antitrust laws any acquisition, whether of assets or of control, which has received the approval of the Commission.

The first of these objectives appears consistent with the current regulatory scheme of the Natural Gas Act. Control over transmission facilities can be accomplished as effectively through acquisition of control of the corporate owner as through acquisition of the assets themselves. There appears to be no logical reason why the Commission's jurisdiction should be limited to the assets acquisition.

But we disagree with the second objective. No case has been made for the proposition that the Commission needs the power to immunize mergers involving natural gas companies from the antitrust laws in order to perform its regulatory function. The Natural Gas Act is aimed at supplementing competition, not at suppressing it. Section 7(g) of the Natural Gas Act (15 U.S.C. 717(f)(g)) expressly preserves the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company, thus recognizing that the public interest is served by the existence of alternative sources of supply. The antitrust laws perform the vital function in this industry of protecting and preserving the possibility of such competing sources and assuring producers of natural gas a competitive market adequate to stimulate and encourage exploration.

The present statutory scheme requires natural gas companies contemplating merger to meet the test of the antitrust laws as well as the Natural Gas Act. That scheme has never been unworkable, or even seriously troublesome. The *El Paso* case mentioned above is the only instance in which an acquisition subject to Power Commission approval has been challenged under the antitrust laws. A single suit hardly justifies a fear that mergers approved by the Commission will automatically face suit under the antitrust laws. It is true that as the law now stands the Department of Justice would be free to bring suit to set aside a merger after the Commission had approved it. But there is little likelihood that that would ever happen again. The Department of Justice's antitrust clearance procedures are as well known in this industry as in others which are also subject to the antitrust laws. With the applicability of the antitrust laws clearly understood, after *El Paso*, prospective partners to a merger involving gas pipelines who make use of these clearance procedures can learn in advance whether the Department will regard their union as an antitrust violation.

In one respect the bill meets a problem of antitrust enforcement which existed in comparable legislation the Commission has proposed in earlier Congresses. The problem existed because natural gas companies universally engage in activities other than the transportation and sale of natural gas which are their only activities which are subject to the jurisdiction of the Commission. Some of these other non-regulated activities are inextricable from the regulated activities of transportation and sale, such as the extracting and marketing of chemical byproducts found in conjunction with natural gas which must be removed before the natural gas can become commercially useful. Others of these non-regulated

activities are the result of diversification by natural gas companies. Thus, were the Commi sion to have approved a merger or acquisition of assets involving both regulated and non-regulated activities of a natural gas company under its earlier proposals, such approval would or might have carried with it immunity from antitrust attack against anticompetitive effects in non-jurisdictional lines of commerce. An additional difficulty existed with respect to situations where the Department of Justice might feel acquisition of a natural gas company by an organization not in the natural gas business created anticompetitive effects in the line or lines of commerce of the acquiring company. Under the earlier proposals, Commission approval would or might have immunized an acquisition of control of a natural gas company which created anticompetitive effects elsewhere.

The present bill provides the following:

> If the transaction so authorized by such certificate brings under common control or management natural gas transportation facilities or activities (subject to the jurisdiction of the Commission) of two or more natural gas companies, the transaction shall not constitute a violation of the provisions of the antitrust laws, as defined by section 1 of the Clayton Act, 38 Stat. 730, 15 U.S.C. 12, and amendments and acts supplementary thereto, because of such common control or management.

As is shown by the exchange or correspondence between the Commission and the Department of Justice, copies of which accompany this letter, the Commission has confirmed the Department's understanding of this provision. Specifically, the Commission has confirmed the Department's understanding:

> (1) That the provision is intended to limit the applicability of the antitrust laws only insofar as such application is based on possible anticompetitive effects due to authorized common control or management of jurisdictional facilities or activities;
>
> (2) That this provision would not limit such application to the common control or management of nonjurisdictional facilities or of the jurisdictional facilities of one party and the non-jurisdictional facilities of another; and
>
> (3) That the bill is not intended to bar the grant of any relief necessary and proper to prevent or remedy any violation of the antitrust laws relating to such other aspects of the transaction, including divestiture of the natual gas transportation facilities or activities subject to the jurisdiction of the Commission if necessary to assure adequate relief from such violation.

It is also our understanding, and we believe it is the understanding and intention of the Commission, that the proposed bill would operate prospectively only, and could not be utilized, for example, to validate a merger already held unlawful.

In summary, the Department of Justice is opposed to the bill insofar as it would grant antitrust immunity to acquisitions of control of natural gas companies or acquisitions of assets of natural gas companies approved by the Federal Power Commission, because power to grant antitrust immunity is not required by the Commission in order to perform its regulatory duties and because competition, which the antitrust laws are designed to foster and promote and protect, continues to play an important and necessary role in assuring the public an adequate supply of natural gas at reasonable prices.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RAMSEY CLARK,
Attorney General.

JULY 6, 1967.

Hon. LEE C. WHITE,
Chairman, Federal Power Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: I refer to your Draft Bill to amend Section 7 of the Natural Gas Act which contains the following reference to antitrust:

> If the transaction so authorized by such certificate brings under common control or management natural gas transportation facilities or activities (subject to the jurisdiction of the Commission) of two or more natural gas companies, the transaction shall not constitute a violation of the provisions of the antitrust laws, as defined by section 1 of the Clayton Act, 38 Stat. 730, 15 U.S.C. 12, and amendments and acts supplementary thereto, because of such common control or management.

It is my understanding, based on your letter of April 10, 1967, transmitting the Draft Bill to Congress, that this language is intended to limit the applicability of the antitrust laws only insofar as such application is based on possible anti-competitive effects due to authorized common control or management of jurisdictional facilities or activities of natural gas companies, but would not limit such application to the common control or management of non-jurisdictional facilities or of the jurisdictional facilities of one party and the non-jurisdictional facilities of another.

It is also my understanding that the Draft Bill is not intended to bar the grant of any relief necessary and proper to prevent or remedy any violation of the antitrust laws relating to such other aspects of the transaction, including divestiture of the natural gas transportation facilities or activities subject to the jurisdiction of the Commission if necessary to assure adequate relief from such violation.

I would appreciate receiving confirmation of my understanding.

Sincerely yours,

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

FEDERAL POWER COMMISSION,
Washington, D.C., July 12, 1967.

Hon. DONALD F. TURNER,
Assistant Attorney General,
Department of Justice,
Antitrust Division,
Washington, D.C.

DEAR MR. TURNER: This replies to your letter of July 6, 1967 inquiring as to the intent and meaning of the Federal Power Commission's proposed bill transmitted to Congress April 10, 1967 to provide for Commission jurisdiction over acquisitions of control of jurisdictional natural gas pipeline companies.

You inquire of the scope of the antitrust immunity which would be provided under our proposed bill and ask for a confirmation of your understanding of its meaning.

The Commission intends, as our letter of transmittal to the Congress states, that:

> Any immunization be limited to matters over which the Commission exercises full regulatory control. Second—*only so much of an approved transaction as combines jurisdictional—facilities of two or more natural gas companies* would not constitute a violation of the antitrust laws. The bill would not support a claim of immunity from antitrust actions challenging . . . even those [aspects] under FPC jurisdiction but dealing with natural gas production, or those activities which the affiliated companies carry on subsequent to the approved transaction. (Emphasis supplied.)

The choice of the phrase "would not constitute a violation of" antitrust laws, rather than "would be exempt from [antitrust laws]", as specified in our proposal in the last Congress, was intended to recognize that, even though the merger of jurisdictional facilities of two pipelines could not itself constitute a violation of the antitrust laws, divestiture of jurisdictional transportation facilities may be an appropriate and lawful remedy, where a violation of the antitrust laws has been found with respect to those aspects of a broader acquisition or a transaction which remain subject to antitrust prosecution in the district courts.

Your understanding of the intent of the bill, as expressed in your letter, is therefore correct.

Sincerely,

LEE C. WHITE,
Chairman.

The CHAIRMAN. I have received letters supporting the legislation from Gov. Daniel J. Evans, State of Washington; Gov. Stanley K. Hathaway, State of Wyoming; Gov. Paul Laxalt, State of Nevada; Donald Hacking, chairman, Public Service Commission of Utah; and Ernest C. Steel, chairman, Board of Railroad Commissioners of the State of Montana—that is, the Public Utility Commission of Montana. We will put all of these in the record in full.

(The communications follow:)

STATE OF WASHINGTON,
OFFICE OF THE GOVERNOR,
Olympia, Wash., July 14, 1967.

Hon. WARREN G. MAGNUSON,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MAGNUSON: I had hoped to be able to appear before the Committee on Commerce as a witness in support of S. 1687 at the hearing scheduled July 17, 1967. Regrettably, I have been compelled to forego appearing personally because of certain unavoidable demands of state government. It is my desire, however, that this letter be read into the record at the hearing, and I would appreciate your cooperation to that end.

After careful analysis and long study, the Washington Utilities and Transportation Commission, which as you know is the agency charged by law with regulating in the public interest the utilities of this state—including natural gas distribution companies, has taken a position in support of S. 1687. I wholeheartedly join in that support. Moreover, I commend the Federal Power Commission for their efforts in obtaining the introduction of this legislation to the Congress. My regret is that this legislation wasn't enacted ten years ago. Had it been the law then, the State of Washington would have been spared the concern we have all shared about the continued stability and adequacy of the supply of natural gas into our region.

Since 1960 when El Paso Natural Gas Company actively succeeded to Pacific Northwest Pipeline Corporation as the sole supplier of natural gas to the Pacific Northwest, we in the State of Washington have enjoyed safe dependable, abundant service at rates that are lower today than when El Paso took over from Pacific.

El Paso's record of service over the last 7 ½years is one of which it can be justly proud, but my interest is neither in congratulating nor rewarding El Paso for past performance, however laudable. Rather, my concern is for the State of Washington. As you know, this state is well into a period of enormous growth. The need for energy supply that is reliable, stable in price and abundant in quantity is fundamental to the proper stucture of that growth.

I consider it, therefore, hazardous at this crucial juncture in our state's development to have the single supply of natural gas available to our region pass from hands that have proved able to meet the public's convenience and necessity into hands as yet unknown and untried.

I affirm the further recommendation made by the Washington Utilities and Transportation Commission that the Committee on Commerce add to S. 1687 whatever amendatory language is appropriate to confirm the 1959 decision of the Federal Power Commission when it found unanimously that the public interest was best served by the merger of the Pacific into El Paso. My hope is that El Paso, which has served us so well in the past, be allowed to continue serving in the future, as the F.P.C. intended that it should.

Respectfully submitted.

DANIEL J. EVANS,
Governor.

EXECUTIVE DEPARTMENT,
Cheyenne, Wyo., July 14, 1967.

Re Statement of position of State of Wyoming in favor of Proposed National Legislation to amend Sections 7 and 20 of the Natural Gas Act to provide that the Federal Power Commission (FPC) approve and certificate jurisdictional utility security or asset acquisition transactions whereby control of an interstate natural gas pipeline company is obtained; and to provide that the FPC approval of such jurisdictional acquisition transaction would with certain limitations exempt the same from antitrust laws.

Hon. WARREN G. MAGNUSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MAGNUSON: I am informed that hearings are scheduled on S. 1687 for July 17, 18 and 19, 1967, by the Senate Committee on Commerce of which you are Chairman. As Governor of the State of Wyoming, I should like to

offer my comments upon the substance of S. 1687 for inclusion in the record of these hearings for your consideration.

In order that full and fair consideration be given this important matter, I feel that cognizance must first be given to the basic consideration concerning "why" and "how" utility regulation came about of which I am sure you are most conversant. This basic consideration, while a valid and inextricably essential part of legislated law and key court determinations, has too often been taken for granted and, consequently, improvidently overlooked in the evaluation of utility problems.

Considering that American public utility law developed and evolved in a society averse to any restriction on individual enterprise as a necessary, indispensable and unavoidable means of ensuring the public of safe, adequate, continuous and non-discriminatory service at reasonable rates; it then is axiomatic that the various state and federal regulatory bodies whose main legal reason for existence is to protect the public interest are, by their expertise and valuable experience, best able and qualified to judge who is best able to provide and maintain a required utility service.

Although the above comments are certainly an oversimplification of an extremely broad and complicated area they clearly demonstrate the crippling and dilacerate effect on the utility regulatory ideal of the existing problematic "dichotomous" regulatory circumstance wherein it is legally incumbent upon one Agency (FPC) to create and participate in the sustaining of fully regulated utility operations; but, conversely, it is incumbent upon another Agency (Justice Department) to forcefully enervate these same operations on the very basis of exclusivity upon which the very existence of such utilities was legally permitted and justified. Arguments of "size" or "degree" notwithstanding, there is a clear gross inconsistency herein in the fact that public utility operations should not and cannot, within this realm of regulation, be equated to other businesses.

I note that, in the letter of April 10, 1967, by which the Chairman of the Fedaler Power Commission transmitted to the Honorable Hubert H. Humphrey, Vice President of the United States, in his capacity as President of the United States Senate, a draft of a bill which is now S. 1687, reference is made to the El Paso Natural Gas Company (El Paso)—Pacific Northwest Pipeline Corporation (Pacific) merger case. We believe it is significant to note that our state has consistently supported said merger proposal in each proceeding concerning, or in some material way affecting, the same. In summation, our state's position, formulated after due deliberation and careful consideration of all available materials and studies and with due regard to the recommendations of our most directly interested state agencies, has been premised on the following grounds:

(1) That natural gas is an industry of major importance to the economy of Wyoming.

(2) That Wyoming is primarily a gas producing state and being far distant from large population centers had, prior to the subject Merger, suffered in development of its natural potential and sale of its surplus reserves;

(3) That since the time when subject Merger plan was effectuated El Paso's appearance on the scene has acted to intensify exploration and drilling in Wyoming, greatly enhancing the state's economy, substantially improving the development picture in Wyoming, and making new reserves available to out-of-state users as well as to Wyoming users;

(4) That El Paso's oft-stated plans for development in Wyoming and the size and scope of the natural gas plant constructed by El Paso at Opal, Wyoming, for the purpose of stripping butane, propane and other liquid hydrocarbons from Wyoming produced natural gas stand as testimony to the fact that El Paso has faith in the resource potential of Wyoming;

(5) That the subject Merger has set in motion and would justify and make feasible new recovery experiments which will lead to the release and utilization of high quality Wyoming gas reserves in tremendous quantities, which when rendered recoverable, could of themselves go far toward alleviating the necessity for purchasing additional natural gas reserves from Canada and other foreign sources as is presently the case.

(6) That the proportion of Wyoming's relatively small population using natural gas is very high and will continue to grow as gas is made available in new areas, and it therefore follows that Wyoming has a definite continuing interest in natural gas development and the beneficial effect of the Merger thereon;

(7) That the rate benefits to Wyoming users and out-of-state users if large Wyoming natural gas resources are fully developed and made available are clearly apparent; and

(8) That the public would benefit by the diminished burden of regulation on the Federal Power Commission if said Merger were allowed to go to fruition.

Considering the above we conclude that we should adhere to the considered position taken by our state in earlier relevant proceedings and must lend our unqualified support to legislation that would permit thc Federal Power Commission to set into motion, without unwarranted and unanticipated obstructions, carefully studied and conceived Merger proposals, such as that of El Paso and Pacific, to which the FPC has given its approval only after fair hearing and consideration of *all* elements therein involved. In our opinion S. 1687 would fairly and equitably accomplish this end, especially since it is patterned after similar legislation now applicable to financing transactions of other regulated—but in no sense more essential—businesses. We would, of course, emphatically urge that S. 1687 be amended so as to be certain that such bill, upon its enactment into law, will authorize preservations of the El Paso-Pacific merger without further proceedings or, at the very least, authorize preservation of that merger following decision by the Federal Power Commission anew that the merger is required in the public interest tested against the standards provided under S. 1687.

We appreciate this opportunity to state the position of our state in this very import matter.

Respectfully yours,

STANLEY K. HATHAWAY, *Governor.*

CARSON CITY, NEV., *July 14, 1967.*

Hon. WARREN MAGNUSON,
Chairman, Senate Commerce Committee,
Washington, D.C.:

Permit me to refer your attention of February 2 relating to problems of natural gas industry in Pacific Northwest. I endorse material contained therein and specifically urge enactment of S. 1687 with amendments appropriate to accomplishing objectives set forth in letter above. Request you make my letter and wire part of hearing record.

Sincerely,

PAUL LAXALT,
Governor.

THE STATE OF NEVADA,
EXECUTIVE CHAMBER,
Carson City, Nev., February 2, 1967.

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

DEAR SENATOR MAGNUSON: I am in receipt of your letter of January 16, with enclosures, which concerned itself with the present situation of the natural gas industry in the Pacific Northwest.

I have studied the matter and reviewed it with the Nevada Public Service Commission. I concur with the following excerpt from the Idaho Public Utilities Commission, directed to you on December 8, 1966:

> Approval of the merger would permit the merged company substantial flexibility with respect to both availability and utilization of natural gas reserves. Also, the merger would have brought about much greater economic and financial strength of the merged companies. The economic and financial strength of the merged companies would have enabled the distribution companies to more accurately plan and carry out the expansion of their services. Another benefit of the merger would have been the substantial savings resulting from the combining of services which otherwise must be provided by separate companies, such as geological, engineering, accounting and executive functions, which would amount to a savings of several million dollars annually. In addition, the merged companies would be able to accomplish large-scale financing at less cost. Such savings would result in lower cost of service and thus in lower rates to the rate payers in the areas served by the merged company, as it must be remembered that the merged companies would have been regulated by the Federal Power Commission in regard to the ultimate cost of natural gas to the distribution companies.

In summary, the benefits of the merger would have afforded stability of rates at the lowest possible level and improved and expanded service.

This, in substance, sets forth the position of the State of Nevada. My inquiry reveals that the gas distributing company serving a major portion of Nevada, and more specifically, the northern division has experienced substantial difficulty in fulfilling its commitments because of all too frequent delivery interruptions by El Paso Natural Gas to Southwest Gas Company. This in itself points up total inadequate reserves which should be available for distribution throughout northern Nevada and has resulted in rate schedules which are prohibitive and detrimental to the general economy of our State.

We believe that the merger as contemplated and authorized by the Federal Power Commission would substantially benefit Nevada by firming up the gas reserves, which eventually would lead to better rate structure.

There is presently in construction a large steam generating power plant in northern Nevada, which will be required to build expensive coal facilities unless this gas matter is resolved in 1967, with other plants to follow in the same category. It would, therefore, appear from our standpoint that in order to accomplish all of these things, appropriate legislation is in order and that we would concur in supporting the proposed legislation or a reasonable substitute.

The Nevada Public Service Commission has been in contact with the Nevada Congressional Delegation on the matter and have expressed their views, generally, supporting the position taken both by Washington and Idaho Utility Commissions.

Thank you.

Sincerely,

PAUL LAXALT,
Governor.

PUBLIC SERVICE COMMISSION OF UTAH,
Salt Lake City, Utah, July 6, 1967.

Hon. WARREN G. MAGNUSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: Because of the keen interest of the Public Service Commission of Utah in the matters involved in S. 1687 and H.R. 8549, I am enclosing herewith copy of my letter to The Honorable Ralph H. Wickberg, President of the Idaho Public Utilities Commission and also President of the Western Conference of Public Service Commissions, and a copy of the Resolution of the Western Conference of Public Service Commissions adopted at a regular meeting of the Conference held at Stateline, Nevada, on June 14, 1967.

Respectfully,

DONALD HACKING,
Chairman.

PUBLIC SERVICE COMMISSION OF UTAH,
Salt Lake City, Utah, July 6, 1967.

Hon. RALPH H. WICKBERG,
President, Western Conference of Public Service Commissions,
Statehouse, Boise, Idaho.

DEAR PRESIDENT WICKBERG: As you will recall I was a member of the Resolutions Committee of the Western Conference of Public Service Commissions held at Stateline, Nevada in June; other members being the Honorable Francis Pearson of Washington and the Honorable Zan Lewis of Wyoming.

To me the most vital and important resolution considered by the Resolutions Committee and adopted by the Conference was the resolution urging passage by Congress of S. 1687 and H.R. 8549.

It is clearly apparent, particularly from the mess which has developed in the El Paso Natural Gas Company-Northwest Pipeline Merger, that there is a desperate need for legislation which will permit Federal Power Commission jurisdiction over acquisitions of stock or facilities and approve mergers of natural gas pipeline utilities, though such approval may have an adverse effect on competition and thus violate provisions of the Antitrust Laws provided the Commission finds that other public interest questions clearly outweigh considerations of competition.

The Utah Public Service Commission is of the view that Senate Bill 1687 would provide the needed legislation and would not destroy the effectiveness of

Antitrust Legislation, but would be a means of removing what Justice Harlan called "the existing bifurcated system" where the general public interest questions stand completely stalled and become entrapped in a dual jurisdiction squabble without end, and during which time the general public interest must suffer grievously.

It is my understanding that copies of the subject Resolution of the Western Conference of Public Service Commissions have been served on all members of Congress and I shall not attach a copy to this communication. It is my further understanding that under authorization from the State of Idaho and in pursuance of the Resolution you will testify before the Senate Commerce Committee, over which Senator Warren G. Magnuson of Washington is Chairman, in support of S. 1687, in July.

Accordingly, I shall mail a copy of this letter to Senator Magnuson and also to Senators Moss and Bennett of Utah, and Congressmen Burton and Lloyd of Utah.

Sincerely,

DONALD HACKING,
Chairman.

RESOLUTION NO. 1

RESOLUTION BY WESTERN CONFERENCE OF PUBLIC SERVICE COMMISSIONS URGING PASSAGE BY CONGRESS OF S. 1687 AND H.R. 8549, ADOPTED JUNE 14, 1967

Whereas, Section 7(c) of the Natural Gas Act at present provides that the approval of the Federal Power Commission must be secured for the acquisition by any person of the assets of a natural gas pipeline company; and

Whereas, in April 1962 the Supreme Court of the United States declared: (1) that the Federal Power Commission's authority does not extend to approval of acquisitions of controlling stock interests in natural gas pipeline companies; (2) that, unlike other federal regulatory agencies possessing power to approve acquisitions, the Federal Power Commission's approval of an acquisition of assets does not exempt the transaction from prosecution under the antitrust laws; and (3) that the Commission cannot even make its statutory determination as to whether a proposed acquisition of pipeline facilities would be required by present or future public convenience and necessity as long as an antitrust action directed against the acquisition is pending in the courts; and

Whereas, where an industry is subject to such detailed regulation as is now exercised by the Federal Power Commission with respect to the operations of interstate natural gas pipelines, this Conference agrees that the Federal Power Commission should have authority to pass upon stock acquisitions affecting control of a pipeline, and, with respect to all acquisitions, stock or asset, the Federal Power Commission should have the authority to authorize such transactions even if they have an adverse effect on competition, where the Commission finds that the effect is insubstantial or is clearly outweighed by other public interest considerations; all as provided in the bills S. 1687 and H.R. 8549, now pending before Congress; and

Whereas, the present system under which the Federal Power Commission fully regulates the natural gas industry as a public utility industry and the Department of Justice plays a completely uncoordinated role in applying the antitrust laws alone to a proposed merger has resulted and can again in the future result in the disruption of effective regulation at the expense of the public interest.

Now, Therefore, Be It Resolved, that the Western Conference of Public Service Commissions recommends to the Congress that appropriate legislation be enacted: (1) to give the Federal Power Commission jurisdiction over acquisitions of stock of natural gas pipeline companies; (2) to give the Commission authority to approve a merger even though there are adverse effects upon competition, provided that the Commission finds those adverse effects to be insubstantial or clearly outweighed by other public interest considerations.

Be it Further Resolved, that the Secretary of this Conference be instructed to transmit a copy of this resolution to each member of Congress, the secretary and the executive committee of the NARUC and to arrange for appropriate representation at the hearings on S. 1687, now scheduled to be held on July 17, 1967, and at the hearings on H.R. 8549, when scheduled.

Board of Railroad Commissioners,
Ex-Officio Public Service Commission,
Helena, Mont., July 10, 1967.

Senator Warren Magnuson,
Chairman, Senate Commerce Committee,
U.S. Senate, Washington, D.C.

Dear Senator Magnuson: The Montana Public Service Commission wishes to be placed on record as supporting passage of S. 1687. The Commission also supported and voted for Resolution No. 1 as passed by the Western Conference of Public Service Commissions at meeting held June 14, 1967.

Sincerely yours,

Ernest C. Steel,
Chairman.

The Chairman. This morning we will hear as our first witness the Chairman of the Federal Power Commission, Mr. Lee White. We will be glad to hear from him on this very important matter.

STATEMENT OF LEE WHITE, CHAIRMAN, FEDERAL POWER COMMISSION, ACCOMPANIED BY COMMISSIONER CHARLES R. ROSS AND RICHARD A. SOLOMON, GENERAL COUNSEL

Mr. White. Thank you, Mr. Chairman, and other members of the committee.

Sitting here at the table with me is Commissioner Charles R. Ross, of the Federal Power Commission, who, on one point, has a view different from that of the other members of the Commission. He is here to answer any questions that the committee may have, and would perhaps care to make a statement of his own.

We have always, in the Commission, undertaken to make clear when we are in total agreement and when we are in partial agreement, and where we are split down the middle. That happens rarely. All of us do try to afford each other the opportunity to make his own position clear rather than having the burden of trying to speak on someone else's behalf.

The Chairman. We wouldn't want you all to agree all the time. We would think there might be something wrong with you if you agreed on everything.

Mr. White. If that is the test of a successful Commission, we are one of the most successful Commissions, Mr. Chairman.

Also at the table, seated to my left, is Richard A. Solomon, who is the general counsel of the Commission, who is also expert in the field of antitrust law which is one of the aspects of this particular proposal. Mr. Solomon served in the Antitrust Division of the Justice Department for a considerable period of time and is quite familiar with the antitrust implications of our legislative proposal.

The statement I have is not unduly long in terms of what we have to offer.

The Chairman. I think you had better read your statement. It is not unduly long. I think it will lay a foundation for the whole problem we are going to be discussing in this legislation.

Mr. White. I appreciate that opportunity. If there are questions as I go through it, it might be better to break in rather than to await the end.

This is a legislative proposal of the Commission itself. It is one that we believe is quite important. Whereas it has been introduced in a

previous Congress at the request of the Commission, events of the past year or so make it clear that it is more than an academic exercise. There are real problems that this legislation would deal with.

The CHAIRMAN. The reason I would like you to make this record as complete as possible with the background of the Commission's bill, is that we have some peripheral problems involved in this field that probably will be introduced at this hearing. We may have some amendments ourselves to take care of these peripheral problems.

Mr. WHITE. Mr. Chairman, I am pleased to be here today to testify in support of S. 1687. This bill will assign to the Federal Power Commission the same responsibility over acquisitions of control over natural gas pipeline companies that it now exercises over asset acquisitions. It will also centralize responsibility for passing on all such acquisitions and mergers in the Commission rather than leaving them subject, as they are now, to challenge under the antitrust laws in the district courts of the United States. At the same time the bill includes provisions to insure that full consideration is given to competitive issues and also to protect the legitimate interests of the Department of Justice with respect to possible violations of the antitrust laws which might result from other aspects of a merger involving natural gas transportation facilities.

In the Natural Gas Act of 1938, Congress wisely provided for Commission review of acquisition of the facilities of natural gas companies. However, no review was provided for acquisitions of control of those facilities through stock purchase—or other means—even though such control obviously puts the acquirer or that group of individuals who acquire the stock, in essentially the same position a- if it had bought the facilities. The Commission believes the purposes of the Natural Gas Act to provide for public review of acquisitions could therefore be thwarted if two natural gas pipeline companies come under common control through a stock purchase, without the benefit of our review, since one such an acquisition is consummated our authority over any consequent merger of the actual facilities would have relatively little significance operationally.

S. 1687 would correct this obvious gap by amending section 7 of the Natural Gas Act to require any person who would acquire control (S. 1687 applies only to acquisitions of control and provides that purchase of less than 10 percent of the stock of a natural gas company shall not, by itself, be deemed control) of a jurisdictional natural gas pipeline company through purchase of its securities or in any other manner first to obtain a certificate of public convenience and necessity from the Federal Power Commission.

It would also provide that an approved merger transaction would not constitute a violation of the antitrust laws, insofar as it involved a combination of pipeline transportation facilities. Under the bill the Commission could not certificate any transaction involving acquisition of control over the facilities or stock of a natural gas company unless we were able to find that any adverse effects of the proposed acquisition on competition were insubstantial or were clearly outweighted by other public interest considerations.

The bill directs the Commission to notify the Department of Justice and Governors of the affected States and entitles them to participate in the Commission proceedings. The Department as well as other

interested parties would be permitted to appeal a Commission decision to the Federal court of appeals under the Natural Gas Act's existing provisions.

The Commission first proposed legislation similar to S. 1687 in 1962. Bills incorporating this proposal were first introduced in Congress as S. 2279 and H.R. 6483, 89th Congress. S. 1687 differs from the earlier proposals in one significant respect: It has been expanded to provide for FPC review of acquisitions of control of a natural gas pipeline company by any person, as for example, by a competing fuel company, whereas previous bills merely applied to acquisitions by other natural gas companies. This change would eliminate the anomaly that a natural gas producer, which is a natural gas company under the act, would have to secure Commission approval of an acquisition while a gas distribution company, exempted under section 1(c) of the act, or a holding company owning other gas or oil properties, would not be required to secure Commission approval.

Equally important, the Commission feels that it should have the responsibility to examine into the qualifications of other groups to own and operate natural gas pipeline companies. Thus if the owner of a competing fuel wished to acquire a natural gas pipeline we believe he should first have to prove his qualifications to the Commission. There may well be situations where the public interest would not be served by subordinating a pipeline to companies primarily engaged in different, if not antithetical, types of operation.

I do not mean to suggest that all or even most such transactions would be contrary to the public interest. But we think public justification of the willingness and capacity of the proposed new owner to perform the important public functions entrusted to the Nation's natural gas pipelines is the minimum degree of protection required.

The bill also provides that the Commission may, by rule or order, exclude from the requirements of the section, acquisitions of control by persons who do not engage in the production, transportation, or sale of any fuel or source of energy.

The Commission's present lack of authority over one who acquires a controlling stock interest in a natural gas company is in contrast to acquisitions of control of gas distribution companies which, under the Public Utility Holding Company Act, require SEC approval. 15 U.S.C. 79(1). Moreover, other regulatory statutes providing for comprehensive regulation of industries, virtually without exception, recognize the necessity of public review by the regulatory body of acquisitions of control of the regulated companies through both stock and asset routes.

Thus the Interstate Commerce Act—for railroads—(49 U.S.C. 5(2))—the Federal Communications Act—(47 U.S.C. 221, 222)—for telephone and telegraph companies, and the Federal Aviation Act (49 U.S.C. 1378), all require approval by the applicable regulatory agency before anyone may acquire control over the regulated company.

Congressional amendment of the Clayton Act in 1950 to eliminate a similar statutory loophole presents an instructive parallel for S. 1687. The Clayton Act, as originally passed, applied to stock acquisitions alone and did not apply to asset acquisitions. This limitation apparently resulted from the fact that in 1914, when the act was

passed, acquisition by stock purchase was the predominant method of acquiring another company.[1]

But over a period of time the exception became almost the rule and the futility of dealing with one method of acquiring control without the other was recognized by Congress in 1950. The Senate Committee on the Judiciary termed the absence of an asset acquisition provision "inconsistent and paradoxical as to the overall effect of existing law." (S. Rept. 1775, 81st Cong., second sess. p. 2.)

Accordingly, Congress amended the act to apply to asset acquisitions as well as those consummated through stock acquisition. (15 U.S.C. 18, 64 Stat. 1125.)

The problem presented by the existing hiatus in the law is not a theoretical one. The natural gas pipeline industry is relatively new, and the history of mergers and acquisitions has not been too extensive. But there have been two other major acquisitions in recent years, in addition to the El Paso-Pacific Northwest merger now before the courts over which we had no power of approval or disapproval. These two cases involved the acquisition of the United Gas Pipe Line Co. by Pennzoil and even more recently the purchase of the stock of the Transwestern Pipeline Co. by Texas Eastern, another major pipeline. I do not suggest that if we had had the authority we seek here we would not have approved either or both of these transactions; nothing that I now know indicates that we would not have done so. But both of these transactions were, in my opinion, sufficiently important in their potential impact upon pipeline operation to have warranted full study by the Federal Power Commission.

Let me note in passing that we have consciously restricted the Commission's proposed new responsibility contained in S. 1687 to pass upon requests for the acquisition of control over the interstate natural gas pipelines. The Commission's existing responsibilities normally cover only a fraction of the business of independent producers, who are basically oil companies. The Commission has no statutory responsibility for the regulation of the oil business, which is subject to review by other Federal and State agencies. In the case of natural gas pipeline companies the Commission has been assigned the predominant regulatory responsibility and we therefore recommend that the new tools proposed by the bill implement this responsibility as to pipeline companies.

Let me now turn to the antitrust immunity feature of our proposal. At present with respect to proposed asset acquisitions, the companies involved in the transaction must not only convince the Federal Power Commission that it is consistent with the Natural Gas Act's public convenience and necessity standard but also be prepared to stand investigation under the separate and quite different standards of the antitrust laws—particularly section 7 of the Clayton Act. This was the holding in the El Paso case, *California* v. *F.P.C.*, 369 U.S. 482. And, of course, a similar dualism would be created with respect to stock acquisitions we are proposing be made subject to the Commission's jurisdiction.

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[1] H. Rept. 1191, to accompany H.R. 2734, 81st Cong. first sess. (to amend the Clayton Act to include asset acquisitions), p. 4, "* * * The present impotence of section 7 raises the question as to why Congress, in granting the (FTC) power to prevent purchases of stock, did not also give it the power to move against acquisitions of assets * * * this omission seems particularly paradoxical. The answer lies in the fact that at the time * * * most acquisitions took the form of stock purchases. By comparison, acquisitions of assets were relatively unimportant.")

The Commission—with Commissioner Ross dissenting on this point—believes that any such dualism is not consistent with the appropriate operation of the natural gas pipeline industry in the public interest and quite unnecessary to insure that full consideration is given to the importance of maintaining the real benefits of competition in the interstate transportation of natural gas.

We have reached this determination in the light of a long background of Commission recognition that in many situations competition between two or more pipelines can better serve the public interest than a single pipeline. This is exemplified by the Commission's past actions in certifying competing pipelines to serve such markets as California, Chicago, Detroit, Philadelphia, and New York.

Moreover, the Commission within the past year has authorized competing pipeline service to Chattanooga, Tenn.; Washington, D.C.; Richmond, Va.; Hartford, Conn.; and a large section of northern Minnesota and Michigan. In the Hartford case, it was, in fact, the Commission, not the companies involved, which took the initiative to bring a competing service to Hartford and we believe, to the substantial benefit of the residents of that city.

The important point with respect to these actions, however, is that they were all done within the ambit of the Commission's public convenience and necessity standard and in each such instance the competitive service was authorized only after a full consideration, on a public record in which interested parties could participate, of all of the other factors which, along with the advantages of competition, go to determine whether a particular new service will, on balance, prove beneficial or harmful. We start with the presumption that, in itself, competition is a good thing. We recognize, however, that the natural gas transportation industry cannot be built to its optimum strength on the basis of theory alone and it is important to examine other relevant factors to determine on the factual record what the actual results of the proposed new service are likely to be.

We have recognized in this bill that there is a difference between the authorization of new competing service and the approval of a merger or consolidation which could have the effect of eliminating existing competition. Accordingly, the bill would authorize the Commission to approve any such merger or consolidation resulting in a transfer of control "only if it finds that the adverse effect, if any, of the proposed transaction upon competition is insubstantial or is clearly outweighed by other public interest considerations." This is the standard adopted by Congress last year in the Bank Merger Act Amendments of 1966 and we think this language, which is more restrictive than that now incorporated into the immunity provisions pertaining to other transportation and communications regulatory agencies, is fully adequate to insure that the consideration of competition will not be unduly subordinated. This is a change from the Commission proposal of the 89th Congress. We have written into the bill a new, and we believe, a stricter and more appropriate standard.

The Congress has already chosen to centralize authority for passing on mergers under similar but less stringent public interest test in the fields of transportation and communications where the existing statutory scheme provides that the regulatory agencies have the final say, subject of course to court review, and the policy embedded in the antitrust laws is considered as a facet—albeit a major facet—of the

broader public convenience and necessity. Mergers and consolidations approved by the Federal Power Commission are now in a virtually unique position of being subject to subsequent challenge in a classic antitrust action. The Commission does not believe it makes any more sense to apply the antitrust standards in evaluating the competitive impact of a proposed regulated pipeline merger than it would for these other areas where Congress has already acted to afford immunity.

We recognize, of course, what is bad under antitrust concepts will frequently be equally bad under any reasonable interpretation of the public interest standard. But this does not mean that all transactions are contrary to the public interest which might be precluded under the very broad standards of section 7 of the Clayton Act.

We also recognize that the Department of Justice has considerable discretion in determining when to commence an action under section 7, which permits them to take into account at least some of the other factors relevant to a determination of the overall propriety of a proposed transaction. Private antitrust litigants may not show a similar restraint. We are convinced that the Federal Power Commission is in a far better position to determine where the overall public interest lies than the district courts in which antitrust actions must be tried, and ultimate relief determined, and the Department of Justice can best perform its role by insuring that the full panoply of competitive considerations are put before the Commission and appropriately considered by it.

The antitrust immunity provided for in the bill is further limited in two other respects. First, it is limited in that it would apply to only so much of a transaction as concerns the acquisition of control of one natural gas pipeline company by another—or otherwise brings them under common control—thus, the immunity would apply only to that part of a transaction over which the Commission has full regulatory control under the Natural Gas Act both before and after the acquisition, and if the companies involved have other activities whose merger raises antitrust problems, these aspects of the transaction would remain fully subject to the antitrust laws. Moreover, the immunity would not apply to an acquisition of a single pipeline by any person other than another pipeline.

Second, the bill has been carefully worded to provide that Commission certification would constitute a determination that approved acquisitions or mergers of pipeline facilities "shall not constitute a violation of" the antitrust laws rather than providing any general or flat exemption from the antitrust laws. This too is a change from the bill introduced in the 89th Congress. This change has been made to insure that the remedy of divestiture of pipeline facilities would be available, if necessary, where a violation of the antitrust laws is found concerning those aspects of a certificated transaction not dealing with jurisdictional pipeline facilities also merged.

Mr. Chairman, S. 1687 has been carefully designed to protect all legitimate interests while at the same time enabling the Commission more effectively to carry out its mandate under the Natural Gas Act. The Commission urges favorable and prompt action on S. 1687.

We are appreciative of the fact that hearings have been scheduled on what we regard as a very important piece of legislation. As I indicated at the outset, and through the prepared statement, Commissioner Ross has a different view than the other members of the Com-

mission on the question of immunity. Although I believe that some of the changes that have been made in this version of the proposal as distinguished from that that was submitted in the 89th Congress, may have satisfied a number of the questions that Commissioner Ross has, he is here and I am sure he is perfectly willing to speak for himself.

The CHAIRMAN. Commissioner Ross, before we ask questions of you and the Chairman and the General Counsel, we would like to hear briefly from you on the point you wish to discuss.

Mr. ROSS. Thank you, Mr. Chairman. As the Chairman indicated, I do support the portion of the bill which would give the Commission the right to approve stock acquisitions.

As he also indicated, I do dissent from the Commission's position as to antitrust immunity, one reason I do that is because I am not an expert in antitrust.

I feel that the Justice Department has a particular ability. They are experts in trying to preserve for our Nation competition which I very strongly believe in. I feel that they should have the primary role.

I am not sure exactly what the Justice Department has to say. If they take the same position that they took as far as the antitrust exemption for power companies is concerned, I would think that they would agree with what I am saying.

The CHAIRMAN. All of the members of the committee haven't yet read what the Justice Department suggested in their letter to us. It is in the record and we will analyze it. I think probably I know what they said, but I am not sure until I read it.

If they run true to form, I know exactly what they said.

Mr. ROSS. If they ran true to form they would say, as Mr. Turner said in previous testimony:

> Regulation and competition may both have to achieve efficiency in productivity.

He also said:

> 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. 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 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.

Mr. Chairman, as you probably know even better than I because you have been engaged in this game longer than I, regulation was originally conceived as a substitute for competition. It is our function in a regulatory body to see to it that we can try to bring to the consumers of this Nation the benefits that competition would have given the consumers had there been two or three competing public utilities.

It is a difficult job and as far as I am concerned I want all the tools that are available to me to help me insure that we get the same benefits for the consumers. And if there is an agency that specializes in competition, such as the Justice Department, I would rather have them working with me under their traditional standards, despite the fact that there may be the problem of dualism that the chairman has pointed out.

It seems to me in this particular case the legislation is in effect overruling the Supreme Court's decision in the *El Paso-Pacific Northwest Merger* case. For we are setting up a different standard and we are requiring Justice to adopt a different standard than heretofore they have used.

This bill in essence provides that a merger per se will not be judged by antitrust standards. In other words, the Pacific Northwest-El Paso merger by itself would have been all right.

I was not a member of the Commission that passed on the original approval of the Pacific Northwest-El Paso merger. I presume under this bill the same result would have happened. I suppose if the Supreme Court were to follow the same reasoning in the latest decision they would still overrule the Commission.

The CHAIRMAN. I think at this point we ought to put in the record the Supreme Court decision in the *El Paso* case, so we will have it.

Mr. ROSS. I think it would be very proper.

The CHAIRMAN. There are some differences of opinion on that.

Mr. WHITE. There is more than one Supreme Court decision.

The CHAIRMAN. The latest one.

Mr. SOLOMON. Excuse me. There are three Supreme Court opinions on this.

The CHAIRMAN. That makes it even more confusing. We will put all three in.[1]

Mr. ROSS. In conclusion, the basic reason I am concerned is that I foresee that in the future of the natural gas industry there is going to be more and more emphasis and more and more concern about the possibility of mergers.

The chairman has pointed out, and very properly so, that we have had a number of decisions where we have allowed competing pipelines to provide service to the communities to give competition in the hopes that this competition will aid us in regulation.

It is my feeling that the more we do this, the more chance there will be that somebody will be hurt and the more tendency there will be to advocate merger as a solution. I am proud of regulation. I think it has done a real good job.

On the other hand there is no question that we have had a tendency to promote the industry that we are regulating. There is a father-son type relationship in some respects, and though the industry may doubt it at times, we do not like to see it doing poorly.

If there are two companies, and one is doing poorly there is a tendency, if a merger were advocated, to go ahead. Maybe everything will look good and the rate of return will rise and we will have no problems. But then you will eliminate the very real benefit of competition which may have forced the utility companies to be more aggressive, to do a better job, which would benefit the consumer.

Because of this possibility, there may be more and more mergers. And having sat on a Commission where we have had a merger, I find that the standards in this act where it says no merger shall be approved unless the adverse effect shall be outweighed by other public interest considerations, it is a very very difficult job to sit down and list those public interest considerations that the Commission should take into account and how much weight you give each of them.

[1] The Supreme Court opinions will be found on pp. 138–173.

For that reason, because it is a difficult job, because I feel there will be some slackening of the urge for competition among pipelines and a tendency to promote mergers. Because they shouldn't be promoted that fast, I therefore oppose the provisions exempting the transactions from the Justice Department's traditional standards.

The CHAIRMAN. Commissioner Ross, do I understand that you oppose the language that determines what is the public interest standard, or are you opposed to any parts of the bill that seem to transfer more of this authority from the antitrust laws to the Power Commission?

Mr. ROSS. I oppose the language.

The CHAIRMAN. I think there are two things involved.

Mr. ROSS. I realize that.

The CHAIRMAN. If we are going to transfer authority to the Power Commission——

Mr. ROSS. I would prefer to keep the system as it presently is, giving Justice its right under the Clayton Act and the Sherman Antitrust Act, and to step in at such time as they see fit.

The CHAIRMAN. In other words, give them free authority?

Mr. ROSS. Yes.

The CHAIRMAN. There are two things involved.

Mr. ROSS. Yes.

The CHAIRMAN. Suppose you transfer this to the Federal Power Commission, then would there be some question as to the authority of the Federal Power Commission's determining this?

Mr. ROSS. That is right.

The CHAIRMAN. The question is moot as to the language if you are not going to transfer.

Mr. ROSS. That is right.

Senator CANNON. Will the chairman yield?

The CHAIRMAN. Yes.

Senator CANNON. What you are really objecting to is the provision that says that this should not constitute a violation of the antitrust law?

Mr. ROSS. Yes, sir.

Senator CANNON. As a broad determination.

Mr. ROSS. Yes, sir.

Senator CANNON. You do not want to say that in and of itself, once you approved it, the agreement does not consitute a violation of the antitrust laws?

Mr. ROSS. Yes, sir.

Senator CANNON. Thank you.

Mr. WHITE. I think in answer to Chairman Magnuson's question, I don't understand Commissioner Ross' position to be, that if the Congress is to transfer this authority to the FPC, that he finds this language objectionable. This language is considerably tighter than that that other agencies used.

Commissioner Ross can, of course, speak for himself on this point.

The CHAIRMAN. Senator Cannon pointed out that what Commissioner Ross is concerned about is the transfer at all. But if it is going to be transferred, I presume that he thinks this language is as strict as you could use.

Mr. ROSS. I agree it is a more strict standard than traditionally used. In rebuttal, I might add, depending on how this is interpreted,

depending on how the courts interpret it, it may not be a very valuable provision after all, and you are going through a lot of words and a lot of work and you will end up possibly with not much different results than we have right now.

Mr. WHITE. If I may, at least for the benefit of Senator Morton, who was not here during my statement, it may be possible to get the impression——

The CHAIRMAN. He understands things pretty well.

Mr. WHITE (continuing). That Commissioner Ross is the only one that is concerned about the possible antitrust implications. What we are in disagreement about is a fairly narrow issue as to who should have the responsibility in the first instance. We have written this bill as distinguished from S. 2279 in the 89th Congress, to allow the Justice Department to challenge any actions taken by a merged company, not dealing with a combination of jurisdictional pipeline facilities, even though the merger itself had the approval of the FPC, if those actions violate the antitrust laws.

Further, if an antitrust violation is found by the district courts, they may require divestiture. We are not proposing in S. 1687 to give the FPC power to freeze totally, irrevocably, and forever, a merger that it approves. It does, however, give a merged company some degree of certainty once the merger is finally approved by the FPC, after the Justice Department has had an opportunity to present its case and to appeal a decision by the FPC to the court of appeals and the Supreme Court, the merger itself would not be subject to collateral attack by the Justice Department in the district court. Further, still, any subsequent action by the merged entity could be subject to the antitrust laws.

The CHAIRMAN. Put it this way: the Justice Department would still have their day in court.

Mr. WHITE. At least 1 day.

Mr. ROSS. Mr. Chairman, they would have their day in court but would have to use a different and less stringent standard. Furthermore, a Commission decision is given a great deal of weight on appeal.

The court is apt to say, and traditionally does, that in matters of judgment, the regulatory agency is better informed than the court; and, therefore, there seems to be a tendency by the courts to uphold our decision if we say, for example, we overruled Justice's objection in a hearing before us.

I might add that this bill, the original bill, was suggested by the Federal Power Commission in 1962, and I think I am at liberty to disclose the fact that it was my original suggestion that we do so.

I did it because I am human like everybody else. I got mad because the Justice Department and Supreme Court thought they knew more about our business than we did. I said, we ought to propose a bill to amend this. The more I have been in regulation, the more I begin to—doubt the wisdom of my original suggestion. I feel that as events subsequently turned out, we were probably wrong.

For us to say, just as a matter of bureaucratic competition, we should be top dog and Justice shouldn't be is a poor excuse for advocating that we take Justice out of the picture.

The CHAIRMAN. This committee tries to keep out of the interdepartmental arguments if we can. What we are concerned with, of course, is how can we help the consumer with the best service and the lowest cost?

Competition isn't necessarily always the answer to that. A regulated, wisely regulated distribution of gas from the well to the consumer may in the long run be better for the consumer. And it may be the only practical way it can be done. This is what I don't like: because of all these interagency matters we delay getting the gas to the consumer in an expanding economy. Sometimes we can't afford to wait and we have to say to someone you make this final decision.

I suppose the proponents of this type of legislation would suggest that the Federal Power Commission is in a better position to make the decision than the Department of Justice. I think this is where we have to take a look at policy. And it is a difficult matter because different parts of the country have different problems.

Turning in around, we haven't had much experience with antitrust pipeline mergers, this is true. I would hope that the Department of Justice would give the same consideration to the Federal Power Commission's views that you suggest the courts would give to the Federal Power Comissioner's view.

Do you have any liaison, Mr. General Counsel, with them?

Mr. SOLOMON. Yes.

The CHAIRMAN. The committee has some questions.

The Commission now—and the General Counsel can answer some of these if he wishes—has power to attach terms and conditions to the issuance of certificates; is that not so?

Mr. WHITE. Yes, that is correct.

The CHAIRMAN. Will the Commission be able to attach terms and conditions to merger proposals?

Mr. WHITE. Yes. In fact we have already done so where we are taking about mergers that involve the acquisition of assets. The answer is clearly yes.

The CHAIRMAN. The standard in this bill is the finding, and this is what we have been talking about, that the adverse effect, if any, upon a proposed transaction, upon competition is insubstantial, or is clearly outweighed by other public interest considerations. Could you elaborate for the record on how you would envision this balancing standard, how it would differ from the present antitrust standards, or how you would envision it should be carried out?

Mr. WHITE. I would be delighted to give you a general response, Mr. Chairman.

The CHAIRMAN. I want it specifically.

Mr. WHITE. In our earlier discussion it is clear there can be a situation in which a proposed merger would have an adverse effect on competition. Yet I think commonsense and practical experience tell us that there may be other offsetting benefits that clearly outweigh this diminished competition or possibilities of diminished competition. Such benefits may involve the reliability or adequacy of service. They may have to do with financial strength, adequacy of supplies or safety.

The CHAIRMAN. This is what I was going to suggest. I don't know, but there could possible be cases where competition wasn't necessarily doing the job that might be done by a merger for the consumer.

Mr. WHITE. That is correct. The way the bill is written it will require a determination by the Commission that any adverse effect on competition is insubstantial or clearly outweighed by other public interest consideration. Commissioner Ross points out this hasn't

been tested yet. We don't know how it would work. The intention is to put quite a burden on the Commission if it is going to disregard the competitive impact. This language is intended to put this burden not only on the present five members but any future Power Commissioners.

The CHAIRMAN. I don't understand this language. If I were writing it I would say "the impact of the proposed language upon competition is not substantial." What is the difference between saying "not substantial" and the words "is insubstantial"?

Mr. WHITE. I don't think there is any difference. It so happens this particular language was lifted from the Bank Merger Act since Congress enacted that once, it occurred to us——

The CHAIRMAN. You would have uniformity, in other words, when courts start to interpret the law.

Mr. WHITE. Yes, sir.

The CHAIRMAN. What role will be played by an opinion on a merger application from Justice?

Mr. WHITE. It is difficult to say for sure, but it is inconceivable to me that any Commission would ignore or disregard the position of the Justice Department. If S. 1687 became law, it would be the Commission's determination to approve or not to approve the merger. But there is just no doubt that an adverse recommendation by the Justice Department against the merger would not be casually or lightly ignored or disregarded by any Commission. I am satisfied that it would be given considerable weight.

In addition, under the Natural Gas Act, if the Justice Department recommended against merger, and the Commission nevertheless approved the merger our decision is appealable. Commissioner Ross points out that we have a very good record in the courts and that there would be a presumption that we have made the right decision. Nevertheless there is the safeguard that any rejection of a Department of Justice position is reviewable by the courts of appeals and then the Supreme Court.

Senator MORTON. Is that true if this is enacted?

Mr. WHITE. Yes, sir.

The CHAIRMAN. As to your authority to make it, and as to the reasons why you made it.

Mr. WHITE. Yes, sir.

The CHAIRMAN. So many appeals, as the General Counsel will tell you and you know, are upon the authority to make the decision.

Mr. WHITE. If this is enacted into law it would clearly give us the authority.

The CHAIRMAN. The bill provides "the Commission shall notify the Attorney General and the Governors of the States in which natural gas companies participate in the transaction, operates, and does business."

There is no time period for response specified. Why is that?

Mr. WHITE. Part of it is a carry-through of the earlier question you asked. We would hate to prescribe a 30-, 45-, or 60-day limit and then feel we couldn't permit the Justice Department to come in later. We do our very best to encourage them to come in on a timely basis but I would be very reluctant to see us specify a period of time and then hold that the Justice Department could not participate because it had waited too long. Of course we are not suggesting that they are dilatory or any Governor would be.

The CHAIRMAN. I suppose you could use the words "reasonable time."

Mr. WHITE. That would be no problem.

The CHAIRMAN. You do, under the bill, put the responsibility upon the Power Commission to notify the Attorney General.

Mr. WHITE. Clearly.

The CHAIRMAN. And to notify the local people involved through the Governor of the respective States?

Mr. WHITE. Yes, sir.

The CHAIRMAN. Who would naturally turn it over to his public utility group.

Mr. WHITE. Yes, that is right. We have many cases in which there is participation by the State governments, either the Governor himself or the public service commission representing the State.

The CHAIRMAN. The antitrust picture, as all of us know, involves both public and private suits. What effect would this bill have on a private antitrust suit?

Mr. WHITE. As far as I know rarely does a private litigant raise a Clayton Act proceeding against a merger, partly because it is hard to show any damages by the merger itself. But a few cases have arisen, I am advised by Mr. Solomon. S. 1687 would have the same effect on private suits as on public suits.

The CHAIRMAN. In other words, the door is still open for private antitrust suits.

Mr. WHITE. Only pefore the Commission. They could make their case to us. In connection with the limited immunity that would be granted to the merger transaction itself, this would bar not only the Justice Department from suing in U.S. district court on the merger but also private litigants. Any possible problem is not really very significant because so rarely do private litigants challenge a merger under the Clayton Act. Such private suits may still be brought involving subsequent action taken by the merged company or concerning non-approved portions of a merger.

The CHAIRMAN. Many natural gas companies are diversified. This bill exempts from the antitrust laws only combinations of jurisdictional pipeline facilities, not all aspects of the merger. That is very clear in the bill.

Mr. WHITE. That is right.

The CHAIRMAN. Is this splitting of company functions realistic in the total view of the company's financial operations?

Mr. WHITE. I think so. We have a recurrent problem of separating the regulated and the nonregulated activities of companies. A large number of these natural gas pipelines have diversified. We must in accounting and in every other fashion insure that those activities are kept separate. We do not regulate matters involving a company's activity if it owns a hotel or engages in any other business. We do separate those assets, profits, and all other activities relating to jurisdictional activities.

This particular proposal concerns only the regulated part of a company and does not free it from any liability under the Antitrust Act involving non-regulated activities.

The CHAIRMAN. If you did that, would you be criticized for getting into something that is not your responsibility?

Mr. WHITE. Right.

Mr. SOLOMON. May I say a word? We recognize that two pipelines might merge and also that there might be included other nonregulated activities of these two pipelines. It is possible the merger of the nonregulated activities would themselves constitute a violation of the antitrust laws. Yet the economics might not allow separation of the two types of activities.

We therefore carefully worded our bill so that it would be possible for the Department of Justice in seeking relief from that part of the merger which had been declared illegal to seek divestiture of the entire structure.

The CHAIRMAN. In other words, putting diversified activities together might constitute a violation of the antitrust laws and the door remains wide open for the Department of Justice to zero in on that.

Mr. SOLOMON. That is right.

Mr. WHITE. And ultimately to have the courts require complete divestiture.

The CHAIRMAN. Of the whole business.

Mr. WHITE. Of the whole business.

The CHAIRMAN. In testimony on S. 683, S. 3136 of last year, another bill which the chairman introduced, a power pooling antitrust review proposal, the Federal Power Commission felt the power to reopen and reeaxamine contracts would be desirable. This is on power contracts. Do you feel that it might be needed here?

Mr. WHITE. There is quite a difference between contracts between existing and independent entities and mergers. Before a merger is consummated, I think as we have indicated in our earlier discussions the greatest care ought to be taken in considering it. But if it ever gets to the point where it is ultimately consummated, I don't believe that the Commission ought to go back and reexamine that, as distinguished from a contract which has prospective operations and will be subject to interpretations.

The CHAIRMAN. You don't suppose this will pose any such problem?

Mr. WHITE. No, more than any other merger. Once a merger is consummated then you keep your eye on the merged entity and gage its actions as to how it meets the standards of the Natural Gas Act.

The CHAIRMAN. S. 683 concerns about pooling agreements on electric energy between independent companies.

Mr. WHITE. Yes, sir. Those are going to be continuing transactions where there will undoubtedly be changes and new circumstances.

The CHAIRMAN. Where we will have to take a look at the future operations.

Mr. WHITE. That makes sense in that situation.

The CHAIRMAN. What effect does the bill have on State laws involving mergers? Are they exempt? How do you treat that?

Mr. WHITE. S. 1687 would have no impact on State laws. To the extent the State has authority today to approve mergers, S. 1687 would not take away that authority and would not say that approval by the FPC automatically precludes a State looking at it or reaching a different conclusion. I think that is one situation where the two applicants or the merger applicants would have to live with both State and Federal regulation if there is any State requirement.

The CHAIRMAN. You will note that all of the Governors of every State in my area, because we do have a problem there, regardless of

political party, have endorsed the general proposals of this bill, including all of the public utility commissions.

Mr. WHITE. Yes, sir.

The CHAIRMAN. In S. 1687—I go back again to the adverse effect of the proposed transaction where competition is insubstantial—it says "or is clearly outweighed by other public considerations." The word "is" is used in the antitrust exemption in S. 1934, the electric power reliability bill, the words "will be insubstantial or will be clearly operated by other public interest considerations" are used. What is the difference between using, Mr. General Counsel, "is" and "or will be?"

Mr. SOLOMON. I don't know. I think "or will be" is a better way of phrasing it. We are concerned with the future here. I believe the "will be" language is more consistent with our concerns.

Mr. ROSS. I would recommend "will be."

Mr. SOLOMON. I think so, too.

The CHAIRMAN. You see we are already amending the bill.

It also contains language, "The Commission may by rule or order" exempt certain mergers and, to quote again, "The Commission may define" certain terms, and "The Commission may transmit" certain evidence of apparent antitrust violations to Justice.

This is what Commissioner Ross was talking about, too. Certain existing provisions, while also using "may," in addition say the Commission "shall" do this or that.

Why don't you make it mandatory upon yourselves?

Mr. WHITE. There are some situations which come to mind where the changes in a corporate structure are in name only, or in form only rather than in substance. For example, one of the pipelines, quite diversified, went through a corporate restructure. I think that situations like that ought to be excluded. Mr. Solomon may have some additional thoughts on that, Mr. Chairman.

Mr. SOLOMON. As far as the last part of the question about transmitting information to the Department of Justice, this language is now in the existing Natural Gas Act in section 20 and we were simply expanding section 20 to cover this new proposed subsection.

Section 20 of the present act uses the term "may." When the Commission becomes aware of something that is a violation, I think it is its obligation and practice to advise the Department. There is no problem on this. We are simply copying the existing language.

As to the general problem of using the word "shall" or "may" in making regulations, I believe the use of the word "may" is preferable for two reasons. First, it avoids the argument that the section is inoperative should the commission fail to issue regulations, and secondly, it avoids a similar argument where the commission failed to issue specific regulations across the board. Therefore, in my view, the word "may" is preferable.

As to the transmitting of information to the Department, I think the chairman can speak for the Commission, but there is no serious problem.

The CHAIRMAN. There have been instances of Commissions, when the word "may" is used, where the practice has been that nothing happened. This might help Commissioner Ross' problem a little bit.

Mr. WHITE. I think so. I certainly perceive no personal objection to it. I think it is better to have a requirement.

The CHAIRMAN. I will ask this question again. I think it is very important. Would the Commission consider a natural gas merger when the merger would raise questions of apparent antitrust violations in the combination of the two companies' nongas activities? I think you have answered it, but it ought to be clear in the record.

Mr. WHITE. I think in that kind of a situation there would be the closest liaison between the Commission and the Justice Department. I think it is perfectly clear from the language we have proposed here that even if we were to approve a merger the Justice Department opposed, they could still appeal.

Beyond and above that, it seems to me it would be quite inappropriate for our Commission to move forward without having consulted with the Justice Department and brought to its attention whatever information we have about nonjurisdictional activities that appear to involve antitrust.

The CHAIRMAN. Of course, there are other situations.

Mr. WHITE. Yes.

The CHAIRMAN. You provide for antitrust exemptions—and this is purely a legal question—from the Clayton Act. Why is it there are not similar express exemptions from the Sherman Act.

Mr. SOLOMON. There are. I think the language may be confusing. The bill provides for exemption from all provisions of the antitrust laws defined in section 12 of the Clayton Act, and that definition covers the Sherman Act and other laws.

This particular section we refer to in the bill defines the antitrust laws as including the Sherman Act as well as the Clayton Act.

The CHAIRMAN. We want to clear that up. With the two acts, it is sometimes confusing.

Mr. SOLOMON. Specifically this would apply to mergers both under sections 1 and 2 of the Sherman Act and under section 7 of the Clayton Act.

The CHAIRMAN. In your 1966 annual report to us you listed 33 major pipeline companies. I think you have answered this, but it also ought to be made clear. This would not be the only group affected by the legislation would it?

Mr. WHITE. No, sir. This would apply to all jurisdictional pipeline companies, on the order of 120 companies.

The CHAIRMAN. And as you mentioned in your testimony, or new companies?

Mr. WHITE. Or new companies.

The CHAIRMAN. Senator Cannon?

Senator CANNON. Thank you, Mr. Chairman. Commissioner Ross made the statement that this legislation would in essence be an overruling of the Supreme Court decisions in the *El Paso* gas case. Do you agree with that, Mr. Chairman?

Mr. WHITE. The *El Paso* case is, I think, a little different. If S. 1687 were enacted into law, and a merger should come to the Commission, and the Commission had heard from the Justice Department and concluded that the merger ought to be approved, there would still be an opportunity for the decisions of the FPC to be reviewed.

Whether S. 1687 changes the standards for approval to the point where there would have been a difference in the results, I think really this depends upon all the facts of that case. I have not sat and heard that case argued and I am not familiar enough with the situation that would prevail.

So I would have to summarize my answer by saying that I am not sure, Senator Cannon.

Mr. Ross. Senator Cannon, if I could just explain my reason for making that statement, it is essentially this: Under this bill it seems to me that a merger almost has to be approved so long as the merged companies are not engaged in any act of restraining competition. One of the reasons that the Supreme Court acted as they did—they said in essence, in my opinion, the El Paso-Pacific Northwest were not actually engaged in any acts that would lessen competition substantially. But they, the merged company, poised at the doorstep of the southern California market, would have a beneficial impact on the relationships or specific relationship between it and El Paso and Transwestern.

In other words, the merged company was not literally doing anything but their very presence as a merged company would have a tendency to lessen the competitive impact that would benefit southern California.

This is why I say I think that under the circumstances this legislation would overrule the *El Paso* case. I can be corrected. General counsel is here.

Senator Cannon. Initially, in that case the merger was filed with the FPC.

Mr. Solomon. It is more complicated than that. Initially the merger was a stock acquisition.

The Chairman. I hate to interrupt. It is getting so complicated that we are not getting any gas in the Pacific Northwest. That is how complicated it is.

Senator Cannon. I didn't mean that was the first step. The first-step was the agreement to exchange the stock.

Mr. White. Right.

Senator Cannon. I am picking out a few of these things I want to talk about. The merger was filed with the FPC and in the FPC the examiner approved the merger and the Commission later approved the examiner's decision, and the District of Columbia Court of Appeals also approved, and the Supreme Court vacated the FPC order.

If this legislation had been in effect, would the Supreme Court have been able to vacate that order on the grounds they vacated the order in this case?

Mr. Solomon. No, not on the grounds they vacated it. They vacated it on the grounds we had no authority over stock acquisitions and that we should not act on the asset acquisition while the antitrust proceeding was pending.

If this law had been in effect, and we had approved the merger, they might have reversed us on the merits, but they would not have reversed us on the basis they did.

Senator Cannon. On the ground that they did?

Mr. Solomon. That is right.

Senator Cannon. This would clearly give you the authority in that case without their saying you didn't have the authority.

Mr. Solomon. Yes, sir.

Senator Cannon. The Utah district court found no violation of the Clayton act. That was in the antitrust proceeding which was separate, is that correct?

Mr. Solomon. That is correct.

Senator CANNON. Then the Supreme Court ordered divestiture in 1964. Did they in effect overrule the Utah court by saying that this is a violation?

Mr. SOLOMON. They certainly did.

Senator CANNON. And that they should divest. Would that decision, that order of divestiture, likely have been the same, or would it be different if this legislation were passed?

Mr. SOLOMON. If this legislation had been in effect, the Commission's approval of the merger would have immunized the transaction from being tested solely under the standards of the Clayton Act as the Supreme Court tested it.

Senator CANNON. That is because of the language in here that establishes the standard to be used.

Mr. SOLOMON. Exactly.

Senator CANNON. We go on to the lower court approving the divestiture and the Supreme Court not approving. That would not be involved?

Mr. SOLOMON. That follows from the others.

Senator CANNON. You are in effect saying that if the legislation here is approved, that that still does not mean that there is no violation of the antitrust law, but simply that this one act alone does not constitute a violation of the antitrust law. Is that in essence correct?

Mr. SOLOMON. If this legislation had been in effect, the standard, as Commissioner Ross quite properly said, for passing upon mergers, would not be whether it violates the antitrust law but the broader standard of public interest plus the impact on competition to which Commissioner Ross has referred.

Senator CANNON. Do you agree with that, Commissioner Ross?

Mr. ROSS. Yes, sir. It is a little double talk.

Senator CANNON. If this legislation is approved, what happens to the *El Paso Gas* case?

Mr. SOLOMON. This legislation, as we are proposing it, is prospective and does not affect the present El Paso situation. If S. 1687 is enacted, future mergers which come before the Commission would be analyzed under the standards of this bill.

This bill is drafted to take care of similar situations and not at all to affect the present posture of this particular litigation.

Senator CANNON. It has no ex post facto effect at all, is that correct?

Mr. SOLOMON. That is correct.

Mr. ROSS. I would like to comment, were this legislation in effect, then there would not have been the pressure to have competitive bids filed for the purchase of the Pacific Northwest, but there would have been more of a tendency to go the merger route rather than actually putting it up for bids as the court has presently under consideration.

Senator CANNON. So that we have all this pulled together in one place, now what is the status of the competitive bids on the Pacific Northwest matter?

Mr. SOLOMON. The Supreme Court, as you know, reversed the district court and sent the case back to the district court. The district court has held a prehearing conference. It has established a procedure, dates, and schedules to be followed by those people who do wish to put in bids for the Pacific Northwest division.

My recollection is that as of the present moment there are eight or nine separate groups who expressed an interest in coming forward

with bids. El Paso itself has a time within which—I don't know the date offhand—they are to come forward with their divestiture proposals.

Senator CANNON. Has the court placed a time limit on that proceeding?

Mr. SOLOMON. I think so. Mr. Harkaway of my staff says El Paso is to come with their plan on August 4 and competing groups are to submit their plans by August 24.

Senator CANNON. You have already said that this——

The CHAIRMAN. Could I ask where will this be filed?

Mr. SOLOMON. With the district court in Salt Lake City.

Senator CANNON. You have already said that in your judgment S. 1687 has no ex post facto effect. Let me ask you whether or not the Commission considered, or recommended, in connection with this matter, or recommends now, any ex post facto effect in connection with this legislation?

Mr. SOLOMON. As to what the Commission recommends now, of course I have to yield to the Chairman. This bill doesn't cover the El Paso situation. It is perfectly clear that the Commission has been under some inhibitions in this whole area since 1962 when the Supreme Court indicated in rather clear terms, that the Commission had been meddling in situations which it should keep away from.

Mr. WHITE. I can say, Senator Cannon, that this was a proposal that had been made by the Commission previously, and in reviewing our legislative program for submission to the Congress, beginning with the 90th Congress, we went over all the proposals.

This was reexamined and the basic concept of closing this gap so that the FPC has responsibility not only over the asset acquisition but stock acquisition was found appropriate by the unanimous Commission.

Commissioner Ross disagrees on the antitrust immunity aspect of it. But at no time was there any discussion about the retroactive features. We have simply not focused on that and our intention here in offering this proposal was to prevent problems of the type that had occurred in the Northwest.

The CHAIRMAN. I was going to ask the obvious question. Would the Commission have any objection to seeing if we can't unravel this situation by making it retroactive?

Mr. WHITE. Mr. Solomon spoke about the inhibition of the Commission to inject itself into a situation, especially when the Supreme Court has suggested that we not do so.

The CHAIRMAN. The matter is now before the court.

Mr. WHITE. That is correct. As to what would be the view of the Commission on such a proposal, honestly do not know.

The CHAIRMAN. The point I make is, you have problems involved, practical problems of gas distribution, and giving gas to the public, and it seems that in some cases we get so tied up with all of these things that the consumer in the long run is the one who suffers.

Mr. WHITE. The Commission is not unaware of the problems in the Northwest.

The CHAIRMAN. We will go into them later.

Senator Morton?

Senator MORTON. Is the amendment to the antitrust laws that you referred to in your statement the so-called Celler amendment?

Mr. WHITE. Yes. It made the Clayton act applicable to assets acquisitions as well as to stock acquisitions.

Senator MORTON. One purpose of this bill is to take that basic philosophy and the same reasons that brought the Congress to pass the Celler amendment and apply it in this area.

Mr. WHITE. That is the principal purpose of that legislation, Senator.

Senator MORTON. Presently you have it for stock acquisitions?

Mr. WHITE. No; the other way around.

Senator MORTON. You have it for asset acquisitions but not stock?

Mr. WHITE. Yes, sir.

Senator MORTON. This is the reverse of what we faced in 1950 in the Congress?

Mr. WHITE. Yes, sir; that is correct.

Senator MORTON. Thank you.

The CHAIRMAN. We thank you very much. I want to say, because this is a complex matter, the record will be kept open for any additions the Commission may wish to make.

Mr. WHITE. Thank you very much.

As your statement pointed out, the differences we have with Commissioner Ross on this one point I hope will not in any sense deter the committee from going forward with what we think is an important consideration.

Although my statement spent a considerable amount of time discussing the El Paso matter, as an example of a situation which S. 1687 is designed to prevent, there are two mergers which have happened in the last year or two which realistically and by any reasonable standard should have been before our Commission. However, as they involved stock acquisitions rather than asset acquisitions, we had absolutely no review of this proposal.

The CHAIRMAN. What would this bill do to the present authority of the SEC?

Mr. WHITE. Nothing whatsoever.

The CHAIRMAN. Their authority would remain as it is?

Mr. WHITE. Yes, sir.

The CHAIRMAN. Mr. Kinsey Robinson, who is chairman of the board of the Washington Water Power Co., is here. Why don't Bill Woods and Mr. Kreager, all three of you come up here, because you are dealing with the same subject. Also Mr. Wickberg, who is president of the Idaho Public Utilities Commission, and representing the National Association of Railroad and Utilities Commissioners.

Mr. Robinson, as I pointed out, is chairman of the board of Washington Water Power. Mr. Woods is chairman of the board of the Washington Natural Gas Co., a distribution company. Mr. Dewayne Kreager, is consultant to the industry.

Kinsey, we will be glad to hear from you first.

STATEMENT OF KINSEY M. ROBINSON, CHAIRMAN OF THE BOARD, WASHINGTON WATER POWER CO., SPOKANE, WASH.

Mr. ROBINSON. I will hand in my formal presentation, and just brief it.

The CHAIRMAN. We will put that in the record in full.

(Mr. Robinson's prepared statement follows:)

Statement of Kinsey M. Robinson

Mr. Chairman, may it please the Committee.

My name is Kinsey M. Robinson of Spokane, and I am Chairman of the Board of Directors of The Washington Water Power Company of Spokane, Washington. I served as President of the Company from 1938 to 1960 and was Chief Executive Officer from 1960 until May of this year when I relinquished my Chief Executive responsibilities. I have been in the utility business all of my adult life, having started as a lineman in 1913.

The Washington Water Power Company is both a natural gas distribution company and an electric company. We serve approximately 40,000 residential, commercial, and industrial gas users in Eastern Washington and Northern Idaho, and serve approximately 155,000 electric customers generally in the same area. The Washington Water Power Company is regulated by the regulatory bodies of both the states of Washington and Idaho. El Paso Natural Gas Co. is the sole supplier of our natural gas supplies, although the Pacific Gas Transmission Company's pipeline from Canada to Northern California traverses our service area.

I also appear here as a proponent of S. 1687 and support the testimony of those witnesses who have preceded me. I likewise hope and recommend strongly that the provisions of this proposed legislation will be expanded to cover the situation that stimulated the Federal Power Commission's request for this legislation and thereby remove the uncertainty that hangs over the future economic development of the Pacific Northwest.

In my opinion, the growth of the natural gas industry in the Pacific Northwest is due to a large degree to the presence of El Paso National Gas Company as the area's pipeline supplier. Its safe, dependable service, and rate policies have permitted nearly all the distributors to reduce the price of gas (our Company has just made its third such reduction). Its ample reserves—more than are available from any pipeline in the country—and its policy of building lateral lines out of its capital funds has brought gas to communities that otherwise would have gone without, and would, therefore, have been passed by in the competition to attract industry.

Before coming into the Pacific Northwest, El Paso had a long and honored history of public service in the Southwest. Organized in 1928, its first deliveries were through a 200 mile long pipeline from the Permian Basin of West Texas to the City of El Paso. During the 1930's and early 1940, El Paso constructed extensions of its system to the developing markets of New Mexico and thence westward to the Douglas, Bisbee, Tucson and Phoenix areas of Arizona.

By 1945, the El Paso system consisted of approximately 2,000 miles of medium and small diameter main and lateral transmission lines with a capacity of approximately 150 million cubic feet of gas per day.

Shortly after the end of World War II, El Paso began deliveries to the rapidly expanding Southern California market. With contracts to sell gas to the Southern California gas distributors, El Paso sought FPC certification to build a large diameter pipeline costing $70 million dollars from the Panhandle of Texas and the Permian Basin of West Texas, to California. In 1946 the project was certificated and thus began El Paso's ever enlarging role as the principal supplier of natural gas to the State of California.

At this time, however, El Paso's reserves were, primarily, residue or "flare" gas; that is gas produced in connection with oil production. State conservation laws, just coming on the books of producing states at that time, severely regulated the amount of oil production allowed. Since most oil production occurred in the summer months when the demand for natural gas is low, El Paso needed a quantity of so-called dry gas, or gas-well gas, that could be used in the winter when the availability of residue gas was restricted.

To acquire dry gas reserves, El Paso pioneered the exploration of the San Juan Basin, later to prove a prolific source. Soon El Paso was taking gas from the San Juan Basin to California and, for the first time, gained freedom from undue reliance upon the uncertainties of residue gas supply. But this was only temporary relief, as greater reserves had to be acquired to meet the demands of the future.

El Paso began to look northward to Canada, then just being recognized as a source of enormous reserves of natural gas. The Pacific Northwest Pipeline Co. was, of course, an obvious link to Canadian gas. Moreover, Pacific itself had large dry gas reserves in the Rocky Mountains and San Juan Basin.

Thus motivated, El Paso acquired the outstanding common stock of Pacific Northwest and, recognizing the advantages of the acquisition were all to be found in operating an integrated system, sought and received the unamimous approval of the Federal Power Commission to merge Pacific into El Paso.

The merger was of immediate benefit to the Pacific Northwest area. Where Pacific was not financially able to aid in sharing in advertising and sales promotion activities, El Paso could and did. Moreover, El Paso undertook a national advertising program calling the country's attention to what the Pacific Northwest states had to offer industry and tourists. It began at once to help the distributors to help their customers, the people of the area.

This help, which, as I will indicate, redounded to the benefit of consumers, took many forms. But before describing some of the helpful things El Paso did, I would like to lay to rest any idea that what El Paso did for the area was what any other pipeline in good financial condition would have done. This is emphatically not the case from my experience with other pipelines around the country.

For example, it is common for pipeline companies to make direct sales to large industrial consumers located near their line, even when such plants are situated within the certificated area of a distribution company. Pacific, for example, reserved to itself several such customers, including a cement plant at Grotto and a sugar mill Moses Lake, the Potlatch Forest Products plant in Lewiston, Bunker Hill Co. at Kellogg, Idaho, to name a few. We know it is essential if a distribution company is to maintain the lowest possible rates to the general public that it have the right to market all the gas within its certificated area. This is for reasons found in the pricing policies under which natural gas is sold by pipelines, wherein a demand charge in addition to a commodity charge for the actual volume of gas delivered is exacted. Absent the opportunity to sell to large customers, the price of gas the distributor must charge homeowners is higher.

From the standpoint of the direct customer there are advantages too. Direct sales by the pipeline to such consumers are not subject to the rate regulation of the FPC or of the state commissions in Idaho, Oregon and Washington.

Since El Paso has come to the Pacific Northwest, it has *voluntarily* turned over to distribution companies the following customers inherited from Pacific:

Customer	Location	Annual revenue	Year
U. & I. Sugar Co	Moses Lake, Wash	$480,890	1960
Menan Starch Co	do	5,485	1960
Aluminum Co. of America	Wenatchee, Wash	129,990	1960
Ideal Cement Co	Grotto, Wash	352,875	1960
Potlatch Forests, Inc	Lewiston, Idaho	2,336,720	1966
Food Machinery Corp	Pocatello, Idaho	234,125	1960
J. R. Simplot Co	do	134,281	1960
Idaho Portland Cement Co	Inkom, Idaho	236,689	1960

Giving up such business in the interest of helping distributors is not normal practice in the industry, nor is El Paso's continuing willingness to assist distributors to expand service into outlaying or distant areas still without natural gas service. Indeed, some pipeline companies have a policy of no lateral lines, which means if you want the gas you have to build to their line to get it. But not El Paso. Since they have been in business in the Northwest, substantially every request by a distribution company for cooperation in building facilities to reach new unserved areas that has been even remotely feasible economically, has been granted.

If the entire amount of new pipeline El Paso has added to its Northwest Division since the merger were laid end to end, it would measure 559 miles, equivalent to the distance from Seattle to Salt Lake City. Here are but a few examples:

In 1965, the largest Oregon distributor desired to bring natural gas out to the ocean beach communities of that state. En route, this distributor had the opportunity to make sizeable gas sales to the Shell Chemical Company, where natural gas is used as a feed stock for chemical fertilizers, and to a large pulp and paper plant of the Crown-Zellerbach Corporation. To assist this distributor, El Paso laid over four-and-one-half miles of 16 inch and 12¾ inch lateral line near Kalama, Washington to Wauna, Oregon. This project, while short in distance, required a difficult submerged river crossing and represented an investment by El Paso of approximately $1,300,000.

This was not El Paso's first major extension in Oregon. Earlier, in 1960, over 120 miles of various sized pipeline was laid to bring additional supply to the Portland-Vancouver area, and to make gas service available to Eugene. El Paso's investment in these projects ran well over ten-and-one-half million dollars. And in that same year, El Paso laid 17 miles of lateral line to bring natural gas service to Klamath Falls and Bend, Oregon. Later, in 1962, El Paso made service possible in Grants Pass, Medford, Ashland and other southern Oregon communities through a 126 mile line that cost approximately $8,000,000.

Each state has seen the effects of El Paso's willingness to develop its area in cooperation with local distributors in a manner that was beyond Pacific's capabilities. For example, in Nevada, El Paso expended $5 million on a 98 mile 16 inch line to bring service to Reno, in cooperation with Southwest Gas Corporation.

The Washington communities of Shelton, Aberdeen, Hoquiam and Quincy would not have received natural gas service when they did, if indeed ever, without El Paso's cooperation in the form of sizeable investments.

This is not a comprehensive list, just a few examples. All told, El Paso has spent more than $117 million for improvements since it acquired the system, and 127 communities have received gas for the first time in that same period.

I cannot pass on, however, without reporting on one experience of my company which, in my opinion, typifies the genuine concern El Paso has demonstrated for the growth and future of our area by action and the commitment of its resources.

For a distributor to be able to purchase gas at the lowest possible cost from the pipeline, it is necessary to minimize, if possible, the severity of the demand placed upon the pipeline's facilities on the coldest day of the year. Said differently, the rate is influenced in part by how much gas is taken on the day of maximum need. To cut down the amount taken from the pipeline, it is necessary to have a secondary source available. Commonly this supplementary supply is provided from gas in storage, gas pumped into a subsurface geologic structure during the summer, when demand is low, and withdrawn in the winter, when the need is greatest.

In a partnership arrangement, El Paso, The Washington Water Power Company, and Washington Natural Gas Co. are jointly developing an underground gas storage project in Western Washington. Recognizing such a project posed considerable economic risks, the two distributing companies were reluctant to ncur the investment alone. We therefore sought El Paso's participation and it was enthusiastically given. The project is still under development and testing and today represents a joint investment of nearly $6 million. To my knowledge, El Paso is the first pipeline company in America to cooperate in a gas storage venture such as ours with its distributor companies.

The benefit of El Paso's participation in this undertaking will be enjoyed by the area's gas users in several ways; for one, in the event of a service outage a sizeable supply of natural gas will now be available in the Seattle-Tacoma area for emergency service. For another, this project will contribute significantly to the rate stability enjoyed in the area since El Paso succeeded to Pacific; and lastly, will give us a most economic peak shaving facility.

The reliability of service and safety of operations is another way pipeline companies are rated. Here again, the Pacific Northwest is especially fortunate. For without exception, no other part of the country has enjoyed safer and more dependable natural gas service from a supplier. Here is the record:

In the last seven plus years, since El Paso has been our supplier, there have been but three service interruptions, and they have all been minor.

The first happened in September of 1966, when a 4-inch longitudinal crack in the 26-inch line bringing gas from Canada was discovered south of Sumas, Washington. While the line was being repaired, some interruptible customers, that is, users who pay less for their gas because it is subject to curtailment were put off the line. But not one firm service customer was affected.

The second service interruption occurred two months later when gas was interrupted to Colton, Washington. In all, a total of eight domestic customers were affected. Service was restored within a few hours. The outage was caused by someone who had climbed the high fence around El Paso's measuring station and closed the valve.

The third affected the towns of Warden and Moses Lake, Washington, in January of this year. Approximately 1,100 customers were without service for ten hours. A farmer, digging a trench with excavating equipment, accidentally punctured the 8⅝-inch El Paso owned lateral serving those communities.

Thus, during eight years of operations in which two trillion cubic feet of natural gas have been delivered through its system, those three minor incidents are the only incidents on an otherwise perfect record of performance.

Reviewing this record, I cannot help but reflect how difficult it is to forego such performance in exchange for the bare hope that what comes after will be at least adequate.

On the question of pipeline safety, a subject of concern to this Committee, El Paso's record in the Northwest is perfect. Not one incident involving personal injury can be charged to the operation or performance of the pipeline.

There are still other ways of determining the value of a pipeline to an area. One of first importance is the amount and kind of natural gas reserves behind

the pipeline's commitment of service. Thus, if divestiture is imposed, the Pacific Northwest will be back where we were before the merger, no matter what the Court's decree may provide. El Paso is the most reserve-rich pipeline in America. I am advised they have over 40 trillion cubic feet of natural gas available, of which 8.1 trillion is attributable to company-owned leaseholds and 32.3 trillion controlled under contract.

But the reserve inventory is only part of the story, and perhaps the least important. The ability of a pipeline to add to its reserves is essential. It is possible to obtain an FPC certificate on a showing of adequate reserves to meet the present market for fourteen or fifteen years. But if a pipeline has not the skill or the will to add to those reserves, there exists no power in the FPC or the courts to direct their efforts toward finding more gas, or compelling another pipeline to turn over some to it. And surely the Pacific Northwest must look into the future for longer than fifteen years.

El Paso, however, has shown a remarkable ability to increase its reserves, and has proven itself to be an industry leader in this endeavor. As an example of its farsightedness, El Paso now has a contract with the Atomic Energy Commission and the Department of the Interior to participate in a project designed for the peaceful use of a nuclear explosion which, it is hoped, will be the key to unlocking vast reserves of natural gas below the surface in "tight" formations. Designated "Project Gasbuggy", the experiment is designed to determine the feasibility of using a nuclear explosion to stimulate production from gas bearing strata of low permeability. The project involves a detonation of a 20-kiloton nuclear device at a depth of 4,200 feet in the San Juan Basin, 55 miles east of Farmington, N. Mex. The expectation is that gas production will be materially increased by use of this method, and if that expectation is fulfilled, El Paso's supply of deliverable reserves of dry gas should be significantly enhanced in the next few years.

In the meantime, El Paso has entered into a contract with Westcoast Transmission Company, Ltd. of British Columbia under which the Northwest will receive 200 million cubic feet of gas per day in addition to the 300 million feet now being delivered across the Canadian Border at Sumas, Washington. The application covering this contract is before the FPC for its approval, and when given will further strengthen the ability of the Northwest to meet its increasing gas requirements.

After reserves, the question of rates is worth examining. What is El Paso's record here? It is, again, a record that would be hard to improve upon. And the fact that the rates have actually gone down is no accident. Inefficiency of operations, unwise extensions of plant, imprudent gas supply contracts are only a few of the ways a pipeline may find itself in a posture where it must raise its rates, and once having proved the need there is nothing the FPC can do but concur.

From the moment El Paso began serving the Northwest, there has been rate stability. In fact, this year El Paso made certain tariff changes that resulted in a reduction in the cost of gas to its customers, who, in turn, passed it on in nearly every case to the ultimate consumers. The annual effect of this reduction for the entire Northwest, based upon the estimated volumes to be sold during 1967, amounts to approximately $3,600,000.

But again this is only part of the story. Impressive as El Paso's record has been in decreasing their charges for gas from the levels in effect when they took over from Pacific (an interlude during which the price of most commodities was rising) it is not the whole story.

From the beginning, El Paso made tariff changes to assist distributors, and thus helped the distributors avoid the necessity of raising their rates to the public.

For example, in 1963 a distributor found itself unable to realize a sufficient margin on large volume sales to the plants of the Weyerhaeuser and Longview Fibre Companies on the Columbia River in Washington state for competitive reasons. El Paso voluntarily adjusted its tariff and by so doing reduced its revenues from that distributor customer by about $30,000 a year. Two years later it repeated the process, this time the revenue reduction amounted to $27,000 a year.

But even before this, El Paso had reduced this same distributor's contract demands in eight separate communities, demands negotiated by the distributor with Pacific but which later proved onerous when the distributor's sales fell below expectations, and by so doing "saved" the distributor $815,000 annually. This is not to be thought of simply as a windfall to the stockholders of the distribution company; rather, the need for this revenue, but for El Paso's action, could easily have precipitated a rate increase by the distributor.

In Idaho, the same situation developed, but in reverse fashion. There the tariff available to the distributor required that when a certain sales volume was reached

in Boise a different rate became applicable, the effect of which would have been to nearly double the cost of gas to the distributor. To avoid this, El Paso cooperated by changing certain conditions of its tariff that permitted the distributor to remain eligible under the old rate. Four years later El Paso did it again, to the ultimate benefit of gas users throughout Idaho.

Because of the substantial contribution of El Paso to the economic development of the area, I regret that S. 1687 was not the law a decade ago. If it had been the law, the future of the natural gas industry, which as we have seen is vital to the economy of the Northwest, would not be in doubt today.

We in the Northwest need a well-managed, far-sighted, experienced, strong and dependable pipeline supplier. We have one today in El Paso Natural Gas Company. I hope this Committee will amend S. 1687 to allow the Federal Power Commission to once again find whether the public interest of the entire nation wouldn't better be served, *California included*, by allowing El Paso to remain as our supplier. *I do not seek this for El Paso's benefit*, but for the sake of the area. Indeed, if El Paso sought to divest itself of its Northwest Division for reasons of its own, I would unhesitatingly commit the resources of my company to resist such an effort.

The Federal Power Commission in the interests of all the people has advanced the passage by the Congress of S. 1687. I hope the interests of my area are not forgotten when the wisdom of this legislation is recognized.

The Pacific Northwest faces enormous growth. In the State of Washington alone last year non-agricultural working force was increased by 93,000, as many as were added in the previous five-year period 1960–1965. In terms of rate of advance, this represents a tripling of the national experience. And every economic indicator I know of points to explosive growth, much of it caused by the phenomenal success of the region's aerospace industry. But cental to that growth is the need for energy, of this there can be no question. We are told that our great river systems have all but been developed, or should not be developed, and that the low cost electricity from falling water that contributed so much to the economic development of our area should be augmented by thermal plants in the near future. It is, therefore, essential that we preserve an abundant, dependable and reasonably priced supply of natural gas coming into our region. For us to lose what we have at this time is to introduce doubt where we now have confidence, to replace performance, with uncertainty and speculation. This is a heavy and needless price for an area to pay that is coming into its own and needs experience, ability, and energy to do the job as El Paso has done in the past.

I trust this can be avoided. Thank you.

Mr. ROBINSON. I am Kinsey M. Robinson, of Spokane, Wash. I am chairman of the Board of Washington Water Power Co. I was president from 1938 to 1960, chairman and chief executive officer until May of this year when I relinquished my chief executive responsibilities to our president.

I have been in the utility business all my life, having started as a lineman in 1913. I was president of Idaho Power Co. from 1934 to 1938.

The Washington Water Power Co. is a natural gas distributing company and an electric utility. We serve about 40,000 residential, commercial, and industrial gas customers in eastern Washington and northern Idaho. We serve about 155,000 electric customers in the same service area.

We are regulated by the Washington and Idaho commissions and we have a plant account of $330 million.

El Paso is our sole supplier of pipeline gas. Pacific Gas Transmission line crosses our service area and wheels some gas for El Paso from Alberta.

I appear as a proponent of S. 1687 and support the testimony of those who will testify with me. I hope this legislation will be expanded to cover a situation which stimulated the FPC to request the legislation and thereby remove the uncertainty that hangs over the future economic development of the Pacific Northwest.

Growth of gas in the Northwest is largely due to El Paso. Rate reductions and large reserves have been very helpful. They made three rate reductions, one in 1959, one in 1964, and one in 1967.

El Paso's taking over Pacific Northwest has been helpful to all of the distributors. Advertising both national and local was helpful and I am not sure another company would have done it.

Pacific Northwest serves a number of customers direct. El Paso did not believe in this, knowing that the local distributor needed these large industrial loads to help maintain low rates to all customers. El Paso built many lateral lines where distributors could not do it.

Gas storage: We have a particular interest in this, Washington Natural Gas, El Paso and Washington Water Power have an investment of about $5 million in the gas storage project on the west side of Washington. We are going to have to spend quite a lot more. We would like to know who our partner is. We know that El Paso is one, a good one. I am not sure somebody else would be.

We had only three interruptions—and they were all minor—in the 8 years that El Paso has been operating there. They were all minor and at least two of them certainly could not be charged to El Paso. People will dig up a pipeline and El Paso can't protect themselves.

Canadian gas: We are asking for—El Paso has an application to bring 200 million additional therms from British Columbia, that is now before FPC for approval.

The CHAIRMAN. Put in the record what a therm is.

Mr. ROBINSON. A therm is a hundred thousand B.t.u.

The CHAIRMAN. Go further. What is a hundred thousand B.t.u.?

Mr. ROBINSON. British thermal units, Mr. Chairman.

The CHAIRMAN. How much gas is that, so a layman will understand it?

Mr. ROBINSON. I don't know that I can tell you that.

Bill?

Mr. WOODS. A B.t.u. is the amount of heat required to raise the temperature of 1 pound of water 1° F.

Mr. ROBINSON. Bill has been in gas all his life, and I have been in electric.

We hope that that is true because our load is growing very rapidly in the Northwest. We rather think it is one of the fastest growing areas in the United States. We must protect our customers.

The CHAIRMAN. Right there, when I made the statement that this is getting so complicated we aren't getting gas, what I meant is we are not getting sufficient gas. And we are surely not, if this continues the way it is going, all these complications, we are not going to have anywhere near the gas that is needed for us to take care of a minimum of our growing needs. Is that correct?

Mr. ROBINSON. I think it is certainly to the credit of El Paso that while they have been under this order of divestiture, that they have actually really gone out and worked very hard to find additional gas for out area. I think with the problems that they have had, an enthusiastic company might have a very difficult time.

The CHAIRMAN. This committee is not passing on the merits or demerits of divestiture or all the legal questions. What we are concerned with, all of us, where there is gas available, we need this gas for our growing needs. We would like to have it cleared up some way, whether it be retroactive or in the future if the courts move, so we can get the available supply.

Mr. ROBINSON. One of the surest ways would be to amend this bill and make it retroactive.

The CHAIRMAN. I don't know. The committee will pass on that.

Mr. ROBINSON. As I said, S. 1687 should have been law a decade ago. I hope it will be amended to make it that way.

We certainly have been very well served by El Paso, and I am sure that this is just as advantageous to the State of California as it is to the Northwest.

I know one thing, if El Paso were trying to divest its Northwest division, our company would resist with all possible effort. Northwest is on the move, all hyroplants are built, under construction or planned, and we must protect our supply of low-cost natural gas for the future. I am sure El Paso can do that job.

I have experienced another problem if the FPC order is reversed by the Supreme Court. The Pacific Northwest Power Co., of which I am chairman of the board, was awarded a license by the Federal Power Commission, confirmed by the Circuit Court of Appeals in the District of Columbia, and then upset by the Supreme Court. We are now back to the FPC for more hearings, possibly court reviews. We have been in this 12 years and have $5 million invested. We are still at a stalemate. I hope some similar law can be passed in connection with that matter.

Thank you, Mr. Chairman, for this opportunity to appear.

The CHAIRMAN. To bear out what you said, Mr. Robinson, the real concern of every responsible official in Washington, Wyoming, Nevada, Idaho, and all these places, every Governor speaking for his public utility commission, the Attorney General and others have expressed great concern about the situation we are in. These documents are a part of the record. But these letters are really testimony of their deep concern about this matter because of all these complications and everything that is going on that we have heard about today.

I have the opinion, from your statement, Mr. Robinson, that you felt that the Commission itself—you have dealt with the Commission over many, many years—was somewhat more moved than even they were in 1962 to have some legislation of this type because of this situation.

Mr. ROBINSON. I am sure that is true.

The CHAIRMAN. If we would quiz them on that, I think they would agree.

Do you have any questions, Senator Cannon?

Senator CANNON. One or two.

You are in effect saying that you favor this legislation. Because El Paso has been a good supplier you would like to see an ex post facto feature written in?

Mr. ROBINSON. Yes, sir.

Senator CANNON. Have you examined the applicants that are on file with the Federal court in connection with this divestiture to determine whether or not these people are equally able to——

Mr. ROBINSON. No. We are waiting until they make their presentations, at which time we certainly will review them.

Senator CANNON. Your main concern is that somebody provide you the service that you require or are entitled to.

Mr. ROBINSON. That is right, sir.

Senator CANNON. If one of these companies—and one of them will be successful if the court's action is followed out—takes over and they provide you comparable service, that will satisfy your needs?

Mr. ROBINSON. We expect that they would have to do it to be approved.

Senator CANNON. The court would require that as a part of the divestiture proceeding, would they not?

Mr. ROBINSON. That is right.

Senator CANNON. Does it require a cooperative effort between El Paso and the person to whom they divest?

Mr. ROBINSON. I do not know that answer.

Senator CANNON. Thank you.

The CHAIRMAN. Senator Morton?

Senator MORTON. I have no questions at this time.

The CHAIRMAN. Mr. Woods?

Again, for the record, William P. Woods is chairman of the board of the Washington Natural Gas Co., and a distribution company, is that right?

STATEMENT OF WILLIAM P. WOODS, CHAIRMAN OF THE BOARD AND PRESIDENT, WASHINGTON NATURAL GAS CO., SEATTLE, WASH.

Mr. WOODS. That is correct. If I may, I would like to read my statement since it is short.

The CHAIRMAN. All right.

Mr. WOODS. Mr. Chairman, may it please the committee, my name is William P. Woods. I am chairman of the board of directors and president of Washington Natural Gas Co., a natural gas distribution company serving approximately 143,000 residential, commercial, and industrial customers in 54 cities and towns in the western part of the State of Washington, including the cities of Seattle, Tacoma, Everett, Olympia, and Renton. Washington Natural Gas Co. is not regulated by the Federal Power Commission, but it is subject to the comprehensive regulatory jurisdiction of the State of Washington's Utilities and Transportation Commission.

The CHAIRMAN. Right there, for the record, the utilities commission also has expressed a deep concern because they are directly involved in this, even more than others in the government of the State. They know more about it.

Mr. WOODS. That is correct.

I am here as a proponent of S. 1687. But before proceeding, I would like to acknowledge a limiting influence that compels me to keep my testimony brief. Within a few days, my company plans to register securities with the SEC preparatory to a public offering of these securities to the investing public. The question of the quality and adequacy of the supply of natural gas available to my company, which is the subject of my testimony, is quite naturally of interest to the investment community. To minimize the hazard that my testimony might be misinterpreted, with the result that Washington Natural Gas Co. would fail to accomplish its program of financing on the most favorable possible terms, I feel that I should limit my comments.

I mention this only to prevent any inference that the size of my statement is in any way proportional to my commitment to this legislation. Thus at the outset I want to make it perfectly clear that I support S. 1687 for those reasons advanced by Mr. White of the Federal Power Commission, and that I also favor the addition of language to S. 1687 that would allow the present supplier of natural gas to the Pacific Northwest, El Paso Natural Gas Co., to remain as the region's sole supplier.

At the same time, I do not want my testimony to be construed as indicating that Washington Natural Gas has any doubts that the decision of the district court in the divestiture proceedings, when it is made, will be anything but a fair one; or that the Federal Power Commission in certificating whatever entity may emerge from those proceedings will tolerate anything less than the full satisfaction of the public's convenience and necessity in the Pacific Northwest.

Indeed, we expect to be an active party in both proceedings to assist the court and the Commission, while at the same time protecting the interests of our customers and investors. Nor do I suggest that unless the Congress acts in the manner I urge, the Pacific Northwest will suffer any impairment in the quantity of its natural gas supply. It won't.

What I do contend is this: Our region is served today by a pipeline company that has demonstrated by performance that it has the reserves, the financing, the competence, and the will to render the kind of safe, dependable, and abundant supply we feel we are entitled to.

If we can maintain this situation we are better off, not only for today, but for tomorrow, when the need for energy to satisfy the growth ahead will become crucial.

It is not likely that the entity that emerges from the divestiture proceedings would be possessed of any attribute that El Paso does not now have in greater measure, if only for the reason that it is from El Paso's assets that those hopeful of succeeding to El Paso must look to find the bulk, if not all, of their resources. Unless, therefore, there exists some overbalancing consideration not apparent to me, it seems more obvious than ever that the Federal Power Commission properly found that the public interest would best be served by permitting the merger of Pacific into El Paso. With the advantage of hindsight, and aware of what has happened in the Northwest since that decision was made, I can only salute its wisdom and bear witness that what served the public interest in 1960 serves it even better in 1967.

Thus the maintenance of El Paso Natural Gas Co. could affect for the better the quality of the supply of natural gas to the Pacific Northwest. Again, this does not imply shortages; it means, rather, that there is a great deal more to a pipeline than just gas reserves, pipe in the ground, compressor stations, and valves. There is the ability to add reserves on terms and conditions that do not increase its cost to the ultimate consumer. There is the capacity to shift supply from various sources, depending upon market or operating conditions. There is the managerial skill to attract and keep personnel that are dedicated to safe, dependable service. There is the sensitivity to the needs of the ultimate consumer, and what he should pay for his gas. There is, in short, a commitment to the public service. El Paso has all of these attributes.

In El Paso we have a record of performance that could hardly be improved upon. If divestiture is compelled, we trade this record for a hope. We are required to face a period of waiting and testing to see if what replaces El Paso measures up. If it does, then we will have not lost ground. But if it doesen't, and this is a needless risk I feel we should be spared, then the Pacific Northwest will be without an adjunct to its economy that cannot be recovered or duplicated.

Thank you.

The CHAIRMAN. Thank you, Mr. Woods. That is a fine statement. I feel somewhat like you do, personally, about this matter and the implication of your statement is that regardless of what is done, somebody ought to be able to make a decision and get it done so we know where we are going. We need to know as you are better aware than others, what source of supply you are going to have, and how much and how reliable it is going to be.

Mr. WOODS. That is right.

The CHAIRMAN. We have been at least 7 years considering with this, at least. In the meantime we are growing in population at an astounding rate. This is what we are looking at. That is what all of these Governors and attorneys general and public utility commissioners are worried about and concerned about.

If they decide to divest and can turn to somebody to do it as well, that is fine with everyone. But let's get at it.

Senator Cannon?

Senator CANNON. Thank you, Mr. Chairman. El Paso has been the sole supplier for your company; is that right?

Mr. WOODS. Since the merger, that is correct.

Senator CANNON. The first full paragraph of your statement, I have a little hard time reconciling it. You say:

> I don't want my testimony to be construed as indicating that Washington Natural Gas has any doubts that the decision of the district court in the divestiture proceedings, when it is made, will be anything but a fair one; or that the Federal Power Commission in certificating whatever entity may emerge from those proceedings will tolerate anything less than the full satisfaction of the public's convenience and necessity in the Pacific Northwest.

Yet you go on to indicate that you do have doubts, and this is the reason for your request that we in effect enact some ex post facto conditions here.

Mr. WOODS. My position is this: I think what the courts and the Commission do will be fair. The thing that I question is that we have an operation today that has proven satisfactory. That whatever comes out of it will be as good as what we have since El Paso came into the picture—that is what I question.

Senator CANNON. If we assume that the decision of the court is a fair one, and that the FPC requires full satisfaction of the public's convenience and necessity in the Pacific Northwest, does that satisfy your requirements?

Mr. WOODS. It will satisfy me if they are as satisfactory as they have been with El Paso.

Senator CANNON. Wouldn't they have to be able to fully satisfy the public's convenience and necessity to do that?

Mr. WOODS. They might under some conditions and they might not under others. I will give you one example. Mr. Kreager referred to the spirit of cooperation we have received from the pipeline supplier.

That is all that I have.

The CHAIRMAN. Senator Morton?

Senator MORTON. I have no questions. Thank you.

The CHAIRMAN. For the record, Mr. Kreager is the consultant to the industry, and has had long experience in these matters.

STATEMENT OF H. DEWAYNE KREAGER, CONSULTANT TO INDUSTRY, SEATTLE, WASH.

Mr. KREAGER. I have a statement for the record, supported by quite a bit of statistical material. It may be of use to the committee.

The CHAIRMAN. We will put that in the record in full.

(Testimony resumes on p. 62.)

(The statement and appendixes follow:)

STATEMENT OF DR. H. DEWAYNE KREAGER, CONSULTING INDUSTRIAL ECONOMIST

My name is H. Dewayne Kreager. I am a professional industrial economist with consulting offices located at 20th Floor, Exchange Building, Seattle, Washington 98104. My legal residence is at 9250 N. E. 19th Street in Bellevue, Washington, suburban to Seattle.

While my professional practice is national in scope, and I frequently serve clients in New York, Washington, D.C., San Francisco and other places in the United States and Canada, I am primarily a specialist in the problems of economic growth for business and industry in the Pacific Northwest. My profession has caused me to appear as an expert witness before this Committee, the Senate Interior Committee, the Interstate Commerce Commission, the Civil Aeronautics Board, the U.S. Tariff Commission, and before various Federal and State Courts.

A statement of my qualifications for appearing before this Committee in regard to the matters hereunder consideration is appended to this testimony. Occasionally, to support my testimony, I shall refer to certain professional experience particularly pertinent to my testimony.

I am here as a proponent of S. 1687 and adopt the testimony advanced in its support by Federal Power Commission witnesses who have preceded me.

The purpose of my testimony is to establish for the consideration of the Senate's Committee on Commerce, certain economic factors pertinent to the public interest of the Pacific Northwest, with specific reference to the natural gas industry. The essence of my testimony is as follows:

(a) The Pacific Northwest, primarily the states of Washington and Oregon, is among the fastest growing of industrial areas in the nation. The Seattle-Everett-Tacoma Metropolitan areas of the Puget Sound Region in Washington comprise the fastest growing area in the United States today. This growth will continue on a basis that is both predictable and certain.

(b) Natural gas, available in a volume that is both stable and permissive of rapid expansion, plus a price (rate) that is stable as to predictability over a period of years, is an absolute necessity for sound diversification of the economic base required by a fast growing industrial area. These requirements, stable supply and stable price, plus predictability of feasibility for future expansion, have been met under management and ownership of the gas pipeline serving the Pacific Northwest region since 1959. I refer specifically to the ownership and management provided by the El Paso Natural Gas Company.

(c) If the public interest of the people of the Pacific Northwest in economic terms is to continue to be served through the economic expansion that lies ahead, then any successor to the ownership and management of the natural gas pipeline serving the area must be not less in resources, ability and competence than that afforded by the present ownership and management of El Paso. By resources I refer to adequate reserves or access to adequate reserves of natural gas. By ability I refer to the financial structure of the company, which must be of sufficient size and strength to permit it to participate in and contribute to the economic growth of the Pacific Northwest. By competence I refer to the established experience record of the management of a company which assures that it has not only the foresight and courage to use, on a risk basis if necessary, its gas reserves and finances, but the operating expertise to assure safe and dependable supply.

(d) Finally, I shall contend that for the above reason, the Federal Power Commission in its original findings permitting the merger of the Pacific Northwest Pipeline Company into El Paso Natural Gas was acting in the public interest, defined in economic terms, of the Pacific Northwest. (See Pacific Northwest Pipeline Corporation and El Paso Natural Gas Company, Docket Nos. G–13018 and G–13019, FPC Order Issuing Certificate, December 23, 1959.)

For the reasons summarized above, I am here as a proponent of S. 1687. While my testimony in support of this legislation will be necessarily narrowed by my concern for the special problems caused the Pacific Northwest by the decision in *California* v. *Federal Power Commission*, 369 U.S. 482, nevertheless, I would like to voice at least a few remarks to register my general support for the bill.

The concept that the Federal Power Commission be given the authority to determine the economic implications of any dimunition of competition, that might result as a consequence of the merger of entities subject to its jurisdiction, I find wise and well supported by the experience in other sectors of our regulated economy. I refer specifically to the jurisdiction of the Interstate Commerce Commission over railroads. There are some rough parallels that can be struck between natural gas pipelines and railroads. Except that railroads do not take title to the goods they transport and pipeline companies usually, but not always, do, the economic function performed by both is essentially one of transportation. Indeed, pipeline companies are often called "transmission companies." in the tripartite natural gas industry-production, transmission and distribution—the companies engaged in transmission have for their single mission the task of moving the gas from the well head to a point from which the distributors can bring it to the ultimate consumer. Pipeline companies, like trunk line railroads, are typically inter-state in character, affecting the economy of entire regions. So being, their activities should be, and of course are, regulated against the background of the national interest.

The Interstate Commerce Commission now has the authority and the responsibility to weigh the effects of reduced competition when finding the public's interest in railroad merger cases. The self-same authority is sought by the FPC through this legislation.

Recently I testified before the Interstate Commerce Commission in a case involving the merger application of the two largest railroads connecting the Puget Sound region to the central and eastern part of the country. No more than a glance at the map is needed to appreciate the transcendant importance to that region of such a proposal. The loss of competition resulting from such a union could mean strangulation of the economic life of the area. In fact, competition between the proposed merged roads and other transcontinental railroads serving the region was a central issue before the ICC.

The public interest is a seamless web, indivisible into mathematically measured segments. The judgment of how the public interest can best be served in any situation requires the application of a special quality of expertise, one enriched by experience and knowledge of the industry examined, and often of the area to be served. Thus the ICC is peculiarly suited to find whether a merger should take place as a matter of public interest in economic terms. That the merger may result in reduced competition is something the ICC is best able to fold into its judgment, based on investigation, testimony and sensitivity to what may prove to be other over-riding public benefits. Indeed, the trend has long been to remove from the courts the duty to render decisions of seminal economic significance and rest instead in independent agencies the power to make such decisions.

The authority sought by the FPC in this legislation is in essence the same Congress has seen fit to bestow upon the CAB, the FCC and the ICC.

I should think opponents of this legislation would face a confusing task in distinguishing between the regulation mandated by Congress to the FPC from that imposed upon its sister agencies in the fields of interstate transportation and communication. The public policies to be served seem to me identical. If it is well for the ICC to decide the question of competition in railroad merger cases, and I think the Congress acted wisely when it did so confer this authority upon the ICC, then it is equally wise to vest in the FPC the same authority when it comes to mergers of natural gas companies.

In economic terms, I would have to conclude that the FPC in placing its blessing on the merger of Pacific Northwest Pipeline Company into the El Paso Natural Gas Company did a very good job of assessing the public interest of the Pacific Northwest region.

It should be noted at this point that I am no stranger to utility operations in the Pacific Northwest or the relationship of energy services to the economic growth of the area.

I am a member of the board of directors and the executive committee of the Washington Natural Gas Company in Seattle. While I appear at the request of one of my clients, my appearance is not as a spokesman for any company or any industry, but in my professional capacity as an industrial economist particularly conversant with the economy of the Pacific Northwest region and the relationship of energy supplies to that economy.

Also, I am a director and member of the executive committee of the Pacific Northwest Bell Telephone Company and serve as an economic consultant to that company, particularly with reference to the economic growth assessments involved in programing (currently) over $100 million annually in expansion of telephone facilities in Washington and Oregon. I perform similar services for various of the electric power utilities in the State of Washington as an economic consultant on their economic growth problems.

I also serve as an economic consultant on growth problems to several of the major companies involved in forest products, aerospace, and industrial research that make up the backbone of the economic future of the region. Simultaneously I am also an economic adviser to five of the major financial institutions of the region.

From mid-1957 to January of 1960 it was my privilege to serve the State of Washington as that state's first director of commerce and economic development. In that official capacity I was visited frequently by the then president of El Paso Natural Gas, Mr. Paul Kayser. That was the period in which his company was actively seeking the support of the official agencies of the government of the State of Washington in support of El Paso's application to the FBC to merge into itself the Pacific Northwest Pipeline Corporation. My official approval, in terms of my responsibilities for programming economic development of the State of Washington, was a prerequisite to the general approval subsequently given by the then Washington Public Service Commission. That we acted well in reference to the economic public interest of the people of the State in indicating that approval will be borne out by certain subsequent economic facts summarized below.

My purpose in part is to suggest to the Senate Committee on Commerce that the performance of El Paso Natural Gas in serving the public interest of the Pacific Northwest over the last seven and one-half years is compelling evidence that the FPC by its action of approval in the El Paso-Pacific Northwest Pipeline merger case, has demonstrated its capacity to wisely evaluate and determine the public interest. In fact, in my judgment, had the provisions of S. 1689, investing the FPC with authority to weigh public interest factors, been in effect in 1957 when the FPC approved the El Paso-Pacific Northwest Pipeline merger, the public interest of the Pacific Northwest could have been even better served. The Proceedings since 1962, reversing the FPC decision and requiring divestiture by El Paso of its Pacific Northwest holdings, have created a situation of uncertainty that has been distinctly harmful to the Pacific Northwest in economic terms.

To expedite my testimony I propose to answer these questions for the convenience of the Committee: (1) What is the economic growth situation, present and future, in the Pacific Northwest? (2) How important is natural gas to this growth, and how well has El Paso Natural Gas Company serviced the natural gas needs of the region. (3) What are the economic implications to the region if reversal of the FPC approval of the El Paso-Pacific Northwest merger is allowed to stand.

Economic growth in the Pacific Northwest

Frequently I am called upon to testify as to the present and future economic growth of the Pacific Northwest. The most recent occasion was in February of this year before the Civil Aeronautics Board in the matter of the Transpacific Route Investigation, Docket No. 16242. This was with specific reference to growth of the Seattle-Everett-Tacoma metropolitan areas of the Puget Sound region of Washington State. The extensive statistical exhibits for that testimony are already a matter of public record.

To save time for this committee I will simply list the following general economic facts and conclusions, supported by a minimum of statistical exhibits appended to this testimony. These apply primarily to the Seattle-Puget Sound area, and secondarily to the states of Washington and Oregon in general.

(a) *General Economic Growth* in the Pacific Northwest is now faster than that of the state of California, famous for its growth rates for two generations. Appendix I, Table I, utilizes up-to-the-moment data on telephone installation growth as an index of comparison of the growth of the Pacific Northwest metropolitan areas, Seattle and Portland in general, with the Los Angeles and San Francisco areas. These data, in the absence of equally current and equally accurate

population data on all areas, permit an accurate comparison of growth rates since all three west coast states are comparable in income levels and in the degree of saturation of telephone services as related to population, household and business establishments. From these data it will be noted that the average annual rate of growth over the 1960–66 period, in total telephone stations is: Seattle Area 4.73%, Portland Area 4.59%, Los Angeles Area 4.42%, and San Francisco Area 3.95%.

(b) *Population* in both Oregon and Washington is projected at rates of growth substantially in excess of national rates. Appendix I, Table II, contains these data from 1965 through 1985. Rates of population growth for Washington are projected at levels two to three times the growth rate for the United States. Oregon's population projections are from 20% to 30% faster than national rates. Applied to the Puget Sound metropolitan area the rate of population increase will lead that of the National approximately four times over the next twenty years.

(c) *Personal income* growth in the State of Washington led all of the fifty states, at approximately 14%, in 1966. In the last three years the State of Washington has always been first or second in this important economic indicator. More important is the predictable stability of this income growth. The chart in Appendix I, Table III, attached to this testimony, illustrates that income growth will be at a faster rate even than the explosive population growth over the next decade.

(d) *Employment* in the State of Washington, using June data for wage and salary categories, showed a 5.6% increase in 1967 over 1966, coming on top of a sensational 8.5% increase for 1966 over 1965. More important this is permanent growth not so-called boom growth. Fully half of it would have occurred even if the aerospace industry (Boeing) in the Seattle area had not expanded so substantially. Security of tenure for Boeing employment, at a level of approximately 95,000 in the Seattle area, is now estimated at ten to twelve years, based on the backlog of orders for commercial jets now in hand and the projection of future capital expenditures for the airline industry. Expanding tourist industry, diversification of consumer manufacturing, and greater efficiency in transportation services has accounted for much of the remaining growth. Most important, the future growth of the area is assured by the emergence of a massive industrial research industry. By the end of 1967 more than 12,000 persons will be employed directly in industrial research activities (science and engineering) in the Seattle area alone in jobs that did not exist eight years ago. In brief, the employment base of the Pacific Northwest state of Washington has increased more than 30% on a permanent basis in just three years.

(e) *The housing market* for the Seattle-Tacoma-Everett metropolitan areas thus far in 1967 is running 20.5% ahead of 1966, and 1966 was 39% ahead of 1965. In fact, the Seattle area is the only housing market among major metropolitan areas in the United States to show an increase in 1967 over 1966 for *both* single-family and multi-family dwellings.

(f) *On power consumption* for industrial purposes a good index of the industrial growth rate of the states of Washington and Oregon can be had from the Bonneville Power Administration 1966 Annual Report (Table 8 in that report). For industry customers, both firm and non-firm power, the combined trend percentage index for sales by Bonneville stood at 15.5% over 1965, representing the largest single year increase in the ten year span of 1957–1966. The combined trend index for the ten year period was in excess of 150% over the 1957 Fiscal Year base. These data adequately measure the rising demand for energy for industrial purposes in the Pacific Northwest.

(g) *Air traffic*, origin and destination, has risen with the growth in the regional economy. In the first four months of 1967 passenger traffic at Seattle-Tacoma International Airport, origin and destination combined, rose 23% over 1966 compared to a U.S. national rate of increase of 15.5%.

The above data are sufficient to establish the dynamic and permanent growth trend of the territory serviced by the Northwest Division of the El Paso National Gas Company. Next it is useful to relate the natural gas industry to that growth trend, and, by evaluation of the effectiveness of the pipeline service provided the Northwest by El Paso, to confirm that the EPC acted in the best public interest of the Pacific Northwest in approving the El Paso-Pacific Northwest Pipeline merger in 1959.

Natural gas in the economy of the Pacific Northwest

I have undertaken (a) to make an independent evaluation of the growth of natural gas as a facet of the economy of the three Pacific Northwest States

(Washington, Oregon, Idaho) in the ten year period (1957–1966); and (b) to assess the extent to which the public interest in economic terms related to gas, particularly industrial, had been met during that period.

I have summarized in brief statistical form, Appendix III, Tables I through IV, appended to this testimony, the growth in natural gas consumption in the three state area during the period under study. Obviously, this growth not only compares favorably with the increase in consumption of other forms of energy in the region but in many instances and localities actually exceeds the rate of growth for other energy forms.

Such a phenomena is normal to an area in which natural gas is relatively new. The gas industry in the Pacific Northwest is not only acquiring its share of new growth in the area, in the same sense that other utilities (telephone and electric power) are doing, but is rapidly moving into the almost unlimited market provided by long-time resident households who have not heretofore been users of natural gas.

As an industrial economist, with more than twenty years of close relationships in and out of government to all aspects of the utility industry, I should emphasize at this point that today an industrial area does not enjoy true diversification of industry without natural gas. Professionally I would question that many of the significant industrial expansions in the last three years could have taken place without adequate natural gas service in the region. And I include in this evaluation the massive growth of the aerospace industry in the Seattle Area and related metalurgical, chemical, electronic and other support industries.

A glance at Appendix II (attached) will quickly identify the range of industrial uses now prevalent for natural gas in the Pacific Northwest states of Washington, Idaho and Oregon. Some 345 industrial customers are listed in that Appendix, 96 in Idaho, 107 in Washington and 145 in Oregon. Three are direct industrial customers of El Paso, the rest are served on a firm or interruptible basis by the various distributor companies that receive their sole supply of gas from El Paso's Pacific Northwest Division.

To certain of these industrial consumers, natural gas is more than a convenience or merely a preferred fuel, it is a practical necessity. Appendix III, Table I, is a list of industrial consumers who could be considered "captives" of natural gas. These are volume users who either need gas as feed stock (as a raw material), or who use it in certain manufacturing processes that can only be performed by direct firing with gas, either natural or propane. Considering that propane costs approximately 12 cents per gallon (approximately 100,000 BTU's) and the average price per therm (100,000 BTU's) of natural gas is approximately 4 cents for interruptible and 7 cents for firm service, the substitution of propane as an alternative can be dismissed as unfeasible, except on a standby basis.

I have personal recollections of an item of historical interest that is pertinent to this case. In 1951–1952 it was my privilege to serve the Federal Government as the Executive Officer of the Office of Defense Mobilization, which agency, as several of the members of this Committee will recall, operated under the broadest grant of authority over the economy of the United States ever contained in a Presidential Executive Order. It was during that period, the Korean War, when two competing interests were appearing before the Federal Power Commission seeking the official permit to bring natural gas into the Pacific Northwest. Pacific Northwest Pipeline sought to bring the gas from the Four Corners area of the Southwest. West Coast Transmission sought a permit to bring it in from the Peace River Area of Canada. Both applicants actively sought the support of the Office of Defense Mobilization. In due course the Federal Power Commission itself requested the ODM, as the then economic manager of the nation, to submit its official position to the commission. I recall the reply, distinctly, because after extended inter-agency conferences I personally drafted the letter for the signature of the Director of Defense Mobilization.

The official ODM position was to the effect that the agency was not concerned with the source of gas, either the Southwest or Canada, but that the over-riding consideration was to have natural gas in the Pacific Northwest as the last remaining major industrial area in the United States without it. The ODM position in 1951, and I paraphrase, was to the effect that it was essential to the economic security of the nation, and to the economic well being of the Pacific Northwest, to have abundant supplies of natural gas available at the earliest feasible date; and, accordingly, the best interests of all concerned could be served by granting a permit to both applicants, thereby assuring the Pacific Northwest of abundant gas supplies, and the insurance of two sources rather than one.

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The subsequent history of natural gas in the Pacific Northwest bears out the soundness of this reasoning. Gas has come from both sources thereby assuring both adequacy and reliability of supply. Obviously, if the public interest in 1951–52, in the words of the Office of Defense Mobilization, was to be found in assuring an adequate and reliable flow of natural gas into the Pacific Northwest, then it follows with some logic that the performance of El Paso Natural Gas, after the merger with Pacific Northwest Pipeline in 1957, certainly was consistent with that public interest. And so was the ruling of the Federal Power Commission in 1959 approving that merger.

I will not dwell on the details of the history of natural gas in the Northwest prior to the El Paso takeover, since that has been or will be fully covered by other witnesses. Nor should I attempt to involve myself in the technical details of supply and cost participation between El Paso and the various distribution companies in the region. Instead, from an industrial economist viewpoint, the following points are of real significance.

The growth of the natural gas distribution industry in the Pacific Northwest states of Washington, Oregon, and Idaho has been phenomenal in the last ten years. Basic summary data on this growth will be found in Appendix III, attached to this testimony. The degree of economic growth therein measured is not unexpected, because the growth of the natural gas industry has come in a period of expansion in the general economy of the region. Thus the industry has benefitted not only from a completely new market for natural gas, but from the new economic and industrial expansion of the region.

In the last ten year period, 1957–67, total gas sales in the three states have increased from 70.7 billion cubic feet in 1957, the year of El Paso acquisition of the Pacific Northwest Pipeline, to 212.8 billion cubic feet in 1966, more than 205%.

Total ultimate customers rose 164.4% from 156,997 in 1957 to 413,490 in 1966. The faster rise in total sales than in total customers reflects a healthy increase in industrial customers and a greater volume of consumption per domestic customer as the popularity of natural gas became established.

Natural gas now represents 27.7% of all energy sales in the three states, which compares most favorably with the 32.6% represented by well established hydroelectricity in the region coming from justly famous and efficient low-cost generating facilities. Indeed. on a BTU equivalent basis, El Paso in 1966 provided for the Northwest 2⅓ times the energy marketed by the Bonneville Power Administration.

The net plant investment of eight distributor gas companies (the two largest being Northwest Natural and Washington Natural in Portland and Seattle respectively) increased 219.9% in this ten year period, from 139 million in 1957 to over 445 million in 1966.

All of this growth represents a considerable strain on pipeline facilities and on the availability of gas reserves. El Paso Natural met the challenge effectively. As an economist I would not argue that this growth could not have been achieved without El Paso ownership and management at the helm of the gas transmission lines serving the Pacific Northwest. On the other hand there are the self-evident economic facts that (a) this growth has taken place during El Paso's stewardship; and (b) El Paso has been able to meet the resource, financial, and management challenges involved. Obviously the public interest has been served, and the FPC decision to approve the original acquisition of the pipeline facilities by El Paso has been vindicated.

With the greatest period of economic growth for the Pacific Northwest lying in the decade immediately ahead (see projections through 1985 in data attached as Appendix I) it becomes logically obvious that continuing protection of the public economic interests of the region requires control and operation of natural gas pipeline facilities serving the region in the decade ahead to be not less, at the very least, than those gas reserves, financial, and management resources which have been available under El Paso stewardship.

El Paso has followed a constructive growth-minded policy of encouraging and assisting the expansion of distributor companies rather than acquiring further facilities itself. While total gas sales were rising over 200% El Paso expanded its direct industry sales by but 34% (See Appendix III, Table II), reflecting the fact that the company actually transferred former direct industry customers to the customer lists of distributor companies. Only three direct industry customers in the three states now accrue to El Paso; the rest are served through distributor companies. (See Appendix II)

Appendix IV summarized the data that reflect the extent to which the pipeline company has expanded its operations to reach the rising demand for gas in the region. Total gas sales in the Northwest Division of the company have increased

140%, reflecting approximate ten year increases of 180% in firm loads and 60% in interruptible industrial loads. The average annual increases have been 18% for firm, 6% for interruptible and 13.4% for total sales.

Were the expansion data for El Paso's services limited to the more rapidly growing states of Washington and Oregon, the increase percentages would reflect higher levels. The 1966 annual reports for the two largest distributors in Washington and Oregon, for example, reflect ten year increases in industrial sales of gas in a range from 160–240%, and increases in total gas sales in excess of 200%.

As an industrial economist who has spent much of his professional life working with utilities, and the relationship of energy resources to industrial growth, diversification, and expansion, I should record a basic fact that is important to any perspective on the economics of energy as an ingredient in production processes This fact is not exclusively important to this case, but is generic to all utility supply and cost situations. To wit: the availability of a form of energy is often more important than its cost. Another way to say this is that while low cost of an energy supply is important, the low cost is not nearly so important as the stability of the supply of that energy. Cost of energy is a function of the proportion of its cost to the total costs of production and sale of a given industrial product. I often explain this to industrial and political persons in the Pacific Northwest by suggesting that the low cost of our hydro energy should not be over-emphasized as a singular virtue. It is not the low cost that is so important, but the availability of a large stable source of low cost power that is important. Long term programming is essential to successful industrial production. An industry can program costs, regardless of their level, but it cannot program an unstable supply.

Continuing this context I now refer back to the earlier reference in my testimony regarding my contacts in 1958 and 1959 with the then head of El Paso Natural Gas, Mr. Paul Kayser, in my then official capacity as Washington State Director of Commerce and Economic Development. The conditions I imposed upon Mr. Kayser were for a pipeline company large enough and resourceful enough to make long term commitments for industrial gas supplies at predictable (not necessarily low) prices. Industry cannot use gas in its production processes unless it can program both the volume and cost of the gas into its operations over a long period of time.

It is of major importance to this case that this Committee note that Mr. Kayser and his company were able to meet my stipulated conditions. Ability to provide for a constantly increasing supply of gas is attested to in the exhibits in Appendix III, and in my testimony above in refernce thereto. The stability and predictability of rate (cost) for industrial service can be evidenced by the fact that the interruptible rate of 2.86¢ per therm applying after the El Paso takeover of the pipeline in late 1957 was reduced effective January 1, 1967 to 2.744¢ per therm. The 345 commercial and industrial users listed in Appendix II for the three Northwest states provide ample evidence of the fact that the supply and price situation surrounding natural gas for industrial use in El Paso served territory is sufficiently stable to encourage widespread industrial and commercial use of gas.

In brief, the public interest of the Pacific Northwest has been served by El Paso stewardship because (a) supplies have been both adequate and stable; and (b) rates (costs) have been held stable, even reduced on January 1, 1967.

Confidence in El Paso as the transmission line owner and operator has been factually attested to by the fact that in the past ten years the eight distributor companies served by the El Paso Northwest Division have added over $306 million, a 220% increase, to their total plant investment. When managements put their stockholders' money on the line in a business in which the investing companies are wholly dependent upon another corporate entity for their resource supplies the degree of confidence is high indeed.

And El Paso has gone a long way in building this confidence. Most noteworthy in my own state has been El Paso's $2 million participation in a joint underground storage project, now in the development and testing stages, with Washington Natural Gas Company and the Washington Water Power Company. El Paso is currently asking authorization from the Federal Power Commission to increase its contribution to this project by another $1.6 million to enable further testing and an increase of storage inventory. When fully activated these underground storage facilities will further enhance the stability of the available supply of natural gas to homes, businesses and industry in the State of Washington.

Any energy flow, gas or electric, is subject to outages. Only big experienced operators can minimize these outages. El Paso's record for dependable service is unexcelled.

One final and a most essential point for consideration by this Committee is the role of a gas transmission line company as a participant in the promotion and

development of the regions that it serves. Universality of economic interest over a wide geographical area is limited almost exclusively to gas transmission companies and telephone companies. One can say with certainty, for example, that in the States of Washington and Oregon, only the El Paso Natural Gas Company and the Pacific Northwest Bell Telephone Company have this universality of interest. What helps any segment of the economy of the two states, whether or not directly related to gas or telephone business, helps these companies. This kind of universal interest is more restricted for gas distribution companies and electric utilities since they operate in smaller geographical jurisdictions, and are more subject to competitive forces on their perimeters.

Since Washington and Oregon, among the fastest growing states in the Union, only have these two major companies with universality of interest throughout the region, these companies must necessarily be well financed. Well managed, and experienced operators if the best economic interests of the two states are to be served. As a Director of Pacific Northwest Bell Telephone Company, and an economic consultant to that company on its growth problems, I have some appreciation of the excellent job this company (newest in the Bell System having been created in 1961) has done in promoting the Pacific Northwest and helping communities to meet their economic growth problems. The same can be said for El Paso Natural Gas Company.

Following are some of the specifics in that regard:

From the time that it first began to operate in the Pacific Northwest, under its own name until 1964, El Paso Natural Gas Company actively promoted the Pacific Northwest in all parts of the United States. The greatest activity took place in the form of advertising carried in newspapers throughout the country. Newspaper space was purchased not only in large metropoltian papers but in selected smaller communities with a population of 10,000 or less. El Paso expenditures for newspaper space promoting the Pacific Northwest through 1960–1964 totaled $386,000. This averages over $77,000 per year or more than half of the annual advertising budget for the same period appropriated by the State of Washington for use in the tourist industry promotion programs of the State's Department of Commerce and Economic Development. As the original organizer and first director of that state department I have some appreciation for the dollar value of El Paso's efforts.

In addition El Paso Natural Gas was active in the Seattle Worlds Fair. I also have close knowledge of this because I was a member of the Seattle World Fair Commission and served on the Board of the Century 21 Corporation which operated the Fair, the only financially successful venture of its kind in the U.S. in the post war era. El Paso contributed $100,000, about one-third of the total budget, to the Natural Gas exhibit at that Fair, and worked aggressively to secure the participation of other companies.

Participation by El Paso Natural in the cost of promoting natural gas uses in the Pacific Northwest has been a key to the stability of gas rates in the Pacific Northwest. Stable rates have been achieved through increased sales, which in turn have permitted higher utilization of the pipeline and related facilities In the 1960–1966 period El Paso Natural's expenditures for the promotion and sale of gas in the areas served by its Northwest Division have totaled $1,367,000.

The United States Supreme Court decision of 1964, in effect requiring divestiture of El Paso's holdings in the Pacific Northwest pipeline, has created five years of uncertainty that has unquestionably imposed a handicap on the growth and development of the natural gas industry in the Pacific Northwest and in the use of natural gas in that region. One effect, particularly in recent years, has been to reduce the promotional expenditures by El Paso.

Economic implications if divestiture accomplished

The natural gas transmission company (El Paso) serving the Pacific Northwest for the past seven and one-half years has successfully met the test of providing adequate and flexible sources of gas, and for moving that gas through its company owned facilities to the point of delivery to the various distributing companies.

In addition it has spent generously from its own funds to promote the economic development of the Pacific Northwest region, and to assist the distributing companies in all possible ways to create increased demand and to service that demand.

The transmission company has been particularly helpful in its efforts to encourage industrial use of gas, which in turn has created greater employment in the region and contributed substantially to its sound economic growth.

The public interest, in economic terms, has been served.

The health and strength of the natural gas transmission company serving Washington now and in the future is of prime inportance not only to homeowners

and commercial users in the state, but to the scores of industries that provide the bulk of the state's industrial employment.

The public interest in economic terms cannot be served by the mere legal process of turning this venture over to a new operator. Since the needs of Washington for natural gas in the decade ahead are predictably higher by a substantial margin than during the past decade, there must be throughout the next decade a transmission line company no less resourceful, no less well financed, and no less experienced in management than the present transmission company. In fact, the transmission company, existing or new as the case may be, must be prepared to expand the efforts made by El Paso during the past ten years. El Paso's record over the past decade assures its ability to meet this challenge.

If the provisions of S. 1687 (which would provide for the Federal Power Commission the same authority to determine the economic implications of any public interest implications of any merger of entities subject to its jurisdiction as accrues to other regulating agencies) had been in effect in 1967 the Pacific Northwest would not now be subjected to grave uncertainties over the nature of the owner and operator of its sources of natural gas. In my judgment the public interest of the Pacific Northwest would be served by enactment of S. 1687 with an appropriate amendment to maintain the present structure of natural gas supply into the Pacific Northwest.

No one can predict what entity will come into existence to take El Paso's place. One can assume that what will issue from the legal proceedings designed to constitute a natural gas supplier for the Pacific Northwest out of the present El Paso system will be adequate. Certainly that is the hope. But it is not likely that the "part" will prove superior to the "whole" from which it must be taken. Indeed, the fact that doubt exists at all about such a fundamental adjunct to the economy as the quality of the supply of natural gas into the region is itself a qualitative factor to the economist. In assessing the soundness of the economic structure of the region, one now must deal, to a degree at least, with uncertainties. Economic planning and programming is not best done where hopes must be substituted for verities.

This uncertainty should be eliminated. The present structure of natural gas supply into the Pacific Northwest should be preserved. It is my recommendation that S. 1687 be amended in whatever fashion appropriate to accomplish this worthy goal.

Appendix I

TABLE I.—AVERAGE ANNUAL RATE OF INCREASE, DEC. 31, 1960–JUNE 30, 1966

[In percent]

	Main stations	Total stations
Seattle, Tacoma, Everett	3.35	4.73
Portland-Vancouver area	3.08	4.59
Los Angeles area	3.23	4.42
San Francisco Bay area	2.91	3.95

Source: Pacific Northwest Bell Telephone Co., for Seattle and Portland areas. Pacific Telephone & Telegraph Co. for Los Angeles and San Francisco Bay areas.

TABLE II.—POPULATION GROWTH—WASHINGTON AND OREGON—1965–85

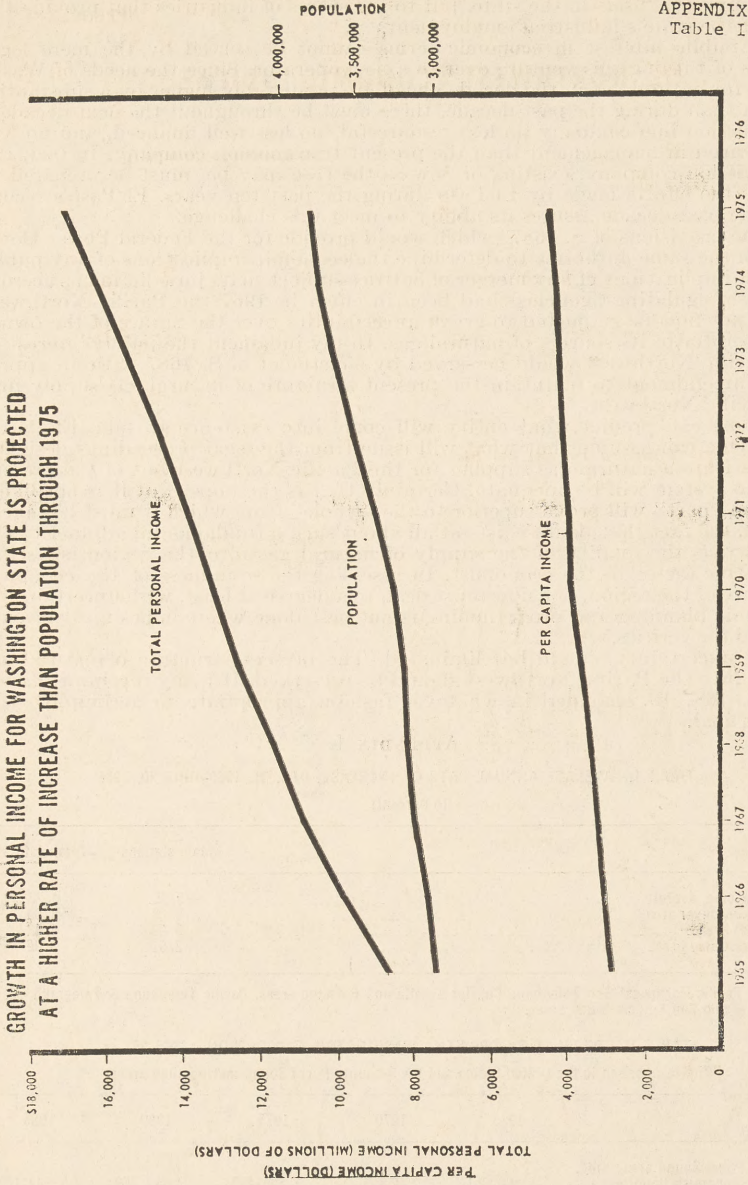
[With comparison to the United States and the 3-county Puget Sound metropolitan areas]

	1965	1970	1975	1980	1985
3-county (Puget Sound area; King, Pierce, Snohomish Counties) [1]	1,566,351	2,068,917	2,556,428	3,112,469	3,744,107
State of Washington [1]	3,039,518	3,615,942	4,209,327	4,892,585	5,680,357
State of Oregon [1]	1,948,400	2,113,200	2,329,000	2,595,000	2,898,400
United States [2]	193,818,000	208,249,000	225,123,000	244,566,000	265,575,000

	Percent increase			
	1965–70	1965–75	1965–80	1965–85
3-county area	32.09	63.21	99.01	139.03
State of Washington	18.96	38.49	60.97	86.99
State of Oregon	8.39	19.56	33.01	48.16
United States	7.44	16.15	26.18	37.02

[1] Business Research Division Pacific Northwest Bell Telephone Co.
[2] U.S. Department of Commerce Bureau of the Census Population Estimates Feb. 7 1966 p. 14.

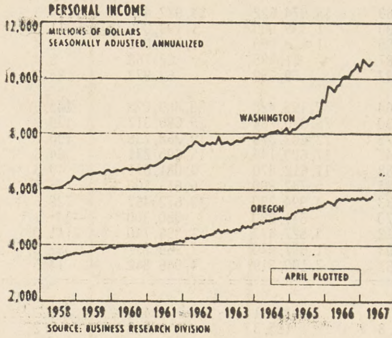
APPENDIX I
Table III

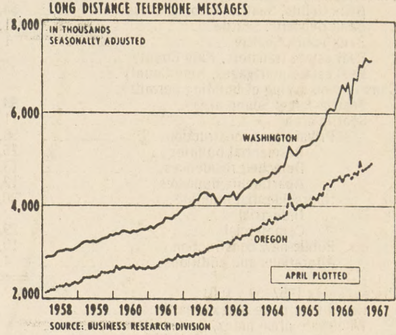


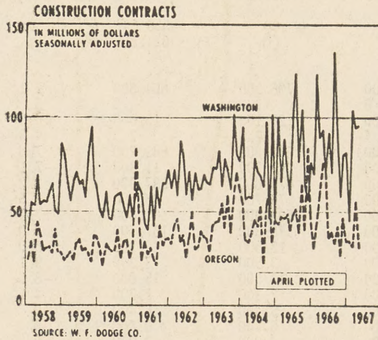
Source: Testimony of H. Davayne Kreager before Civil Aeronautics Board, Transpacific Route Investigation, Feb. 1967. From projections by Bus. Research Dept., Pac. NW Bell.

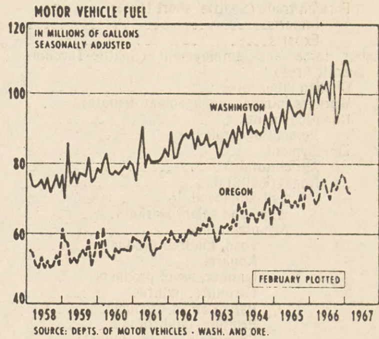
APPENDIX I
Table IV

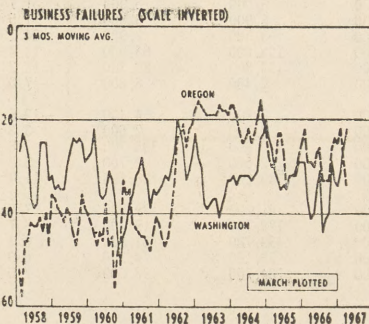
NORTHWEST ECONOMIC INDICATORS *

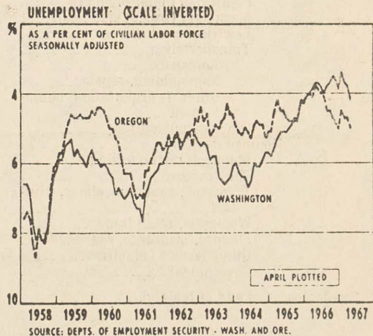












* Compiled by Business Research Division, Pacific NW Bell Telephone Co.

TABLE V.—SEATTLE-TACOMA-EVERETT METROPOLITAN AREA INDICATORS

	May 1967	April 1967	May 1966	Percent increase, May 1967–66
Finance and real estate (thousands of dollars):				
Bank debits, Seattle-Tacoma-Everett area [1]	$4,482,969	$4,074,622	$3,922,446	14.3
Bank deposits, Seattle	1,341,000	1,339,000	1,199,000	11.8
Bank loans, Seattle	1,133,000	1,110,000	1,065,000	6.4
Real estate transfers, King County	68,687	61,435	62,768	9.4
Real estate mortgages, King County	78,187	59,359	62,973	24.2
Construction (value of building permits):				
Seattle-Puget Sound area [2]	94,338,064	42,138,425	38,409,028	145.6
Seattle area [3]	71,903,130	26,320,764	25,685,317	179.9
Private new construction	56,315,975	22,603,375	19,368,738	190.8
Residential building	25,841,842	17,609,145	15,695,271	64.6
Detached residences	13,558,058	11,612,870	9,081,671	49.3
Apartments/duplexes	12,277,484	5,742,800	6,613,600	85.6
Nonresidential building	30,474,133	4,994,230	3,673,467	729.6
Industrial	224,170	671,380	380,300	−141.1
Commercial	29,060,718	3,527,477	1,296,740	2141.0
Public new construction	10,952,293	1,617,070	2,269,737	382.5
Alterations and additions	4,634,862	2,100,319	4,046,842	14.5
Prices (index 1957–59=100):				
Retail food price index, Seattle	(4)	113.1	114.4	
Wholesale price index, United States	105.8	105.3	105.6	0.2
Transportation:				
Freight carloadings (Washington Oregon northern Idaho) number of cars	77,542	76,734	81,608	−5.0
Foreign trade (Seattle short tons):				
Imports	(4)	(4)	556,647	
Exports	(4)	(4)	621,209	
Labor force and employment (Seattle-Tacoma-Everett Area):				
Civilian labor force	711,800	706,300	664,800	7.1
Workers in labor-management disputes	0	900	0	0
Unemployment	17,300	20,100	15,600	10.9
Percent unemployed	2.4	2.8	2.3	4.3
Employment	694,500	685,000	649,200	7.0
Agricultural	10,500	9,700	11,300	−7.1
Nonagricultural	684,000	675,600	637,900	7.2
Self-employed	78,400	76,700	76,500	2.5
Wage and salary workers	605,600	598,900	561,400	7.9
Manufacturing	181,200	178,300	167,700	8.0
Food, kindred products	12,700	12,500	12,100	5.0
Apparel	3,600	3,500	3,300	9.1
Lumber, wood products	13,800	13,500	15,000	−8.0
Furniture, fixtures	2,300	2,300	2,200	4.5
Paper, allied products	6,400	6,400	6,400	0
Printing, publishing	6,400	6,400	6,400	0
Chemicals, allied products	2,200	2,200	2,200	0
Stone, clay, glass	3,400	3,200	3,300	3.0
Primary metal products	4,700	4,100	4,700	0
Fabricated metal products	6,000	6,000	5,900	1.7
Machinery (except electrical)	6,900	6,900	6,800	1.5
Electrical machinery	3,600	3,500	2,900	24.1
Transportation	106,500	105,000	93,900	13.4
Aerospace	95,400	93,800	80,700	18.2
Shipbuilding, repair	7,300	7,400	8,800	−17.0
Other transportation equipment	3,800	3,800	4,400	−13.6
Other manufacturing	2,700	2,800	2,600	3.8
Nonmanufacturing	424,400	420,600	393,700	7.8
Mining, forestry, fishing	2,800	2,500	2,700	3.7
Construction	31,300	30,200	28,100	11.4
Transport, communications, utilities	42,200	41,700	39,000	7.7
Wholesale, retail trade	130,100	128,700	119,700	8.7
Finance, insurance, real estate	33,900	33,700	31,900	6.3
Other service industries	79,400	79,100	74,300	6.9
Government	104,900	104,700	98,000	7.0

See footnotes at end of table, p. 53.

TABLE V.—SEATTLE-TACOMA-EVERETT METROPOLITAN AREA INDICATORS—Continued

Hours and earnings (Seattle-Everett Metropolitan Area) [5]	Average weekly hours			Average weekly earnings		
	April 1967	March 1967	April 1966	April 1967	March 1967	April 1966
Manufacturing industries	41. 1	40. 9	39. 7	$142. 62	$140. 70	$131. 41
Food, kindred	37. 8	37. 7	37. 9	125. 87	125. 54	121. 66
Logging, lumber	37. 5	37. 8	38. 3	116. 63	115. 67	115. 28
Primary metals	40. 5	42. 1	42. 4	142. 97	149. 46	147. 13
Fabricated metals	39. 8	39. 1	39. 0	145. 27	139. 98	138. 45
Machinery (except electrical)	41. 9	43. 0	44. 1	149. 16	153. 94	164. 93
Transportation equipment	43. 0	42. 7	40. 3	153. 94	151. 16	135. 81

[1] Includes King, Pierce, and Snohomish Counties.
[2] 13 major cities and unincorporated areas of King, Pierce, and Snohomish Counties.
[3] City of Seattle and unincorporated King County.
[4] Not available.
[5] Includes King and Snohomish Counties.

Highlight sources: Building department, King and Pierce Counties, Seattle and selected cities; Federal Reserve Bank of San Francisco; Pacific Northwest advisory board; Port of Seattle; Seattle Marine Exchange; U.S. Department of Labor; Washington State Employment Security Department; Pioneer Title Insurance Co.

Appendix II

Industrial customers for natural gas, in Washington, Oregon, Idaho as served, April 1967, by distributing companies, plus direct industrial customers of El Paso Natural Gas Company.

Washington: (Total 107).
Direct Industrial Customers: 1. Phillips Pacific Chemical Company.
Washington Natural Gas Company:
1. Bethlehem Pacific Coast Steel Corporation, Seattle Plant
2. Bethlehem Pacific Coast Steel Corporation, Bolt & Nut Department
3. Boeing Airplane Company, Transport Division
4. Boeing Airplane Company, Plant I
5. Boeing Airplane Company, Developmental Center
6. Hooker Chemical Corporation
7. Lone Star Cement Corporation
8. Pacific Car and Foundry Company, Renton Division
9. Pennsylvania Salt Manufacturing Company of Washington, Western Division
10. St. Regis Paper Company
11. Scott Paper Company, West Coast Division
12. Seattle Steam Corporation
13. Weyerhaeuser Timber Company

Washington Water Power Company, The:
1. Kaiser Aluminum Chemical Corporation (2)
2. Fairchild Air Force Base
3. Boise Cascade Corporation

City of Ellensburg, Washington:
1. Kittitas County Dairymen's Association
2. Twin City Foods, Inc.

Columbia Gas Company: 1. Country Gardens, Inc.
Cascade Natural Gas Corp.:
1. Shell Oil Company
2. Texaco, Inc.
3. Weyerhaeuser Company (2)
4. Mobil Oil Company
5. The Welch Grape Juice Company, Inc. (2)
6. Granger Clay Products Co.
7. The Dow Chemical Co.
8. Gram Lumber Co
9. Pope and Talbot, Inc.
10. Chevron Chemical Co.
11. Longview Fiber Co.
12. Utah-Idaho Sugar Co. (2)
13. Carnation Co. (2)
14. Consolidated Dairy Products Co.

15. Libby, McNeill & Libby, Inc. (4)
16. Stokely-Van Camp, Inc., Frozen Food Division (2)
17. Seneca Foods Corp.
18. Brown & Kelley Produce Co.
19. Yoshino-Western, Inc., Dehy Division
20. Georgia Pacific Corp.
21. California Packing Corp. (2)
22. General Foods Corp., Birdseye Division
23. Rogers Walla Walla Canning Co.
24. Aluminum Company of America
25. Kawecki Chemical Co.
26. Lynden Frosted Foods, Inc.
27. Washington Canners Cooperative
28. Umatilla Canning Co.
29. Sunnyside Custom Cannery
30. Blue Ribbon Growers, Inc.
31. Safeway Stores, Inc., Safeway Juice Plant, Brookside Div.
32. Yakima Valley Grape Producers, Inc.
33. M & R Stud Mill
34. Boise Cascade Corp.
35. McKennon Dairy Farms, Inc.
36. Wapato Fruit Products
37. Woodland Tie Co.
38. Evans Harbor Products (2)
39. Pacific Protein Corp.
40. Allied Chemical Corp.
41. Northwest Petrochemical Corp.
42. Scott Paper Co.
43. A & M Rendering Co.
44. American Fabricators, Inc.
45. Brooks Lumber Co.
46. Mt. Baker Plywood Co.
47. Kaiser Cement & Gypsum Co.
48. Chris Knutzen & Co.
49. Consolidated Dairy Products Co.
50. Intalco Aluminum Corp.
51. Grays Harbor Chair & Manufacturing Co.
52. Anerdson & Middleton Lumber Co.
53. West Coast Plywood Co.
54. Port Dry Kiln Co.
55. Reynolds Metals Co.
56. Ross-Simmons Hardware Lumber Co.
57. Washington Pulp and Timber Co.
58. Great Western Lumber Co.
59. Whatcom County Dairymen's Assn.
60. American Potato Co.
61. Pronto Foods, Inc.
62. Chef-Ready, Inc.
63. County Gardens, Inc.
64. Kenite Corp.
65. Cedargreen Foods.
66. Chelan Packing Co.
67. Keyes Fibre Co.
68. Valley Evaporating Co.
69. Hops Extract Corp. of America
70. American Packing Corp.
71. Farwest Fisheries
72. Fishmerman's Packing Co.
73. Nakat Packing Co.
74. Sebastian Stuart Fish Co.
75. J. E. Traftone & Sons Co.
76. Lynden Berry Growers, Inc.
77. Columbia River Packers
78. Bellingham Cold Storage Co.
79. C. V. Wilder Co.
80. Cascade Frozen Foods, Inc.

81. Pierson Dehydration Co.
82. National Fruit Canning Co.
83. Kale Canning Co.
84. Lynden Clay Products
85. Kelley Farquhar & Co.
86. New England Fish Co.
87. San Juan Islands Cannery

Oregon: (Total 145).

Direct Industrial Customers: Oregon Portland Cement Company.

Cascade Natural Gas Corporation:

1. Ore-Ida Foods, Inc.
2. Amalgamated Sugar Company
3. Idaho Canning Company
4. Chemical Lime Company
5. Ellingson Lumber Company
6. Ellingson Timber Company
7. Sweet Corn Research
8. Rogers Walla Walla Canning Company (2)
9. Umatilla Canning Company
10. Pendleton Woolen Mills
11. U.S. Gypsum Company
12. Lamb-Weston Company
13. Brooks Willamette Corporation (2)
14. LELCO, Inc.
15. Jefferson Plywood Company
16. Smith Brothers Canning Company
17. Pendleton Canning Company
18. Smith Canning & Freezing Company

California-Pacific Utilities Company:

1. Boise Cascade Corporation (2)
2. Winema Lumber Company
3. Clay Thomas Lumber Company
4. Klamath Brick & Tile
5. Borden Chemical Company
6. Klamath Plywood Corporation
7. Modoc Lumber Company
8. Douglas Veneer Company
9. Round Prairie Lumber Company
10. Forest Industries, Inc. (2)
11. Agnew Plywood Company
12. Chevron Asphalt Company
13. Carolina-Pacific Plywood, Inc.
14. Cheney Forest Products, Inc.
15. Custom Plywood, Inc.
16. Eugene F. Burrill Lumber Company
17. Ideal Cement Company
18. Kogap Manufacturing Company
19. Minnesota Mining & Manufacturing Company
20. Olsen-Lawyer Lumber Company
21. Reichhold Chemical, Inc.
22. Rogue Gold Dairy
23. Rogue Valley Plywood, Inc.
24. Russek's, Inc.
25. Steve Wilson Company
26. Table Rock Lumber Company
27. Timber Products, Inc.
28. Tolo Lumber Dryers, Inc.
29. Vancouver Plywood Company
30. White City Plywood
31. Myrtle Creek Plywood, Inc.
32. C & D Lumber Company
33. Hanna Nickel Smelting Company
34. L & H Lumber Company
35. Nordic Plywood, Inc.
36. Evans Products Company
37. LaGrande Brickyard

Northwest Natural Gas Company:

1. Kal-Wood Company
2. Lester Cedar Products, Inc.
3. Crown Zellerbach Corporation (4)
4. B & J Veneer Company
5. J. H. Baxter & Company (2)
6. Cuddeback Lumber Company
7. Eugene Chemical Works
8. Eugene Plywood Company
9. Eugene Stud & Veneer, Inc.
10. Forcia Lumber Company
11. Giustina Veneer Company
12. Jones Veneer & Plywood Company
13. Snellstrom Lumber Company
14. United States Plywood Corporation
15. Weyerhaeuser Timber Company
16. Publisher's Paper Company
17. Shell Oil Company
18. Union Pacific Railroad Company
19. Kaiser Gypsum Company, Inc.
20. Columbia River Paper Company (2)
21. The Borden Chemical Company
22. Clear Fir Products Co. of Oregon Limited
23. Georgia-Pacific Company
24. Rosboro Lumber Company
25. Springfield Lumber Mills
26. Harvey Aluminum, Inc.
27. The Dalles Lumber Company
28. Burkland Lumber Company
29. Aluminum Company of America
30. Pendleton Woolen Mills
31. Willamette Plywood Corporation
32. Clark County Dairymen's Co-op
33. Johnson Lumber Company
34. Jones Veneer & Plywood Company
35. Larson, Clark & Powell
36. Freres Forest Products Company
37. Simpson Timber Company
38. Ash Grove Lime & Portland Cement Company
39. Chipman Chemical Company
40. Northern Pacific Terminal Company
41. Paris Woolen Mills
42. Stayton Canning Company
43. Coquille Valley Lumber Company
44. Santiam Lumber Company
45. Wah Chang Corporation
46. Wood Fibreboard Company
47. Vancouver Plywood Company
48. Morse Bros. Pre-Stress Concrete
49. Eugene Chemical Company
50. Boise Cascade Corporation
51. Cascade Plywood Corporation
52. Western Veneer & Plywood Company
53. Northwest Fabrics
54. Spaulding Pulp & Paper Company
55. North Plains Lumber Company, Inc.
56. Leading Plywood
57. Alpine Veneer
58. Armour & Company
59. Blitz Weinhard Company
60. Columbia Brick Works
61. Continental Can Company
62. Linnton Plywood Association
63. Malarkey, Herbert
64. Mayflower Farms
65. McCormick & Baxter Creosoting

66. Milwaukie Plywood Corporation
67. Multnomah Plywood Corporation
68. National Biscuit Company
69. Oregon Worsted Company
70. Pacific Carbide & Alloys Company
71. Tektronix, Inc.
72. FMC Corporation
73. Great Western Malting Company
74. Lucky Lager Brewing Company
75. Pope & Talbot, Inc.
76. Brownsville Particle Board and Associated Products, Inc.
77. Schneider Lumber Company
78. Coburg Veneer Company
79. Jefferson Woolen Mills
80. Lulay Brothers
81. Avison Lumber Company
82. Fort Hill Lumber Company
83. Northwest Veneer
84. Oregon American Studs
85. Willamina Lumber Company
86. Berkey Planing Mill
87. Oregon Alder-Maple Company
88. Commercial Plywood, Inc.
89. Shell Chemical Company

Idaho: (Total 96).
Direct Industrial Customers: 1. Bunker Hill.
Intermountain Gas Company:

1. Union Pacific RR Co. (3)
2. El Paso Products Co.
3. Kermac Nuclear Fuels Corp.
4. Monsanto Chemical Corp.
5. J. R. Simplot Co. (4)
6. Idaho Portland Cement Co.
7. Idaho Concrete Products Co.
8. Idaho Falls Animal Products Co.
9. Idaho Falls Brick & Tile Co.
10. Fresh Pak Processors, Inc.
11. Idaho Potato Growers
12. J.P.M. Corp.
13. Penick & Ford, Ltd., Inc., Potato Starch Div. (3)
14. Rogers Brothers (2)
15. Upper Snake River Dairymen's Assn., Inc.
16. U-I Sugar Co.
17. American Potato Co.
18. R. T. French Co.
19. Idaho Dehydrating Co., Inc.
20. Bannock Paving Co.
21. Pocatello Paving Co.
22. FMC Corp., Minerals Products Div.
23. Idaho Concrete Products
24. Kraft Foods Co.
25. Idaho Potato Growers, Inc.
26. Lamb Weston, Inc.
27. Burley Brick & Sand Co.
28. Cascade Container Corp.
29. Great Atlantic & Pacific Tea Co.
30. Burley Processing
31. Ore-Ida Potato Processors
32. Amalgamated Sugar Co. (3)
33. Magic Valley Foods
34. National Dairy Products Corp.
35. Rocky Mountain Chemical Co.
36. Gordon Paving Co.
37. Idaho Frozen Foods, Inc.
38. Idaho Hide & Tallow Co.
39. Idaho Alfalfa Products

40. Magic Valley Processing Co.
41. Carter Packing Co.
42. Green Giant Co.
43. Pet Milk Co.
44. Stockmans Meat Co.
45. Gabriel Packing Co.
46. Cinder Products Co.
47. Jerome Co-op Creamery
48. Potato Products Corp.
49. Albertson's
50. Blackline Asphalt
51. Gem State Packing Co.
52. Harris Bros. Lumber
53. Idaho Creameries
54. Pullman Brick
55. Pumice Products Co.
56. Weatherby Lumber Co.
57. Ada County Dairymen's Assn.
58. Idaho Pine Co.
59. Asphalt Paving & Construction Co.
60. Crookham Co.
61. Dairymen's Co-op Creamery of Boise Valley
62. Idaho Meat Packing Co.
63. Armour & Co.
64. Idaho Animal Products Co.
65. Idaho Concrete Pipe Co.
66. Western Block Co.
67. Western Idaho Potato Growers, Inc.
68. Nampa Custom Cannery
69. Gem Canning Co.
70. Gem Fruit Union, Inc.
71. Eber Eldered Mint Still
72. Idaho Mint Distillers, Inc.
73. Fruitland Canning Co.
74. Boise Cascade Corp.
75. Farmers Co-op Creamery
76. Idaho Canning Co.
77. Mosier Rendering Co.
78. Allen Custom Canning Co.

Washington Water Power Company, The:
1. Coeur d'Alene Stud Co.
2. DeArmond-Joyner Lumber Co.
3. R. W. Lumber Co.
4. Post Falls Lumber Co.
5. Idaho Veneer Lumber Co.
6. Potlatch Forests, Inc.
7. Hedlund Lumber Co.
8. Burns-Yaak River Lumber Co.

Note: The number shown in parentheses to the right of an individual customer designates the number of plants served within the state by the same company.

INDUSTRIAL CONSUMERS ABLE TO USE NATURAL GAS ONLY

Idaho:

Intermountain Gas Company:
J. R. Simplot Company

Oregon:

Northwest Natural Gas Company:
Shell Chemical Company

Washington:

Direct Industrial Customer of El Paso:
Phillips Pacific Chemical Company

INDUSTRIAL CONSUMERS COMMITTED TO USE OF NATURAL GAS OR PROPANE

Idaho:

Direct Industrial Customer of El Paso: Bunker Hill Company

Intermountain Gas Company:
- Ada County Dairymen's Association
- Boise Cascade Corporation
- Burley Processing
- Dairymen's Co-op Creamery of Boise Valley
- Farmers Co-op Creamery
- Great Atlantic & Pacific Tea Company
- Idaho Creameries
- Idaho Frozen Foods, Inc.
- Idaho Potato Growers, Inc. (2)
- Jerome Co-op Creamery
- Kermac Nuclear Fuels Corporation
- Lamb-Weston, Inc.
- Magic Valley Foods
- Ore-Ida Potato Processors
- Potato Products Corporation
- Rogers Brothers (2)
- Western Idaho Potato Growers, Inc.

The Washington Water Power Company:
- DeArmond-Joyner Lumber Company
- A. P. Green Company
- Idaho Veneer Lumber Company
- Potlatch Forests, Inc.
- J. R. Simplot Company
- Sno Crop, Inc.

Nevada:

Southwest Gas Corporation: Anaconda Copper Company

Oregon:

California-Pacific Utilities Company:
- Agnew Plywood Company
- Boise Cascade Corporation (2)
- Carolina-Pacific Plywood, Inc.
- Custom Plywood, Inc.
- Evans Products Company
- Hanna Nickel Smelting Company
- Klamath Plywood Corporation
- Kogap Manufacturing Company
- Minnesota Mining & Manufacturing Company
- Nordic Plywood, Inc.
- Rogue Valley Plywood, Inc.
- Russek's, Inc.
- Steve Wilson Company
- Vancouver Plywood Company
- White City Plywood
- Winema Lumber Company

Cascade Natural Gas Corporation:
- Lamb-Weston, Inc.
- U.S. Gypsum Company

Northwest Natural Gas Company:
- Alpine Veneer
- B & J Veneer Company
- Cascade Plywood Corporation
- Columbia Brick Works
- Commercial Plywood, Inc.
- Eugene Plywood Company
- Giustina Veneer Company
- Jones Veneer & Plywood Company (2)
- Leading Plywood
- Linnton Plywood Association
- Malarkey, Herbert
- Milwaukie Plywood Corporation

Oregon—Continued

Northwest Natural Gas Company—Continued

Nultnomah Plywood Corporation
National Biscuit Company
Owens-Illinois Glass Company
United States Plywood Corporation
Vancouver Plywood Company
Western Veneer & Plywood Company
Willamette Plywood Corporation

Washington:

Cascade Natural Gas Corporation:

Anderson & Middleton Lumber Company
Intalco Aluminum Corporation
Reynolds Metals Company
Whatcom County Dairymen's Association

Washington Natural Gas Company

American Biscuit Company
American Can Company
Atlas Foundry & Machine Company
Boeing Company (3)
Can Industries, Inc.
Centralia Plywood Company
Donald Lyle, Inc.
Farwest Plywood Company
Fisher Flouring Mill Company
Hardell Plywood Company
Heath Tecna Corp.
Lacey Plywood Company
Lewis Pacific Dairy Association
Metro-Seattle
Northern Commercial Company
Northwest Glass Company
Pacific Car and Foundry Company
Tacoma Plywood and Door Company
Tidewater Plywood Corporation
Western Gear Corporation

The Washington Water Power Company:

Boise Cascade Corporation
Calkins Manufacturing Company
International Pipe & Ceramic Company
Quarry Tile Company
Spokane Steel Foundry

Note: Number shown in parentheses to the right of an individual customer indicates number of plants served within the state by the same company.

Appendix III

PACIFIC NORTHWEST GAS INDUSTRY GROWTH DATA, WASHINGTON, OREGON, IDAHO

TABLE I.—TOTAL GAS SALES[1]

(Since acquisition of Pacific Northwest Pipeline by El Paso Natural Gas Co., in 1957)

	1957		1966	
	Volume (billion cu. ft.)	Amount	Volume (billion cu. ft.)	Amount
Washington	42,528,445	$13,822,241	112,510,266	$40,371,107
Oregon	18,193,534	5,846,218	66,132,120	24,089,698
Idaho	10,077,801	3,565,829	34,166,311	12,834,801
Total	70,799,780	23,234,288	212,808,697	77,295,506

[1] Source: Brown's Directory. Data include all sales by distributor companies, plus direct industry sales by El Paso Natural. Northwest division of El Paso supplied all gas involved.

TABLE II.—DIRECT INDUSTRY SALES BY EL PASO [1]

	1957		1966	
	Volume (thousand cu. ft.)	Amount	Volume (thousand cu. ft.)	Amount
Washington	3,107,053	$1,178,201	4,848,896	$1,909,374
Oregon	(None)		1,166,607	454,846
Idaho	6,810,723	2,431,481	7,487,253	2,961,792
Total	9,917,776	3,609,681	13,502,756	5,325,912

[1] Source: Brown's Directory.

TABLE III.—TOTAL ULTIMATE CUSTOMERS [1]

	1957	1966	Percent increase
Washington	63,582	195,207	207.4
Oregon	89,932	160,230	88.8
Idaho	3,483	58,053	1,567.3
Total	156,997	413,490	164.4

[1] Customer totals are for 1965.

TABLE IV.—GAS SALES COMPARED TO OTHER SOURCES OF ENERGY, CALENDAR YEAR 1965, WASHINGTON, OREGON, IDAHO

	Washington (billion B.t.u.'s)	Oregon (billion B.t.u.'s)	Idaho (billion B.t.u.'s)	3-State total	
				Billion B.t.u.'s	Percent of total
Natural gas [1]	114,862	59,703	34,444	209,009	27.7
Distillate fuel [2]	83,478	55,757	22,380	161,615	21.3
Residual fuel oil [3]	47,699	27,581	2,163	77,443	10.2
Liquified petroleum [4]	4,659	3,806	2,199	10,664	1.4
Kerosene [5]	193	108	2,892	3,193	.4
Coal [6]	12,550	8,358	27,667	48,575	6.4
Hydroelectricity [7]	167,542	56,117	22,656	246,315	32.6
Total, other than gas	316,121	151,277	79,957	547,355	72.3
Total, all sources	430,983	210,980	114,401	756,364	100.0

[1] 1,076 B.t.u./ft.^{3}
[2] 5,825,000 B.t.u./bbl.
[3] 6,287,000 B.t.u./bbl.
[4] 95,900 B.t.u./gal.
[5] 5,670,000 B.t.u./bbl.
[6] 26,200,000 B.t.u./ton.
[7] 3,412 B.t.u./kw.-hr.

Sources: Bureau of Mines publications; mineral industry surveys; annual fuel oil shipments, Aug. 9, 1966. Mineral industry surveys, annual liquified petroleum gas shipments, Sept. 12, 1966. Mineral industry surveys, bituminous coal and lignite distribution, Mar. 1966. Federal Power Commission press release No. 14817 Feb. 21, 1967. Hydroelectricity is reported as number of kw.-hr. generated and may not be consumed entirely in the State reported above.

TABLE V.—NET PLANT INVESTMENT—GAS DISTRIBUTION FACILITIES

(In Northwest division territory, El Paso Natural Gas Co.)

	Dec. 31, 1957	Dec. 31, 1966
Distributing companies:		
California-Pacific Utilities	$3,067,102	$13,625,316
Cascade Natural Gas	16,882,332	62,697,950
Intermountain Gas Co	17,947,458	[1] 50,442,826
Northwest Natural Gas	45,497,171	117,926,984
Rocky Mountain Gas Co	2,940,021	[3] 6,267,141
Washington Natural Gas Co	27,463,262	93,914,300
Washington Water Power	[4] 17,631,000	[5] 33,224,000
Southwest Gas Corp	7,866,768	67,519,405
Total of distributing companies	139,295,114	445,617,922
Increase (percent)		219.9
El Paso natural pipeline facilities (Northwest division only)	$238,433,779	[6] $242,921,000
Total plant investment for all companies	$377,728,893	$688,538,922
Increase (percent)		82.3

[1] As of Dec. 31, 1965.
[2] As of Dec. 31, 1960.
[3] As of Dec. 31, 1964.
[4] Gross plant as of Dec. 31, 1958.
[5] Gross plant as of Dec. 31, 1965.
Estimated from FPC docket CP66-315.

APPENDIX IV

BASIC STATISTICS, NORTHWEST DIVISION, EL PASO NATURAL GAS CO.

	1957		1966	
	Total	Average day	Total	Average day
Total gas sendout, m.c.p. at 14.73 p.s.i.a.[1]	132,032,879	361,734	317,594,530	870,122
Total sales, m.c.p. at 14.73 p.s.i.a	124,426,801	340,895	291,059,443	797,423
Firm	75,961,791	208,114	213,191,495	584,086
Interruptible	48,465,010	132,781	77,867,948	213,337

[1] 140.5 percent increase 1966 over 1957. Average annual increase, 14.05 percent.

Note: Firmload rose from 61 percent in 1957 to 73.2 percent in 1966. Interruptible load, 39 percent in 1957 and 26.8 percent in 1966.

	Increase, 1966 over 1957 (percent)	Average annual increase 1957–66 (percent)
Firm	180.7	18.07
Interruptible	60.7	6.07
Total	133.9	13.39

Note: Total ultimate consumers served, 1957=156,997 (Washington, Oregon, Idaho); 1966=413,490. Increase=164.4 percent.

Mr. KREAGER. I will use the time available to me for a quick summary.

I am here in support of S. 1687. I am an economist, not a lawyer. Accordingly, my purpose, briefly, is to establish by some economic measurements the fact that the public interest has been served by the natural gas supply situation in the Northwest over the last 10 years. By implication, of course, I am suggesting that the public interest has been imperiled in terms of what we might regard as a

legal technicality—divestiture by El Paso of Pacific Northwest pipeline—that could be eliminated by the legislation that is before you for consideration now.

I am here under the sponsorship of the gas distribution industry in the Pacific Northwest but don't presume to speak for them. I speak as a professional industrial economist. I am identified with the industry of course because I am a member of the board of directors of Washington Natural Gas and its executive committee and I do professional consulting work for utility industries throughout the Northwest.

Briefly, I have had several experience exposures to this situation which may be useful to the committee as a matter of perspective. These will bring back some recollections to you, Mr. Chairman. In 1951 I had the privilege of serving the Government of the United States as the executive officer of the Office of Defense Mobilization. This was the period of the Korean war. You may recall that the Office of Defense Mobilization for all intents and purposes was the economic manager of the country. This was also the period in which the leading contenders for permits for gas transmission lines proposed to serve the Pacific Northwest were appearing before the Federal Power Commission. There were (*a*) the Pacific Northwest proposal which would come up from the Southwest and (*b*) the west coast proposal which would come down from Canada. We were asked by the FPC in the Office of Defense Mobilization to indicate for the record our opinion of these applications in relationship to national economic security. It is interesting to note that in 1951, after a very considerable amount of interagency consultation, I drafted for the signature of the Director of Defense Mobilization the letter to the Federal Power Commission which indicated that we were not, as a matter of administration policy at that time, concerned with where the gas came from.

We were directly concerned in a national security sense with the fact that the Northwest must have an adequate supply of natural gas, and that it would be better if it came from both sources.

As you know this is what subsequently happened.

The CHAIRMAN. That is the whole point here. They must have it. The question is how can this best be done? That is all we want decided.

Mr. KREAGER. Obviously in this industry, Senator, we are talking about bigness. The reserves of gas have to be considerable. The capacity of the pipeline has to be considerable. The ability of the transmission operator financially and managementwise has to be such that it can expand these facilities. Particularly important in this industry, as a professional in the business, I would say that experienced management has no substitute. Pipeline management is dealing with large sums of money and their experience and their ability and their willingness to expend large sums of money to meet growth demands is of major importance.

In 1957 I returned to the State of Washington as that State's first director of commerce and economic development. This was the period in which El Paso had recently acquired the Pacific Northwest pipeline facilities. Mr. Keyser, the then president of El Paso, was in the State of Washington very frequently conferring with the Governor, with the State public service commission, and with me as the State director of commerce, seeking the approval of the State for the El Paso acquisition and the El Paso operation.

In my capacity for concern with the industrial development of the State of Washington, I recall stipulating to Mr. Keyser the requirement that the operator of the transmission line must be of sufficient caliber that this company could establish rates for industrial use that were predictable over a period of years and, if possible, in due course of time could be lowered.

It is interesting to note that in the 10 years that have elapsed since that time not only have we acquired 345 industrial customers in the three Pacific Northwest States for natural gas, but a 2.86-cents-per-therm industrial rate on interruptible gas in 1957 was reduced to 2.744 on January 1, 1967. Both the supply and the cost have been met by Mr. Keyser's company.

I don't think I have to elaborate any more than is summarized in my written testimony the fact that in the Pacific Northwest in general today, but in the State of Washington in particular, and most particularly in the Seattle/Tacoma area, we have the fastest growing economy in the United States. This economy has to be served in the future by greatly expanded gas facilities.

I don't want to belabor the point, but using very current statistics such as growth in telephone services, it is interesting to note that at the present time over the last 6 years the annual growth rate for Seattle in telephone facilities is 4.7 percent, for Portland it is 4.6, in Los Angeles it is 4.4, and in San Francisco 3.9.

We are talking about a population increase rate, in the current 5-year period, which nationally over the 5 years is 7.4 percent, in Oregon it is 8.4 percent, in Washington it is 19 percent, and in the Puget Sound area it is 32 percent.

I could present many more growth statistics which would illustrate the fact that a growing economy has to have available to it a growing supply of natural gas.

How well has this need been served? It is interesting to note that from an almost standing start 10 to 12 years, natural gas now provides 27.7 percent of the total energy base in the Pacific Northwest States of Washington, Oregon, and Idaho. This gains some significance when you compare this 27.7 percent gas to the 32.6 percent which is hydroelectricity. And of course the hydroelectricity assets of the Pacific Northwest are internationally famous. This data establish the fact that natural gas in the Northwest is a very important factor already and due to become much more important.

One other useful point to keep in mind is that gas transmission companies have a universality of economic interest in any territory that they serve that is not qualified by any other kind of industry, except the long lines telephone business.

For instance, we would say in the Pacific Northwest that the only two companies that have an interest in every area and everything that happens anywhere in the two States of Washington and Oregon are the operator of the gas transmission lines, El Paso, and of course the Pacific Northwest Bell Telephone Co.

Incidentally I am also a director of the Bell Telephone Co. and actively work with them in programing some $125 million of capital investment each year.

Such universality of interest is an important thing because anything that helps anybody grow anywhere in Washington and Oregon helps the gas transmission line and helps the long lines telephone company.

Therefore, these companies and their management have to be of sufficient size, sufficient resources, and sufficient experience to meet the growth responsibilities that are imposed upon them. This is a greater and a broader experience really than accrues, as Mr. Woods knows, to a gas distribution company which is more restricted in the territory that it serves.

So without belaboring the point, having on behalf of the industry made this evaluation of (1) Pacific Northwest growth, and (2) the relationship of natural gas to it over the last 10 years, I would have to conclude, on economic terms of course, that the public interest has been well served. And by implication of course the Federal Power Commission's approval of the El Paso-Pacific Northwest pipeline merger is in the public interest. And by further implication, of course, the whole matter of effective gas transmission line operation into the Pacific Northwest is imperiled because of pending court matters. A legal technicality has greatly imperiled the public interest, industrially and economically in the Northwest in this case. The situation can be corrected by enactment of S. 1687 with appropriate amendments to insure elimination of divestiture decision now imperiling ownerships and operations of Pacific Northwest pipeline by El Paso Natural Gas Co.

The CHAIRMAN. At that point in the record, when I said 7 years, the first certificate issued was December 23, 1959, that is about 7 years.

For the record, the Commission was unanimous in that decision at that time. And we based our plans upon that at that time, not knowing we would get all these complications. The Commission was unanimous.

Mr. KREAGER. In short, just in summary: we are operating in the fastest growing part of the United States today under a natural gas transmission situation that has been eminently satisfactory, that promises, because of successful past experience, to meet the public interest in the years that lie ahead of us. We would like to see the uncertainty removed that hangs over that economic asset.

We believe S. 1687 can accomplish this purpose. In any event, any successor to the present transmission line ownership and management must be not less than El Paso in its reserves, not less than El Paso in its financial ability.

And above all, it must be not less than El Paso in its management experience and willingness to use those reserves and those finances to expand the availability of natural gas to the Pacific Northwest.

Thank you very much, Senator.

The CHAIRMAN. Just to show what problems we have, and I am not passing, like you and Mr. Woods on what is fair and what should be done, to show how you can get really fouled up in one of these things, and why we should have some delegation of some kind of authority to make decisions occasionally, I have been a little bit modest about the years.

Here are the chronological steps: In 1956 there was agreement to exchange stock.

In 1957, in May, 99 percent of the stock was exchanged when they started this.

In 1957, in July, the United States filed action for violation of the Clayton Act in Utah District Court.

In 1957, in August, the merger was filed with the Federal Power Commission—what we are talking about here—to take care of these things in the future.

In November, 1959, 2 years later, or 2½ years later, almost, the Federal Power Commission Trial Examiner, and subsequently the Commission, approved unanimously.

In 1961, the District of Columbia Court of Appeals affirmed the Federal Power Commission order.

In April 1962, a year later, the Supreme Court vacated the Federal Power Commission order.

In the fall of 1962 the Utah District Court found no violation of the Clayton Act.

In 1964, almost 2 years later, the Supreme Court ordered divestiture.

In 1965, the lower court approved the plan of divestiture.

And then in the spring of 1967 the Supreme Court disapproved the plan of divestiture.

That is some record, isn't it? I will put that in the record. And here we are looking toward some plans to take care of our needs.

Any questions of Mr. Kreager?

Senator CANNON. I have none.

The CHAIRMAN. Thank you very much.

The CHAIRMAN. Mr. Wickberg, we will be glad to hear from you.

Mr. Wickberg, for the record, is the chairman of the Idaho Public Utilities Commission and is representing the National Association of Railroad Utilities Commissioners.

You represent the Idaho Public Utilities Commission?

STATEMENT OF RALPH H. WICKBERG, PRESIDENT, IDAHO PUBLIC UTILITIES COMMISSION, FOR IDAHO PUC AND NATIONAL ASSOCIATION OF RAILROAD & UTILITIES COMMISSIONERS; ACCOMPANIED BY PAUL RODGERS, GENERAL COUNSEL, NARUC

Mr. WICKBERG. Yes, sir; Mr. Chairman.

My name is Ralph Wickberg, and I reside in Boise, Idaho. I am now serving, and have served as president of the Idaho Public Utilities Commission since 1961. I am also privileged to be vice president of the Western Conference of Public Service Commissions.

I am here in support of S. 1687.

The Idaho Public Utilities Commission has regulatory jurisdiction over all public utilities operating in the State of Idaho, including the natural gas distribution companies operating there.

I appear here today both on behalf of the Idaho Public Utilities Commission, and as a representative of the Western Conference of Public Service Commissions, which consists of the regulatory bodies of the 11 Western States, which passed a resolution in late June at their Lake Tahoe meeting in support of this bill.

With me is Mr. Paul Rodgers, secretary-counsel of the National Association of Railroad Utility Commissioners.

I am authorized by the Honorable Don Samuelson, Governor of Idaho, acting pursuant to section 67–802(4), Idaho Code, to say that the views which I express in this statement represent the official views of the government of the State of Idaho.

Mr. Fred Allen, the president, has authorized me, if I may, to add to my statement one paragraph that reads as follows. This statement was addressed to me and says:

Also, I am authorized by the Honorable Frederick N. Allen, as President of the National Association of Railroad and Utilities Commissioners (NARUC), to state that the Association supports the enactment of S. 1687 in its present form. The NARUC was founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands which regulate carriers and public utilities. The chief objective of the NARUC is to serve the public interest through the advancement of governmental regulation of carriers and utilities.

And there is an official attachment.

The CHAIRMAN. That will be put in the record.

Mr. WICKBERG. The resolution passed at Lake Tahoe by the western conference is adopted and is contained within the statement. I don't think it is necessary to read the resolution.

The CHAIRMAN. All right.

Mr. WICKBERG. We strongly support the purposes of S. 1687 and H.R. 8549 and believe that passage of this proposed amendment to the Natural Gas Act will improve the effectiveness of regulation of the natural gas industry—and that is enactment will be in the interest of both the general public and of the consumers of natural gas throughout the Nation.

In this connection, I would like to submit for the record Resolution No. 1 adopted on June 14 of this year by the Western Conference of Public Service Commissions. It reads as follows:

Whereas, Section 7(c) of the Natural Gas Act at present provides that the approval of the Federal Power Commission must be secured for the acquisition by any person of the assets of a natural gas pipeline company; and

Whereas, in April 1962 the Supreme Court of the United States declared: (1) that the Federal Power Commission's authority does not extend to the approval of acquisitions of controlling stock interests in natural gas pipeline companies; (2) that, unlike other Federal regulatory agencies possessing power to approve acquisitions, the Federal Power Commission's approval of an acquisition of assets does not exempt the transaction from prosecution under the antitrust laws; and (3) that the Commission cannot even make its statutory determination as to whether a proposed acquisition of pipeline facilities would be required by present or future public convenience and necessity as long as an antitrust action directed against the acquisition is pending in the courts; and

Whereas, where an industry is subject to such detailed regulation as is now exercised by the Federal Power Commission with respect to the operations of interstate natural gas pipelines, this Conference agrees that the Federal Power Commission should have authority to pass upon stock acquisitions affecting control of a pipeline, and, with respect to all acquisitions, stock or asset, the Federal Power Commission should have the authority to authorize such transactions even if they have an adverse effect on competition, where the Commission finds that that effect is insubstantial or is clearly outweighed by other public interest considerations; all as provided in the bills S. 1687 and H.R. 8549, now pending before Congress; and

Whereas, the present system under which the Federal Power Commission fully regulates the natural gas industry as a public utility industry and the Department of Justice plays a completely uncoordinated role in applying the antitrust laws alone to a proposed merger that has resulted and can again result in the disruption of effective regulation: Now, therefore, be it

Resolved, That the Western Conference of Public Service Commissions recommends to the Congress that appropriate legislation be enacted: (1) to give the Federal Power Commission jurisdiction over acquisitions of stock of natural gas pipeline companies; (2) to give the Commission authority to approve a merger even though there are adverse effects upon competition, provided that the Commission finds those adverse effects to be insubstantial or clearly outweighed by other public interest considerations; and be it further

Resolved, That the Secretary of this Conference be instructed to transmit a copy of this resolution to each member of Congress, and to arrange for appropriate representation at the hearings on S. 1687, now scheduled to be held on July 17, 1967, and at the hearings on H.R. 8549, when scheduled.

The resolution of the Western Conference of Public Service Commissions concurs fully with the views of the Federal Power Commission that—under circumstances where an industry is subject to such comprehensive regulation as is the natural gas industry—the FPC should have authority to determine where the total public interest lies, and the responsibility for determining to what extent competition may or may not serve the public interest.

We believe that this bill will correct a defect in the present regulation of the natural gas industry by which control of natural gas pipelines can presently be obtained without being subject to the basic regulatory process.

We further believe that when this defect is corrected as contemplated by the proposed bill the narrow interpretation of the antitrust statutes should not be allowed to prevail where it is in the public interest to allow the merger of two or more existing natural gas pipelines.

As this committee is aware, the Federal Power Commission—in asking that this bill be introduced—cited the Supreme Court's 1962 ruling with respect to the Commission's approval of the merger of El Paso Natural Gas Co., and Pacific Northwest Pipeline Corp., as an example of the fact that today "the FPC cannot even carry out its statutory responsibility to decide whether a proposed acquisition is in the public interest as long as an antitrust action is pending."

The matter of the pending divestiture of El Paso Natural Gas Co.'s Northwest division—which was formed from the former Pacific Northwest pipeline—is one of grave concern to many of us who are charged with regulatory responsibilities in the West.

The pending divestiture of El Paso Natural Gas Co.'s Northwest division points out most strongly the reason for our concern in the West over the present posture of the Natural Gas Act as it relates to mergers of natural gas pipeline companies.

The El Paso divestiture case, after some 10 years, is now back before the district court in Salt Lake City, Utah, for de novo proceedings. The Pacific Northwest, the Rocky Mountain area, the Southwest, and the great consuming areas of California, find themselves, as a result, unable to forecast with any certainty many vital and long-range questions regarding energy supplies essential to their continued economic growth. As only one example—but one of major importance—neither the customers of El Paso's present Northwest division nor of its Southern division know today what gas reserves will be allocated to the two separate companies following final divestiture. And this question of reserves is basic, I may add, as gas reserves constitute the "inventory" of a natural gas pipeline company upon which the public must rely.

In recent days, I have been in touch with a number of my colleagues on regulatory commissions in States served by El Paso. They are aware of my testimony and concur in my view that this bill not only fills an important need, but that it is imperative that it be further amended to provide for the preservation of the present El Paso Natural Gas Co. system, and the benefits it provides to the 11 States it

serves. I am joined in urging this modification of the bill by the regulatory commission of several Western States.

The text of letters and telegrams from these State regulatory bodies is attached to this statement as exhibits, and I respectfully request that they be made a part of the record.[1]

The CHAIRMAN. All right.

Mr. WICKBERG. I might say in summary: It has been more than a decade since El Paso Natural Gas Co. acquired controlling stock interest in Pacific Northwest, a concern which was experiencing serious financial difficulties and operating problems in trying to serve the Pacific Northwest and Rocky Mountain area. It has been almost 8 years since the Federal Power Commission approved—as being in the interests of the public and the Western States—the actual merger of these two companies.

Thus, in these years, we have had an opportunity to experience and to evaluate the service rendered by the merged El Paso system.

Back in 1957, the former Pacific Northwest Pipeline Corp. faced a financial crisis, a crisis with the most serious implications insofar as the energy supply for the Pacific Northwest-Rocky Mountain area was concerned. The company was unable to meet its actual costs. It was not even in a position to promote its markets in the Northwest. It did not have the financial resources to build essential extensions for providing service. In fact, there was no question that further substantial additional rate increases were imperative if Pacific Northwest Pipeline Corp. were to continue to operate independently. And, at the same time, it was apparent to the regulatory authorities and the natural gas distributors and customers in the area that further rate increases would probably lead to a collapse of the company's market.

It was under these circumstances that El Paso, which served California and the Southwest, applied to the Federal Power Commission for authority to merge with Pacific Northwest. Recognizing the advantages inherent in the proposed combined system, numerous parties representing various States and distribution companies throughout the West favored and supported the merger during lengthy and detailed hearings. Included among these advocates of the merger was my own State Commission, the Idaho Public Utilities Commission, as well as:

The attorney general of Arizona; the Nevada Public Service Commission; The New Mexico Public Service Commission; the public utility commissioner of Oregon; the attorney general of Texas; the Washington Utilities and Transportation Commission, the attorney general of Wyoming; the Southern California Gas Co.; The Southern Counties Gas Co. of California; Southern Union Gas Co.; Intermountain Gas Co.; Northwest Natural Gas Co.; Washington Natural Gas Co.; and Washington Water Power Co.

After full hearings, and after examining all aspects of the public convenience and necessity—including the possible lessening of competition—the Federal Power Commission uananimously ruled that the El Paso-Pacific Northwest merger was in the public interest. Among the benefits deriving from the merger, and cited by the Commission, were: (1) lower gas rates to consumers would result

[1] The letters referred to appear on p. 74.

from cost savings made possible by the merger, (2) increased gas supplies would strengthen the combined systems, (3) development of sources of supply and markets would be stimulated, (4) a financially stronger gas supplier would be created, and (5) the gas supplies of the combined system could more effectively be used to meet emergencies at times of peak demand.

In the intervening years since the merger was accomplished, all of these anticipated advantages have materialized to the benefit of the general public, the gas consumers, the distribution companies, and the many industries in the West which are dependent upon natural gas as a source of energy.

The merger has permitted far greater flexibility in obtaining and allocating natural gas reserves. The merged company has substantially greater economic and financial strength; and through El Paso's contributions, distribution companies in the Pacific Northwest and Rocky Mountain areas have been able to more effectively plan and carry out the expansion of their services. There have been substantial savings in operating costs accomplished by combining services such as geological, engineering, accounting, and executive functions.

Further, the merged company has been able to accomplish large-scale financing at less cost—thus resulting in a lower cost of service and consequent lower rates to customers.

The CHAIRMAN. It seems to me that one of your statements bears repeating.

This is what bothers me about our future, the question of gas reserves. The Commission and all you people involved, the long list of names you read, you said, "The merger has permitted a far greater flexibility in obtaining," but more importantly, "allocating natural gas reserves."

Mr. WICKBERG. Yes, sir.

The CHAIRMAN. This is looking beyond the thing I am concerned about, the allocation. The gas reserves are not here forever. There will be a time in the not too far distant future when the problem of allocation is going to be most important; where it goes.

Mr. WICKBERG. May I interpose a comment at this point? This is one of the primary objectives of the Commissions, as the one I serve on, which have been interested since the time this problem came up. Everybody realizes court proceedings are now underway because of the Supreme Court order to divest the Northwest system from El Paso. One of the problems regulators, maybe not the industry, would be so aware of this, if competitive bids for instance are gathered by the court, and if these bids exceed the depreciated cost of the facilities, and if those then have to be certificated by the Federal Power Commission, we feel that there is at least a danger of increased costs to the consumer if the impact were were decided today.

We feel it is not within the competence at least of our Commission or anyone else that I am acquainted with to predict what reference will be allocated to the new company that is to be created, nor, conversely, will the reference be left with the now El Paso Co. which will be in the Southern part of the United States.

So it not only creates the problem of inventory or gas reserves but it also creates a potential problem in the amount of dollars that the rate payers will be responsible for.

The CHAIRMAN. All of these statements are in the record.

Mr. WICKBERG. In summary, the benefits of the merger have afforded stability of rates and have resulted in improved and expanded service.

In view of these many advantages accruing from the operations of this merged company, we are gravely concerned by the fact that it has been necessary under existing law for the Supreme Court to order the dissolution of the combined company. Justice Harlan—in his separate opinion at the time the Supreme Court ordered divestiture—made this apt observation:

> This case affords another example of the unsatisfactoriness of the existing bifurcated system of antitrust and other regulation in various fields. In this case, the Federal Power Commission had indicated its approval of this merger as being in the public interest. The Department of Justice, however, considered the merger to be violative of the antitrust laws and, for that reason alone, against the public interest . . . *It does seem to me that the time has come when this duplicative, and, I venture to say, anachronistic system of dual regulation should be re-examined.* (Emphasis added.)

The CHAIRMAN. It may be technically, legally, a violation. I don't know. That doesn't necessarily mean that divestiture is going to help the situation with us.

Mr. WICKBERG. We wouldn't of course try to rule on that either. When I left Boise last week I looked at the then latest record of the district court proceedings in Salt Lake City. Approximately 30 intervenors have been admitted to this case as parties, along with El Paso Natural Gas Co. and the Department of Justice. In addition, seven potential purchasers of the Northwest division have been admitted as amicus curiae and will be heard by the court with respect to their proposals for acquisition of the properties.

This extremely complex case has ramifications which make it impossible to foretell the nature, the adequacy, the effectiveness, or the extent of the future natural gas service which is of such vital importance to the continued economic growth of 11 Western States.

Some months ago, last December 8, I wrote to the chairman of this committee, Senator Magnuson, expressing concern at the critical situation which had developed, and with your permission I should like to quote them for the record:

> * * * the natural gas pipeline system in the northwest is fraught with uncertainties which threaten further expansion of the natural gas industry in the Pacific Northwest. The natural gas distribution companies of the northwest and the regulatory agencies having jurisdiction over these natural gas distribution companies have been placed in the position of dealing with a phantom. As of this date, we have no knowledge as to what will ultimately occur to the natural gas pipeline system of the northwest. Stability of the natural gas utilities in the Pacific Northwest cannot be accomplished * * *
>
> As of this date, there is no possible way of accurately determining the ultimate financial structure or the ability of the new company which would acquire the assets of the old Pacific company. There is doubt as to the ultimate base on which the company will be allowed to earn a return. The lack of this knowledge prohibits any accurate forecasting as to the ultimate cost of natural gas in the Pacific Northwest. Industries contemplating the use of natural gas as a source of energy, without knowing or being able to accurately forecast this cost, will necessarily be cautious with respect to expansion of existing, or construction of new, facilities without this information.
>
> Although it is, of course, of prime concern to the Pacific Northwest that this situation has occurred in our area, we respectfully point out that this situation could occur in any area of the United States under the current statutes of the United States. To correct what is currently occurring in the Pacific Northwest and to prevent similar occurrences in other areas of the United States, legislative action to establish a single procedure and a single standard to be applied in

evaluating proposed mergers in the natural gas industry is needed. Under the present law, the Federal Power Commission, the agency charged with regulating the natural gas industry, determines whether the merger of two natural gas companies would be in the public interest and is required by the public convenience and necessity. In making this determination, the Federal Power Commission must consider the proposed merger in all its aspects, including any effect on competition. The Federal Power Commission considers the competitive factors, the service to be afforded the public, the question of conservation, the probable effect on rates, the growing needs of the markets, and all the other factors involved from the standpoint of the public convenience and necessity. Notwithstanding this thorough consideration by the Federal Power Commission of all aspects of a proposed merger, including the effect on competition, under present law the proposed merger can be questioned by the Department of Justice under the antitrust laws alone.

Under the Natural Gas Act, the Federal Power Commission fully regulates the natural gas industry as a public utility industry. To have the Federal Power Commission responsible for evaluating mergers in the natural gas industry on the basis of all the factors involved in the public interest, including the competitive aspect, and in addition to have the Department of Justice play a completely uncoordinated role in applying the antitrust laws alone to a proposed merger, is wasteful, disruptive, and not conducive to effective regulation. *The prime purpose of the regulation of a utility is to provide for stable and continuing service to the public at the lowest possible reasonable cost. What is presently occurring in the Pacific Northwest is a classic example of what can happen when the regulatory process is disrupted * * *.*

* * * the confusion caused by the proceedings in the El Paso-Pacific merger, and which could occur at other times in other areas, is not in the public interest. Legislation is necessary and of the utmost importance. The questions involved in assessing the effects of a merger such as that of El Paso-Pacific should be subject to appraisal against a single congressionally established standard.

We feel that the words we used some months ago are now more apropros than they were when then said. This meeting resulted from working between the various utility commissions of the Northwest and of the areas of Utah, Wyoming, Nevada, Oregon, Washington, and Idaho.

The CHAIRMAN. Mr. Kreager took out the word "Montana." We have a strong letter from the utilities group in Montana.

Mr. KREAGER. I took out Montana only because I was addressing myself to the three States on which I had statistics.

The CHAIRMAN. There is a very strong letter, a communication from the Public Utility Commission in Montana, about this matter.

Mr. WICKBERG. All of the people at the State level in regulation of the distribution companies who obviously have their costs controlled to a major degree by the cost of the purchased gas from the pipeline companies. We don't know who the company will be, we don't know what financial references or background it will have.

Not only that but problems that come up before Federal bodies, with the present company being ordered to divest itself, some of the examiners have taken the position, and I don't say illogically, that in fact El Paso should not be binding its future successor to long-range commitments. If the present operating company cannot bind the future in matters that affect the public interest in economic development and customer cost in the Northwest States, then I think it proves once more that some solution should come before it gets more chaotic than it is now. This is the easiest way to say it.

The CHAIRMAN. How can Bill Woods advise his people on plans for capital investments unless he has some semblance of reliability of source? It is just impossible. And they have to be sufficiently long commitments so that they can make some plans to serve the public

because, if not, there is a disruption, and a disruption normally leads to having to charge more for gas.

Mr. WICKBERG. This will be true. In fact, as the market grows, and new gas suppliers are needed, then those supplies have to be acquired by somebody and reserves dedicated to the new import, whether it be foreign from Canada or from the United States sources.

If there is a grave doubt—which I know exists by testimony I have read—that the present company should not in fact be subsituting its judgment for the new company, whoever it may be, then there is no deterrent to the public interest insofar as those areas in the Northwest.

I might address myself, if I may, for a moment to another matter.

In the public interest field there are other matters, not only economics, the price and the costs, but in the Federal Power Commission they will have this not only in gas pipelines but in transmission electric lines, the duplication of right-of-way. Land is becoming quite a problem. Many times if you had two, either distribution lines of gas or transmission lines of electric power, the public interest might be served to have one right-of-way, one ditch dug up through the country, rather than despoil the country by competing lines of that nature. At least taking the area out of production, or the beauty of the countryside, questions on which are being raised more and more.

Mr. Chairman, I think the rest of the statements have been reasonably well covered except that we from Idaho, joined by Washington and some other States, feel very deeply that this bill should be amended to include the situation that now exists. It would seem to us that if the legislation is well founded, and we will support the bill whether the amendment is made or not, we feel that the situation that created the very crying need for such legislation should be capable of solution under the proposed bill if passed.

I might state that in the early days of this controversy when the Federal Power Commission approved the merger and some State officials of the State of California felt this was tying to one gas supply; namely, El Paso, since that time Pacific Gas Transmission has built a 36-inch line over 600 miles from Alberta, Canada, into San Francisco. And the Gulf Pacific case was decided so that Trans Western now also serves Southern California.

So, in fact, the case has drifted on so long that the lack of competition in California as a sole supplier no longer exists.

The point we would like to make is that if this bill be passed, that it should be able to look at this situation in the light of all current conditions. I might add another thing.

As far as the Federal Power Commission is concerned, and other Federal regulatory agencies, States and State commissions, not only the Governors but State commissions, have the automatic right of intervention and can present its case much easier to a Federal regulatory body, whether it be on adverse effect of competition, price, or any other matter which can come before the Commission.

Mr. Chairman, that concludes my statement.

The CHAIRMAN. Thank you, Mr. Wickberg. I appreciate your testimony.

(Exhibit A follows:)

EXHIBIT A

STATE OF IDAHO, *Boise, July 7, 1967.*

Hon. RALPH WICKBERG,
President, Idaho Public Utilities Commission,
Industrial Administration Building,
Boise, Idaho.

DEAR MR. WICKBERG: Pursuant to the provisions of Section 67–802(4), Idaho Code, which designates the office of Governor of this State as the sole official conduit of communication between the government of the State of Idaho and the government of the United States, this letter will and does authorize you to express the views of the State of Idaho with regard to S. 1687 to the Committee on Commerce of the United States Senate at hearings to be held in the week of July 17, 1967.

Sincerely,

DON SAMUELSON, *Governor.*

RESOLUTION URGING PASSAGE BY CONGRESS OF S. 1687 AND H.R. 8549

Whereas the Western Conference of Public Service Commissions on June 14, 1967 has adopted by Resolution No. 1 urging passage by Congress of S. 1687 and H.R. 8549, a copy of said resolution being attached hereto and made a part hereof by reference; and

Whereas the Senate Commerce Committee is conducting hearings concerning S. 1687 commencing July 17, 1967; and

Whereas the Honorable Ralph H. Wickberg, President of the Idaho Public Utilities Commission, will be testifying at said hearings in support of S. 1687: Now, Therefore, be it

Resolved, That the Arizona Corporation Commission endorses the action of the Western Conference of Public Service Commissioners' Resolution No. 1 adopted June 14, urging passage by Congress of S. 1687 and H.R. 8549, and be it further

Resolved, That the Secretary of the Arizona Corporation Commission be instructed to transmit copies of this Resolution to Senator Warren Magnuson, Chairman of the Senate Commerce Committee, inquiring into the merits of S. 1687.

Dated at Phoenix, Arizona, this 10th day of July, 1967.

E. T. "EDDIE" WILLIAMS, Jr., *Chairman.*
MILTON J. HUSKY.
DICK HERBERT.
GEORGE S. LIVERMORE, *Executive Secretary.*

MONTANA BOARD OF RAILROAD COMMISSIONERS,
Helena July 10, 1967.

SENATOR WARREN MAGNUSON,
Chairman, Senate Commerce Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: The Montana Public Service Commission wishes to be placed on record as supporting passage of S. 1687. The Commission also supported and voted for Resolution No. 1 as passed by the Western Conference of Public Service Commissions at meeting held June 14, 1967.

Sincerely yours,

ERNEST C. STEEL, *Chairman.*

NEVADA PUBLIC SERVICE COMMISSION,
Carson City, Nev., July 6, 1967.

IDAHO PUBLIC UTILITIES COMMISSION,
Statehouse,
Boise, Idaho.

To Whom It May Concern: Be it known that the undersigned, all members of the Nevada Public Service Commission, do hereby affirm support of Resolution Number 1 as approved and adopted by the Western Conference of Public Service Commissions at their Lake Tahoe meeting June 14, 1967.

Be it further known that the undersigned also support and endorse the enactment of appropriate legislation, namely S. 1687 and H.R. 8549.

Sincerely,

REESE H. TAYLOR, Jr.,
Chairman.
NOEL A. CLARK,
LESLIE W. CARLSON,
Commissioners.

NEW MEXICO PUBLIC SERVICE COMMISSION,
Santa Fe, N. Mex., July 5, 1967.

Hon. RALPH H. WICKBERG,
President, Idaho Public Utilities Commission,
Statehouse, Boise, Idaho.

DEAR RALPH: In response to your communication dated June 30, 1967, with reference to Senate Bill 1687, I have discussed the Resolution passed by the Western Conference of Public Service Commissions with our New Mexico state Commissioners and we unanimously endorse the resolution supporting this proposed legislation.

Sincerely,

L. J. CHAMBARD, *Chairman.*
WALTER E. BRUCE, Jr.,
MORRIS YASHVIN, *Commissioners.*

OREGON PUBLIC UTILITY COMMISSIONER,
Salem, July 6, 1967.

Hon. RALPH H. WICKBERG,
President,
Idaho Public Utilities Commission,
Statehouse,
Boise, Idaho

DEAR RALPH: This is in response to your letters of June 29 and 30 and the enclosed copies of Resolution No. 1, adopted by the Western Conference of Public Service Commissions on June 14, recommending favorable consideration by Congress of two objectives described in the resolution.

The resolution adopted by the Western Conference did not contain Resolve (3) set forth in the original proposed resolution, a copy of which you furnished me prior to the meeting of the Western Conference. As indicated in my letter of June 9, I neither supported nor opposed Resolve (3) and, with respect to Resolves (1) and (2), expressed no objection. After having reviewed the finally adopted resolution containing only Resolves (1) and (2), I concur with the conference action in supporting Resolution No. 1.

Enclosed, for your information, is a copy of a letter from Governor McCall sent to each member of the Oregon congressional delegation expressing Governor McCall's views on proposed legislation regarding mergers and any inclusion therein of provisions affecting aspects of the El Paso—Pacific Northwest merger.

Sincerely,

Sam
SAM R. HALEY,
Commissioner.

Enc.

PUBLIC SERVICE COMMISSION OF UTAH,
Salt Lake City, Utah, July 6, 1967.

Hon. RALPH H. WICKBERG,
President, Western Conference of Public Service Commissions,
Statehouse, Boise, Idaho.

DEAR PRESIDENT WICKBERG: As you will recall I was a member of the Resolutions Committee of the Western Conference of Public Service Commissions held at Stateline, Nevada in June; other members being the Honorable Francis Pearson of Washington and the Honorable Zan Lewis of Wyoming.

To me the most vital and important resolution considered by the Resolutions Committee and adopted by the Conference was the resolution urging passage by Congress of S. 1687 and H.R. 8549.

It is clearly apparent, particularly from the mess which has developed in the El Paso Natural Gas Company-Northwest Pipeline Merger, that there is a desperate need for legislation which will permit Federal Power Commission jurisdiction over acquisitions of stock or facilities and approve mergers of natural gas pipeline utilities, though such approval may have an adverse effect on competition and thus violate provisions of the Antitrust Laws provided the Commission finds that other public interest questions clearly outweigh considerations of competition.

The Utah Public Service Commission is of the view that Senate Bill 1687 would provide the needed legislation and would not destroy the effectiveness of Antitrust Legislation, but would be a means of removing what Justice Harlan called "the existing bifurcated system" where the general public interest questions stand completely stalled and become entrapped in a dual jurisdiction squabble without end, and during which time the general public interest must suffer grievously.

It is my understanding that copies of the subject Resolution of the Western Conference of Public Service Commissions have been served on all members of Congress and I shall not attach a copy to this communication. It is my further understanding that under authorization from the State of Idaho and in pursuance of the Resolution you will testify before the Senate Commerce Committee, over which Senator Warren G. Magnuson of Washington is Chairman, in support of S. 1687, in July.

Accordingly, I shall mail a copy of this letter to Senator Magnuson and also to Senators Moss and Bennett of Utah, and Congressmen Burton and Lloyd of Utah.

Sincerely,

DONALD HACKING, *Chairman.*

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,
Olympia, Wash., July 3, 1967.

Hon. RALPH H. WICKBERG,
President, Idaho Public Utilities Commission,
Statehouse, Boise, Idaho.

DEAR RALPH: This is to affirm our support for the resolution passed on June 14th by the Western Conference of Public Service Commissions at the Lake Tahoe meeting.

We have endorsed, in principle, legislation as embodied in S. 1687 for a long time, and we do now endorse specifically S. 1687 as it comes before the Senate Commerce Committee.

In addition, we favor an amendment to this proposed legislation that would nclude the pending divestiture of the pipeline company presently operating in the Pacific Northwest. Many years of indecision and litigation are behind us, and the future is still uncertain as to the disposition of this case. Therefore, it would seem that reasonable and orderly regulation of distributors could best be assured if a firm source of supply could be affirmed with its attendant price stability.

Sincerely,

ROBERT D. TIMM, *Chairman.*

WYOMING PUBLIC SERVICE COMMISSION,
Cheyenne, July 3, 1967.

Re Statement of Public Service Commission of Wyoming in full support of Resolution No. 1 adopted on June 14, 1967, by Western Conference of Public Service Commissions urging passage by Congress of S. 1687 and H.R. 8549.

Hon. RALPH H. WICKBERG,
President, Idaho Public Utilities Commission,
Statehouse, Boise, Idaho.

DEAR COMMISSIONER WICKBERG: The Public Service Commission of Wyoming has in the past and continues to fully support legislation that would permit the Federal Power Commission to consider and act upon utility merger proposals as utility law requires and permits, and to set such approved mergers into motion without the ever-present possibility of its carefully studied and considered decisions on mergers being set aside on a pure non-utility basis by another agency (Justice Department).

The above identified Resolution is a clear and proper statement of the position of the Wyoming Commission. Our Commission has become a sponsor and signatory of such Resolution to lend its full and unqualified support thereto.

Furthermore, it should be noted that our Governor, Honorable Stanley K. Hathaway, has in behalf of the State of Wyoming indicated his full support for the subject legislation in his letter directed on February 1, 1967, to the Wyoming Congressional delegation and to Senator Magnuson.

Very truly yours,

RICHARD J. LUMAN,
Chairman.
WALTER W. HUDSON,
ZAN LEWIS,
Commissioners.

The CHAIRMAN. The committee will recess until tomorrow morning at 10 o'clock. Our first witness will be the Governor of Utah, Calvin Rampton.

(Whereupon, at 12:40 p.m., the committee was recessed, to reconvene at 10 a.m., on Wednesday, July 19, 1967.)

84-444—67——6

GAS PIPELINE MERGER

WEDNESDAY, JULY 19, 1967

U.S. Senate,
Committee on Commerce,
Washington, D.C.

The committee met at 10 a.m., in room 5110, New Senate Office Building, Hon. Frank E. Moss presiding.

Senator Moss. The committee will come to order.

This morning's hearing is the second day of hearings on S. 1687, a bill to amend the Natural Gas Act with respect to mergers and antitrust review.

Yesterday the committee heard from the Federal Power Commission and witnesses from the Pacific Northwest. This morning's witnesses come from Utah and California.

We are very pleased to have before the committee as our first witness the Governor of the State of Utah, the Honorable Calvin L. Rampton, who brings to us not only his experience and responsibility as the Governor of the sovereign State of Utah, but many years experience as an outstanding attorney, practicing attorney, in Utah and elsewhere in the West, and one who is intimately familiar with the general problem that is before this committee.

Governor Rampton, you may proceed in whatever manner you choose.

STATEMENT OF HON. CALVIN L. RAMPTON, GOVERNOR OF THE STATE OF UTAH

Governor Rampton. Thank you, Mr. Chairman.

Prior to my assuming office in January of 1965, as Governor of the State of Utah, I had been engaged in the practice of law in Salt Lake City for 25 years. My practice dealt largely with State and Federal regulatory agencies, particularly with the Interstate Commerce Commission. I welcome the opportunity to appear before this distinguished committee of the U.S. Senate for the purpose of presenting my views regarding S. 1687.

I have for many years followed the tortuous, expensive, and confusing course of the *El Paso Natural Gas Co.-Pacific Northwest Pipeline Corp.* case. In addition, while engaged for many years in the private practice of law before becoming Governor of Utah, I had prolonged exposure to proceedings conducted by the Interstate Commerce Commission for the purpose of determining whether, and how, merger of certain western railroads might serve the public interest. Out of insight gained from observing the progress of these two matters, I am prompted, and believe myself reasonably well qualified, to endorse the objectives of S. 1687.

I am satisfied that the Federal Power Commission should possess clear and undivided authority to consider whether a proposal to acquire control of a natural gas company would, if approved, serve the public interest. The Commission's jurisdiction should be comprehensive, of course, and should apply, therefore, whether a given proposal contemplates control be gained through the acquisition of assets or the purchase of stock. If the Commission approves such a proposal, the enabling certificate of public convenience and necessity should certainly operate to immunize the merger against attack upon grounds the merger violates antitrust law such as that provided under the Clayton Act.

These appear to be the very worthwhile objectives of S. 1687. Their achievement would constitute great improvement in regulation of the interstate natural gas industry to assure protection of the public interest and would encourage orderly development of that industry. It appears imperative to eliminate any possibility that there may be recurrence of a situation so harmful to the public interest in securing efficient, stable, economic, and experienced natural gas service as has been that situation brought about by the *El Paso-Pacific Northwest* case.

We in the State of Utah, in common with many, many others living within the western sections of our country, have deep interest in assurance regulation of the natural gas industry will be effective and orderly so that this important industry may retain its vitality and the capacity to accommodate our booming needs. Natural gas constitutes a significant part of our total energy supply.

The committee members will recognize the population of the Western States is expanding at an unprecedented rate. Population within my State has mounted by some 22 percent within the past decade. As a result, heavy new energy requirements have developed and natural gas has been relied upon to supply a material share of these needs. Energy requirements of the area west of the Continental Divide are projected to increase by some 70 percent in the 15-year period ending in 1980 and it is expected natural gas will be called upon to furnish something on the order of one-third of these new demands. Thus, it is obviously to our considerable interest to encourage every solid effort to improve the natural gas industry's ability to provide the public with ample supplies of gas at low and equitable rates.

I have taken particular note of recitation in the letter of Federal Power Commission Chairman Lee C. White, transmitting the draft of what has become S. 1687 to the Honorable Hubert H. Humphrey, in his capacity as President of the United States Senate. As reprinted in the Congressional Record of this past May 4, the letter contains the following paragraph:

> The bill would bring the Natural Gas Act into line with the Congressional enactments for other regulated industries such as those under the ICC, the CAB and the FCC, which provide that transfer of assets or control of a regulated company, if determined to be in the public interest by a regulatory commission, would not constitute a violation of the antitrust laws. Under the Natural Gas Act, as construed in *California* v. *Federal Power Commission*, 369 U.S. 482, the FPC cannot even carry out its statutory responsibility to decide whether or not a proposed acquisition is in the public interest as long as an antitrust action is pending.

Freedom to devise activities and practices allowed members of the interstate natural gas industry, in common with that of those engaged

in other regulated industries, is very different from, for example, the shoe, electronics, or automotive industries where the dynamics of competition are primarily relied upon to regulate marketing behavior. An interstate natural gas transmission pipeline company is thoroughly and constantly supervised and controlled by the Federal Power Commission. The company may neither initiate nor terminate service without permission of that Commission. The price of natural gas purchased by the company is fixed by the Commission. The Commission defines the markets these companies may serve and regulates the rates which may be exacted for such service.

I do not wish to be understood as asserting that competition is undesirable or unnecessary in the natural gas transmission business solely because the industry is regulated. There might well be circumstances in which assurance of competition may prove desirable. However, S. 1687 properly requires that the Federal Power Commission must assess the significance of competitive considerations in judging whether or not a proposed merger should be authorized as promoting the overall public interest.

Still, there are many and exceedingly complex added factors which should be considered by a regulatory agency in connection with deciding whether or not to certificate a proposed acquisition or merger. Proper concern for the public's interest compels consideration of many relevant factors additional to, and which may prove to be vastly more important than, the single element of competition. May I mention only a few of such additional considerations which come readily to mind as applied to the natural gas industry:

Will service to the public be improved?

Will the transaction promote conservation of this irreplaceable resource?

What will be the effect on rates? Will rates be lower than would otherwise be possible?

What are the present and probable future requirements of the markets?

Will there be an improvement in the gas supplies available for the markets?

Answers to questions such as these, susceptible of development in the most searching and exhaustive detail by the Federal Power Commission and its staff, bear directly on matters of vital concern to the general public and to gas consumers. Yet, under present law, unless changed after the manner of S. 1687 would effect, the courts are neither required nor permitted to accord any weight whatever to the findings or expertise of those experienced regulators entrusted with supervision of the natural gas industry in deciding whether a merger transaction affecting interstate natural gas transportation companies and attacked under the antitrust laws should survive.

If you were going to consider the question of monopoly in a vacuum separate and apart from any other factors which may determine whether or not a merger should be granted, I think you would also decide that it should not, because separate and apart from any other considerations it is natural that the granting of a merger will reduce competition and to that extent it is not considered, in light of the whole picture, adverse to the public interest. By the same token any time a company comes in with an application for a new certificate of convenience and necessity, if you consider that in a vacuum so far as the

competitive aspects only are concerned, it should be granted because standing by itself the public can be presumed to get better service from an additional company. However, when you consider what the entrance of this additional company into the field may do in the long run to the ability of an existing company to render the service, you get an entirely different picture.

It is my feeling for this reason that you can't consider the question of the applicability of competitive factors separate and apart from the entire picture.

For these reasons, I urge your approval of S. 1687, legislation which would place exclusive authority for determining all public interest elements—including those involving anticompetitive overtones—squarely where they should be; namely, in the hands of the Federal Power Commission—the most informed, experienced, and expert Federal agency in this field.

I alluded earlier to the statement by Federal Power Commission Chairman White that, pursuant to *California* v. *Federal Power Commission*, 369 U.S. 482, the Commission cannot now carry out its statutory responsibility to decide whether a proposed acquisition is in the public interest so long as an antitrust action is pending. We in Utah are acutely aware of that decision which operated to vacate a certificate of public convenience and necessity issued by the Federal Power Commission approving the merger of El Paso Natural Gas Co. and Pacific Nothwest Pipeline Corp. as being in the public interest. The Court held at that time that the Commission, under present statutes, did not have authority to act on such a merger during the pendency of an antitrust suit.

As a result, we in Utah—and, as well, those in much of the West—have lived through recent years wholly uncertain and uneasy as to who might succeed to El Paso Natural Gas Co. in operation of the former Pacific Northwest Pipeline Corp. properties and when that succession might occur.

This uncertainty and uneasiness would not have obtained these many years nor would they treaten to continue long into the future if the provisions of S. 1687 had been law during the years past. The remarkably complex question of whether the merger of Pacific Northwest Pipeline Corp. into El Paso Natural Gas Co. would serve the total public interest, with due regard for such anticompetitive consequences as reason would suggest might follow upon the merger, would have been determined with clarity and finality long since. Furthermore, the determination would have been reached by the Federal Power Commission in the exercise of its vast and singular expertise respecting the operations of interstate natural gas companies and how these interact in infinite variety to affect the public interest.

It is a pity S. 1687 has not been the law. It should become the law at the earliest possible date. The El Paso-Pacific Northwest situation in its present posture should not have been, and its like should not be permitted to recur. S. 1687 would appear to be well designed to prevent such recurence.

In addition, I believe that the bill is designed to give full protection to the public interest. I have seen the light provisions which apply to the Interstate Commerce Commission work well, particularly in the *Western Pacific* merger cases where both Southern Pacific and

Santa Fe attempted to obtain control of Western Pacific Railroad. In this case the Department of Justice appeared as a party before the Interstate Commerce Commission and originally opposed the merger on the grounds that it would reduce competition and, therefore, was not in the public interest. After having sat through the hearings, the Department of Justice withdrew their objections. However, in spite of their withdrawal of the objections, the Interstate Commerce Commission denied the merger. But the denial was made by the Commission on the basis of all factors in the case and not on the basis of one factor in a vacuum.

Furthermore, under this bill as now proposed, as well as under the procedure under other Federal regulatory agencies, the question of competition may be attacked in the courts but it is attacked not as a separate proceeding but merely as a finding in the principal area.

Both as Governor and as a longtime practitioner, I feel that this bill is in the public interest.

Thank you.

Senator Moss. Is it your understanding, Governor, that the finding made by the Federal Power Commission, if this bill would become law, would still be appealable to the courts on the basis of being arbitrary, capricious, or something of that sort?

Governor Rampton. That is right, Mr. Chairman. It would be appealable just as any other finding in this case is appealable. Theoretically the Court should reverse it only if there is no credible evidence to support it.

But you and I, as practitioners, have seen the courts depart from this many times and actually weigh the evidence itself. It would be appealable.

Senator Moss. And is it your understanding that it would be possible and a desirable practice, for example, for Justice, if they had a position to take on the antitrust factors, to appear before FPC?

Governor Rampton. Yes. And I am sure they would. I think they have an adequate opportunity to protect the public interest in this proceeding and not in a companion or supplemental proceeding before the Court.

Senator Moss. Are you aware of how long the *El Paso* case has been in litigation?

Governor Rampton. I would make a rough guess at 6 years, Senator. I haven't counted up the time. It has been a good long while.

Senator Moss. I think it is closer to 10.

What sort of impact has this long litigation and delay had in Utah, or on the economy of Utah, if you have been able to detect it?

Governor Rampton. It has had considerable adverse effect, particularly on the development of the natural gas industry in the State of Utah, and the willingness of this company or other companies to make application for transmission facilities. I think it has almost held us at a standstill there for a number of years so far as the development of transmission facilities through and into and out of the State is concerned.

Senator Moss. In your opinion has this been a factor in delaying applications for other servicing pipelines in the area?

Governor Rampton. It has practically tied up the development except for merely distribution into areas that already have or are generally served by other companies such as Mountainview Supply Co.

Our situation in Utah is this: We have been a producer and exporter of gas for a considerable period of time. A number of years ago—we had been, I say for a considerable period of time. A number of years ago we sort of passed over and became more of a user than a producer.

We are concerned in Utah not only with the local distribution by Mountainview Supply Co., which is the company having the certificate for distribution and sale in most of Utah, we are vitally concerned in the supply of gas, the basic supply of gas, because we can see the time coming up very soon when Mountainview Supply's own production facilities in eastern Utah, Colorado, and Wyoming, are going to be inadequate.

We need the interstate transmission of gas through our State and we need to know where we stand on it in order that the companies involved can proceed with adequate planning and construction for the future.

Senator Moss. Utah does have an economic planning commission, that functions trying to plan ahead on the ecoomic development of the State?

Governor Rampton. It does. One of our principal problems is going to be the question of fuel, and just what part gas will play and what part coal is going to play. We don't use much oil for heating. But also what part oil will play if it enters the picture.

Senator Moss. Does this have any bearing on the problem of dealing with oil shale that is now pending before the Department of the Interior, and the regulations on oil shale, that has been the concern of the Congress recently.

Governor Rampton. It certainly will. We of course don't know just when we are going to achieve an economically feasible method of producing the oil from the oil shale, but it is highly important to us. We are working on that now.

The State itself owns a considerable number of the oil shale reserves. The Federal Government has issued proposed regulations and, I believe, in about 20 days now the time expires when the States may respond to these proposals. All of this fits into future planning so far as availability of fuel and power is concerned.

Senator Moss. Have you had a chance to examine the bill closely enough to determine whether or not this has what we call the grandfather clause and what this effect might be if in effect we have a "grandfather" grant of right?

Governor Rampton. I don't think it will have very much effect, the question of existing rights. I think it is going to be more prospective than anything else in its operation to determine what will be done in the future in regard to the applications. So far as my interest is concerned and the interests I have been expressing here, I don't think the grandfather clause is very material one way or the other.

Senator Moss. You don't view this an an effort to unscramble any omelets that have been scrambled before, but to try to prospectively deal with this problem?

Governor Rampton. That is right.

Senator Moss. Governor, we surely appreciate your appearance here, and your very strong and forthright statement. I might say for the spectators that the Governor had sent on copies of his statement, and maybe it was the railroad shutdown, but for some reason they

were not delivered to the committee. Therefore we don't have available the number that this committee likes to have.

Governor RAMPTON. They have been shipped, I think 150 of them, Mr. Chairman. I am sure they will find their way into the committee files.

Senator MOSS. Thank you very much. We do appreciate it, Governor.

Governor RAMPTON. Thank you, Senator.

Senator MOSS. The next witness is Robert A. Hornby, president of the Pacific Lighting Corp., San Francisco, Calif. We are happy to have you come before the committee, Mr. Hornby. Would you introduce your associate?

STATEMENT OF ROBERT A. HORNBY, PRESIDENT, PACIFIC LIGHTING CORP., SAN FRANCISCO, CALIF.; ACCOMPANIED BY JOHN ORMASA, VICE PRESIDENT AND GENERAL COUNSEL, PACIFIC LIGHTING CORP.

Mr. HORNBY. Yes, sir. I am Robert A. Hornby, president of Pacific Lighting Corp. With me I have Mr. John Ormasa, vice president and general counsel for our system.

Senator MOSS. We are very glad to have you, too, Mr. Ormasa.

Mr. ORMASA. Thank you.

Mr. HORNBY. I very much appreciate the opportunity to present this statement. I hope it will assist the committee's consideration of the bill.

I have been with the Pacific Lighting system since 1925, and for a short time theretofore I was with the staff of the California Public Utilities Commission, and prior to that for a short time as a consulting engineer, always in the public utilities business.

Pacific Lighting's two gas distribution utility subsidiaries are the Southern California Gas and Southern Counties Gas Cos. With 3 million customers, the companies serve the largest and, up to now at least, the fastest-growing gas system in the United States. We have attached to the copy of the statement which I am reading from maps which show our system.

Senator MOSS. Very good.

Mr. HORNBY. Southern Californians have billions of dollars invested in gas appliances and equipment and thus are dependent on our system for their gas supplies. The sales of out-of-State gas to our companies and facilities to make such sales must be approved by the Federal Power Commission. Our own public utility service to our customers is comprehensively regulated by the California Public Utilities Commission. The demand for natural gas in our service area grows by over 100 million cubic feet per day each year.

The system has, under gas purchase contracts, in excess of 2 billion cubic feet of gas per day of out-of-State gas. Therefore, Pacific Lighting has a deep interest in the strength, reliability, efficiency, and competitiveness of pipelines serving California so that the future needs of our customers may continue to be supplied at lowest reasonable rates.

Up to the end of World War II, California had been self-sufficient in its gas supply. As we faced the post-war years, however, it was

apparent that we had to take steps to bring in gas from other States, and in 1945 we contracted with El Paso Natural Gas Co. for out-of-State gas supplies. The Federal Power Commission certificated the project in 1946, and late in 1947 the pipeline had been built to the California border at Blythe, Calif., and the out-of-State gas started flowing to our customers.

The population explosion which occurred in a magnified way, I might say, in southern California is common knowledge. Forward and vigorous action has been required to meet California's vastly expanding needs. El Paso Natural Gas Co. has performed creditably through the years, but on one occasion it failed to meet our needs. In 1957, it became evident that El Paso was not diligently proceeding in bringing requested needed supplies and our requirements were then large enough to make an additional pipeline feasible.

We, therefore, contracted with Transwestern Pipeline Co. as our second out-of-State pipeline company supplier, and the Federal Power Commission approved this new source of supply. Additional increments of supply continue to be purchased from both companies. A list of the FPC certifications of gas supply to southern California by El Paso and by Transwestern is attached as table I. I might say those have increased sixteenfold since October 1947.

As shown by the table, our system recently had its supply increased following conclusion of a protracted and complex case before the Federal Power Commission. California now imports more gas than any other State in the Union, and our system purchases more gas from El Paso Natural Gas Co. than is purchased by any other State served by that company. These supplies are being furnished at favorable rates, and are absolutely essential to the growth of our system.

I think, Senator, the record of the two pipeline suppliers to southern California in bringing large and increasing volumes of low-cost gas is excellent. But in making that observation, I am not implying a position on the pending court review of the case.

THE SCOPE AND PURPOSE OF THIS STATEMENT AND THE BASIC POSITION OF THE PACIFIC LIGHTING SYSTEM

The Pacific Lighting system supports the requiring of a certificate of public convenience and necessity for acquisition of a controlling interest of any person engaged in the transportation of natural gas. It further supports granting to the Federal Power Commission the authority to issue a certificate of public convenience and necessity when the Commission finds that the adverse effect, if any, of the proposed transaction upon competition is insubstantial or is outweighed by other public interest considerations.

The uneven review of pipeline company mergers under existing law can hardly assure that the public interest will be protected. If the present omission in the Natural Gas Act is corrected by the enactment of S. 1687, the FPC will have the necessary authority as well as the responsibility to review all mergers. The Department of Justice has neither the staff nor the legal obligation to review all mergers. Thus we see, with the enactment of S. 1687, the public receiving full protection in all future pipeline mergers.

The case for eliminating the costly delay and uncertainty caused by the duplicate review of mergers of natural gas pipelines by the Federal Power Commission and Department of Justice is quite overwhelming. The general public cannot possibly be served by situations such as exist with respect to our principal supplier, El Paso Natural Gas Co., where some 4½ years after a merger was approved by the FPC, it was disapproved under the antitrust laws, and 2 years later the divestiture is not yet in sight.

As the Senator has observed, it has been 10 years since the first action was taken. It seems clear to me that the Federal Government should speak with one voice in regulating natural gas pipelines.

We support S. 1687 in the interests of our 3 million customers, because it will serve the twin purposes of empowering the FPC to scrutinize such acquisitions, while at the same time eliminating the needless duplication of regulatory effort at the Federal level which makes the ultimate consumer the victim of a tug of war between Federal agencies. I cannot emphasize too strongly the effect on the ultimate customer. In southern California, with almost 3 million domestic and commercial customers, and with an enormous industry depending upon our supply, and with a very large part of our defense establishment being served by us, the continuity of supply is absolutely essential.

It seems clear that the FPC should be given the job. Congress has given the FPC the responsibility for approving any interstate pipeline facility before it is built, and any such facility cannot be abandoned without FPC permission. The rates at which the pipelines buy gas from the producers and at which they sell to distributors are also fixed by the FPC.

The Federal Power Commission has a recurring issue before it: Whether the public interest in a particular market area is best served by providing additional pipeline company competition in service to a given area. There are no longer large unserved market areas in the United States, and the emerging pattern is that an application by a natural gas company to provide service to a particular area is increasingly encountering alternate proposals from other natural gas suppliers. The Federal Power Commission is well equipped to resolve such issues. It has a continuing task to keep abreast of the growing needs of the consumers in the many market areas, and the changing picture as to gas reserves required to meet the needs of those markets. Its areas of expertise include checking plans and designs, making cost allocations, economic feasibility studies, estimates of market requirements, establishing accounting procedures, and other complex areas. It has a staff of about 1,100 with a wide variety of engineering, accounting, financial, economic, and legal talent. The Commission is constantly exercising its discretion and experience in resolving these difficult and highly complex problems. It is unrealistic and unfair to expect a court to possess such expertise and resources.

It is not possible to create a single standard, applicable to varying factual situations. A given case requires the application to it of the Commission's expertise in determining whether in fact competitive effects are clearly outweighed by other public interest considerations. When a certificate application is before the Commission, it has the ability to thoroughly test a proposal and, with its authority to attach conditions, it has the power to remedy subsequent defects and otherwise protect the public and the parties.

Congress has entrusted the Federal Power Commission with a mandate to assure natural gas service to ultimate consumers at the lowest reasonable rates. It is the considered judgment of the Pacific Lighting system that the Congress should further its mandate through providing the Federal Power Commission with the powers herein advocated under S. 1687.

The Commission takes seriously its responsibility to consider competition. It should be recognized that antitrust considerations are only one of the many public interest factors to be considered in a dealing with an industry of necessity so closely regulated as the natural gas pipeline. A primary purpose of Federal regulation is to avoid unnecessary duplication of pipeline facilities so that consumers will not have to pay for two pipelines when one will do the job. The FPC encourages competition when it will help reduce the cost of gas, but the economies of large-diameter pipe are so great that competition in and of itself is not necessarily of benefit to consumers. The delicate balancing of the benefits of competition is a job which requires the intimate knowledge of the industry and the overall responsibility for regulating it for the benefit of the public which knowledge the Federal Power Commission possesses.

In Opinion No. 512, issued January 24, 1967, the Commission clearly pointed out what we believe to be the sound rationale. In this opinion, authorizing an additional competitive supplier to the gas utilities serving Washington, D.C., and parts of Virginia, the Commission stated that:

> It is axiomatic that utilities are natural monopolies and that unbridled competition within the utility sector would lead to greater costs to the detriment of consumers and the utilities themselves. A monopoly, however, should not be automatically and consistently protected where it is demonstrated that competition would produce greater benefits to the public.

In that case, which I cite, the Federal Power Commission authorized a second supplier. In his communication of April 10, 1967, to the Honorable Hubert H. Humphrey, President of the U.S. Senate, the Chairman of the Federal Power Commission points out that under existing law as construed by the U.S. Supreme Court in *California v. Federal Power Commission*, the Federal Power Commission cannot now decide whether a proposed acquisition is in the public interest when there is antitrust action pending. We are familiar with that proceeding and its background.

Prior to the creation of Pacific Northwest Pipeline Corp., El Paso supplied to us, as it does today, substantial volumes of gas from the San Juan Basin in New Mexico. (See map of El Paso system attached.) These reserves are much closer to California than to the Northwest, and form an essential source of gas supply for California consumers. When Pacific Northwest Pipeline Corp. proposed to build a pipeline from the San Juan Basin to the Northwest, we recognized the possible detrimental effect upon our consumers, and we urged denial of the application. There was a competitive application which would have provided the needed natural gas from nearby Canadian sources.

Although the Pacific Northwest area clearly needed the benefits of natural gas, the proposed Pacific Northwest project had inadequacies in design, reserves, haulage conditions, and markets, and at best was a marginal project which soon piled up losses. El Paso Natural Gas Co. acquired control in 1957. When this occurred, we

were particularly concerned to prevent the uneconomic Pacific Northwest system from being a burden upon California consumers.

We urged that the Federal Power Commission require that separate records be maintained covering costs incurred on the old El Paso system and on its newly acquired Pacific Northwest system so as to insure appropriate cost allocations in future rate cases. The Federal Power Commission, in approving the merger, granted this requisite protection.

In both of these instances, the Commission was exercising its expertise. Because of El Paso's strong financial and managerial strength and development of further gas supplies and market, the Northwest division has achieved solvency and the possible burden upon the California consumer of the merged Northwest division has been rendered remote and speculative. As to whether the Pacific Northwest division, remaining as a part of the El Paso Co., makes it a stronger company is not now an issue before the Salt Lake district court.

We are appearing before that court, and we have a dual interest in appearing before the district court. On the one hand, we are interested in a strong, financially healthy El Paso Natural Gas Co. emerging from that divestiture proceeding with adequate gas reserves to continue to meet all of its existing obligations and to competitively provide future increments of supply required of that system. On the other hand, we are interested in a strong, healthy new company owning the divested assets—if that is what the court finds—so that company will be capable of selling large volumes of gas to the Pacific Lighting system at a competitive price.

I would say parenthetically, Senator, we have been and will continue to be for more gas from more sources in large volumes at the competitive prices. In addition to the alternatives just mentioned, the court in Salt Lake is faced with a formidable problem of how to divide the gas reserves, especially those in the San Juan Basin. If the divestment results in a partitioning of the San Juan Basin and a redelivery of the same gas to California of these divided supplies, the total supply will in nowise be increased, but the costs may be. If the divestment calls for the separation of additional San Juan supplies and the transporting of such supplies to the Pacific Northwest, an area in close proximity to the prolific Canadian gas supplies, it seems likely that these San Juan supplies would cost more than nearby Canadian gas. Of course, it appears that the court has an obligation to see that commitments to the Pacific Northwest are met from either United States or Canadian sources. These alternatives and costs confront the court with an awesome task.

Such alternatives for future supply and dilemmas as to pricing are the kinds of posers that the Federal Power Commission is accustomed to hearing, examining, and disposing of in the total public interest. I have dwelt on this protracted El Paso-Pacific Northwest merger because we are necessarily intimately acquainted and affected by the case, and because it is a notable and current example of the adverse effects of the present duplication of Federal authority. But, more importantly, it illustrates the advantages of the proposed legislation in disposing of such complex issues.

When similar problems affecting the needs of large numbers of customers arise in the future, it is hoped that the proposed legislation

will be law, enabling the Federal Power Commission to have the requisite authority to dispose of such matters and thus avoid multiplying the complexities and especially avoid having courts unnecessarily and unfairly burdened with the resolution of such cases. This seems most important when we consider that there is in existence within the Federal Power Commission a body of experts now ready and able to deal with these problems. We urge this committee to favorably consider the legislation embodied in S. 1687. We thank you for hearing us out.

Senator Moss. Thank you, Mr. Hornby. The table and maps[1] attached to your statement will be also reproduced in the record to make your testimony fully meaningful.

(The table referred to follows.)

TABLE I.—FPC PERMANENTLY CERTIFICATED OUT-OF-STATE GAS SUPPLIES FOR SOUTHERN CALIFORNIA

[Volumes shown in millions of cubic feet per day]

Delivery date	From El Paso Natural Gas Co.	From Transwestern Pipeline Co.	Total certificated out-of-State supply
Oct. 30, 1947	126		126
Jan. 5, 1948	51		177
Feb. 18, 1949	131		308
Mar. 15, 1950	61		369
Oct. 1, 1950	41		410
Jan. 15, 1953	151		561
Jan. 1, 1954	51		612
Nov. 1, 1954	101		713
Nov. 1, 1956	51		764
Aug. 5, 1957	76		840
Nov. 1, 1957	75		915
Jan. 1, 1958	26		941
Jan. 1, 1959	25		966
July 1, 1959	76		1,042
Jan. 1, 1960	101		1,143
Aug. 9, 1960		300	1,443
Dec. 2, 1966	131		1,574
Jan. 1, 1967	122		1,696
July 15, 1967		340	2,036

Senator Moss. I take it that the Pacific Lighting Corp. is for competition wherever it can reduce the wholesale cost of gas that you purchase for distribution through your system.

Mr. Hornby. We are, as I say, for more gas from more sources at competitive prices. And those prices that we now enjoy are quite favorable, and we hope that there will be new sources that will meet those competitive prices.

Senator Moss. Mr. White, the Chairman of the Commission, pointed out yesterday that the Federal Power Commission had in instances, I remember particularly Hartford, actually approved and in effect induced competition, feeling that this had the effect that you talked of of giving a competitive stimulus to the market and, therefore, bring down the cost of gas. Has this been your experience on observing the Power Commission, that they are perfectly willing to approve competitive sources if the other factors make it possible to deliver gas at a lower price?

Mr. Hornby. I couldn't have said it as well myself, sir. I agree with you.

Senator Moss. As the Governor who testified this morning said, these things are never decided in a vacuum. There are all sorts of

[1] The maps have been placed in the subcommittee files.

factors that weigh on the ultimate final decision. I take it that is the burden of your endorsement here of the general provisions of S. 1687?

Mr. HORNBY. Yes, it is, sir.

Senator MOSS. Yesterday's witness stressed the problems arising from the uncertainty of the nature of the prime company in the Northwest. Recognizing that several suppliers are in California, has El Paso's uncertain future affected your company's operations?

Mr. HORNBY. It has hung over our plans and our prospects for these many years. And as long as it remains unresolved, it will necessarily affect our planning and our negotiations. It certainly is of importance to the ultimate consumer as well as to the purchaser, ourselves.

Senator MOSS. Is your situation somewhat akin to what the Governor said about the Utah situation, that it impeded a lot of planning that needed to be done on energy supplied within the State? He was speaking more broadly than just gas alone but he said this impeded their planning.

Have you observed any of that in the California area?

Mr. HORNBY. As I said a moment ago, not knowing whether the total supply will be as we presently enjoy it, because we don't know what will become of the San Juan basin source, plus what will become of the other sources along the Pacific Northwest pipeline, we are always in any planning, we must do forward planning not less than 5 years in advance, and we must take into consideration the doubts that the adjudication of this case casts on any such forward planning. So we just don't know whether our total existing supply will continue to exist as long as there is a prospect of some substantial part of it being removed from our present supplier.

Since we don't know what the nature of the new acquiring company will be, not only as to whether it will be a company with adequate total supplies to meet its obligations, not knowing whether its management will be an improvement over its original management, those are the things which will remain unresolved until one more time the matter will have gone through the courts.

Senator MOSS. Do you see any inconsistency between the assertions that the gas pipeline merger review should remain in the Department of Justice in the *El Paso* case, where the Department's divestiture plan was rejected by the Supreme Court?

Mr. HORNBY. I guess I would have to ask my counsel to answer that

Senator MOSS. I would be glad to have Mr. Ormasa respond.

Mr. ORMASA. I am not sure I have the full import of your question. Would you mind rephrasing it?

Senator MOSS. The merger review remains in the Department of Justice, although its plan of divestiture has been rejected by the Supreme Court. I wonder if you see any inconsistency in that situation.

Mr. ORMASA. Any inconsistency in their retaining the power to review the merger in view of the fact the Supreme Court has turned down the plan they proposed to the Court?

Senator MOSS. Yes.

Mr. ORMASA. I don't see any inconsistency per se in that, Senator. I think the problem that you run into is that this whole area we are discussing here involves a tremendous amount of expertise as to how the market area is best served. The Department of Justice has a certain expertise itself. It is an expertise in antitrust matters. It is not an

expertise on how you serve a given market area. On the one hand the Federal Power Commission has substantial help. I say substantial help in terms of 1,500 experts at beck and call on how you resolve these problems. On the other hand it you are going to treat it solely as an antitrust problem you have on the one hand the Department of Justice, which does not have this help, the U.S. Supreme Court, which does not have this help. So you will find inconsistencies are going to crop up because you are going to take a look from a very different viewpoint.

It is not fair perhaps to the Court to impose this kind of burden upon them which they have had to assume up until now. So we would be better off as a whole, probably, if we put it in one pot, so to speak, and that one pot ought to be those who are most expert in the matter.

I hope I have answered your question.

Senator Moss. Yes; I appreciate that response. In effect what we are doing here is trying to effect a divestiture that was recommended by Justice and disapproved by the courts. But when the ultimate solution is effected, it is handed back to the FPC to monitor and regulate from that point on.

Mr. Ormasa. And their stands are so different. That is the point you are making? Their stands are so different. That is where we run into inconsistency.

Senator Moss. Thank you.

Mr. Hornby. May I add an observation which I ran into in a great many cases in my long career. I found that the Federal Power Commission as well as our own State commission are quite willing to listen to any individual or organization that seems to have a right to be heard. Certainly that includes the Justice Department. I fully believe in the continuation of that and I am sure the Justice Department will be heard exhaustively, if you please, by the Federal Power Commission if it thinks it has something that should be given consideration.

Senator Moss. Maybe I am fishing for a hopeful prediction. It took about 3 years after the first order before disapproval by the Supreme Court. I wonder if you foresee an equally long wait in the second one, or can you tell me optimistically we will be getting to it shortly.

Mr. Ormasa. Frankly I am not too optimistic.

Senator Moss. So we might be living with the *El Paso* case for some years yet.

Mr. Hornby. That is correct.

Senator Moss. We do appreciate having you gentlemen come and testify. You have certainly been very helpful in building the record for the committee. We thank you both very much.

Mr. Ormasa. Thank you.

Mr. Hornby. Thank you, Senator.

We will take a 10 minute recess and then continue. We have more witnesses we have yet to hear this morning.

(Recess.)

Senator Moss. The hearing will resume.

Our next witness will be Mr. William M. Bennett, Commissioner, California Public Utilities Commission, San Francisco, Calif.

Mr. Bennett, we are very glad to hear from you, sir.

STATEMENT OF WILLIAM M. BENNETT, COMMISSIONER, CALIFORNIA PUBLIC UTILITIES COMMISSION, SAN FRANCISCO, CALIF.

Mr. BENNETT. Thank you, Senator. I appreciate the opportunity to be heard.

I should state at the outset that I received notice of this informally Friday in California, and prepared my statement last night and boarded a plane, and arrived here just now. So I will attempt to follow the statement, but I have other material which I would like to rely upon. And if my statement is not as formal, as precise as it otherwise would be, it is because I am not as prepared as I would have been had more notice been given.

Senator MOSS. In order to assure for the hearing record that there is no misunderstanding on the timing of these hearings, I think the following facts are relevant:

On December 8, 1966, Ralph Wickberg, of the Idaho Public Utility Commission and Robert Timm, of the Washington Utility and Transportation Commission wrote to Senator Magnuson indicating their grave concern with the present situation in the natural gas industry in the Pacific Northwest.

In January of 1967 this letter, among other items, was sent to nine Western Governors, including Washington, Oregon, and California. This material was also furnished to all affected western congressional offices.

On March 10 this material was again sent to 18 Western Senators.

On May 4, 1967, the bill was introduced and all accompanying material was reproduced for the record.

On June 15, 1967, hearings were announced by the usual distribution of several hundred press releases, and all witnesses who requested time were scheduled.

As the witnesses have indicated, there was time for the Western Conference of Public Service Commissions to adopt a resolution on the subject.

The record shows that Ralph Wickberg was in personal touch with many of his counterparts in the State commission.

So I don't want the record to indicate that there was not ample notice of these hearings. We regret if notice didn't come to the attention of Mr. Bennett, and we are very glad that you have come on. Certainly you will be able to supplement your statement. But I didn't want the record to show that this hearing had been suddenly put together without the usual practice of widespread notice.

Mr. BENNETT. Senator, I did not mean to imply any criticism whatsoever. I am merely stating it is the fact that neither the attorney general of the State of California nor myself as a commissioner, nor the Southern California Edison Co., which is vitally interested in this matter, was given notice in time to be here.

I would request that further hearings be set down so that those people who are strongly opposed to this bill, as am I on behalf of the State of California, might be heard.

Senator, by way of background, let me point out that I have been associated with this case since 1956. As a deputy attorney general I represented the State of California in oppressing the El Paso merger.

When I become commissioner I was appointed special counsel to represent my State in these proceedings by then Governor Brown.

I am struck by the fact today we hear there is much chaos and confusion concerning the administration of the antitrust laws as far as this case is concerned when the fact of the matter is there is no confusion, there is no public crisis and there is no need for legislation.

I have practiced before the Federal Power Commission now for over 10 years. I have been on this antitrust or monopoly case for 11 years. This case illustrates that the Clayton Act is working well as to one pipeline corporation, to wit: the El Paso Natural Gas Corp. It has not escaped the regulations of the antitrust laws. In fact it has been caught by them, by the U.S. Supreme Court, and this bill is unnecessary since that transaction is behind us.

As has been suggested, if it is to be made retroactive, I strongly oppose that as being nothing more than a piece of private legislation with no corresponding public benefit.

Senator, let's examine the so-called chaos and confusion. I was told in 1956 or asked by then Attorney General Edmond G. Brown to bring a competitive pipeline to the State of California. Our State was totally dependent for out-of-State natural gas on the El Paso Co. There were no competing pipelines.

We began negotiations with Pacific Northwest Pipeline Corp., with Mr. Ray Fisch, and it was agreed that Pacific Northwest would file an application to come to California to attempt to serve the Southern California Edison Co. which has millions of electric ratepayers, just as important as gas ratepayers, and in support of that application would be the weight of the attorney general of the State of California.

During the midst of those negotiations, after Fisch had negotiated with Edison to supply gas to Edison in Southern California, the world's largest electric utility, Paul Kayser, of El Paso, flew out to California, told Edison it would not be in the public interest for them to make arrangements to get competing gas in the California market, and at the same time, or along about there, acquired the outstanding common stock of Pacific Northwest while we were negotiating to bring Pacific Northwest to California.

When this transaction occurred, a letter was promptly written to Attorney General Herbert Brownell, prepared by me, signed by Attorney General Brownell, asking if this did not violate section 7 of the Clayton Act, and to our delight the then Attorney General of the United States filed a complaint in the district court in Salt Lake City, Utah charging this stock acquisition was in violation of section 7.

The Securities and Exchange Commission called in El Paso and warned them of the possible consequences of their conduct in terms of the Clayton Act. The Attorney General of the United States himself, or at least his staff, discussed the question of impropriety here, as did the attorney general of California. And they were placed on clear notice that what they were doing was about to run afoul of the Clayton Act in the opinion of some of us as lawyers.

On July 22, 1957, the complaint was filed in Utah, notice to this pipeline corporation that they were charged with violating the Clayton Act, and then—and here comes the self-created confusion and abase utilization of a Federal agency—El Paso files an application with the Federal Power Commission asking its approval of this self-same merger which was condemned by the Attorney General of the United States.

No California gas utility, including Pacific Light & Gas Supply, objected to any of this, as should have been done on behalf of its gas consumers. Only the attorney general of the State of California. And we disagreed with the ultimate Federal Power Commission approval of this merger and appealed to the U.S. Supreme Court where that Court, in *California* v. *Federal Power Commission*, said quite clearly, and so far as I am concerned enunciated a rather clear proposition of law, that of course a Federal agency, absent statutory authority, could not in the face of a charge by the Attorney General of the United States approve a pipeline transaction as here.

Here was the confusion caused by this applicant flying in the face of motions to stay before the Power Commission, pleadings on behalf of many of us who were just as interested in a strong pipeline as is El Paso, that what they were doing was not only contrary to the public interest but indeed contrary to the interest of the shareholders of El Paso itself and contrary to our interests in a strong gas supplier. But none of these warnings were heeded.

So here is your chaos and here is your confusion.

How did the system so far as the administration of the antitrust laws work? Quite well. The U.S. Supreme Court did not accept the proposition that a Federal agency could be played off against the U.S. district court. Ultimately we went back to Salt Lake City, Utah, before Judge Ritter. and the U.S. Department of Justice prosecuted the monopoly violation.

Judge Ritter found no violation. An appeal was taken to the U.S. Supreme Court in which I participated again, and Justice Douglas has clearly pointed out that Pacific Northwest was a viable competitor for the California market, and when it was taken over by El Paso, California and the West lost the benefit of that competition. And it was remanded to divest without delay.

So we returned to Utah again and rather than divesting to create a meaningful, competitive independent pipeline, El Paso puts in a divestiture plan which as far as I am concerned is a sham and fraud upon the Government. The Justice Department changed its position in the midst of that trial—as the U.S. Supreme Court said, "knuckled under" to El Paso.

Again in behalf of California I appealed, and no gas utility in the West appealed to represent the public interest. And the U.S. Supreme Court for the third time pointed out that its mandate was not being met, that there was a mandate of the Clayton Act and competition in the gas industry was intended by the Congress when it passed section 7 of the Natural Gas Act.

Monopolies are not intended in the natural gas industry, despite the previous speaker. We are not dealing here with public utilities; we are dealing with natural gas pipelines. We don't have the control over pipelines we have over public utilities as I, for example, do as a commissioner have over P.G. & E. The FPC cannot compel service, cannot compel expansion to existing needs in future expanding markets because they are not public utilities. Pipelines serve markets as they choose.

In any event the Supreme Court in the divestiture case for the third time pointed out and said quite interestingly enough, that El Paso had been on notice "almost from the very beginning that they were in possible violation of the Clayton Act," which is why the Court in the second case said divest.

What they were saying was taken from my brief in which I set forth chronologically 22 separate indications in which they were told by public officials, Federal or State, don't merge, you are going to scramble, it will entail grave consequences to you, and more importantly to your customers and to your ratepayers. Despite this they went ahead.

Bear in mind this pipeline monopoly merger gave El Paso control of the Western gas markets in terms of wholesale supply from Canada to Mexico and from the Rocky Mountains to the Pacific Coast. I am stating it that way, which is what it was. It shows clearly what a monopoly and what an evil device it turned out to be.

Senator Moss. Doesn't the Federal Power Commission regulate the rates, the rate of gas, the cost of gas?

Mr. Bennett. I am delighted you asked that question, Senator. I would like to relate this to you and to the members of the committee.

When this merger was proposed I tried this case before the Federal Power Commission. The question of rates and charges was not permitted to be gone into. We wanted to know in California what impact this would have in terms of cost of service or increased gas rates to the customers of California and the other Western States. The financial vice president of the El Paso Natural Gas Co., testified that since they were taking over a pipeline corporation which had a revenue deficiency, since they had issued new outstanding common stock which carried with it a dividend service requirement, and since they had so much by way of money to pay out in dividends to existing shares, there was immediately a drain upon surplus in terms of funds available to service the new existing shares issued to get the new pipeline corporation. And the witness from El Paso, pursuant to my cross-examination, said, "we are going to make up the revenue deficiency by increasing the rates in the southern part of the system." That means California, Arizona, and New Mexico.

I said, "Why put it upon us? We don't want this pipeline system."

"Because the Northwest can't stand it."

And so we had filed against us rate increases and charges ultimately amounting to over half a billion dollars. This was at a time when the Federal Power Commission was not setting down rate cases for hearing. They had had this backlog of producer cases. And so this matter went on under the Natural Gas Act. El Paso, any pipeline company, merely files a piece of paper, an application for a rate increase. A statutory period of 6 months goes by and the rates go into effect without a hearing.

We had rates and charges which we are paying which rose to $500 million, or slightly in excess thereof, and upon which ultimately we received refunds through the efforts of California of $155 million, distributed throughout the three Southern States I mentioned in the Southwest.

Why did the refund take place? It took place because the U.S. Supreme Court, in *California* v. *Federal Power Commission*, said you have no right to the Pacific Northwest system. Meaning, because you have no legal title to it, you cannot impose upon your other customers the obligation to pay for something you illegally acquired. And the Federal Power Commission in its rate decision specifically pointed this out as I argued that matter and that point to them.

Senator Moss. Isn't this what Mr. Hornby said when he testified here about the insistence of Pacific Lighting Corp. to keeping separate the costs of the pipeline as against El Paso——

Mr. Bennett. No, sir.

Senator Moss (continuing). So that it wouldn't affect the rate?

Mr. Bennett. There was no separation. It became a merged, single, one corporation. No conditions, no separation.

Senator Moss. Didn't they have to keep separate accounting, as he testified, so that the costs of one were not intermingled with the other?

Mr. Bennett. Their vice president testified they increased the rates and charges to California to make up the deficiency of the Northwest. They have one share of common stock, El Paso Natural Gas Co., which had to be serviced. They had to service the debt capital. It wasn't debt capital of northern division and southern. It was one single company, one pipeline. That was not true. They were required to keep separate records, but we could never find they kept separate records to anybody's satisfaction except their own.

I should point this out to you as well. What were some of the effects of the prosecution of the monopoly and the persistence, because we thought we were correct? To begin with, since El Paso was charged with violating the Clayton Act and dominating the western gas market, another pipeline was permitted to come to California—Transwestern—because El Paso did not dare oppose it. If they opposed that application, they would have been giving evidence to the U.S. Attorney General that they were dominating the western section of the country.

The Pacific Gas Transmission Pipeline Co. came into being because of this fact. There is the great benefit to the West, because of the antitrust laws. I should point out to you, Senator, that the statement made that there is an expertise in the Federal Power Commission on monopoly questions is totally untrue. As a Commissioner, I am not in any other manner able to pass upon antitrust cases by virtue of training I have had except by virtue of cases I have handled. A Commissioner is directed and trained to direct himself to rates and charges, service discrimination.

Historically, the courts have had control of antitrust questions, and because of that they have built up the expertise, as has the Antitrust Division of the U.S. Government. And you would be making a terrible mistake, in my judgment, to discard all that experience and that expertise and give it to an agency which by law is not committed to resolving these questions.

On one occasion, when the expertise of this agency was invoked so far as the antitrust laws are concerned, they made a monumental error, and that is when they approved the monopoly or the acquisition of Pacific Northwest by El Paso Natural Gas Co. That Federal Power Commission, that staff, found that there was no violation of the Clayton Act. Here was a chance for them to exercise their expertise.

What did the U.S. Supreme Court say? They almost unanimously disagree, save for two Justices, with that judgment of the Federal Power Commission. So here the one chance the Federal Power Commission had to exercise their judgment, they were totally in error.

I for one, as a lawyer, as one assigned to this case, as an American, don't want to see this thing taken away from the Federal courts.

If you take it away from this agency or from the courts and give it to this agency in this field, why limit it to the Federal Power Commission or natural gas matters? Bear this in mind in terms of this crisis: What crisis are we talking about?

There is no crisis in the West so far as the public is concerned. Pacific Lighting Gas Supply is not confronted with any date as to future plans. They just had approved by the Federal Power Commission a new enormous project from the El Paso Natural Gas Co. They defeated the Gulf-Pacific project, which was a competitive pipeline to California.

And so any inhibition which may be suggested here by virtue of this litigation is totally untrue. And I speak now as a Commissioner who I think has some right to speak for the gas consumers I am charged by law with representing. I should point out to you that the California commission, of which I am a member, had occasion in the past, about 8 years ago, to direct the California gas utilities to be vigorous with the Federal Power Commission and so speak for the public interest, because that wasn't being done.

These accomplishments were done by public officials and public officers in response to public interest demands. The retroactive part of this flies in the face of three U.S. Supreme Court cases, it flies in the face of the fact that California is the greatest growing gas market in these United States, as Mr. Hornby just testified to. And he himself said they would need more gas from more sources at competitive prices.

Unless you have an additional pipeline to offer that competition, you are not going to get competitive prices. And the purpose of the proceedings in Utah, in which I am representing California, is to divest, as the Supreme Court said, and to create a pipeline with the independent management, ability, and reserves to come to the California market.

And if that pipeline offers a project to California and if El Paso can be it, we are the beneficiaries of it. You should know this, Senator. Every time there has been even the breath of a new pipeline proposed for California, whether it has gone as far as an application or hearing before the Federal Power Commission, El Paso has lowered its border prices. And I am suggesting that if there hadn't been that hint or threat or reality of future competition, we would never have had the benefit.

The Gulf-Pacific project was beaten by El Paso, because it offered a lower border price. And do you think it would have offered a lower border price if Gulf-Pacific hadn't come into being as a project and as an application threatening that market?

This bill will benefit one company—El Paso. It will not benefit the California customer. It will take away the great beneficial language of Justice Douglas when he said California is a growing gas market, it needs additional pipelines. If you enact language which cures this retroactively, you will be making a shambles of the antitrust laws, you will be taking some very sound decisions of the U.S. Supreme Court, discarding them, and I think the greatest blow and injury to the public interest so far as monopoly law is concerned that I can conceive of.

This is nothing but a private bill designed to circumvent the interests of the gas consumers of the West, and to fasten a monopoly

stranglehold upon gas supplies from Canada to Mexico and from the Rocky Mountains to the Pacific Ocean. It is not in the interests of the California gas consumers nor the consumers of the Northwest, nor to the interest of the Pacific Lighting Gas Supply, whom I regulate.

I hope that you have a great many questions. One of my problems is, having been on it so long, I get wrapped up in perhaps too much detail. That is the price you acquire from having lived with it so long.

Senator Moss. Thank you. Are you here at the direction of the California administration, the government of the State?

Mr. Bennett. Senator, I am not here at the direction of Governor Ronald Reagan. I am a Democrat, appointed by Governor Edmund G. Brown, I am proud to state, and a holdover in the present administration. I don't know what, if any, stand Governor Reagan has on this.

I am sent here, as I have been for 11 years, as an unpaid volunteer special counsel by the attorney general of the State of California, Thomas C. Lynch. In our State, it is traditional on matters of law such as this, that the attorney general of the State of California speaks, and I am speaking for and on behalf of him. My views are his views.

Senator Moss. Thank you. We heard testimony earlier about the method of appeal from the ICC and the FCC and other regulatory agencies. Wouldn't this same provision applying to the FPC enable the Federal courts ultimately to have the final say on monopoly if the FPC, as you allege, erroneously permitted a monopolistic situation to be approved?

Mr. Bennett. In a measure, that would be true, Senator. But I would respond this way: if the Federal courts are going to review it ultimately, and since they now have the initial jurisdiction, why give them review power which is rather final? Let them have original jurisdiction as they now have.

You should, Senator, know this: There is a certain erroneous assumption here in the room that the Federal Power Commission is not empowered and does not pass upon these monopoly questions. The *City of Pittsburgh* case—I have forgotten the circuit which handed that down—specifically pointed out that the Federal Power Commission could not ignore a monopoly question in granting a certificate. The only vice in the present system, so far as the Federal Power Commission is concerned, is that they did have the right or duty in a certificate case, if somebody is charging a monopoly violation, to consider and pass upon it. But they had better be right.

Let's take an extreme case. I am El Paso before the Federal Power Commission in the Pacific Northwest pipeline merger, and the Attorney General doesn't file a charge that it violates the Clayton Act. But some American citizen who legally is classified as a lunatic files a complaint in Mexico City in a Mexican court saying this violates the Clayton Act. Certainly we don't say in that case that the Federal Power Commission couldn't go ahead and approve the merger in the face of such a preposterous charge.

But when you have the Attorney General of the United States, why change the system which makes one public agency listen to him and hear the complaint until a judge tries the matter? In the Federal court there is nothing unfair. El Paso was given notice. It has the right of cross-examination and to present a case, and, if it loses, to appeal.

I would like to emphasize the reason El Paso is here today and this bill is proposed retroactively: it is the antitrust laws work too well against El Paso. This bill will benefit them and them alone. Look to the natural gas industry. There never again, in my judgment, will be a situation such as this because the Supreme Court told them not to do it this way. They have been warned, all natural gas companies. It would be not only unlawful but extremely foolish. Somebody had to be rather foolish to choose this route, believe me.

We are not confronted with any pipeline mergers in the near future. I am not aware of any proposals such as that. I think realistically they are not going to occur. So you are passing a piece of legislation—if this gets our—which is unnecessary in terms of future public interest, which is unnecessary in terms of the future interests of any natural gas company or pipeline which wants to merge.

The only reason for this bill, as I see it, is to bail out the pipeline company which violated section 7 of the Clayton Act. Then why limit it to El Paso? Let's take care of General Electric on price fixing and all the rest of them. I don't know how we can separate one violation from another. I happen to believe we have an obligation to enforce these laws.

Senator Moss. Your observation that the pipeline company was not really a utility—is that why in your mind, the law should be different for FPC as aginst, say, ICC and FCC and other regulatory agencies?

Mr. Bennett. Senator, look at it this way. If I could, let me take time to get to the answer. In California, the Pacific Lighting Gas Supply or Pacific Gas and Electric Co. are public utilities. We can compel service. They are monopolies, true. We hear all manner of complaints. We can make them go out and serve a given county, area, or do many, many things because they are public utilities impressed with public trust, they have indicated their priorities, and so on.

El Paso or a pipeline company, by law, is not a public utility. You can't go to a pipeline company and say "I live in Salt Lake City, Utah. I want you to build a pipeline from El Pso to Salt Lake." Pipelines only give gas to people with whom they make contracts.

So that what I am saying is this: When you make a pipeline company a supermonopoly covering the Western Hemisphere and don't have attendant public utility controls, you are foisting an even greater evil upon the public, which has no control through any Federal agency or any law in terms of compelling service, expanding to markets, and that type of thing.

Under the Natural Gas Act, unlike the situation in most States, and certainly in California, as I stated previously, a pipeline company can file a piece of paper and in 6 months begin to collect rates and charges. A nice way to get capital without a hearing.

And when the Commission finally gets around to the hearing, we have this situation of refunds. We hope that will never come to pass again. But no public utility may operate that way. Pipelines do, which is an even greater reason why you should not put them in the position where they literally have a pipeline running throughout the Western half of the United States.

Bear in mind that whoever controls the pipelines, those areas, those producing areas, has the basic power over the producer himself.

I view this as a serious piece of legislation which, if passed, would emasculate Supreme Court decisions, which is very, very strongly opposed to the public interest of the people of California, Washington, Oregon, and Utah, all of them.

Senator Moss. Thank you. I must appear at another committee. Senator Hollings has arrived. He will preside.

There are one or two questions yet that have been suggested that he may want to pose to you. I do appreciate your testimony. I realize you have been living with this for 10 years.

Mr. Bennett. I don't want to be dying with it. That is why I am here.

Senator Moss. We hope not. I was going to ask whether you are optimistic that we might get the best cure accomplished within a relatively short time.

Mr. Bennett. I know the divestiture is going to occur. I have great faith in the district court. I haven't the slightest doubt but what, left alone, that thing is going to occur sooner than people expect, because the Court has now recognized it and the trial judge is quite aware of the fact that expedition is required.

The only thing that will accomplish that is some legislation frustrating that effort.

Senator Moss. Thank you. I hope you will excuse me. I will turn the gavel over to Senator Hollings.

Senator Hollings. Mr. Bennett, in *Cascadia Natural Gas* v. *El Paso Natural Gas*, 1967, the Court disapproved the divestiture of the plan. The Court stated "In the present case, proceedings of California interests in a competitive system was at the heart of our mandate directing divestiture." Do you see any inherent conflict in California's interests and the interests of the United States?

Mr. Bennett. No, I do not, on a broad basis, Senator, because Washington and Oregon are as interested in competitive gas supplies as is California. I should point out to you that as far as I am concerned on this matter of refunds, it wasn't only California which was the beneficiary of my efforts in that matter. It was most of the other Western States.

You should bear in mind that if there is no competition in Washington or Oregon, those States will have no bargaining power with El Paso. There is one pipeline with whom they deal, and that is the end of the matter. I should state this: Pacific Northwest is not growing as is California, so the question of a second pipeline there at this point is somewhat academic.

Senator Hollings. Is there anything further that you wish to submit?

Mr. Bennett. I would merely respectfully request that the bill not be recommended, certainly not passed. I want to thank you for your time and consideration.

Senator Hollings. We appreciate very much your appearance. That will conclude Mr. Bennett's testimony at this time.

(Mr. Bennett's prepared statement follows:)

STATEMENT OF WILLIAM M. BENNETT, COMMISSIONER, CALIFORNIA PUBLIC UTILITIES COMMISSION, ON BEHALF OF THE STATE OF CALIFORNIA

Previously, as a Deputy Attorney General of the State of California, and subsequently as Special Counsel, I have represented the State of California since 1956 in the El Paso merger litigation.

California opposes Bill S. 1687.

Legislation divesting the Federal Judiciary of the determination of monopoly violations in the natural gas industry is unnecessary and unwise.

The Federal Power Commission, by law and pursuant to the Natural Gas Act, is concerned with rates and charges and service matters dealing with natural gas companies. It has neither the personnel nor the expertise to protect the public interest so far as monopoly violations are concerned. The most glaring example of this is found in Cal. v. FPC 369 U.S. 482. Here, the merger of the El Paso Natural Gas Company and the Pacific Northwest Pipeline Corporation was approved by the Federal Power Commission as being in the public interest when, as the United States Supreme Court subsequently pointed out, such a merger was in clear violation of Section 7 of the Clayton Act (USA v. El Paso Natural Gas Company 376 U.S. 651). Thus, upon one momentous occasion, when this administrative agency was called upon to judge whether corporate conduct violated the Clayton Act, a completely erroneous determination was made.

There is no reason to remove the public protection which the Department of Justice and the Federal Judiciary afford to the nation's gas consumers. No crisis exists. No proposed mergers are in sight and the El Paso merger is an example of an efficiently working system which, while El Paso may complain, resulted admirably in placing the restraints of the Clayton Act upon an unlawful merger.

This Committee should disabuse itself of any notion that confusion and chaos are rampant in the administration of the anti-trust laws upon the natural gas industry. When El Paso acquired the outstanding common stock of Pacific Northwest, it was advised by the SEC of possible anti-trust violations and on July 22, 1957, a complaint charging such violation was filed by the United States Attorney General. Within three weeks—on August 7, 1957—El Paso filed an application with the FPC seeking approval of the same transaction which the attorney general charged as illegal. El Paso chose to create the confusion; it proceeded with the merger despite requests to stay its action; it intermixed and scrambled the corporate assets despite clear warnings as to consequences. And incidentally, the ultimate unlawfulness of the FPC approval of this merger was not difficult to predict.

Such litigation as is the subject of this hearing will never arise in the future, but if it does, it will simply be because of a proper application of the monopoly aws to a corporate violator thereof.

I should point out to this committee that this merger was responsible in part for exorbitant rate increases against the State of California imposed by El Paso. The decision of the United States Supreme Court setting aside the merger resulted in enormous gas refunds to California. The monopoly prosecution, despite FPC approval, permitted additional competing pipelines to California. There is no public crisis and no public interest to be served by this legislation. A suggestion has been made that this legislation be made retroactive, which will simply have the effect of rewarding a deliberate violation of the Clayton Act. There is no attendant public benefit, only private gain. And if such a result comes to pass, it clearly is a reward for unlawful conduct and further weakens the anti-trust laws.

In the last decision of the United States Supreme Court, the El Paso Natural Gas Company was ordered to divest itself of Pacific Northwest Pipeline Corporation. This last result again was because of the persistence of California in challenging the conduct of the Department of Justice as well as the District Court below.

California is dependent upon imported natural gas for its energy supplies. It sorely needs competition between and among pipelines. If this legislation, as amended, washes out three United States Supreme Court decisions, all of them in the public interest, then law violation is condoned and rewarded and competition for all time is denied not only California but other States affected by this bill as well.

In short, there is no crisis, and there is no confusion in the administration of the anti-trust laws. The failure of El Paso to evade the law before the Judiciary is evidence of that fact. The anti-trust laws work and they have worked in this case as to the El Paso Company. The legislation here proposed will simply rescue management from decisions which can only be characterized as exceedingly poor business judgments and exceedingly adverse to the public interest.

It will permit the violator of the Clayton Act to keep its ill-gotten gains. California urges that such legislation not be enacted. This bill will make moot the divestiture proceedings presently being held before a United States District Court in Utah. It will frustate the mandate of the United States Supreme Court that El Paso divest itself of the Pacific Northwest Pipeline Corporation and that

a new pipeline corporation be created to compete for the California gas market. This bill is contrary to the interest of the gas consuming public and should be rejected.

Senator HOLLINGS. Did Mr. Boyd come in—Mr. Howard Boyd?

(No response.)

Senator HOLLINGS. Apparently he is unable to be here. How about Professor Anderson? Has he arrived?

(No response.)

Senator HOLLINGS. We have several requests, gentlemen, that these hearings be resumed, so they will be resumed at a date to be announced in the future.

There being nothing further, the committee stands in recess.

(Whereupon, at 11:40 a.m., the hearing was recessed as above noted.)

(The following was received for the record:)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 24, 1967.

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

DEAR SENATOR MAGNUSON: I wish to add my voice in support of the testimony given before your Committee July 18th by Ralph H. Wickberg, President of the Idaho Public Utilities Commission and Vice President of the Western Conference of Public Service Commissions.

Mr. Wickberg enjoys the respect of all persons who have been in contact with him, regardless of party or interests. His knowledge and reputation of his outstanding abilities extend far beyond his personal acquaintance. I am sure his presentation demonstrated his competence. In addition to his individual qualifications, I am sure you took due note of the support given his statement by responsible officials of Arizona, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

I can add little or nothing to his factual presentation but want to underscore particularly the need for an amendment to preserve the El Paso integrated system. The reasons so well stated by Mr. Wickberg do not need repetition to prove their validity. I urge the favorable consideration of your committee.

I respectfully request that my communication be made part of the record on hearings on S–1687.

Sincerely yours,

JAMES A. MCCLURE,
Member of Congress.

[Telegram]

SALEM, OREG., *July 17, 1967.*

Hon. WARREN MAGNUSON,
U.S. Senate, Washington, D.C.:

On June 21 I sent you a copy of my letter to Oregon's congressional delegation regarding Senate bill 1687. As stated then, I have no objection to the original bill to grant the Federal Power Commission certain powers.

In the determination of natural gas utilities monopoly status, however, in continuance of that letter, I am strongly opposed to proposed amendments that would add the "grandfather" clause to the bill. Oregon's present and future economy is closely tied to the natural gas industry. The "grandfather" clause would have a detrimental effect on the State of Oregon in view of prolonged litigation which would leave the status of the State's natural gas supply in doubt. I respectfully submit that the interests of Oregon and the Pacific Northwest can best be served by following the recent decision of the U.S. Supreme Court which ordered establishment of a new company to serve this area. Recognizing the potential detrimental effect on our State, I request that a public hearing be held on this proposed amendment and that interested parties be notified in ample time to be heard. Your continued assistance is appreciated.

TOM MCCALL,
Governor of Oregon.

[Telegram]

Reno, Nev., *July 19, 1967.*

Senator Warren G. Magnuson,
Chairman, U.S. Senate, Commerce Committee, Senate Office Building, Washington, D.C.:

I understand that the Commerce Committee of the U.S. Senate is presently holding hearings on S. 1687.

It is not my intention to oppose the legislation although it would not be, in my opinion, in the best interests of the West for a "grandfather clause" to be added as an amendment to the bill.

Should it be necessary I, with other businessmen, would be glad to appear in opposition to such an amendment if for some reason the present hearings are postponed.

Respectfully,

Thomas Kean,
President, Sierra Chemical Corp.,
Member, Nevada State Legislature.

Statement on Behalf of Southern California Edison Company

Southern California Edison Company, a California corporation, is engaged in the business of generating, distributing and selling electric energy as a public utility in certain portions of central and southern California and in portions of Nevada. The territory served contains an estimated population in excess of 6 million people. To supply the required electric utility service for its service area, Edison operates a number of steam electric generating plants in the southern California area which use, as fuel for the generation of such electricity, oil and natural gas in very substantial quantities. Its total fuel bill for the year 1966 alone exceeded $98½ million, more than $65 million of which was for natural gas.

Because of the severe air pollution problems in the Los Angeles Basin, where most of its existing generation stations are located, and the stringent regulations resulting thereform designed to require maximum use of natural gas in the generation of electricity, the company has for many years made strenuous efforts to increase the supplies of natural gas to the area, and has been and continues to be vitally concerned with the desirability of effective competition being established and maintained in the southern California market area (e.g., *U.S.A.* v. *El Paso Natural Gas Company*, 376 U.S. 651, 658). The company was one of the active appellants, along with the People of the State of California and Cascade Natural Gas Company, in the most recent proceedings before the United States Supreme Court involving that Court's rejection of the plan of divestiture proposed by El Paso Natural Gas Company following its illegal merger with Pacific Northwest Pipeline Corporation; therein the Court observed with respect to the El Paso plan, as had the District Court, that what it proposed was "A division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That is what the root of this plan is." (*Cascade Natural Gas Company, et al.*, v. *El Paso Natural Gas Company, et al.*, 87 S.Ct. 932, 17 L. ed. 2d 814).

The Company is vitally interested in any proposed legislation which could either benefit or adverse such competitive or antitrust aspects of the law applicable to such situation, and we appreciate the opportunity to present to this Committee our views upon S. 1687.

S. 1687 is substantially similar to the initial portion of an earlier draft of such proposed legislation, which we understand was being sponsored by El Paso Natural Gas Company, although it does not contain certain additional provisions of the earlier draft which appeared to us to be designed to "forgive" the unlawful El Paso merger with Pacific Northwest Pipeline Corporation and, in effect, to reverse the results of the Supreme Court decision relating to the divestiture of that illegal merger.[1]

[1] The earlier El Paso draft contained the following additional provisions, among others, "(n)(A) Any acquisition of a controlling interest, through the ownership of securities or in any other manner, of any natural-gas company which was consummated prior to the date of enactment of this Act, the entity resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and had not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, as amended by this Act, without prejudice by any prior to pending judicial proceedings." This section seems to be tailor-made for reconstitution of the El Paso-Pacific Northwest merger, despite the decisions of the United States Supreme Court's finding such merger to be unlawful under the antitrust laws and ordering divestiture.

S. 1687 does, however, incorporate provisions which we believe are subject to a construction that we would not suppose would be desired by the Antitrust Division or by the Congress; namely, that it is subject to a construction which, as a practical matter, could preclude any new companies in the future, if it were to be enacted, being able to provide any competition for established pipelines. This possibility results from the following:

(*a*) S. 1687 provides in part: "No natural gas company or person which will be a natural gas company upon completion of any proposed construction, extension, *acquisition*, or other transaction, shall . . . undertake the construction . . . or acquire, lease, purchase, or operate such facilities . . . and . . . *in any manner, acquire control of* or the power to manage, *directly or indirectly*, any person engaged in the transportation of natural gas subject to the jurisdiction of the Commission, unless there is in force with respect to such person or natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts, transactions or operations." [Emphasis added.]

(*b*) Unless the Federal Power Commission were also required by the proposed bill to modify its traditional criteria for the issuance of certificates of public convenience and necessity (namely, showings as to adequate gas supply and deliverability, market, financing backing, and economic feasibility), which the bill does not require, it would seem that the enactment of S. 1687 could result in the practical prohibition of any new company being organized and undertaking to make the necessary arrangements for such additional showing so as to provide competition with any established pipelines, for it would seem most difficult for such a new company to satisfy such requirements without acquiring in some manner, directly or indirectly, a substantial interest in a gas supply and/or facilities or in marketing contracts or financial arrangements or a pipeline.

(*c*) Nor is it entirely clear as to what would be the effect or intended effect of the amendment to subsection (c) as proposed in S. 1687 upon the so-called grandfather clause proviso in subsection (c). The committee's attention is called to the fact that the proviso refers to "the effective date of this amendatory Act". If no change in such effective date as regards grandfather clause certificates is intended, we believe this is an ambiguity which should be clarified.

Nor do we believe the expansion of the scope of the Federal Power Commission authorizations with respect to "the production, transportation, or sale of any fuel or source of energy", even in the limited manner suggested in S. 1687 (page 2, lines 13–18), is necessary or desirable, and it would seem to set a very ambiguous and questionable precedent.

We would also respectfully call the committee's attention to the limited scope of the effect of similar legislation in the face of vigorous enforcement of the antitrust laws by the Antitrust Division (e.g., *U.S.A.* v. *First City National Bank of Houston, et al.*, Dec. March 27, 1967, 35 LW 4030).

For such reasons, we respectfully submit that S. 1687 in its present form is undesirable and should not be enacted.

If the Congress subscribes to the understandable view, that in the future, regulated companies contemplating a merger ought to have available some procedure whereby they could make application to an appropriate forum, setting forth the facts of the proposed merger, and obtain, after due process, a definitive determination upon which they can rely in proceeding and making substantial committments, without exposure to future claims of antitrust violations because of the fact of such merger, there is, we respectfully submit, no justification for limiting such procedure to natural gas companies. Such principle and procedures, if sound with respect to mergers involving regulated natural gas companies, are equally sound and important with respect to other similarly regulated industries. Legislation designed for that purpose should not, therefore, we submit, be limited to an amendment of the Natural Gas Act alone. Any such legislation should take the form either of a general bill which would apply such principle to all of the major regulated industries or should be modified, at the very least, to provide similar amendments to the Federal Power Act. Similarly, we believe, that, if the Congress favors such legislation, providing procedures for a definitive advance determination from an antiturst standpoint which can be relied upon, the procedures should also be sufficiently broad to apply with respect to pooling, interties and other joint utility arrangements.

Again, may we express our appreciation for this opportunity to submit our views.

LONGVIEW FIBRE CO.,
Longview, Wash., July 13, 1967.

Hon. Senator WARREN G. MAGNUSON,
Committee on Commerce,
New Senate Office Building,
Washington, D.C.:

I recommend the passage of S. 1687 the FPC bill to make it the final authority on mergers in the areas it regulates. Double jeopardy in such mergers is not only unjust but is against the interest of consumers since the FPC concerns itself with the benefits to users whereas the Department of Justice conerns itself with theoretical maintainance of competition which in regulated industries is almost nonexistent. We, as a large gas user, along with other gas users in the State of Washington may be materially hurt if the divestiture of Pacific Northwest pipelines by El Paso goes through. In view of the Supreme Court decision, remedial legislation; namely, S. 1687, seems the only hope to protect the interests of our State.

R. P. WOLLENBERG,
Executive Vice President.

IDAHO PUBLIC UTILITIES COMMISSION,
Boise, December 8, 1966.

Hon. WARREN G. MAGNUSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MAGNUSON: The present situation of the natural gas industry in the Pacific Northwest is of grave concern to the states of Idaho, Washington and Oregon. The need for some type of legsilative relief, if the Pacific Northwest area is to continue its strong economic advances, is mandatory.

Our concern for the natural gas industry and its importance to the states of Idaho, Oregon and Washington can be shown by comparing it to the sale of electricity by the Bonneville Power Administration. For the year 1965 the sale of natural gas in the three states amounted to approximately 194,000 M^2CF, or 1.9 billion therms, which is the equivalent of approximately 56 billion kilowatt hours of electricity. For the fiscal year ending June 30, 1965, the Bonneville Power Administration sold 34.9 billion kilowatt hours of electricity. It can be be seen that the energy delivered through the pipeline of El Paso in three states is equal to 1.7 times the energy output of the Bonneville Power Administration.

A review of the situation occurring in the El Paso Natural Gas Company (El Paso)-Pacific Northwest Pipeline Corporation (Pacific) merger case points out the reasons for our grave concern.

In 1956 El Paso acquired the capital stock of Pacific. In 1957 El Paso and Pacific filed applications with the Federal Power Commission requesting authorization to merge their assets. In this Federal Power Commission proceeding the states of Washington, Oregon, Idaho and Nevada all joined in favoring the merger because of their common interest in encouraging the growth of natural gas distribution systems in their respective areas.

Approval of the merger would permit the merged company substantial flexibility with respect to both availability and utilization of natural gas reserves. Also, the merger would have brought about much greater economic and financial strength of the merged companies. The economic and financial strength of the merged companies would have enabled the distribution companies to more accurately plan and carry out the expansion of their services. Another benefit of the merger would have been the substantial savings resulting from the combining of services which otherwise must be provided by separate companies, such as geological, engineering, accounting and executive functions, which would amount to a savings of several million dollars annually. In addition, the merged companies would be able to accomplish large-scale financing at less cost. Such savings would result in lower cost of service and thus in lower rates to the rate payers in the areas served by the merged company, as it must be remembered that the merged companies would have been regulated by the Federal Power Commission in regard to the ultimate cost of natural gas to the distribution companies. In summary, the benefits of the merger would have afforded stability of rates at the lowest possible level and improved and expanded service.

The proposed merger discussed above was unanimously approved by the Federal Power Commission which considered all aspects including the competitive effect lost because of the merger of the two pipeline companies.

The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission, observing:

"The Commission found that the public interest would be served in several respects by the merger: the combined system would be considerably strengthened by the increase in available gas supplies; development of sources and markets would be stimulated; the merged company would be in a stronger financial position; existing gas supplies could be more effectively used to meet emergencies in periods of peak demand; and, finally, cost savings would be realized that would ultimately be reflected in lower rates . . . We find no error."

On review by the Supreme Court the Court of Appeals was reversed and the Commission's order approving the merger vacated on the ground that the Federal Power Commission should not have acted until a pending Department of Justice antitrust complaint against the merger under Section 7 of the Clayton Act was adjudicated.

The result was, then, to require that right of the merger to survive be tested only against the standards of the Clayton Act, and the benefits derived from the proposed merger, as found by the Federal Power Commission, were not given due consideration with respect to the total public interest in the antitrust proceedings.

This antitrust action had been filed by the Department of Justice in the United States District Court in Utah shortly before El Paso and Pacific filed their application with the Federal Power Commission seeking authority to merge. The District Court had deferred trial of the antitrust complaint pending final action by the Federal Power Commission. The District Court in Utah thereupon held the merger did not violate Section 7 of the Clayton Act. This decision was reversed by thee Supreme Court and divestiture ordered.

Justice Harlan in his separate opinion aptly noted the unfortunate legislative pattern underlying this case when he stated:

This case affords another example of the unsatisfactoriness of the existing bifurcated system of antitrust and other regulation in various fields. In this case, the Federal Power Commission had indicated its approval of this merger as being in the public interest. The Department of Justice, however, considered the merger to be violative of the antitrust laws and, for that reason alone, against the public interest. . . . It would be unrealistic not to recognize that this state of affairs has the effect of placing the Department of Justice in the driver's seat even though Congress has lodged primary regulatory authority elsewhere. *It does seem to me that the time has come when this duplicative, and, I venture to say, anachronistic system of dual regulation should be re-examined.* (Emphasis added.) Had the subtle and necessarily speculative questions involved in assessing the short-term and long-term effects of this merger been subject to appraisal by a single agency, under congressionally established standards marking the relationship between the different and often competing objectives of the antitrust laws and those governing the regulation of "interstate" natural gas, who can say that this case might not have called for a different outcome?"

Following negotiations with the Department of Justice, a proposed plan of divestiture was approved by the United States District Court in Utah. Numerous parties, including the regulatory agencies of Washington, Idaho and Oregon, sought to participate in the divestiture proceedings, but were denied the opportunity to do so. Appeals have been taken from the lower Court's decree to the Supreme Court of the United States by two corporations and by California. These appeals are now pending with hearings thereon expected sometime early in 1967.

From the above it can readily be seen that the natural gas pipeline system in the northwest is fraught with uncertainties which threaten further expansion of the natural gas industry in the Pacific Northwest. The natural gas distribution companies of the northwest and the regulatory agencies having jurisdiction over these natural gas distribution companies have been placed in the position of dealing with a phantom. As of this date, we have no knowledge as to what will ultimately occur to the natural gas pipeline system of the northwest. Stability of the natural gas utilities in the Pacific Northwest cannot be accomplished. No one can yet predict what the outcome of the pending appeals will be. There is considerable chance for further and indeterminate delay in resolving matters at issue in the divestiture proceedings which are now before the Federal Power Commission and which have been stayed pending a decision of the Supreme Court on the aforementioned appeals. As of this date there is no possible way of accurately determining the ultimate financial structure or the ability of the new company which would acquire the assets of the old Pacific company. There is doubt as to

the ultimate base on which the company will be allowed to earn a return. The lack of this knowledge prohibits any accurate forecasting as to the ultimate cost of natural gas in the Pacific Northwest. Industries contemplating the use of natural gas as a source of energy without knowing or being able to accurately forecast this cost will necessarily be cautious with respect to expansion of existing, or construction of new facilities without this information.

Although it is of course of prime concern to the Pacific Northwest that this situation has occurred in our areas, we respectfully point out that this situation could occur in any area of the United States under the current statutes of the United States. To correct what is currently occurring in the Pacific Northwest and to prevent similar occurrences in other areas of the United States, a need for legislative action to establish a single procedure and a single standard to be applied in evaluating proposed mergers in the natural gas industry is needed. Under the present law the Federal Power Commission, the agency charged with regulating the natural gas industry, determines whether the merger of two natural gas companies would be in the public interest and is required by the public convenience and necessity. In making this determination the Federal Power Commission must consider the proposed merger in all its aspects, including any effect on competition. The Federal Power Commission considers the competitive factors, the service to be afforded the public, the question of conservation, the probable effect on rates, the growing needs of the markets, and all the other factors involved from the standpoint of the public convenience and necessity. Notwithstanding this thorough consideration by the Federal Power Commission of all aspects of a proposed merger, including the effect on competition, under present law the proposed merger can be questioned by the Department of Justice under the antitrust laws alone.

Under the Natural Gas Act the Federal Power Comimssion fully regulated the natural gas industry as a public utility industry. To have the Federal Power Commission responsible for evaluating mergers in the natural gas industry on the basis of all the factors involved in the public interest, including the competitive aspect, and in addition to have the Department of Justice play a completely uncoordinated role in applying the antitrust laws alone to a proposed merger, is wasteful, disruptive, and not conducive to effective regulation. The prime purpose of the regulation of a utility is to provide for stable and continuing service to the public at the lowest possible reasonable cost. What is presently occurring in the Pacific Northwest is a classic example of what can happen when the regulatory process is disrupted.

Legislative action is needed to allow the Federal Power Commission to employ its full expertise in determining whether a contemplated merger would be in the public interest, and which would coordinate and define the roles of the Federal Power Commission and the Department of Justice in examining the proposed gas utility mergers.

The undersigned believe that the confusion caused by the proceedings in the El Paso-Pacific merger, and which could occur at other times in other areas, is not in the public interest. Legislation is necessary and of the utmost importance. The questions involved in assessing the effects of a merger such as that of El Paso-Pacific should be subject to appraisal against a single Congressionally-established standard.

We have presented to you the above problem in the hope that you might afford to us your assistance and advice in arriving at a possible solution.

Mr. Ralph Wickberg, President of the Idaho Public Utilities Commission, has been appointed coordinator in our joint efforts to arrive at a solution to the above problem. We would appreciate that any correspondence on this matter would be directed to him at: Idaho Public Utilities Commission, Statehouse, Boise, Idaho, 83702.

We will be very pleased to furnish any additional information.

Respectfully,

Idaho Public Utilities Commission,
By Ralph H. Wickberg.
Washington Utilities and Transportation Commission,
By Robert D. Timm, *Secretary*.

GAS PIPELINE MERGER

WEDNESDAY, SEPTEMBER 20, 1967

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

The committee met at 10:12 a.m. in room 5110, New Senate Office Building, Hon. Frank E. Moss, presiding.

Senator MOSS. The committee will come to order.

The committee has set this time to resume hearings on S. 1687. The first 2 days of hearings on this bill were held July 18 and 19, of this year.

S. 1687 was introduced by the chairman of the committee at the request of the Federal Power Commission. In its general terms, S. 1687 is similar to bills first proposed by the FPC in 1962 and later introduced into the 89th Congress as S. 2279 and H.R. 6483.

S. 1687 is designed in purpose to close what Chairman White of the Federal Power Commission at the July hearings characterized as an "* * * existing hiatus in the law * * *". (p. 14.) Thus under the law as it now stands one pipeline company subject to FPC jurisdiction may acquire control of another without subjecting the transaction to public review, depending solely upon the means selected to obtain such control. The FPC's present jurisdiction is limited to passing on those acquisitions where the assets of one pipeline company are acquired by another. But if, instead of acquiring assets, capital stock is acquired as a method of obtaining control of a pipeline company, then the FPC is without jurisdiction. S. 1687 would assign to the Federal Power Commission the responsibility to pass on acquisition of control of FPC jurisdictional gas pipeline companies when such control is acquired by means of stock acquisition. S. 1687 would also give a limited immunity from the antitrust laws for FPC-approved acquisitions of control of pipeline companies by either stock or asset acquisition.

At the conclusion of the hearings on July 19, various parties indicated orally and in writing that they would like the opportunity to present testimony later. It is my understanding that most of these statements will be submitted into the record today, but without formal presentation by witnesses. The committee will, however, receive any testimony from any party present with relation to this matter.

The testimony in behalf of eight midwestern pipelines was to be presented this morning by F. Vinson Roach, vice president and general counsel, Northern Natural Gas Co., Omaha, Nebr. Due to the death of an officer of the company Mr. Roach, who was in Washington, D.C., prepared to testify, had to turn around and go home, and hence the statement of the position of these companies will be placed in the record in the absence of Mr. Roach. The statement will be accompanied by a letter from Mr. Roach explaining the circumstances. Without objection they will be included in the record at this point.

84-444—67——8

(The statement and letter follow:)

STATEMENT OF F. VINSON ROACH, VICE PRESIDENT AND GENERAL COUNSEL, NORTHERN NATURAL GAS CO.

Mr. Chairman, I wish to express my appreciation for being afforded an opportunity to testify with respect to S. 1687. I have been authorized to express the views of the following eight named companies: Mississippi River Corporation, St. Louis, Mo.; Natural Gas Pipeline Company of America, Chicago, Ill.; Northern Natural Gas Company, Omaha, Nebr.; Panhandle Eastern Pipe Line Company, Kansas City, Mo.; Southern Natural Gas Company, Birmingham, Ala.; Texas Eastern Transmission Corporation, Houston, Tex.; Texas Gas Transmission Corporation, Owensboro, Ky.; and Transcontinental Gas Pipe Line Corporation, Houston, Tex.

These companies are engaged in varied business activities but one activity common to each is the operation of an interstate natural-gas pipeline. The transportation of natural gas in interstate commerce and the sale of such gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, through the medium of these interstate pipelines, is subject to regulation by the Federal Power Commission by virtue of the provisions of the Natural Gas Act. We, therefore, are vitally interested in S. 1687, which proposes an unwarranted extension of the Commission's existing authority.

I wish to preface my remarks by stating that none of the companies for whom I am testifying takes any position with respect to the need or desirability of enacting limited legislation, the result of which would be to permit El Paso Natural Gas Company to continue to own and operate its Pacific Northwest Division. Such a decision is solely for this Committee's determination as well as that of the Congress. I do, however, express the unanimous view of the companies, which I represent, in opposition to the instant bill which proposes an amendment of sections 7 and 20 of the Natural Gas Act which would be applicable to our business activities.

While opposed to the entire bill, we are particularly concerned with that portion thereof which would enlarge the Federal Power Commission's authority to require that a certificate of public convenience and necessity be obtained where not only the unquestioned control of a natural-gas pipeline company is to be obtained through the purchase of stock, but which reaches further and would apply to the acquisition of only 10 percent or perhaps a lesser amount of stock. We feel that this recommendation of the Commission is merely a first step in an effort to secure that authority which the Commission has sought for many years, and never obtained, namely, general jurisdiction over the issuance of securities by natural-gas pipeline companies. As long ago as 1949 the Commission sought such grant authority in H.R. 5306, 81st Congress, 1st session. Hearings were held, but that bill was never reported out of committee. Since then the Commission has periodically requested this authority but the Congress has never seen fit to amend the Natural Gas Act to so provide.

Interestingly enough, Commissioner O'Connor, a present member of the Commission, has expressed his opposition to giving the FPC general securities jurisdiction over natural-gas pipeline companies. In a letter of then FPC Chairman Swidler, dated February 24, 1965, to Congressman McCormack re H.R. 5870, 89th Congress, 1st session, a bill to amend section 12 of the Natural Gas Act, the following appears:

"Commissioner O'Connor has asked me to note his opposition to the proposal on two grounds. First, it is his view that the abuses which necessitated conferring similar jurisdiction over securities of the investor-owned segment of the electric power industry have not been found in the natural gas transmission industry. He therefore sees no need for the legislation, and would regard the existing case law and accounting regulations as adequate to assure that abuses will not occur. Second, he believes that the proposed amendment would overturn traditional financing methods which, in his view, enabled the natural gas transmission industry to grow at an unprecedented rate and helped prevent the abuses that formerly prevailed in the electric power industry."

We submit that Commissioner O'Connor's reasons for opposing the proposed amendment of section 12 of the Natural Gas Act apply with equal force to the amendment here proposed.

We, in the pipeline industry, have had 29 years of regulation by the Federal Power Commission. There has never been an occasion, to my knowledge, of any problem presented by the Commission's lack of securities control, such as here

sought, or, absent El Paso, lack of authority to immunize a merger or acquisition from antitrust statutes. The reasons are clear. Where the stock of a natural-gas pipeline company is acquired by others, the company owning and operating such facilities, and the facilities themselves, are still as much subject to the control and regulation of the Commission *after the stock acquisition as before*, in all areas including full authority over the rates, the return allowance, abandonment of service in whole or in part, construction, extension and operation of new facilities, and the like. Thus, the basic regulatory scheme cannot be evaded by transfer of stock ownership. This statement is confirmed in *Humble Oil and Refining Company*, Docket No. C162–627, 27 FPC 1078 (June 1, 1962), a Commission proceeding involving the acquisition of a pipeline company's stock. There the presiding examiner found (p. 1090):

"Staff counsel contends that unless authorization is required for the acquisition of facilities by the device of stock purchase 'a company could acquire jurisdictional facilities without surveillance by the Commission.' It is certainly true that under the concept here adopted, persons, firms or corporations acquiring facilities subject to the Commission's jurisdiction are not themselves, as individuals or as a corporation, subject to the 'surveillance' of this Commission. To make them so would indeed create an anomalous situation. *But the corporation owning and operating such facilities and the facilities themselves would be subject to the control and regulation of the Commission both before and after such acquisition. Nor can that jurisdiction be evaded by the abandonment of such facilities without the authorization of this Commission. This is acknowledged by Staff counsel in the quotation set out above (supra, p. 1087). It is not at all clear, then, what the nature of the surveillance is which Staff counsel contends may be evaded by the 'device' here under consideration.*" [Emphasis supplied.]

In passing, I believe it important to note that the instant requested legislation is not the only amendatory legislation sought by the Commission. For many years it has sought enlarged authority but with rare exception the Congress has denied these requests. I emphasize this point so that the committee will not be misled into believing that there is such a significant need for this legislation that this is the only legislation sought by the Commission. That is not the fact.

I would like to point out that most natural-gas pipeline companies today engage in activities other than the transportation and sale of natural gas which are our only activities subject to the jurisdiction of the Federal Power Commission. This bill would cause the FPC to pass upon purchases of stock in companies which are engaged in many businesses in addition to operation of a regulated pipeline. For example, the FPC would have to approve acquisition of "control" of Mississippi River Corporation because it has a majority interest in a pipeline company, yet its interests in non-pipeline businesses are the greater part of its business. We fail to perceive any good reason why the Commission, which regulates the pipeline business, should be empowered to say who should buy stock of a company such as Mississippi which is, for example, primarily in the railroad business. And, if it does undertake this, what happens if the acquisition of the company involved is already regulated by another Commission, namely, the ICC? Many other pipeline companies would be faced with similar problems.

The proposed bill would in no wise immunize the nonjurisdictional activities of the Companies for whom I speak from the provisions of the several antitrust statutes. Thus, there would be created a most undesirable kind of dualism of authority if the proposed bill were to be enacted. *Two* departments of government would, under the proposed bill, have authority to impede or deny a proposed stock acquisition, in whole or material part, with all of the attendant delays inherent therein.

Today, the *only* branch of Government which is authorized to treat with this problem is the Antitrust Division of the Department of Justice, and with its antitrust clearance procedures we feel that a determination can be more expeditiously obtained with respect to the propriety of a proposed stock acquisition than would be the case if the proposed bill is enacted. In this respect, we are confident that this committee will recognize that the delay caused by the need to obtain Commission approval for that part of the transaction as to which it would have jurisdiction would decrease the number of potential buyers of any natural-gas pipeline company stock. Further, the grant of the authority requested by the Commission, particularly with respect to that language requiring a certificate where 10 percent of the voting stock—or perhaps less—is to be acquired, could actually freeze the present owners of stock to the point that they might be unable to sell it as a package, since control over the prospective purchaser consitutes control over the seller. This fact also raises the question—how would the bill

apply to stock sold through a stock exchange? Would a prospective purchaser of stock through a stock exchange be required to obtain a certificate from the Commission prior to any purchases if he intended to acquire a total of 10 percent or more of the particular company's stock to be purchased in small blocks at various dates? In other words, at what point in time would such an investor be required to apply to the Commission for a certificate.

The bill could be read to provide that prior to the purchase of any stock where the ultimate intention is to acquire an amount which might even be less than 10 percent, a certificate must first be obtained. It is hard to imagine a more stringent straight-jacket on free trading in the stock exchanges. Obviously, legitimate large investors such as pension and mutual funds would be discouraged from acquiring common stocks of natural-gas pipeline companies. They would regard this change in the regulatory climate as a change for the worse and the result would, in our opinion, damage the value of outstanding pipeline securities and impair the ability of pipelines to sell new securities.

I would like to emphasize the fact that not only is the natural-gas pipeline industry a vital industry, but in carrying out its day-to-day responsibilities this industry is in the financial market competing with all businesses seeking money to enable expansion and growth. The pipeline industry competes with General Motors, A. T. & T., U.S. Steel and all of the other large corporations in the American economy. We are very concerned about our ability to obtain funds needed for growth on reasonable terms in competition with the other industries if we are unduly restrained in our operations, which we feel would be the case if the present bill were favorably considered.

Further, although the present bill only relates to the acquisition of stock of a natural-gas pipeline company, investor confidence in such securities would, in our opinion, be impaired by its passage because the investor community would be perturbed that the next step would be an attempt to obtain control over nonregulated activities of natural-gas pipeline companies which, if successful, could result in a definite limitation on future growth of nonregulated earnings which today contribute substantially to the overall earnings of natural-gas pipeline companies. This perturbation is not without foundation. This record reflects that Commissioner Ross now favors amending the instant bill to provide for review by the Commission of the acquisition of nonutility facilities or control of a nonutility company by natural-gas pipeline companies subject to the jurisdiction of the Commission.

We believe it is essential that, for example, management of natural-gas pipeline companies have full discretion in investing funds, represented either by cash or stock, to produce the best results for their stockholders. But the instant bill would impair this discretion by virtue of the direct control over purchasers or acquirers of stock and the concurrent indirect control over the sellers or issuers. The managements of natural-gas pipeline companies have generally recognized the need to diversify and invest in nonregulated industries wherein its stockholders may have a reasonable opportunity to earn an appropriate return more consonant with that earned by other nonregulated enterprises rather than the rigidly controlled return permitted by the Commission.

In this regard, it should be noted that investors in the natural gas industry, although afforded an "opportunity" to make a so-called fair return, are by no means guaranteed that they will realize a fair return nor are they guaranteed freedom from risk or competition. An added factor is that, under the present state of the law, the Commission's position has been to consistently refuse to allow natural gas companies any protection against the declining value of the dollar returned to the investor through the rate of return allowed to be earned and has gone so far as to deny natural-gas pipelines any of the benefits from liberalized depreciation *contra* the obvious congressional intent. Thus, just so long as such managements continue to fulfill, as they have in the past, the needs of the consuming public in various areas in which pipelines controlled by them are operating, such activities being within the Commission's jurisdiction, from there on such managements should have every opportunity, in their discretion, to invest stockholders' money, even if represented by new securities, in those nonregulated enterprises which they believe offer an opportunity of earning a fair return for the investor.

The pipeline industry recognizes that its customers are entitled to expect continued and increasingly good service. It is, however, also the nature of the free enterprise system that creative business initiative flourishes against a background of only such restraint as is absolutely necessary.

The enactment of the instant bill could be construed as an approbation of the limitation of the expansion of business activities by a natural-gas pipeline company

at a time when the rest of the Federal Government is doing everything possible to encourage investment and expand the national economy. This national policy is expressed in various actions of the Congress and Executive and Administrative branches of the Federal Government. Thus, the investment credit provisions of the Revenue Act of 1962 were enacted to stimulate the economy of the country by stimulating capital investment and the earnings therefrom. Internal Revenue Service, Revenue Procedure 62–61 relating to the so-called "guideline" depreciation rates, has the same basic objective. The same is true of the previously enacted "liberalized depreciation" provisions of section 167 of the Revenue Act of 1954, and the Tax Reduction Act of 1964. All of the foregoing legislative acts have as their common objective the stimulation of the economy through capital investment and reinvestment.

In view of the foregoing, we believe that it is clear that any legislative or administrative action which would tend to restrict or hamper investment by natural-gas pipeline companies would be inconsistent with publicly declared national policy. And, the instant bill would, in our opinion, have this restrictive effect.

Before discussing the various contentions set forth in the Commission's written statements in support of the instant bill, I feel it appropriate to refresh the Committee's recollection as to how the bill was conceived and the real reason it is before you. In this connection the record in these proceedings gives us a clear answer. FPC Commissioner Ross testified:

"I might add that this bill, the original bill, was suggested by the Federal Power Commission in 1962, and I think I am at liberty to disclose the fact that it was my original suggestion that we do so.

"I did it because I am human like everybody else. I got mad because the Justice Department and the Supreme Court thought they knew more about our business than we did. I said, we ought to propose a bill to amend this. The more I have been in regulation, the more I begin to—Now I am doubting the wisdom of my original suggestion. I feel that as events subsequently turned out, we were probably wrong.

"Just as a matter of bureaucratic competition for us to say we should be top dog and Justice shouldn't be, I think this is a poor excuse for advocating that we take Justice out of the picture."

Frankly, I cannot conceive of a reason with less substance than the foregoing which motivated the Commission in seeking this legislation.

With your permission I will now respond to several contentions advanced by the majority of the Commission in support of the bill. It states:

"In the Natural Gas Act of 1938, Congress wisely provided for Commission review of acquisitions of the facilities of natural gas companies. However, no review was provided for acquisitions of control of those facilities through stock purchase—or other means—* * *."

The inference is that the Congress overlooked securities acquisitions and, therefore action should be taken now to correct this omission. We believe to the contrary. Congress acted wisely and deliberately as the legislative history of the Natural Gas Act reflects. In the hearings on H.R. 11662, held on April 2, 1936, said bill being the predecessor to H.R. 6586 which was passed and which was enacted into law in 1938 as the Natural Gas Act, Mr. De Vane, Solicitor of the Federal Power Commission stated (p. 10):

"The bill that you have now, H.R. 11662, is in substantially all respects, insofar as it goes, similar to the provision of the Federal Power Act with reference to the electric industry. The bill itself does not go quite as far as, nor does not confer quite as much jurisdiction upon the Commission as does the Federal Power Act."

Again, at page 33 of the same hearings, the following appears:

"Mr. COLE. Does this bill cover the recommendation of the Federal Trade Commission following its investigation?

"Mr. DE VANE. With two exceptions· one of them is the control over securities, and control over the beginning and abandonment in operations. With those exceptions it does.

"Mr. COLE. What was the last?

"Mr. DE VANE. Beginning and abandonment in operations. The latter one is quite important in this industry. Regarding the first, there may be some debate as to whether that one is as important now as it was prior to the passage of the Securities Act of 1933."

We submit that the action of Congress was deliberate and correct in not granting control over securities.

The Commission further states that the acquisition of stock by one natural gas company of another *without any public review* has public interest implications such

a diminution of competition. The answer to this contention is that public review and adequate remedies are *now* provided, namely, under the antitrust laws, as is graphically indicated by the action of the Justice Department in the *El Paso* case.

The Commission states:

"The proposed bill would effectively prevent this method [stock acquisition] of evading the basic regulatory scheme."

I have demonstrated earlier, by reference to the *Humble* case, that under the present provisions of the Natural Gas Act, even where control of a natural-gas pipeline company is obtained through a stock acquisition, the Commission nevertheless retains its full authority over rates, charges, accounting, construction, extensions, abandonments and the like (p. 4, *supra*). We submit that the foregoing conclusively demonstrates that the basic regulatory scheme cannot *now* be evaded.

The Commission further states:

"The bill would enable the Commission to review proposals by organizations which are not natural gas companies, including competitors of the natural gas industry, to take over control of an interstate pipeline company. There is a public interest in review of such transactions to consider their impact upon the preservation of competition and the ability of pipeline company management to function effectively."

We feel that there is no history or foreseeable prospect warranting any fear or perturbation because of the possibility that a competing fuel may acquire control of a natural-gas pipeline company. The statement which I made earlier, reflecting the Commission's complete control over existing natural-gas pipeline companies' operations, suffices to prove that even if a competing fuel acquired a natural-gas pipeline company, the natural-gas pipeline company could not reduce service or fail to carry on its responsibilities required under the Natural Gas Act. The *Humble* case, to which I referred earlier, in fact involved a stock acquisition of a natural-gas pipeline company by a competing fuel, Humble Oil and Refining Company and the Commission has cited no problem in connection therewith since Humble took over. Further, it must be assumed, that the Antitrust Division of the Department of Justice would take a careful look at any such proposed or actual acquisition of control which might suggest a lessening of competition. Finally, it is important to note that the Commission cannot now require an existing natural-gas pipeline company, not controlled by a competing fuel or other interest, to do any more than it can require of a natural-gas pipeline company whose stock is acquired by others, including competing fuels.

The Commission states:

"The bill contains express provision for participation by the Attorney General of the United States in Commission hearings on proposed acquisitions."

This provision we feel would have an adverse rather than a beneficial effect as is implied by the Commission. It would undoubtedly result in the Justice Department feeling compelled to intervene in every Commission proceeding where either a stock acquisition or facilities merger is proposed. Otherwise the Justice Department would waive any opportunity to even be heard in respect to matters as to which it has had years of expertise. Such protective intervention would necessarily result in more protracted hearings, resulting in substantially increased expense to the acquirer of the stock. Undoubtedly, the Commission would next request an additional appropriation to provide for added personnel which would be required (a duplication, in fact, of personnel presently employed by the Justice Department). In this time of rising costs, proposed higher taxes and demand for curtailment of Federal expenses, it would be inappropriate to spend more of the taxpayers' money to duplicate personnel now on the Justice Department payroll.

The Commission further states:

"* * * there have been two other major acquisitions in recent years, in addition to the El Paso-Pacific Northwest merger now before the Courts over which we had no power of approval or disapproval. These two cases involved the acquisition of the United Gas Pipe Line Company by Pennzoil and even more recently the purchase of the stock of the Transwestern Pipeline Company by Texas Eastern, another major pipeline. I do not suggest that if we had had the authority we seek here we would not have approved either or both of these transactions; nothing that I now know indicates that we would not have done so. But both of these transactions were, in my opinion, sufficiently important in their potential impact upon pipeline operation to have warranted full study by the Federal Power Commission."

Since the Commission's files are replete with information with respect to the operation of all of the pipeline companies involved, and the Commission had full knowledge of the proposed acquisitions, it is significant that the Commission admits that nothing that it now knows would have caused it to withhold approval of either or both of these transactions. Insofar as future proposed acquisitions are concerned, the Natural Gas Act and the Federal antitrust laws are more than adequate to protect the public interest. In this regard, attention is directed to section 20(a) of the Natural Gas Act which in pertinent part provides:

"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 Commission also states that the purpose of the Natural Gas Act can be thwarted if two pipelines come under common control through a stock purchase without the Commission's review, since once such an acquisition is consummated, the Commission's authority over any consequent merger of the actual facilities will have relatively little significance operationally. This argument, in essence, was advanced by the Commission staff in the *Humble* case, referred to hereinbefore, and, as the excerpt from the Examiner's decision in that proceeding clearly discloses, the mere acquisition of control of a pipeline through stock does *not* obviate the fact that the Commission continues to have as much control after acquisition, as it did before, over the operations of the pipelines with respect to rates, charges, accounting, discrimination, preference, construction, extensions and any attempt to abandon or alter service. Accordingly, the Commission's authority over any consequent merger of the actual facilities continues to have as much significance operationally as would be the case if the stock acquisition had not taken place and only a merger of facilities was involved.

The Commission cites an amendment to the Clayton Act which, conversely, eliminated a statutory loophole which the Commission now asserts exists in the Natural Gas Act and needs closing. We submit that there is no parallel, contrary to the Commission's assertion, in the amendment to the Clayton Act and the situation here presented. The Clayton Act amendment was to provide full coverage over companies which essentially are non-regulated companies. Here we have an actively regulated industry and, as pointed out hereinbefore, the Commission loses no authority over the operation of pipelines even if control through stock is transferred.

Section 7 of the Clayton Act as originally adopted in 1914 was intended to prohibit anti-competitive mergers which were not so blatantly restrictive as to violate the limited prohibitions of the Sherman Act. At that time the prevalent merger technique was acquisition of stock, and section 7 was, therefore, framed in terms of stock acquisitions. The result was complete immunity from regulation for any asset acquisition not barred by the strict tests of the Sherman Act. The 1950 Clayton Act amendments were necessary to bring such asset acquisitions, which might be sufficiently anticompetitive to warrant their prohibition, under official scrutiny and control.

Since pipeline *stock* acquisitions now and for many years have been fully subject to the Clayton Act, such acquisitions can receive ample review by the Justice Department and the courts under the standards of the antitrust laws and the "loophole" in the original Clayton Act, which was closed in 1950, has no analogy here. The fact is that the Commission always has had jurisdiction over asset acquisitions, and the primary congressional objective in passing the Natural Gas Act, namely to protect the gas consuming public against unreasonable prices, can be achieved by the Commission without regard to the ownership of the pipeline stock. The Commission's problem is simply one of disagreeing with the propriety of the Justice Department having the authority over stock acquisitions rather than the Commission.

Permeating the Commission's statements of position is the emphasis on the importance of maintaining competition in the natural-gas pipeline industry. We believe a healthy competition presently exists, the Commission has not stated to the contrary and, the Commission has, in fact, directed the Committee's attention to several instances affirming this to be the case. Most significantly, it states that in one case involving Hartford, Connecticut, it was "the Commission, not the companies involved, which took the initiative to bring a competing industry to Hartford." Thus, the Commission asserts the fact that it presently has the authority, without antitrust immunity provision here sought, of fostering competition. I must say, in passing, that I find the Commission moving in circles since it must be obvious that, if a transaction requires antitrust immunity, it can only

be because the Department of Justice might initiate proceedings to set aside such transaction because of a lessening of competition or threat thereof. We fail to see how competition can be improved by the antitrust immunity here requested and feel things should be left as they are.

With your permission, I will now briefly point out some other serious problems presented by the instant bill. First, the words "control" and "power to manage" are undefined. The bill proposes to permit the Commission to define these terms and we feel strongly that no such unrestricted delegation of authority should be granted. If the bill is to be favorably considered, which we hope will not be the case, we urgently request the Committee and the Congress to set forth in clear and unambiguous language the standards which must be applied by the Commission. We feel that it is incumbent on the Commission to advise this committee, at this time, the several types of situations which it now believes fall within the ambit of the words "control," " indirect control," and "power to manage," other than those provided for under the grant of authority at p. 4, lines 6, *et seq.* of the bill. Even as to these, the Commission should be required to place in the record proposed rules or orders which it would seek to adopt. If it has not made a sufficient study to do so at this time, then action on this bill should be postponed until such information is in this record and those to be affected have an opportunity to review and reply thereto if deemed warranted. On the other hand, if the Commission does not have any definitive ideas as to situations to which these words would be applicable, then this fact is added reason why the committee should not grant the Commission's request since it would be in effect approving a "pig in a poke" to which our industry would be subjected.

Regardless of the intention of the members of the Congress as to the meaning of the words contained in the bill, this committee is fully aware of the fact that unless clear and unambiguous standards are laid down, regulatory bodies and the courts reach far afield in reading concepts and interpretations into an act which many times would never have received congressional approval if known.

Another extremely ambiguous delegation of authority is contained in the language of the bill wherein it provides that the Commission may issue a certificate "only if it finds that the adverse effect, if any, of the proposed transaction upon competition is insubstantial or is clearly outweighed by other public interest considerations." Nowhere is the word "insubstantial" defined. Nowhere are the "Other public considerations" which would clearly outweigh competition defined or suggested. The bill as now drawn would, for the first time, place the burden of proof to prove these facts upon those seeking to acquire "control" of a natural-gas pipeline company through a stock purchase, but no guidelines are provided. The converse is true today. The burden of proof, if a potential antitrust transgression is foreseen, is now on the Department of Justice where it should be, consistent with the doctrine of American jurisprudence.

Finally, there is no so-called "grandfather" provision in the instant bill, and our industry has no way of knowing what action the Commission might take with respect to present stock ownership of piepline companies if the bill is enacted. If the bill is to be enacted, which I hope will not be the case, we strongly urge the incorporation of a "grandfather" provision to protect present stockowners.

In closing, I again wish to express my appreciation for the opportunity of appearing here and the kind attention the members of the committee have given our presentation. We hope that it will be of some assistance to you in arriving at your informed decision. We respectfully urge this committee not to report favorably on the instant bill.

NORTHERN NATURAL GAS CO.,
Omaha, Nebr., September 18, 1967.

Re S. 1687.

Hon. WARREN MAGNUSON,
Senate Commerce Committee,
Washington, D.C.
(Attention of Mr. Fred Lordan, Staff Director).

DEAR SENATOR MAGNUSON: I want to thank you for the opportunity afforded to me to appear and testify with respect to the above bill on behalf of—

Mississippi River Corporation
Natural Gas Pipeline Company of America
Northern Natural Gas Company
Panhandle Eastern Pipe Line Company
Southern Natural Gas Company
Texas Eastern Transmission Corporation

Texas Gas Transmission Corporation
Transcontinental Gas Pipe Line Corporation

I am writing this letter to you from Washington, D.C., where I arrived today in connection with my appearance scheduled for Wednesday, September 20, 1967. Due to the death of the Assistant to the President of our company, an intimate friend of mine of twenty-seven years standing, I must return to Omaha, Nebraska, for his funeral, and accordingly I will be unable to personally appear on September 20 as scheduled.

I understand that I am the only witness scheduled for September 20, 1967, and therefore I requested that my appearance be rescheduled between October 3 and October 6, 1967, at which time my schedule will permit my return to Washington. Future Committee business, however, apparently will not permit such rescheduling. Accordingly, I request that you incorporate my prepared statement, thirty-five copies of which are enclosed, in your hearing record and that if and when the hearing is resumed, I be afforded an opportunity to appear and orally summarize the enclosed prepared statement.

Very truly yours,

F. VINSON ROACH.

Senator MOSS. The committee has likewise received, and we will put in the record, a statement from Gov. Tom McCall of Oregon. Without objection the statement of Governor McCall of Oregon will be included in the record.

(The statement follows:)

STATEMENT OF TOM MCCALL, GOVERNOR OF OREGON

In confirmation of my telegram of July 17, 1967, to the Honorable Warren G. Magnuson, Chairman, I submit this statement setting forth my position on S. 1687.

I have no objection to the original bill to grant the Federal Power Commission certain powers to be used in the determination of natural gas utilities monopoly status. However, I am strongly opposed to proposed amendments that would add a "grandfather" clause to the bill.

The recent United States Supreme Court case of *United States* v. *First City National Bank*, —U.S. —, 18 L. Ed 2d 151, 87 S. Ct. 1088, decided March 27, 1967, casts doubt upon the effectiveness of a "grandfather" clause which would allow retroactive approval of the El Paso-Pacific Northwest merger. Oregon's present and future economy is closely tied to the natural gas industry. Such a "grandfather" clause would have a detrimental effect on the State of Oregon in view of prospective prolonged litigation which would leave the status of the State's natural gas supply in doubt for some time to come.

Furthermore, another recent United States Supreme Court case, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 17 L. Ed 2d 814, 87 S. Ct. 932 (1967), when implemented, ought to increase greatly the strength of the entity which will succeed to the assets to be divested by the El Paso Natural Gas Company over what it would have been had the divestiture decree which was over turned by *Cascade*, supra, gone into effect.

Under these circumstances, I respectfully submit that the interests of Oregon and the Pacific Northwest can best be served by following the recent United States Supreme Court decisions, including the one mentioned above, which ordered establishment of a new company to serve this area.

Senator MOSS. The committee will receive and place in the record a letter from the Seattle law firm of Ferguson & Burdell in connection with this same matter, the bill before us. Without objection that will be included.

(The letter follows:)

LAW OFFICES OF FERGUSON & BURDELL,
Seattle, Wash., September 13, 1967.

Re S. 1687.

Hon. Senator WARREN G. MAGNUSON,
Senate Office Building, Washington, D.C.

DEAR WARREN: I received your telegram requesting me to notify your Committee if I desired to testify regarding the above bill. I regret that my previous engagements will not permit me to testify on this bill, but I will take this oppor-

tunity to give you my views about the bill and the amendment that was suggested by several of the witnesses during the last hearing.

The bill as introduced would be prospective in effect and would be similar in nature to the Bank Merger Act. Since the decision of the Supreme Court in the bank cases, it is questionable whether this type of legislation is of any real value. By that I mean the Antitrust Division and the courts still have the final say and the net effect is an additional proceeding with attendant cost and delay. I can see no real merit or necessity for the passage of the bill as introduced.

The proposed amendment, which would have the effect of sending the El Paso Merger case back to the Federal Power Commission, would be a much more serious matter. This litigation has now consumed 11 years and many hundreds and thousands of dollars in expenses. The Supreme Court of the United States has three times ruled on this case and has reversed the Federal Power Commission in one instance and the District Court in two instances. Final divestiture hearings have now been set by the District Court to commence on October 16, 1967.

During these many years of litigation, the distributors and consumers in the Northwest have been uncertain of their future gas supplies and have been unable to properly plan extensions of their systems. The February 1967 opinion of the Supreme Court indicated that very substantial benefits should be given to the customers and potential customers of the Northwest Pipeline System from El Paso. These benefits have been translated by some of the prospective purchasers of the system into many millions of dollars that will flow to the customers in the State of Washington, which is the largest consumer on the pipeline. The amendment would either have the effect of postponing this benefit or eliminating it completely, to the detriment of these Washington and other Northwest consumers.

If no legislation is adopted in this session of the Congress on this matter, it appears likely a new operator of the pipeline will be selected by the District Court before the end of the year. If the amendment is passed, and particularly in view of the recent bank cases, this litigation will be extended another 2 or 3 years at the minimum, with the attendant uncertainties. Under the circumstances, I strongly feel that Congress should go slow in adopting any law which overrules the Supreme Court after it has spoken three times on the same matter, and I also strongly feel that such legislation is harmful to the free enterprise system.

Many thanks for offering me the opportunity to appear before your committee, and I only regret that I cannot do so but hope you will consider my views when making a determination on this matter.

Best personal regards,

W. H. Ferguson.

Senator Moss. Senator Monroney has written the Federal Power Commission with relation to clarification and further explanation of one phrase of Mr. White's testimony previously submitted. Senator Monroney would like his letter and the reply thereto placed in the record. Without objection they will be entered at this point.

(The letters follow:)

U.S. Senate,
Committee on Commerce,
September 14, 1967.

Hon. Lee C. White,
Chairman, Federal Power Commission,
Washington, D.C.

Dear Mr. Chairman: The purpose of this letter is to seek some clarification from you as to the meaning of the language contained in S. 1687 concerning "a natural gas company" and "any person engaged in the transportation of natural gas." Statements made in the hearings held by the Senate Commerce Committee by you and Chairman Magnuson would indicate that the bill applies to natural gas pipeline companies and not natural gas producers. But because natural gas producers are now construed to be "natural gas companies" under the Natural Gas Act, I am concerned that the language of S. 1687 could be construed to include natural gas producers.

There are many natural gas producers that own and operate their own gas gathering system which, of course, entails the transportation of natural gas. As drafted S. 1687 would seem to require a natural gas producer to obtain FPC approval of the stock acquisition of another natural gas producer, if the latter had any gas transportation facilities, such as a gas gathering system, which might

technically qualify him as "a person engaged in the transportation of natural gas" under S. 1687.

I think the intent and the meaning of "natural gas company" as relates to natural gas producers should be precisely stated for the record. I would very much appreciate having your opinion with respect to the issues raised in this letter.

Best wishes and kindest personal regards.

Sincerely,

MIKE MONRONEY.

FEDERAL POWER COMMISSION,
Washington, D.C., September 19, 1967.

Hon. A. S. MIKE MONRONEY,
U.S. Senate
Committee on Commerce,
Washington, D.C.

DEAR SENATOR MONRONEY: This replies to your letter of September 14, 1967, seeking clarification of the language contained in S. 1687. As you note, the bill has been drafted to apply to acquisition of control of any "natural gas company" which is also a "person engaged in the transportation of natural gas." As you correctly observe, natural gas producers have been held to be "natural gas companies" within the meaning of the existing provisions of the Natural Gas Act and some of these producers own and operate gas gathering facilities which transport gas for various distances. You therefore seek to pin down the intent and meaning of S. 1687 as to whether ownership and operation of such gas gathering facilities might technically qualify a producer as "engaged in the transportation of natural gas" under S. 1687.

This is not our intent in proposing S. 1687 and is not, as I shall explain, the meaning of the bill. In my testimony at the July 18, 1967 hearing I said:

"* * * we have consciously restricted the Commission's proposed new responsibility to passing upon requests for the acquisition of control over the interstate natural gas pipelines. It does not apply to control over a producer of natural gas."

This is the meaning of S. 1687 because the bill would be subject to the exemption of section 1(b) of the existing Act with respect to "gathering of natural gas." S. 1687 is written to apply to the acquisition of any person engaged in the transportation of natural gas "subject to the jurisdiction of the Commission." This means that the transportation must be jurisdictional in order that the bill apply and the transportation by a producer would not be jurisdictional if it involved no more than gathering under existing section 1(b).

Under the Natural Gas Act, the Commission has two separate sources of jurisdiction, one over transportation and the other over sales for resale. Transportation is the only relevant jurisdictional basis under S. 1687 and the gathering exemption is effective to limit that transportation jurisdiction. Thus, S. 1687 would not affect the acquisition of a natural gas producer who owns no transportation facilities or owns only gathering facilities. On the other hand, the bill would apply to an acquisition of any natural gas company which is both a producer and the owner of jurisdictional pipeline transmission facilities. The dividing line between exempted gathering and the subsequent transportation facilities has been elucidated in a number of Commission cases. *Barnes Transportation Company, Inc.*, 18 FPC 369 (1957); *Ben Bolt Gathering Company* v. F.P.C., 323 F. 2d 610 (CA5 1963); and *Jupiter Corporation* v. *F.P.C.*, 362 F. 2d 92 (1966).

I appreciate this opportunity to clarify the intent and meaning of S. 1687. Please let me know if I may be of further assistance.

Sincerely,

LEE C. WHITE, *Chairman.*

Senator MOSS. The staff should be asked to inquire of the Federal Power Commission whether or not any merger proceedings have transpired since the introduction of this bill which the record should reveal. The staff is directed to do that, and the reply of the Federal Power Commission will be made a part of the printed record.

(The information requested follows:)

FEDERAL POWER COMMISSION,
Washington, D.C., October 19, 1967.

FREDERICK J. LORDAN,
Staff Director, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR FRED: This replies to your letter of October 6, 1967.

In accordance with the instructions of Senator Moss at the hearing on S. 1687 on September 20, 1967, we submit herewith data on those jurisdictional natural gas pipeline companies which have merged or which have proposed to merge by means of a transfer of a controlling stock interest since the predecessor bill to S. 1687, 90th Congress, S. 2279, 89th Congress, was introduced in 1965.

Sincerely,

LEE C. WHITE, *Chairman.*

ACQUISITIONS OF NATURAL GAS PIPELINE COMPANIES UNDER FPC JURISDICTION THROUGH TRANSFER OF A CONTROLLING STOCK INTEREST OCCURRING SINCE S. 2279, 89TH CONGRESS, PREDECESSOR TO S. 1687, WAS INTRODUCED IN 1965

UNITED GAS PIPE LINE CO.—PENNZOIL CO.

In 1965, by means of purchase and a tender offer of Pennzoil stock, Pennzoil acquired 42 percent of the outstanding stock of United Gas Corp., the holding company parent of United Gas Pipe Line Co. United Gas Pipe Line Co. had, at the time, over 9,000 miles of transmission pipeline and in 1965 its net income was $14,653,000. It is classified as a class A pipeline by the Federal Power Commission. United controls almost 21 trillion cubic feet of natural gas reserves, more than any other pipeline company and delivered 1½ trillion cubic feet of gas in 1966.

TRANSWESTERN PIPELINE CO.—TEXAS EASTERN TRANSMISSION CORP.

On March 23, 1967, Texas Eastern Transmission Corp. offered $16 per share for Transwestern Pipeline Co. stock.

The original deadline for the acceptance of this offer was extended from April 7 (when 65 percent of the stock had been offered) to April 18. Texas Eastern has now acquired over 86 percent of Transwestern's stock. Texas Eastern is the second largest pipeline company in terms of gas sales serving Northeastern markets with net income in 1966 of $40 million and deliveries of over 1.1 trillion cubic feet of gas in 1966. Transwestern is the second largest gas supplier to California with net income in 1966 of $6 million and deliveries of 283.5 billion cubic feet of gas. Both are classed as class A pipelines by the Federal Power Commission. Texas Eastern controls over 16 trillion cubic feet and Transwestern 6.5 trillion cubic feet of gas reserves.

Together the two companies are the second largest company in the Nation in terms of gas sales (to El Paso Natural Gas Co.). They may be potential, but are not now, competitors for midcontinent gas supplies.

KANSAS-NEBRASKA NATURAL GAS CO.

As of October 12, 1967, Kansas-Nebraska Natural Gas Co. is the object of a fight for its control between United Utilities, Inc., the second largest independent telephone holding company in the country and Kaneb Pipe Line Co., a petroleum products pipeline in Kansas, Nebraska, South and North Dakota.

Kansas-Nebraska has approximately 7,400 miles of transmission and gathering pipeline in Kansas, Nebraska, Colorado, and Wyoming and serves 77 towns at wholesale and 200 towns at retail. In 1966 its net income was $5.3 million. It is classed as a class A pipeline company by the Federal Power Commission and controls 2.4 trillion cubic feet of natural gas reserves and delivered 104 billion cubic feet in 1966.

In August 1967, officials of Kansas-Nebraska and United Utilities, Inc., announced plans to merge through an exchange of stock. Kaneb, which had purchased over 9 percent of Kansas-Nebraska's stock through a tender offer, applied to the Kansas Corporation Commission to issue securities to purchase more Kansas-Nebraska stock. Kansas-Nebraska opposed Kaneb's application on the grounds that Kaneb's proposed high interest charges for the capital it needed to take over Kansas-Nebraska would then become a serious liability to Kansas-Nebraska. Kansas-Nebraska stated it could borrow money at far less than Kaneb which would "unquestionably increase the cost of services and seriously affect

[the] rate structure." Kaneb, subject to the Kansas Commission as it is a common carrier in Kansas, then announced it had secured private financing and withdrew its application. On September 20, 1967, Kaneb announced it owned 20 percent of Kansas-Nebraska stock and would continue to press for a merger. On October 10, 1967, the Kansas Commission ordered Kaneb to "cease and desist" purchasing additional Kansas-Nebraska shares pending a complete hearing beginning November 20, 1967.

The Federal Power Commission has had no authority to pass on these mergers.

Senator Moss. Finally, I think the chairman should inquire in regard to any additional witnesses who desire to be heard.

Are there any witnesses here this morning who wish to be heard orally by the committee?

I recognize that the large part of the testimony that we were scheduled to hear had to go in by writing only, but it is in the record in full and will be before the committee. We are ready to take any additional testimony if there is any.

I would indicate that copies will be available if any of the press or others who are here want to see copies of the testimony that was placed in the record in writing this morning. Of course, as soon as the transcript is printed, it will be available to any person who makes a request for it.

That would appear, then, to conclude the business of this committee this morning. The hearing will now be closed, subject to the call of the Chair if there is anything further that has to go into this record.

(Whereupon, at 10:18 a.m., the committee was recessed, subject to the call of the Chair.)

(The following communications were subsequently received for the record:)

U.S. Department of Justice,
Office of the Deputy Attorney General,
Washington, D.C., August 28, 1967.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U.S Senate, Washington, D.C.

Dear Senator: During the recent hearing on S. 1687, the gas pipeline merger bill, the attention of the Committee, after the initial statements of Chairman White and Commissioner Ross of the Federal Power Commission, focused extensively upon the possible application of the bill to the merger of Pacific Northwest Pipeline Company into El Paso Natural Gas Company, which was held unlawful by the Supreme Court subsequent to its consummation, and on the possible amendment of the bill to permit the Power Commission in future proceedings to validate that merger.

In our letter to you of July 17, 1967, we stated:

"It is also our understanding, and we believe it is the understanding and intention of the Commission, that the proposed bill would operate prospectively only, and could not be utilized, for example, to validate a merger already held unlawful."

This understanding was based on the language of the bill which speaks expressly in terms of future transactions and which for this reason could not be interpreted to give the Commission power to approve a transaction which has already been consummated. Our interpretation of the bill is confirmed by the testimony of the General Counsel of the Federal Power Commission before the Committee. He stated, "As I understand it, this legislation, as we are proposing it, is prospective and does not affect the present El Paso situation."

The Department of Justice would be strongly opposed to any amendment of S. 1678 which would "forgive" the El Paso—Pacific Northwest merger, or which would give the Commission the authority to approve such a past merger which has been held unlawful by the courts.

Witnesses urging a "forgiveness amendment" have stressed what they described as the uncertainty which has resulted from the antitrust litigation over the El Paso—Pacific Northwest merger. For example, they say that the entity which is to acquire the Pacific Northwest properties is an as yet unknown quantity whereas

El Paso's capacity to operate these properties has been proven by 10 years of successful operation since the merger occurred.

It is true that the outcome of the divestiture hearing to be held this Fall in the district court at Salt Lake City is uncertain to the extent that the court must determine in light of the Supreme Court's recent decision in *Cascade Natural Gas Co.* v. *El Paso Natural Gas Co.* what properties are to be divested and how and to whom they shall be divested. But this uncertainty is the legacy of El Paso's unlawful acquisition of the stock of Pacific Northwest which set in motion the chain of events which have led to the situation which exists today and to the Supreme Court's outstanding order for divestiture.

El Paso, by merging Pacific Northwest into its system in the face of a pending antitrust proceeding challenging the merger, created the uncertainty which is now urged as the basis for a "forgiveness amendment." El Paso had had clear warnings from the outset that it might later have to divest itself of its interest in Pacific Northwest. The antitrust suit, begun July 22, 1957, was perhaps the clearest warning of all; it alleged that El Paso's acquisition of Pacific Northwest's stock had violated Section 7 of the Clayton Act and prayed for divestiture.

The merger, by integrating the assets of the two companies, and thus creating problems of fixing properties to be divested, assuring independence from El Paso of the company to operate the divested assets, in addition to tax and regulatory problems, has made the task of divestiture far more complex than it would have been if only the stock acquisition had to be unraveled.

In the ensuing litigation the Supreme Court has made it plain that it regards El Paso's acquisition of control of Pacific Northwest and its subsequent absorption of the latter as a particularly serious violation of the Clayton Act. Moreover, when the Supreme Court ruled that El Paso had violated Section 7 of the Clayton Act by acquiring Pacific Northwest, and ordered "divestiture without delay," it did so for the stated reason that El Paso had been "on notice of the antitrust charge from almost the beginning—indeed before El Paso sought Commission approval of the merger." Thus, if divestiture has become a complex task, it is because El Paso compounded the difficulty of accomplishing divestiture when it hastily converted its stock control to full merger. But the remedy of divestiture in this case is no different from the divestiture ordered in any other merger which the courts have found unlawful.

You may be assured that this Department is proceeding diligently in the divestiture proceeding with the objective of obtaining a feasible plan of divestiture as soon as possible. In our opinion, this is the only proper manner in which to resolve any uncertainty attributable to the merger which may exist in the gas pipeline industry in the West, and to assure the emergence of an operating entity in the Pacific Northwest which will be vigorously competitive, healthy and fully adequate to the needs of the region.

Sincerely,

WARREN CHRISTOPHER,
Deputy Attorney General.

[From the Seattle Post-Intelligencer, Aug. 24, 1967]

PIPELINE BILL

The Pacific Northwest has a major stake in a bill before Congress that would give the Federal Power Commission primary authority to approve or disallow mergers of natural gas pipeline companies, on the basis of public interest.

Introduced by Washington Sen. Warren Magnuson at the behest of the FPC, the bill (S. 1687) would make such mergers immune to anti-trust legal challenges on grounds of reduced competition.

What makes the issue particularly significant to this region is the fact that it arose as a result of a 1962 Supreme Court decision, invalidating the 1960 merger of the Pacific Northwest Pipeline Corp. with El Paso Natural Gas Co. Since 1960, El Paso has supplied the Northwest with all of its natural gas. Under the court order, El Paso must soon divest itself of its Northwest properties.

The pending bill, with an anticipated amendment, would have the effect of preserving the region's natural gas pipeline system as it is, under continuing El Paso management.

Supporters of the legislation, who include Gov. Dan Evans and well known regional economist H. Dewayne Kreager, argue that El Paso has provided safe and dependable service at rates lower than those in effect before the merger; that it is uncertain if El Paso's unknown successor will be able to match El Paso's

demonstrated excellence, and they note that the FPC had been convinced that the merger was in the public's best interest when it approved the action prior to the court's reversal.

Certainly there is proper concern that mergers may result in unfairly reduced competition through creation of monopolies, in all areas of business and industry. Yet, in this case, the gas pipeline industry would not be exempted from public regulation.

On the contrary, if the bill were passed, the FPC would be responsible for stringent regulation of the industry, including authority over rate structures, with the public interest as its guiding principle.

Consumers who pay the gas bills are, in the final analysis those with the most to gain or lose by pipeline company mergers. We believe they would be best protected by enactment of the Senate bill.

AMERICAN FEDERATION OF LABOR,
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Washington, D.C., September 20, 1967.

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

DEAR SENATOR: The attached statement sets forth the position of the American Federation of Labor and Congress of Industrial Organizations on S. 1687, a bill amending the Natural Gas Act to provide for Federal Commission regulation of gas pipeline mergers.

I respectfully request that the statement be included in the record of the hearings on this bill.

Sincerely yours,

ANDREW J. BIEMILLER,
Director, Department of Legislation.

STATEMENT BY ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. Chairman, my name is Andrew J. Biemiller. I am director of the Department of Legislation, American Federation of Labor and Congress of Industrial Organizations. I am also chairman of the AFL–CIO Staff Committee on Atomic Energy and Natural Resources.

I wish to convey the position of organized labor on S. 1687 which would amend the Natural Gas Act to require issuance by the Federal Power Commission of a certificate of public convenience and necessity to acquire controlling interest, in any manner, of a gas pipeline company under FPC regulation.

The AFL–CIO endorses the general purposes of the bill. It is our understanding that there is no existing federal law protecting consumers from the possible effects of such merger on the rates they have to pay.

Although the Securities and Exchange Commission requires disclosures of stockownership and provides other protections when such mergers are proposed, such protections are for the investing public and not for the consuming public.

Recently there have been two major gas pipeline take-overs—Texas Eastern Corporation has acquired Trans-Western pipeline company; Pennzoil Refinery has absorbed United Gas Pipelines. Presently, the Keneb Corporation, and United Utilities, part of the International Telephone & Telegraph holding company empire, are contending over acquisition of Kansas-Nebraska Pipelines Company.

There is absolutely no review of such combinations as to their effect on the ultimate rate to consumers or as to monopolistic implications. The sole recourse now available is private litigation such as that which recently resulted in a U.S. Supreme Court decision setting aside the merger of El Paso Gas Company and the Pacific Northwest Pipeline Corporation.

Organized labor, therefore, supports the basic provisions of this bill which would subject any such merger proposal to strict scrutiny by the Federal Power Commission before any certificate of convenience and necessity is issued—such scrutiny guided by the basic regulatory purposes of the Natural Gas Act, including protection of consumers as well as safeguards against monopolization.

I note, however, that S. 1687 contains a waiver of the provisions of the Clayton Anti-Trust Act in proposed merger situations if the Commission finds the effect

of the acquisition on competition "is insubstantial or is clearly outweighed by other public interest considerations."

We urge that this waiver be stricken from the bill as a matter of policy. We can conceive of no situation which would as a matter of public policy outweigh full invocation of the Clayton Act's protections in this legislation. It is my understanding that this view is shared by the United States Attorney General with respect to S. 1687.

In conclusion, allow me to state that the AFL–CIO strongly endorses S. 1687 with the amendment I have just mentioned.

I wish to thank this committee for the opportunity to present organized labor's position on this bill.

El Paso Natural Gas Co.,
El Paso, Tex., August 22, 1967.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

Dear Senator: We have reviewed the official transcript of those hearings conducted on July 18 and 19, 1967 before the United States Senate Committee on Commerce in regard to S. 1687, a bill "To amend the Natural Gas Act to require a certificate of public convenience and necessity for the acquisition of a controlling interest, through the ownership of securities or in any other manner, of any person engaged in the transportation of natural gas, and for other purposes."

The transcript displays repeated reference to the merger of Pacific Northwest Pipeline Corporation into El Paso Natural Gas Company and the reason for our interest in these proceedings is, therefore, evident.

Following review of the transcript, we believe a commentary on much of the testimony presented by William M. Bennett should be submitted by us to you for inclusion in the official record of the hearings upon S. 1687. Such a commentary appears essential if those searching the transcript for instruction upon the import of S. 1687 are to gain the most complete understanding possible of this important matter.

It is, therefore, respectfully requested that this letter and the attached commentary on the Bennett testimony (including his prepared written statement) appearing at pages 243–270, both inclusive, of the transcript covering the July 19, 1967 hearings before the Senate Commerce Committee regarding S. 1687 be accepted for filing as part of the official record of proceedings conducted by the Committee relating to that bill.

Respectfully submitted.

G. Scott Cuming, *General Counsel.*

Certain comments given by William M. Bennett before the United States Senate Committee on Commerce in connection with hearings on S. 1687 are quoted to the left below, together with citation of where each such comment may be found. To the right of each comment so quoted are set forth certain materials which will prove helpful in judging worth of the Bennett comment, together with citation to the source of such materials where appropriate. Unless otherwise indicated, transcript references are to the official transcript of hearings on S. 1687.

"* * * we hear there is much chaos and confusion concerning the administration of the antitrust laws as far as this case is concerned when the fact of the matter is there is no confusion, there is no public crisis and there is no need for legislation." Tr. 246, lines 2–6.

"I have been on this antitrust or monopoly case for 11 years. This case illustrates that the Clayton Act is working well as to one pipeline corporation, to wit: the El Paso Natural Gas Corporation." Tr. 246, lines 8–11.

Others differ with Bennett in thinking there is "no confusion," "no public crisis," and "no need for legislation." Similarly, to others, duration of this matter illustrates a vice in applying the Clayton Act to the El Paso-Pacific Northwest affair.

Letter from Daniel J. Evans, Governor, State of Washington, to Hon. Warren G. Magnuson, July 14, 1967: "* * * My regret is that this legislation wasn't enacted ten years ago. Had it been the law then, the State of Washington would have been spared the concern we have all shared about the continued stability and adequacy of the supply of natural gas into our region." Tr. 16.

Calvin L. Rampton, Governor, State of Utah:

"I have for many years followed the tortuous, expensive and confusing course of the El Paso Natural Gas Company-Pacific Northwest Pipeline Corporation case." Tr. 206, lines 19–21.

"* * * we in Utah—and, as well, those in much of the West—have lived through recent years wholly uncertain and uneasy as to who might succeed to El Paso Natural Gas Company in operation of the former Pacific Northwest Pipeline Corporation properties and when that succession might occur.

"This uncertainty and uneasiness would not have obtained these many years nor would they threaten to continue long into the future if the provisions of S. 1687 had been law during the years past. The remarkably complex question of whether the merger of Pacific Northwest Pipeline Corporation into El Paso Natural Gas Company would serve the total public interest, with due regard for such anti-competitive consequences as reason would suggest might follow upon the merger, would have been determined with clarity and finality long since. Furthermore, the determination would have been reached by the Federal Power Commission in the exercise of its vast and singular expertise respecting the operations of interstate natural gas companies and how these interact in infinite variety to affect the public interest." Tr. 213, line 8—Tr. 214, line 3.

[The Governor continued with the following comment in response to question raised by Senator Frank E. Moss (D. Utah): "What sort of impact has this long litigation and delay had in Utah, or on the economy of Utah, if you have been able to detect it?"]

"It has had considerable adverse effect, particularly on the development of the natural gas industry in the State of Utah, and the willingness of this company or other companies to make application for transmission facilities. I think it has almost held us at a standstill there for a number of years so far as the development of transmission facilities through and into and out of the State is concerned." Tr. 216, lines 14–21.

Robert A. Hornby, President, Pacific Lighting Corp., San Francisco, Calif.:

"The case for eliminating the costly delay and uncertainty caused by the duplicate review of mergers of natural gas pipelines by the Federal Power Commission and Department of Justice is quite overwhelming. The general public cannot possibly be served by situations such as exist with respect to our principal supplier, El Paso Natural Gas Company, where some 4½ years after a merger was approved by the FPC, it was disapproved under the antitrust laws, and two years later the divestiture is not yet in sight.

"As the Senator has observed, it has been ten years since the first action was taken. It seems clear to me that the Federal Government should speak with one voice in regulating natural gas pipelines." Tr. 224, lines 13–25.

Written Statement of Kinsey M. Robinson, chairman of the board, Washington Water Power Co., Spokane, Wash.:

"Because of the substantial contribution of El Paso to the economic development of the area, I regret that S. 1687 was not the law a decade ago. If it had been the law, the future of the natural gas industry, which as we have seen is vital to the economy of the Northwest, would not be in doubt today." Tr. 96.

H. Dewayne Kreager, consultant to industry, Seattle, Wash.:

"* * * the fact that the whole matter of the transmission line operation is in limbo because of the pending court matters, would imply that a legal technicality has greatly imperiled the public interest, industrially and economically in the Northwest in this case, a situation which could be corrected." Tr. 168, lines 7–12.

Ralph H. Wickberg, president, Idaho Public Utilities Commission:

"Some months ago, last December 8, I wrote to the chairman of this committee, Senator Magnuson, expressing concern at the critical situation which had developed, and with your permission I should like to quote them for the record:

" '* * * the natural gas pipeline system in the northwest is fraught with uncertainties which threaten further expansion of the natural gas industry in the Pacific Northwest. The natural gas distribution companies of the northwest and the regulatory agencies having jurisdiction over these natural gas distribution companies have been placed in the position of dealing with a phantom. As of this date, we have no knowledge as to what will ultimately occur to the natural gas pipeline system of the northwest. Stability of the natural gas utilities in the Pacific Northwest cannot be accomplished * * *.

" 'As of this date, there is no possible way of accurately determining the ultimate financial structure or the ability of the new company which would acquire the assets of the old Pacific company. There is doubt as to the ultimate base on which the company will be allowed to earn a return. The lack of this knowledge prohibits any accurate forecasting as to the ultimate cost of natural gas in the Pacific Northwest. Industries contemplating the use of natural gas as a source of energy, without knowing or being able to accurately forecast this cost, will necessarily be cautious with respect to expansion of existing, or construction of new, facilities without this information.

" 'Although it is, of course, of prime concern to the Pacific Northwest that this situation has occurred in our area, we respectfully point out that this situation could occur in any area of the United States under the current statutes of the United States. To correct what is currently occurring in the Pacific Northwest and to prevent similar occurrences in other areas of the United States, legislative action to establish a single procedure and a single standard to be applied in evaluating proposed mergers in the natural gas industry is needed. Under the present law, the Federal Power Commission, the agency charged with regulating the natural gas industry, determines whether the merger of two natural gas companies would be in the public interest and is required by the public convenience and necessity. In making this determination, the Federal Power Commission must consider the proposed merger in all its aspects, includ-

ing any effect of competition. The Federal Power Commission considers the competitive factors, the service to be afforded the public, the question of conservation, the probable effect on rates, the growing needs of the markets, and all the other factors involved from the standpoint of the public convenience and necessity. Notwithstanding this thorough consideration by the Federal Power Commission of all aspects of a proposed merger, including the effect on competition, under present law the proposed merger can be questioned by the Department of Justice under the antitrust laws alone.

" 'Under the Natural Gas Act, the Federal Power Commission fully regulates the natural gas industry as a public utility industry. To have the Federal Power Commission responsible for evaluating mergers in the natural gas industry on the basis of all the factors involved in the public interest, including the competitive aspect, and in addition to have the Department of Justice play a completely uncoordinated role in applying the antitrust laws alone to a proposed merger, is wasteful, disruptive, and not conducive to effective regulation. *The prime purpose of the regulation of a utility is to provide for stable and continuing service to the public at the lowest possible reasonable cost. What is presently occurring in the Pacific Northwest is a classic example of what can happen when the regulatory process is disrupted* * * *. (Emphasis in original.)

" '* * * the confusion caused by the proceedings in the El Paso-Pacific merger, and which could occur at other times in other areas, is not in the public interest. Legislation is necessary and of the utmost importance. The questions involved in assessing the effects of a meger such as that of El Paso-Pacific should be subject to appraisal against a single Congressionally-established stand.' " Tr. 185, line 5—Tr. 188, line 2.

Letter from Donald Hacking, chairman, Utah Public Service Commission to Hon. Ralph H. Wickberg, dated July 6, 1967:

"It is clearly apparent, particularly from the mess which has developed in the El Paso Natural Gas Company-Northwest Pipeline Merger, that there is a desperate need for legislation which will permit Federal Power Commission jurisdiction over acquisitions of stock or facilities and approve mergers of natural gas pipeline utilities, though such approval may have an adverse effect on competition and thus violate provisions of the Antitrust

"[S. 1687] * * * is not in the interests of the California gas consumers nor the consumers of the Northwest, nor to the interest of the Pacific Lighting Gas Supply, whom I regulate." Tr. 259, lines 15–18.

"I view this as a serious piece of legislation which, if passed, would emasculate Supreme Court decisions, which is very, very strongly opposed to the public interest of the people of California, Washington, Oregon, and Utah, all of them." Tr. 264, lines 13–17.

Laws provided the Commission finds that other public interest questions clearly outweigh considerations of competition.

"The Utah Public Service Commission is of the view that Senate Bill 1687 would provide the needed legislation and would not destroy the effectiveness of Antitrust Legislation, but would be a means of removing what Justice Harlan called 'the existing bifurcated system' where the general public interest questions stand completely stalled and become entrapped in a dual jurisdiction squabble without end, and during which time the general public interest must suffer grievously." Tr. 26.

Others hold opinion differing from that of Bennett as to the merits of S. 1687.

Letter from Daniel J. Evans, Governor, State of Washington, to Hon. Warren G. Magnuson, July 14, 1967:

"After careful analysis and long study, the Washington Utilities and Transportation Commission, which as you know is the agency charged by law with regulating in the public interest the utilities of this state—including natural gas distribution companies, has taken a position in support of S. 1687. I wholeheartedly join in that support." Tr. 16.

"I affirm the further recommendation made by the Washington Utilities and Transportation Commission that the Committee on Commerce add to S. 1687 whatever amendatory language is appropriate to confirm the 1959 decision of the Federal Power Commission when it found unanimously that the public interest was best served by the merger of Pacific into El Paso. My hope is that El Paso, which has served us so well in the past, be allowed to continue serving in the future, as the F.P.C. intended that it should." Tr. 17.

Letter from Stanley K. Hathaway, Governor, State of Wyoming, to Hon. Warren G. Magnuson, July 14, 1967:

"We would, of course, emphatically urge that S. 1687 be amended so as to be certain that such bill, upon its enactment into law, will authorize preservation of the El Paso-Pacific merger without further proceedings or, at the very least, authorize preservation of that merger following decision by the Federal Power Commission anew that the merger is required in the public interest tested against the standards provided under S. 1687." Tr. 21.

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Calvin L. Rampton, Governor, State of Utah:

"[S. 1687] * * * should become the law at the earliest possible date." Tr. 214, lines 4–5.

Telegram from Paul Laxalt, Governor, State of Nevada, to Hon. Warren G. Magnuson, July 14, 1967:

"* * * specifically urge enactment of S. 1687 * * *." Tr. 22.

Lee White, Chairman, Federal Power Commission:

"Mr. Chairman, I am pleased to be here today to testify in support of S. 1687." Tr. 32, lines 6–7.

Written statement of Kinsey M. Robinson, chairman of the board, Washington Water Power Co., Spokane, Wash.:

"I also appear here as a proponent of S. 1687 and support the testimony of those witnesses who have preceded me. I likewise hope and recommend strongly that the provisions of this proposed legislation will be expanded to cover the [El Paso Natural Gas Company-Pacific Northwest Pipeline Corporation] situation that stimulated the Federal Power Commission's request for this legislation and thereby remove the uncertainty that hangs over the future economic development of the Pacific Northwest." Tr. 84.

William P. Woods, chairman of the board and president, Washington Natural Gas Co., Seattle, Wash.:

"Thus at the outset I want to make it perfectly clear that I support S. 1687 for those reasons advanced by Mr. White of the Federal Power Commission, and that I also favor the addition of language to S. 1687 that would allow the present supplier of natural gas to the Pacific Northwest, El Paso Natural Gas Company, to remain as the region's sole supplier." Tr. 107, lines 18–24.

Written statement of H. Dewayne Kreager, consultant to industry, Seattle, Wash.:

"I am here as a proponent of S. 1687 * * *." Tr. 114.

Ralph H. Wickberg, president, Idaho Public Utilities Commission:

"I appear here today both on behalf of the Idaho Public Utilities Commission, and as a representative of the Western Conference of Public Service Commissions, which consists of the regulatory bodies of the eleven Western States [Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming], which passed a resolution in late June at their Lake Tahoe meeting in support of this bill * * *.

"I am authorized by the Honorable Don Samuelson, Governor of Idaho, acting pursuant to Section 67–802(4), Idaho Code, to say that the views which I express in this statement represent the official views of the government of the State of Idaho.

"Mr. Fred Allen, the President, has authorized me, if I may, to add to my statement one paragraph that reads as follows. This statement was addressed to me and says:

" 'Also, I am authorized by the Honorable Frederick N. Allen, as President of the National Association of Railroad and Utilities Commissioners (NARUC), to state that the Association supports the enactment of S. 1687 in its present form. The NARUC was founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands which regulate carriers and public utilities. The chief objective of the NARUC is to serve the public interest through the advancement of governmental regulation of carriers and utilities.' " Tr. 172, line 21—Tr. 173, line 21.

"In recent days, I have been in touch with a number of my colleagues on regulatory commissions in states served by El Paso. They are aware of my testimony and concur in my view that this bill not only fills an important need, but that it is imperative that it be further amended to provide for the preservation of the present El Paso Natural Gas Company system, and the benefits it provides to the eleven states it serves. I am joined in urging this modification of the bill by the regulatory commissions of several western states." Tr. 178, lines 13–21.

Robert A. Hornby, president, Pacific Lighting Corp., San Francisco, Calif.:

"It is the considered judgment of the Pacific Lighting System that the Congress should further its mandate through providing the Federal Power Commission with the powers herein advocated under S. 1687." Tr. 227, lines 5–9.

"Under the Natural Gas Act * * * a pipeline company can file a piece of paper and in six months begin to collect rates and charges. A nice way to get capital without a hearing." Tr. 263, line 24—Tr. 264, line 3.

A pipeline company seeking authority of the Federal Power Commission to increase its rates must, when applying for such authority, support the request with complex and most detailed data under the requirements of Section 154.63, Regulations Under the Natural Gas Act. Accumulation of these data for filing requires prolonged and intense effort by lawyers, accountants, engineers and many others. The enormous volume of the required data hardly

"Why did the refund take place? It took place because the United States Supreme Court, in *California* v. *Federal Power Commission*, said you have no right to the Pacific Northwest system. Meaning, because you have no legal title to it, you cannot impose upon your other customers the obligation to pay for something you illegally acquired." Tr. 253, lines 8–13.

"The decision of the United States Supreme Court setting aside the merger resulted in enormous gas refunds ($155 million) to California." Tr. 269.

constitutes a mere "* * * piece of paper * * *." Furthermore, Bennett fails to remark that Section 4(e) of the Natural Gas Act requires that the pipeline company refund, *with interest*, the amount of any increase in rates the Federal Power Commission determines to have been excessive. Since March 1 of 1960, the applicable rate of interest has been seven per cent (7%) per annum under Commission Order No. 215A issued at Docket No. R–179.

Matters at issue in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962) had no relation whatever to the refund to which Bennett refers. In plain fact, the Supreme Court did not, in that decision, even consider whether or not the El Paso Natural Gas Company-Pacific Northwest Pipeline Corporation merger was contrary to the Clayton Act, and the Court most certainly did not there say, as Bennett would have it, "* * * you have no right to the Pacific Northwest system." At 369 U.S. 487 (1962), the Court observed:

"*We do not decide whether in this case there were any violations of the antitrust laws*. We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that transaction under the antitrust laws?" (Emphasis added.)

Bennett's testimony is equally wrong even if it be assumed that, in referring to "*California* v. *Federal Power Commission*," he intended to say "*United States* v. *El Paso Natural Gas Company*" (376 U.S. 651 (1964)) in which the Supreme Court did find the El Paso-Pacific Northwest merger was contrary to the Clayton Act notwithstanding that the Federal Power Commission had determined the merger should be approved in the public interest. Again, matters at issue in that case had no relation whatever to the refund to which Bennett refers. The chronological sequence of the two events alone make the causal relationship Bennett may be thought to have intended suggesting an obvious impossibility. The refund was made pursuant to order of the Federal Power Commission at Dockets Nos. G–4769, *et al.* issued *December 4, 1963*. Opinion of the Supreme Court in *United States* v. *El Paso Natural Gas Company*, operating to reverse the lower court's determination that the El Paso-Pacific Northwest merger did not violate the provisions of the Clayton Act, did not issue until *April of 1964*.

"When this merger was proposed I tried this case before the Federal Power Commission [Docket Nos. G–13018, *et al.*] * * *. The financial vice President [Arnold R. LaForce] of the El Paso Natural Gas Company testified that since they were taking over a pipeline corporation which had a revenue deficiency, since they had issued new outstanding common stock which carried with it a dividend service requirement, and since they had so much by way of money to pay out in dividends to existing shares, there was immediately a drain upon surplus in terms of funds available to service the new existing shares issued to get the new pipeline corporation. And the witness from El Paso, pursuant to my cross-examination, said, we are going to make up the revenue deficiency by increasing the rates in the southern part of the system. That means California, Arizona and New Mexico." Tr. 251, line 21—Tr. 252, line 14.

"And their vice-president testified they increased the rates and charges to California to make up the deficiency of the Northwest." Tr. 225, lines 1–3.

"We began negotiations with Pacific Northwest Pipeline Corporation, with Mr. Ray Fisch, and it was agreed that Pacific Northwest would file an application to come to California to attempt to serve the Southern California Edison Company * * *.

"During the midst of those negotiations * * * [El Paso] acquired the outstanding common stock of Pacific Northwest * * *." Tr. 246, line 24—Tr. 247, line 14.

The testimony of Mr. LaForce was expressly and emphatically to the contrary of what Bennett asserts it to have been.

"By Mr. Bennett:

"Q. Mr. LaForce, when you talk about a rate increase for El Paso, how much of a rate increase do you have in mind?

"A. I have not directed any study to that extent, Mr. Bennett.

"Q. Is one of the purposes of that rate increase to permit the El Paso corporation to earn sufficient to meet the obligation represented by the additional shares issued to acquire the Pacific stock?

"A. *Most certainly not.*" (Emphasis added.)

Transcript of Record, p. 2136, line 17—p. 2137, line 1, In the Matter of Pacific Northwest Pipeline Corporation, *et al.*, Docket Nos. G–13018, *et al.*

Bennett here complains, as he alleges, that El Paso prevented him from achieving what it must be assumed he intends to represent as a worthy objective, *i.e.* direct natural gas service by Pacific Northwest Pipeline Corporation to the Southern California Edison Company. Service of this character has been uniformly condemned by the Federal Power Commission as being contrary to the public interest. *Transcontinental Gas Pipeline Corporation, et al.*, 21 FPC 138 (1959); *El Paso Natural Gas Company*, 22 FPC 900 (1959); *Transwestern Pipeline Company, et al.*, 36 FPC —— (1966). Indeed, Bennett himself has often vigorously opposed arrangements of this character. As attorney for the California Commission, in his Brief in Reply to the Petition for Writ of Certiorari filed with the Supreme Court of the United States in *Southern Counties Gas Company of California* v. *Public Utilities Commission of the State of California, et al.* (October Term, 1960), Bennett, at pages 2–3 of the Brief, approvingly quotes a decision of the California Commission directed to question of whether a direct sale to Southern California Edison Company should be approved:

"* * * such a direct sale, which by-passes the locally certificated utility, takes away from the domestic, commercial and industrial customer a firm gas supply that otherwise would aid in meeting the

abnormal peak heating loads on the cold days when Edison ordinarily could burn fuel oil under its boilers."

Additionally, Bennett observes at pages 5–6 of the Brief:

"Equally obviously then, if any gas utility such as petitioner Southern Counties loses a large interruptible customer such as respondent Edison, the millions of small consumers will inevitably suffer an increase in their rates resulting directly from the loss of revenue incurred by the gas utility * * *. Clearly, if a gas supplier is allowed to succeed with this device of pirating from a regulated gas utility its largest single consumer, other gas suppliers will cast their eyes upon the most desirable large consumers served by gas utilities in California and we must expect that suppliers will skim the cream and take away from regulated gas utilities the most desirable of these large interruptible customers."

Still again, Bennett, performing as counsel to the California Commission in an amicus curiae brief filed with the United States Supreme Court in *Federal Power Commission* v. *Consolidated Edison Company of New York, Inc., et al.* (October Term, 1960) where the "direct sale" question was again at issue, observed:

"A basic and long-enduring problem of the natural gas industry is the large demand for gas for space heating in winter months which is not balanced by comparable demands during the balance of the year. If adequate pipeline capacity were built solely to satisfy peak winter demands, it would be idle during much of the year, substantially increasing the cost of transporting and distributing gas. Pipe lines and distributors meet this problem to some extent by gas storage, but primarily by interruptible sales of large volumes of gas to industrial customers during off-peak periods. These sales benefit domestic consumers by spreading capital costs and reducing incremental costs of gas delivered by the system. However, if the decision below stands, straight gas distributors are seriously threatened with the loss of such load-balancing interruptible industrial sales. The result will be imposition of unrecovered fixed costs on the millions of ultimate consumers using gas for residential and commercial purposes."

California natural gas distribution companies purchase their supplies of natural gas from two pipeline companies, Transwestern Pipeline Company and Pacific Gas Transmission Company, and, too, from Standard Oil Company of California, Texaco, Inc., Humble

"So that what I am saying is this: when you make a pipeline company a super-monopoly covering the Western Hemisphere and don't have attendant public utility controls, you are foisting an even greater evil upon the public, which has no control through

any Federal agency or any law in terms of compelling service, expanding to markets, and that type of thing." Tr. 263, lines 17–22.

"And they [El Paso Natural Gas Company] were placed on clear notice that what they were doing was about to run afoul of the Clayton Act in the opinion of some of us as lawyers.

"On July 22, 1957 the complaint was filed in Utah, notice to this pipeline corporation that they were charged with violating the Clayton Act, and then—and here comes the self-created confusion and abase utilization of a Federal agency—El Paso files an application with the Federal Power Commission asking its approval of this self-same merger which was condemned by the Attorney General of the United States." Tr. 248, lines 4–14.

Oil & Refining Company, Union Oil Company of California, Gulf Oil Corporation, Shell Oil Company and a number of other companies producing gas within the State of California in addition to those supplies purchased by these distributors from El Paso Natural Gas Company. Transwestern's assets exceed 200 million dollars and those of Pacific Gas Transmission are in excess of 100 million dollars. Furthermore, Transwestern is controlled by Texas Eastern Transmission Corporation and Pacific Gas Transmission is controlled by Pacific Gas & Electric Company; the assets of Texas Eastern are above one billion dollars and those of Pacific Gas & Electric are well over three billion dollars. It would seem beyond argument that El Paso, required as it is to compete with those mentioned above in efforts to supply the natural gas needs of the State of California, may surely not be said to enjoy the position of a "super-monopoly."

El Paso provides natural gas service to customers located in eleven western states, hardly service embracing the "Western Hemsisphere."

In other circumstance and at other times Bennett does not seem to have thought Federal Power Commission "public utility controls" indifferent or ineffective. For example, as attorney for the California Commission in a brief filed with the United States Supreme Court (October Term, 1960) in connection with *Federal Power Commission* v. *Consolidated Edison Company of New York, Inc., et al.*, Bennett observed at page 7 of that brief:

"The instant decision permits, and indeed invites, the direct sales-transportation arrangement here involved, all of which negates the *complete regulatory scheme set forth in the Natural Gas Act*." (Emphasis added.)

Bennett implies that El Paso Natural Gas Company acted irresponsibly in pursuing efforts to merge with Pacific Northwest Pipeline Corporation and that El Paso, presumably, should have known its efforts could not succeed. The following brief narrative should demonstrate falsity of the charge.

In January, 1957, consequent upon terms of a 1956 agreement, El Paso Natural Gas Company offered to exchange El Paso Common Stock for that of Pacific Northwest Pipeline Corporation. The exchange offer followed reassurance El Paso had derived from opinion of counsel, Messrs. Sullivan & Cromwell, regarding

related antitrust considerations, including those arising in respect to Section 7 of the Clayton Act. Sullivan & Cromwell concluded that while the matter was not entirely free from doubt, it was their opinion that the proposed transaction was not in violation of the antitrust laws presently effective as then so far construed by the courts. In addition, prior to consummation of the exchange offer, both Arthur Dean, Senior Partner of Sullivan & Cromwell, and El Paso's Chief Executive Officer called upon Herbert Brownell, United States Attorney General. The plan to acquire Pacific Northwest was outlined to the Attorney General and members of his staff and the reasons why the acquisition was considered legal were explained. The Attorney General did not then challenge the legal position. By May of 1957, over ninety-nine per cent of the outstanding Pacific Northwest shares had been exchanged for those offered by El Paso.

On July 27, 1957, the Attorney General of the United States filed a complaint in the Utah District Court attacking the stock acquisition as a violation of Section 7 of the Clayton Act. On August 7, 1957, El Paso and Pacific Northwest filed applications with the Federal Power Commission seeking necessary authorization to merge the assets of Pacific Northwest into those of El Paso. The District Court deferred trial of the Attorney General's antitrust complaint pending final action of the Federal Power Commission upon the merger applications. During the month of November, 1959, the Trial Examiner presiding over the merger proceedings recommended the Commission approve the applications of El Paso and Pacific Northwest. The Commission did so unanimously and, upon December 31, 1959, the merger was consummated.

Eleven states, the City of Los Angeles and thirteen distributor or pipeline customers of El Paso and Pacific Northwest participated, along with the Federal Power Commission staff, in exhaustive proceedings heard by the Trial Examiner. Following extended analysis of the Clayton issues, as spread in the text of his decision, the Examiner concluded:

"Considering all of the evidence, it must be found that any lessening of competition, either in the consumer markets or the producing fields, by reason of the elimination of Pacific as a competitor, does not create any obstacle to approving the merger of Pacific into El Paso. There are other factors of greater importance

showing this merger to be required by the public convenience and necessity which indeed far outweigh this single factor of the elimination of Pacific as a competitor of El Paso or any other natural gas company."

The State of California alone appealed from the Federal Power Commission order approving the merger. On March 30, 1961, the United States Circuit Court of Appeals for the District of Columbia Circuit affirmed the Commission order observing:

"* * * Beyond this the Commission found that the public interest would be served in several respects by the merger: The combined system would be considerably strengthened by the increase in available gas supplies; development of sources and markets would be stimulated; the merged company would be in a stronger financial position; existing gas supplies could be more effectively used to meet emergencies in periods of peak demand; and, finally, cost saving would be realized that would ultimately be reflected in lower rates * * *. We find no error."

Nevertheless, in April of the following year, the Supreme Court reversed the Circuit Court and vacated the Power Commission order notwithstanding the plea of the United States Solicitor General, Archibald Cox, as set forth in his brief:

"In sum, the Commission considered the merger in its broadest aspects—the competitive factors, the matter of improved service to the public, the question of conservation, the probable effect on rates, the growing needs of the market * * *. In deciding the question before it—the desirability of the merger from the standpoint of the public convenience and necessity—it did not act improperly and it reached a judgment which was both reasonable and informed."

The succeeding Fall, after a full trial, the Utah District Court found El Paso's acquisition of Pacific Northwest did not violate Section 7 of the Clayton Act but in April of 1964, the Supreme Court reversed that judgment and ordered divestiture.

(The three Supreme Court opinions referred to on p. 18 follow:)

369 U.S. 482

CALIFORNIA, Petitioner,

v.

FEDERAL POWER COMMISSION et al.

No. 187.

Argued March 1, 1962.

Decided April 30, 1962.

Petition to review an order of the Federal Power Commission authorizing merger of a gas company and a pipeline company. The Court of Appeals, 111 U.S.App.D.C. 226, 296 F.2d 348, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that the Federal Power Commission should not have proceeded to a decision on the merits of the merger application where there was pending in a district court a suit challenging validity of the transaction under the antitrust laws, but Commission should have awaited a decision by the court.

Judgment of Court of Appeals reversed, order of Commission approving merger vacated and case remanded to Commission for proceedings in accordance with opinion.

Mr. Justice Harlan and Mr. Justice Stewart, dissented.

1. Gas ⚿4

Evidence of antitrust violations is relevant in applications to the Federal Power Commission for merger on issue of "public convenience, and necessity" as the term is used in the Natural Gas Act. Natural Gas Act, § 7(c) as amended 15 U.S.C.A. § 717f(c).

2. Monopolies ⚿10

Immunity from the antitrust laws is not lightly implied.

3. Public Service Commissions ⚿6

Provision in Clayton Act that it shall not apply to transactions duly consummated pursuant to authority given by the Federal Power Commission under any statutory provision vesting such power, did not give the Federal Power Commission a grant of power to adjudicate antitrust issues. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

4. Public Service Commissions ⚿17

The Federal Power Commission should not have proceeded to a decision on the merits of a merger application where there was pending in a district court a suit challenging validity of the transaction under the antitrust laws, but Commission should have awaited a decision by the court. Clayton Act, § 7 as amended 15 U.S.C.A. § 18; Natural Gas Act, § 7(c) as amended 15 U.S.C.A. § 717f(c).

5. Public Service Commissions ⚿19(1)

Approval of a merger by the Federal Power Commission would not bar an antitrust suit challenging the merger. Clayton Act, § 7 as amended 15 U.S.C.A. § 18; Natural Gas Act, § 7(c) as amended 15 U.S.C.A. § 717f(c).

6. Constitutional Law ⚿79

Antitrust policy entrusted to the courts may not be frustrated by an administrative agency. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

7. Public Service Commissions ⚿6.11

The Federal Power Commission in holding, under merger application, that any lessening of competition was not substantial, improperly undertook to make a finding in an area reserved to the courts by the Clayton Act. Natural Gas Act, § 7 as amended 15 U.S.C.A. § 717f; Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

William M. Bennett, San Francisco, Cal., for petitioner.

Sol. Gen. Archibald Cox, for respondent Federal Power Commission.

Arthur H. Dean, New York City, for respondent El Paso Natural Gas Co.

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Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

El Paso Natural Gas Company first acquired the stock of the Pacific Northwest Pipeline Corp. and then applied to the Federal Power Commission for authority to acquire the assets pursuant to § 7 of the Natural Gas Act, 52 Stat. 825, 15 U.S.C. § 717f(c), 15 U.S.C.A. § 717f(c). This application was dated August 7, 1957. Prior thereto, on July 22, 1957, the Federal Government commenced an action against El Paso and Pacific Northwest, alleging that El Paso's acquisition of the stock of Pacific Northwest violat-

ed § 7 of the Clayton Act,[1] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18, 15 U.S.C.A. § 18. On September 30, 1957, El Paso and Pacific Northwest filed a motion to dismiss the antitrust suit or to stay it, pending completion of the proceedings before the Commission. On October 21, 1957, that motion was denied after hearing; and we denied certiorari. 355 U.S. 950, 78 S.Ct. 553, 2 L.Ed.2d 528.

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In May and June 1958, the Department of Justice wrote four letters to the Commission, asking that the proceeding be stayed pending the outcome of the antitrust suit. On July 29, 1958, the Department of Justice was advised by the Commission that it would not stay its proceedings. The Commission invited the Antitrust Division of the Department to participate in the administrative proceedings; but it did not do so.

The hearings before the Commission started September 17, 1958. On October 2, 1958, El Paso and Pacific Northwest moved in the District Court for a continuance of the antitrust suit. On October 6, 1958, the Department of Justice asked the Commission to postpone its hearing, pending final outcome of the antitrust suit which had then been set for trial November 17, 1958. On October 7, 1958, the Commission wrote the District Court that if the court denied El Paso and Pacific Northwest's motion for a continuance and proceeded with the antitrust trial, the Commission would continue its merger hearings to a date that would not conflict with the trial date of the antitrust case, but that if the court granted the motion for continuance, the Commission would proceed with its hearing. On October 13, 1958, the District Court continued the antitrust suit until the final decision in the administrative proceedings. The latter proceedings were concluded, the Commission authorizing the merger on December 23, 1959. 22 F.P.C. 1091, 23 F.P.C. 350. The merger was consummated December 31, 1959.

Petitioner intervened in the administrative proceedings August 27, 1957, and obtained review by the Court of Appeals, which affirmed the Commission. (111 U.S.App.D.C. 226, 296 F.2d 348), Judge Fahy dissenting. We granted certiorari, 368 U.S. 810, 82 S.Ct. 47, 7 L.Ed. 2d 20.

[1] Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of "public convenience and necessity" as used in § 7 of the Natural

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Gas Act is found in the laws of the United States. City of Pittsburgh v. Federal Power Commission, 99 U.S.App.D.C. 113, 237 F.2d 741.

[2] Immunity from the antitrust laws is not lightly implied. The exemption of agricultural cooperatives from the antitrust laws granted by § 6 of the Clayton Act, 15 U.S.C.A. § 17, and § 1 and § 2 of the Capper-Volstead Act of 1922, 7 U.S.C.A. §§ 291, 292, became relevant in Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. While § 7 of the Clayton Act gave im-

1. Section 7 of the Clayton Act provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

munity 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, 80 S.Ct. 855) 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, 60 S.Ct. 182, 188–190, 84 L.Ed. 181. "When there are two acts upon the same subject, the rule is to give effect to both if possible." Id., at 198, 60 S.Ct. at 188. Here, as in United States v. R. C. A., 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354, while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity" (id., at 351, 79 S.Ct. at 467), there is no "pervasive regulatory scheme" (ibid.) including the antitrust laws that has been entrusted to the Commission. And see National Broadcasting Co. v. United States, 319 U.S. 190, 223, 63 S.Ct. 997, 1012, 87 L.Ed. 1344. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act, 49 U.S. C.A. § 5(11), specifically provides that the carriers involved "shall be and they are hereby relieved from the operation of the antitrust

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laws * * *." See McLean Trucking Co. v. United States, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544.

[3] There is no comparable provision under the Natural Gas Act. Section 7 of the Clayton Act—which prohibits stock acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"—contains a proviso that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Federal Power Commission * * * under any statutory provision vesting such power in such Commission * * *." The words "transactions duly consummated pursuant to authority" given the Commission "under any statutory provision vesting such power" in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in § 7 of the Clayton Act "* * * it is not intended that * * * any * * * agency" mentioned "shall be granted any authority or powers which it does not already possess." S.Rep.No. 1775, 81st Cong., 2d Sess., p. 7, U.S.Code Cong. Service 1950, p. 4300. The Commission's standard, set forth in § 7 of the Natural Gas Act, is that the acquisition, merger, etc., will serve the "public convenience and necessity." If existing natural gas companies violate the antitrust laws, the Commission is advised by § 20(a) to "transmit such evidence" to the Attorney General "who, in his discretion, may institute the necessary criminal proceedings." Other administrative agencies are authorized to enforce § 7 of the Clayton Act when it comes to certain classes of companies or persons;[2] but the Federal Power Commission is not included in the list.

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[4] We do not decide whether in this case there were any violations of the an-

2. Section 11 of the Clayton Act, 15 U.S.C. § 21, 15 U.S.C.A. § 21, vests authority to enforce compliance with § 7 by the persons subject thereto:

"* * * in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil

titrust laws. We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that transaction under the antitrust laws? We think not. We think the Commission in those circumstances should await the decision of the courts.

The Commission considered the interplay between § 7 of the Clayton Act and § 7 of the Natural Gas Act and said:

"Section 7 of the Clayton Act, under which the antitrust suit was brought, prohibits the acquisition by one corporation of the stock or assets of another corporation where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.' Exempt, however, are transactions consummated pursuant to Commission authority. This shows, reasons the presiding examiner, that Congress placed reliance on the Commission not to approve an acquisition of assets in violation of the injunction of the Clayton Act, unless in the carefully exercised judgment of the Commission, the acquisition would nevertheless be in the public interest. What we are attempting to arrive at is the public convenience and necessity. In reaching our determination, we do not have authority to determine whether a given transaction is in violation of the Clayton Act, but we are required to consider the bearing

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of the policy of the antitrust laws on the public convenience and necessity. City of Pittsburgh v. F. P. C. [99 U.S.App.D.C. 113], 237 F.2d 741, 754 (CADC). With the presiding examiner, we find that any lessening of competiion whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial." 22 F.P.C. 1091, 1095.

Apart from the fact that the Commission did undertake to make a finding reserved to the courts by § 7 of the Clayton Act,[3] there are practical reasons why it should have held its hand until the courts had acted.

[5] One is that if the Commission approves the transaction and the courts in the antitrust suit later hold it to be illegal, an unscrambling is necessary. Maryland and Virginia Milk Producers Ass'n v. United States, supra. Thus a needless waste of time and money may be involved. Also these unscrambling processes often raise complicated and perplexing problems on tax matters and otherwise, as our recent decision in United States v. E. I. Du Pont, etc., & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057; 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318, shows.[4] Such complexities

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are inherent in the situation, as approval of the

Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: * * *."

3. Where "the effect of such acquisition may be substantially to lessen competition." Section 7, supra, note 1.

4. In that case, which also was under § 7 of the Clayton Act, we said: "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corpora-

transaction by the Commission would be no bar to the antitrust suit. See United States v. R. C. A., supra.

Another practical reason is that a transaction consummated under the aegis of the Commission as being a matter of "public convenience and necessity" is bound to carry momentum into the antitrust suit. The very prospect of undoing what was done raises a powerful influence in the antitrust litigation, as United States v. E. I. Du Pont, etc., & Co., supra, illustrates.

The orderly procedure is for the Commission to await decision in the antitrust suit before taking action.

Section 7 of the Clayton Act, so far as material here, prohibits stock acquisitions having a prescribed effect. Section 7 of the Natural Gas Act confers jurisdiction on the Commission over the acquisition of assets of natural gas companies,[5] not over stock acquisitions in them. Had the Commission stayed its hand and had the courts found the stock acquisition unlawful, the entire transaction would have been set aside *in limine*. Had the courts found the stock acquisition lawful, presumably no problems under § 7 of the Clayton Act would have remained.

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When the Commission proceeds in the face of a pending but undecided antitrust suit and approves a merger that has been preceded, as this one was, by a stock acquisition, it in substance treats the entire relation of the companies—from the acquisition of stock to the merger—as an integrated transaction. If that administrative action were approved, the Commission would be allowed to do by indirection what it has no jurisdiction to do directly.

[6, 7] It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the Natural Gas Act on the other should be better accommodated. Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. Moreover, as noted, the Commission in holding that "any lessening of competition is not substantial" was in the domain of the Clayton Act, a domain which is entrusted to the court in which the antitrust suit was pending.

The judgment of the Court of Appeals is reversed and the case is remanded for proceedings in conformity with this opinion. It is so ordered.

Mr. Justice FRANKFURTER took no part in the decision of this case.

tion." 353 U.S., at 589, 77 S.Ct. at 875. As to the remedy we stated in United States v. E. I. Du Pont, etc., & Co., 366 U.S., at 334, 81 S.Ct. at 1254: "We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfuly borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

5. Section 7(c) provides in relevant part: "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or 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."

Mr. Justice WHITE took no part in the consideration or decision of this case.

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Mr. Justice HARLAN, whom Mr. Justice STEWART joins, dissenting.

In this case originating in the Federal Power Commission, the Court today announces a new and surprising antitrust procedural rule: If the Commission is asked to "proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that [merger and its antecedent] transaction[s] under the antitrust laws," the Commission must abstain from a determination and "await decision in the antitrust suit before taking action." (Ante, 369 U.S., pp. 487, 489, 82 S.Ct., pp. 905, 906.)

The holding does not turn on any facts or circumstances which may be said to be peculiar to this particular case. It is not limited to Federal Power Commission proceedings. Without adverting to any legal principle or statute to support its decision, the Court appears to lay down a pervasive rule, born solely of its own abstract notions of what "orderly procedure" requires, that seemingly will henceforth govern every agency action involving matters with respect to which the antitrust laws are applicable and antitrust litigation is then pending in the courts.

I cannot subscribe to a decision which broadly works such havoc with the proper relationship between the administrative and judicial functions in matters of this kind. The decision, on the one hand, in effect transfers to the Antitrust Division of the Department of Justice regulatory functions entrusted to administrative agencies, and on the other hand deprives the courts in government antitrust litigation of the authority given them by statute to determine whether or not interlocutory relief is necessary or appropriate. What this new rule entails is illustrated by this case: A business transaction of great magnitude and importance, which the Federal Power

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Commission has found to be in the public interest, is, at least for the time being, set for naught, without the slightest inquiry into whether the antitrust charges leveled against it are weighty or not. The Court's action is the more unusual because it is taken (1) despite the antitrust court's denial of interlocutory relief when such relief was belatedly sought by the Government; (2) in the face of the considered judgment of the Solicitor General, representing the public interests respectively involved in the administrative and antitrust proceedings, that determination of the ultimate effect of the Commission's order should be left to abide the event of the antitrust case, and that meanwhile such order should be allowed to stand; and (3) at the instance only of an intervenor in the Commission's proceeding which was not even a party to the Government's antitrust suit.

The undiscriminating nature and reach of this decision become apparent when attention is focused on the procedural events occurring prior to the order of the Commission which is here under attack. On July 22, 1957, the Department of Justice instituted a civil action in the United States District Court in Utah against the El Paso Natural Gas Company and the Pacific Northwest Pipeline Company, seeking to restrain an alleged violation of § 7 of the Clayton Act. This violation was said to have occurred when, beginning in January 1957, El Paso embarked on a program of acquiring nearly all of Pacific's outstanding common stock. The complaint asked that the purchase be declared to be a violation of § 7 of the Clayton Act and that El Paso be directed to divest itself of Pacific's stock. No interlocutory relief appears to have been requested.

On August 7, 1957, El Paso filed with the Federal Power Commission its application for authorization to merge Pacific's assets with its own. Despite this announced intention further to intermingle the affairs of the two corporations,

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the Government did not seek temporary

relief from the District Court in Utah. El Paso, on the other hand, contended that "primary jurisdiction" with regard to the merger resided with the Commission and sought to have the antitrust action stayed. Its motion was denied by the District Court, and on March 3, 1958, we denied leave to file a petition for common-law certiorari to that decision. 355 U.S. 950, 78 S.Ct. 553, 2 L.Ed.2d 528.

When the case was returned to the District Court the Government again made no effort to obtain from that court an order maintaining the status quo pending the outcome of the suit. Instead, the Assistant Attorney General in charge of the Antitrust Division suggested to the Commission that it stay its own proceedings until the antitrust suit had terminated. When this request was rejected by the Commission, the Antitrust Division withdrew from the Commission proceedings despite an express invitation from the Commission that it participate.

Hearings before the Commission's examiner were scheduled to begin on September 17, 1958, and the trial of the antitrust suit in the District Court was set for November 17, 1958. At a hearing on several pretrial matters held in the District Court on September 5 and 6, the Government, for the first time, moved for a temporary injunction to restrain the asset merger even if the Commission's approval were forthcoming.[1] That motion was denied and not renewed thereafter. The Commission's hearings began on September 17 and were recessed on September 26 until November 12.

El Paso again moved in the District Court for a continuance of the antitrust trial until after the Commission had passed on the merger application, and the Government

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once more asked the Commission to stay its proceedings pending the outcome of the antitrust case. While noting that the Government had refused the Commission's invitation to intervene in the merger proceedings, the Commission agreed to defer to the District Court. It notified the court that if El Paso's motion for a continuance of the trial were denied, the Commission would continue its merger proceeding to a later date. On October 13, 1958, the District Court issued an order granting El Paso's motion and continued the antitrust trial "until the final determination by the Federal Power Commission of the applications now pending before it." The Government has never sought to review this order by mandamus or by any other available means. The Commission subsequently held its hearings and authorized the merger of El Paso and Pacific in an order dated December 23, 1959. It is that order which the Court today in effect holds to have been entered without jurisdiction.

The Court relies on three "practical reasons" to support its perplexing conclusion that despite the Government's failure promptly to seek relief *pendente lite* in the antitrust suit, its failure to press for review of the denial of such relief when belatedly sought and the Commission's expressed willingness to defer to the antitrust court, the Commission was nonetheless required to withhold approval of the merger application: (1) If the asset merger were approved and executed, and the stock purchase thereafter held to be illegal, an "unscrambling" involving "needless waste of time and money" would be necessary; (2) such an "unscrambling" would "raise complicated and perplexing problems on tax matters and otherwise"; (3) the Commission's approval of the asset merger "is bound to carry momentum into the antitrust suit." (Ante, 369 U.S., pp. 488–489, 82 S.Ct., pp. 905, 906). Whatever weight these considerations may be deemed to have, I think that "or-

1. The fact that such a motion was made and denied does not appear in the record before this Court. However, it is asserted in El Paso's brief and is not denied by any of the other parties.

derly procedure" [495] required their determination, at least in the first instance, by the antitrust court, if indeed they were not rejected by the District Court on the Government's 1958 motion to enjoin consummation of the merger. Their consideration by this Court as an original matter is entirely inappropriate, and in no event do any of them affect the *validity* of the Commission's order approving the merger.[2]

I.

Section 15 of the Clayton Act, 15 U.S.C. § 25, 15 U.S.C.A. § 25, grants jurisdiction to the United States District Courts "to prevent and restrain violations" of the Clayton Act, and empowers the United States Attorneys "to institute proceedings in equity to prevent and restrain such violations." The same statutory section provides that pending determination of the merits of a complaint filed by the United States "and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Consequently, it is the duty of the District Court before which an antitrust suit is pending to pass on the desirability of temporary relief in order to avoid later problems of "unscrambling." In the case before us, it was not until more than a year after the Government knew of El Paso's intention to merge Pacific's assets with its own that it requested the District Court to enjoin the execution of [496] this plan. The court's denial of the temporary injunction must be presumed to have been based on its evaluation of the likelihood of success of the antitrust suit and of the difficulties that might arise if interlocutory relief were denied. Not having renewed its motion, the Government may surely not revive it indirectly by attacking the Commission's order. Moreover, by what authority is petitioner, the State of California, an intervenor only in the Commission's proceedings, empowered to assert claims relating to the enforcement of the antitrust laws that are unavailable to the Government, the plaintiff in the antitrust action?

II.

Similarly, whatever is meant by the suggestion that the Commission's approval carries "momentum" into the antitrust suit, this factor is one that should be remedied, if necessary, by purging the antitrust proceedings of any improper influence deriving from the agency determination, not by invalidating the administrative action. The Court's holding —which is unnecessary to a decision of this case and, as the Government argues, also premature[3]—that the concluding proviso of § 7 of the Clayton Act gives the Commission's approval of this asset merger no immunizing effect against the antitrust claim, surely lends added support to the view that the agency is permitted to consider this application as it might consider any other which suggests no difficulties under the antitrust laws. If the Commission's approval is irrelevant to the merits of the Government's [497] antitrust suit, it is the court considering the antitrust claim which should guard itself against giving weight to this irrelevancy, not the Commission passing on the merger application. And if the lower courts should ultimately go wrong in this

2. Because of the posture of this case, I would not reach the question as to what weight should be given to the pendency of administrative merger proceedings by an antitrust court which is asked to grant interlocutory relief. However, I think more can be said than the Court does in favor of staying the hand of an antitrust court pending consideration by the appropriate agency of matters touching on "those areas * * * in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation." Federal Communications Comm. v. R. C. A. Communications, Inc., 346 U.S. 86, 92, 73 S.Ct. 998, 1003, 97 L.Ed. 1470.

3. Whatever may be the impact on a § 7 action of the Commission's approval of this merger, it can be felt only in the antitrust suit. Consequently, I would, as the Solicitor General has suggested, leave this issue open for consideration in the District Court should the agency's order be asserted as a defense in that action.

regard, their error would be correctible in this Court.

Likewise there is little substance to the difficulty which this Court finds in a court "undoing what was done" (ante, 369 U.S., p. 489, 82 S.Ct., p. 906) by the Commission. Had the antitrust trial court been fearful on that score it could have entered an appropriate interlocutory order ensuring that nothing would be done while the litigation was pending.

III.

Finally, I do not think that the record in this case justifies a conclusion that the Commission's refusal to postpone consideration of the merger application amounted to an abuse of discretion. On the Court's premise that the agency's approval did not immunize the transaction from antitrust liability, the Commission's action in granting the certificate of public convenience and necessity did no more than *permit* the merger to be consummated subject to all possible antitrust infirmities. And even proceeding on the Commission's premise that the proviso of § 7 of the Clayton Act gives it the power to immunize mergers from antitrust liability, its decision to go ahead after being notified by the District Court that the motion to continue the antitrust suit had been granted could hardly be regarded as an abuse of discretion.

In conclusion, the Court's decision in this case creates a wholly artificial imbalance between antitrust law enforcement and administrative regulation with respect to federally regulated industries. By displacing the continuing supervision of a court over such interlocutory

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terms as are "just in the premises" with an absolute rule prohibiting the regulating agency from considering applications relating to matters which are also involved in a pending antitrust suit, this decision seems to leave no room for sensible accommodation of the two sets of interests in a given instance. Neither the inflexible rule announced by the Court nor its decision on the facts of this case is supported by reason or authority.

I would affirm.

376 U.S. 651

UNITED STATES, Appellant,
v.
EL PASO NATURAL GAS COMPANY et al.

No. 94.

Argued Feb. 25 and 26, 1964.

Decided April 6, 1964.

Civil suit charging violation of the Clayton Act. The United States District Court for the District of Utah dismissed the complaint after trial, and a direct appeal was taken. The Supreme Court, Mr. Justice Douglas, held that under circumstances, and in view of booming incremental need for natural gas in California, physical proximity, resources and abilities of acquired company (which served adjacent areas), evident opportunities for acquired company's expansion into California, and evident effect of acquired company's previous unsuccessful attempt to enter California, acquisition of stock and assets by natural gas company which then exclusively served California violated Clayton Act, although it was not established that acquired company could in fact have obtained contracts, supplies, financing or licensing to serve California.

Reversed.

Mr. Justice Harlan dissented in part.

1. Federal Civil Procedure ⊂=2282

Findings prepared by counsel for prevailing party and adopted verbatim by district court were formally those of district court, and, although not product of district judge's mind, would not be rejected out-of-hand and would stand if supported by evidence. Fed.Rules Civ. Proc. rule 52, 28 U.S.C.A.

2. Monopolies ⊂=20

Under circumstances, and in view of booming incremental need for natural gas in California, physical proximity, resources and abilities of acquired company (which served adjacent areas), evident opportunities for acquired company's expansion into California, and evident effect of acquired company's previous unsuccessful attempt to enter California, acquisition of stock and assets by natural gas company which then exclusively served California violated Clayton Act, although it was not established that acquired company could in fact have obtained contracts, supplies, financing or licensing to serve California. Clayton Act, § 7 as amended 15 U.S.C.A. § 18; Fed.Rules Civ.Proc. rule 52, 28 U.S.C.A.

3. Monopolies ⊂=20

Production, transportation and sale of natural gas is "line of commerce", and California is "section of the country", within Clayton Act prohibition on certain acquisitions. Clayton Act, § 7 as amended 15 U.S.C.A. § 18; Expediting Act, § 2, 15 U.S.C.A. § 29.

4. Monopolies ⊂=20

Congress used words "may be substantially to lessen competition", in indicating proscribed mergers under amended Clayton Act provision, to indicate its concern with probabilities, not certainties, and it was mergers with probable anti-competitive effect that were proscribed. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

5. Monopolies ⊂=20

One purpose of Clayton Act provision prohibiting certain acquisitions was to arrest trend toward concentration, the tendency to monopoly, before consumers' alternatives disappear through merger. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

6. Appeal and Error ⊂=1176(1)

Upon determination that acquisition of stock and assets of natural gas company violated Clayton Act, Supreme Court not only reversed district court judgment but would direct district court

to order divestiture without delay, where acquirer had been on notice of antitrust charge from almost the beginning. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

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Archibald Cox, Sol. Gen., for appellant.

Gregory A. Harrison, San Francisco, Cal., for appellees.

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice CLARK.

This is a civil suit charging a violation of § 7 of the Clayton Act,[1] by reason of the acquisition of the stock and assets of Pacific Northwest Pipeline Corp. (Pacific Northwest) by El Paso Natural Gas Co. (El Paso). The District Court dismissed the complaint after trial, making findings of fact and conclusions of law, but not writing an opinion. The case is here on direct appeal. 15 U.S.C. § 29. We noted probable jurisdiction, 373 U.S. 930, 83 S.Ct. 1537, 10 L.Ed.2d 689.

The ultimate issue revolves around the question whether the acquisition substantially lessened competition in the sale of natural gas in California—a market of which El Paso was the sole out-of-state supplier at the time of the acquisition.[2]

In 1954, Pacific Northwest received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin, New Mexico, to the State of Washington, to supply gas to the then unserved Pacific Northwest area. Later it was authorized to receive large quantities of Canadian gas and to enlarge its system for that purpose. In addition, Pacific Northwest acquired Rocky Mountain reservoirs along its route. At the end of 1957 it had an estimated 3.51 trillion cubic feet of gas reserves owned outright in the San Juan Basin; 1.04 trillion under contract in the San Juan Basin; 1.59 trillion under contract in the Rocky Mountain area; and 2.33 trillion under contract in Canada—8.47 trillion in all. By 1958 one-half of its natural gas sales were of gas from Canada.

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In 1954 Pacific Northwest entered into two gas exchange contracts with El Paso—one to deliver 250 million cubic feet per day to El Paso in Idaho for transportation to California via Nevada, the other to gather gas jointly in the San Juan Basin for a five-year period. Under the latter agreement El Paso loaned gas to Pacific Northwest from its wells in the San Juan Basin; to avoid duplication of facilities, Pacific Northwest agreed to gather gas with its own facilities from El Paso's wells in the eastern portion of the basin, and El Paso agreed to perform the same service for Pacific Northwest in the western portion. At the same time Pacific Northwest undertook to purchase 300 million cubic feet per day from Westcoast Transmission Co., Ltd., a Canadian pipeline.

An executive of Pacific Northwest called these agreements a "treaty" to "solve the major problems which have been confronting us." A letter from Pacific Northwest to its stockholders stated:

> "This tri-party deal will benefit all concerned. It will give Westcoast what they have been fighting for—a pipeline. It will mean that Pacific

1. Section 7 of the Clayton Act, 38 Stat. 731, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, 64 Stat. 1125, 15 U.S.C. § 18, provides in relevant part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition *may be substantially to lessen competition*, or to tend to create a monopoly." (Italics added.)

2. In 1956, El Paso supplied more than 50% of all gas consumed in the State, the remainder coming from intrastate sources.

will expand

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its facilities, be a larger company, will protect its market from future competition by a Canadian pipeline and it caused the dismissal of the law suit of Westcoast against Pacific's present certificate. *It means that El Paso's California market will be protected against future competition,* and further it results in all parties *now working together for a common end rather than fighting each other.*" (Italics added.)

El Paso, however, could not get Commission approval to build the pipeline necessary to deliver the 250 million cubic feet of gas to California. Consequently, a new agreement on that aspect was negotiated in 1955, whereby El Paso undertook to purchase 50 million cubic feet a day to be delivered on an exchange basis in Colorado. Pacific Northwest, still obligated to take 300 million cubic feet per day from Westcoast, disposed of the balance in its own market areas.

Prior to these 1954 and 1955 agreements Pacific Northwest had tried to enter the rapidly expanding California market. It prepared plans regarding the transportation of Canadian gas to California, where it was to be distributed by Pacific Gas & Electric (PGE). That effort—suspended when the 1954 agreements were made—was renewed when the new agreement with El Paso was made in 1955; and the negotiation of the 1955 contract with El Paso was conceived by Pacific Northwest as the occasion for "lifting of all restrictions on the growth of Pacific." In 1956 it indeed engaged in negotiations for the sale of natural gas to Southern California Edison Co. (Edison). The latter, largest industrial user of natural gas in Southern California, used El Paso gas, purchased through a distributor. It had, however, a low priority from that distributor, being on an "interruptible" basis, *i. e.*, subject to interruption during periods of peak demand for domestic uses. Edison wanted a firm contract

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and, upon being advised that it was El Paso's policy to sell only to distributors, started negotiations with Pacific Northwest in May 1956. The idea was for Pacific Northwest to deliver to Edison at a point on the California-Oregon border 300 million cubic feet of Canadian gas a day. In July 1956 they reached a tentative agreement. Edison thereupon tried to develop within California an integrated system for distributing Canadian gas supplied by Pacific Northwest to itself and others. El Paso decided to fight the plan to the last ditch, and succeeded in getting (through a distributor) a contract for Edison's needs. Edison's tentative agreement with Pacific Northwest was terminated. Before Edison terminated that agreement with Pacific Northwest, Edison had reached an agreement with El Paso for firm deliveries of gas; and while the original El Paso offer was 40¢ per Mcf, the price dropped to 38¢ per Mcf, then to 34¢ and finally to 30¢. Thereafter, and while the merger negotiations were pending, Pacific Northwest renewed its efforts to get its gas into California.

El Paso had been interested in acquiring Pacific Northwest since 1954. The first offer from El Paso was in December 1955—an offer Pacific Northwest rejected. Negotiations were resumed by El Paso in the summer of 1956, while Pacific Northwest was trying to obtain a California outlet. The exchange of El Paso shares for Pacific shares was accepted by Pacific Northwest's directors in November 1956, and by May 1957 El Paso had acquired 99.8% of Pacific Northwest's outstanding stock. In July 1957 the Department of Justice filed its suit charging that the acquisition violated § 7 of the Clayton Act. In August 1957 El Paso applied to the Federal Power Commission for permission to acquire the assets of Pacific Northwest. On December 23, 1959, the Commission approved and the merger was effected on December 31, 1959. In 1962 we set

aside the Commission's order, holding that

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it should not have acted until the District Court had passed on the Clayton Act issues. People of State of California v. Federal Power Comm'n, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54. Meanwhile (in October 1960) the United States amended its complaint so as to include the asset acquisition in the charged violation of the Clayton Act.

[1, 2] There was a trial, and after oral argument the judge announced from the bench [3] that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees "Prepare the findings and conclusions and judgment." They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. United States v. Crescent Amusement Co., 323 U.S. 173, 184-185, 65 S.Ct. 254, 89 L.Ed. 160. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.[4] See 2B Barron

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and Holtzoff, Federal Practice and Procedure (Wright ed. 1961), § 1124. Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in United States v. Forness, 2 Cir., 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case. On review of the record —which is composed largely of undisputed evidence—we conclude that "the effect of such acquisition may be substantially to lessen competition" within the meaning of § 7 of the Clayton Act.

[3] There can be no doubt that the production, transportation, and sale of natural gas is a "line of commerce" within the meaning of § 7. There can also be no doubt that California is a "section of the country" as that phrase is used in §

3. "The Court. Judgment will be for the defendant in this case. Prepare the findings and conclusions and judgment.

"How much time do you want within which to submit it?

"Mr. Harrison. Does the court have a rule, your Honor?

"The Court. No, I have no rule about that.

"Mr. Harrison. Could we have twenty days, your Honor?

"The Court. Twenty days to prepare the findings and conclusions and judgment. I shan't write an opinion in this case.

"Mr. Harrison. I didn't hear you.

"The Court. I don't intend to write an opinion in this case. I think it is a factual matter. I think we have taken a full, fair look at the evidence and the factual issues, and I am not satisfied that the Government has discharged its burden."

4. Judge J. Skelly Wright of the Court of Appeals for the District of Columbia recently said:

"Who shall prepare the findings? Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and state separately its conclusions of law.' We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

"I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." Seminars for Newly Appointed United States District Judges (1963), p. 166

7. The sole question, therefore, is whether on undisputed facts the acquisition had a sufficient tendency to lessen competition or is saved by the findings that Pacific Northwest, as an independent entity, could not have obtained a contract from the California distributors,

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could not have received the gas supplies or financing for a pipeline project to California, or could not have put together a project acceptable to the regulatory agencies. Those findings are irrelevant.

[4] As we said in Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S.Ct. 1502, 1522, 8 L.Ed.2d 510: "Congress used the words *'may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." See also United States v. Philadelphia National Bank, 374 U.S. 321, 362, 83 S.Ct. 1715, 10 L.Ed.2d 915.

Pacific Northwest, though it had no pipeline into California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso. At that time El Paso was the only actual supplier of out-of-state gas to the vast California market, *a market that expands at an estimated annual rate of 200 million cubic feet per day.*[5] At that time Pacific Northwest

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was the only other important interstate pipeline west of the Rocky Mountains. Though young, it was prospering and appeared strong enough to warrant a "treaty" with El Paso that protected El Paso's California markets.

[5] Edison's search for a firm supply of natural gas in California, when it had El Paso gas only on an "interruptible" basis, illustrates what effect Pacific Northwest had merely as a potential competitor in the California market. Edison took its problem to Pacific Northwest and, as we have seen, a tentative agreement was reached for Edison to obtain Pacific Northwest gas. El Paso responded, offering Edison a firm supply of gas and substantial price concessions. We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes

5. California, in a brief *amicus curiae*, pp. 5–6, tells us:

"The dependence of California upon natural gas as a fuel is unique among the states. California does not possess coal deposits sufficient for energy requirements. It is dependent upon natural gas for its energy needs and approximately three quarters of the natural gas utilized in California comes from out-of-state sources. Ninety per cent of all homes in California are heated by natural gas and California industry depends upon natural gas as a fuel. In California the percentage of total energy provided by natural gas is substantially greater than for the nation as a whole.

"During 1962, California Gas distributing utilities purchased over 745,000,000,000 cubic feet of natural gas at a cost somewhat in excess of $266,850,000. California takes in excess of ten per cent of all of the natural gas moving in interstate commerce throughout the United States and exceeds the volume of gas imported by any other state.

"The interest of California in this proceeding is evident. More than 80 per cent of the customers of El Paso before merger resided in the State of California and California ratepayers bear most of the costs of service of El Paso.

"California, alone, consumes more natural gas than the Middle Atlantic states combined, more than half as much as the highly industrialized, thickly populated East North-Central states of Illinois, Indiana, Michigan, Ohio and Wisconsin, and as much as the seven states that make up the West North-Central area. Out-of-state deliveries to California averaged three billion cubic feet per day in 1961. At a price of slightly more than thirty cents per thousand cubic feet (Mcf), this business was worth then about $1,000,000 per day."

within the State. We repeat that one purpose of § 7 was "to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger * * *." United States v. Philadelphia National Bank, 374 U.S. at 367, 83 S.Ct. at 1744, 10 L.Ed.2d 915.

This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless it has excess capacity) must

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compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Those transactions with distributors are few in number. For example, in California there are only two significant wholesale purchasers --Pacific Gas & Electric in the north and the Southern Companies in the south. Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas.*

The effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on. Pacific Northwest's position as a competitive factor in California was not disproved by the fact that it had never sold gas there. Nor is it conclusive that Pacific Northwest's attempt to sell to Edison failed. That might be weighty if a market presently saturated showed signs of petering out. But it is irrelevant in a market like California, where incremental needs are booming. That is underscored in the case by a memorandum dated October 18, 1956, which summarized a meeting at which terms of the acquisition were negotiated. It recited that Pacific Northwest had substantially concluded additional contracts for Canadian gas and that "Pacific plans on selling this additional volume of gas to the California market. * * *" On November 5, 1956, just three days prior to approval by the directors of Pacific Northwest of the

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stock exchange, it made a firm offer to PGE to supply up to 350 million cubic feet a day for 20 years. Even after that approval and before the actual exchange, the chief executive of Pacific Northwest, writing November 22, 1956, said: "I do not think for the present moment we should confuse the sale of gas from our system to California with El Paso taking part of the gas through their present system to California. Reason for this should the El Paso-Pacific deal collapse we would have nothing of substance with California."

Pacific Northwest had proximity to the California market—550 miles distant in Wyoming, even nearer in Idaho only 250 miles away in Oregon. Moreover, it had enormous reserves in the San Juan Basin, the Rocky Mountains, and western Canada. Had Pacific Northwest remained independent, there can be no doubt it would have sought to exploit its formidable geographical position *vis-à-vis* California. No one knows what success it would have had. We do know, however, that two interstate pipelines in addition to El Paso now serve California—one of the newcomers being Pacific Gas Transmission Co., bringing down Canadian gas. So we know that opportunities would have existed for Pacific Northwest had it remained independent.

Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice. Pacific Northwest was

no feeble, failing company;[6] nor was it inexperienced and lacking in resourcefulness. It was one of two major interstate pipelines serving the trans-Rocky Mountain States; it had raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern, and coveted, by El

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Paso. If El Paso can absorb Pacific Northwest without violating § 7 of the Clayton Act, that section has no meaning in the natural gas field. For normally there is no competition—once the lines are built and the long-term contracts negotiated—except as respects the incremental needs.

[6] Since appellees have been on notice of the antitrust charge from almost the beginning—indeed before El Paso sought Commission approval of the merger—we not only reverse the judgment below but direct the District Court to order divestiture without delay.[7]

Reversed.

Mr. Justice WHITE took no part in the consideration or decision of this case.

Mr. Justice HARLAN (concurring in part and dissenting in part).

I.

Contrary to what I had first thought, the Government is not asking in this case, as it did in United States v. Yellow Cab Co., 338 U.S. 338, at 340, 70 S.Ct. 177, at 178, 94 L.Ed. 150, that we "in effect * * * try the case *de novo*,". Rather it contends that on the undisputed facts of record the ultimate determination below was clearly erroneous. See id., 338 U.S. at 341–342, 70 S.Ct. 177, 94 L.Ed. 150. For reasons given in the Court's opinion, I agree that a violation of § 7 of the Clayton Act has been established, and that the District Court erred in deciding otherwise. On this score I shall comment only on two matters.

First. The Court's strictures concerning the District Court's findings seem to me to miss the mark. Findings of fact should, of course, be the product of the conscientious and independent judgment of the district judge. Nevertheless, if they are supported by evidence, they are not rendered suspect simply because the trial court, as

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here, has accepted *in toto* the findings proposed by one side or the other. The real lack in this case is that the District Court wrote no opinion setting forth the reasoning underlying any of the subsidiary findings on disputed issues of fact or connecting the subsidiary findings with its ultimate determination that the Clayton Act had not been violated by this merger.

Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has foundered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance.

Second. This case affords another example of the unsatisfactoriness of the existing bifurcated system of antitrust and other regulation in various fields. In this case, the Federal Power Commission had indicated its approval of this merger as being in the public interest. The Department of Justice, however, considered the merger to be violative of the antitrust laws and, for that reason alone, against the public interest. This Court, under the present scheme of things has

6. Cf. International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431.

7. Cf. Wisconsin v. Illinois, 281 U.S. 179, 197, 50 S.Ct. 266, 74 L.Ed. 799.

no choice on this record* but to sustain the position of the Department of Justice, as indeed it has felt constrained to do, albeit in my view with less justification, in other recent cases involving dual regulation. Cf. United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915; United States v. First National Bank & Trust Co., 376 U.S. 665, 84 S.Ct. 1033, and my dissenting opinions in those cases. It would be unrealistic not to recognize that this state of affairs has

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the effect of placing the Department of Justice in the driver's seat even though Congress has lodged primary regulatory authority elsewhere.

It does seem to me that the time has come when this duplicative and, I venture to say, anachronistic system of dual regulation should be re-examined. Had the subtle and necessarily speculative questions involved in assessing the short-term and long-term effects of this merger been subject to appraisal by a single agency, under congressionally established standards marking the relationship between the different and often competing objectives of the antitrust laws and those governing the regulation of "interstate" natural gas, who can say that this case might not have called for a different outcome?

II.

While I agree with the Court's decision on the merits, I dissent from its peremptory ordering of divestiture. "The framing of" appropriate relief "should take place in the District rather than in Appellate Courts." International Salt Co., Inc., v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 92 L.Ed. 20 (footnote omitted). United States v. E. I. du Pont De Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318, is not to the contrary; that case had already been here before on the merits (353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057), and when it came here again at the relief stage the Court observed that "the District Courts [have] the responsibility *initially* to fashion the remedy * * *." 366 U.S. at 323, 81 S.Ct. at 1248, 6 L.Ed.2d 318. I know of no case where this Court has in the first instance itself directed divestiture or any other particular kind of relief. The fact that these appellees have been "on notice," *ante*, p. 1050, of the charges against them affords no justification for this departure from normal practice. See the cases cited in the second du Pont case, 366 U.S., at 322, 81 S.Ct. 1243, 6 L.Ed.2d 318.

I would remand the case to the District Court for the fashioning of appropriate relief.

* This Court has not had the benefit of an *amicus* brief from the Federal Power Commission.

CASCADE NATURAL GAS CORPORATION, Appellant,

v.

EL PASO NATURAL GAS CO. et al.

PEOPLE OF the STATE OF CALIFORNIA, Appellant,

v.

EL PASO NATURAL GAS CO. et al.

SOUTHERN CALIFORNIA EDISON CO., Appellant,

v.

EL PASO NATURAL GAS CO. et al.

Nos. 4, 5, 24.

Argued Jan. 12, 1967.

Decided Feb. 27, 1967.

Proceeding was brought to frame decree of divestiture pursuant to decision of United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated the Clayton Act and directing the District Court to order divestiture without delay. The United States District Court for the District of Utah, 37 F.R.D. 330, denied intervention by several parties and proposed a decree of divestiture, and appeals were taken. The Supreme Court, Mr. Justice Douglas, held that proposed decree embodying plan for division of country, market, and reserves between new company and natural gas company violated mandate of Supreme Court.

Reversed.

Mr. Justice Stewart and Mr. Justice Harlan dissented.

1. Federal Civil Procedure ⚷315

Those "adversely affected" within meaning of old Federal Rule of Civil Procedure authorizing intervention of right on timely application by applicant "adversely affected" by disposition of property which is in custody or subject to control or disposition of court or officer thereof would usually be those who had interest in the property, but rule could not be read to mean exclusively that group. Fed.Rules Civ.Proc. rule 24(a) (3), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure ⚷338

Where proceeding was brought in federal District Court to frame decree of divestiture pursuant to decision of United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing District Court to order divestiture without delay, State of California, in which competition had been stifled by acquisition of pipeline corporation by a natural gas company, was "adversely affected" within meaning of old Federal Rule of Civil Procedure dealing with intervention of right and was entitled to intervene. Fed.Rules Civ.Proc. rule 24(a) (3), 28 U.S.C.A.; Clayton Act, § 7, 15 U.S.C.A. § 18.

3. Federal Civil Procedure ⚷331

Where proceeding was brought in federal District Court to frame decree of divestiture pursuant to decision of United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing District Court to order divestiture without delay, a large natural gas purchaser, which obtained gas from natural gas company and which desired to retain competition in state, was "adversely affected" within meaning of old Federal Rule of Civil Procedure dealing with intervention of right and was entitled to intervene. Fed.Rules Civ.Proc. rule 24(a) (3), 28 U.S.C.A.; Clayton Act, § 7, 15 U.S.C.A. § 18.

4. Federal Civil Procedure ⚷331

Where proceeding was brought in federal District Court to frame decree of divestiture pursuant to decision of United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing District Court to order divestiture without delay, natural gas distributor, whose sole supplier of natural gas was pipeline company, was entitled to intervene as of right under new Federal Rule of Civil Procedure. Fed.Rules Civ.Proc. rule 24(a) (2), 28 U.S.C.A.; Clayton Act, § 7, 15 U.S.C.A. § 18.

5. Appeal and Error ⚷1198

Where United States Supreme Court held that acquisition of pipeline corporation by natural gas company violated Clayton Act and directed federal District Court to order divestiture without delay, Department of Justice had no authority, by stipulation or otherwise, to circumscribe power of District Court to see that mandate of Supreme Court was carried out, and no one, except Supreme Court, had authority to alter or modify mandate of Supreme Court. Clayton Act, § 7, 15 U.S.C.A. § 18.

6. Monopolies ⚷24(17)

On divestiture pursuant to decision of the United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, gas reserves granted new company to be formed on divestiture must be no less in relation to present existing reserves than pipeline corporation had when it was independent, and new gas reserves developed since merger must be equally divided between natural gas company and new company. Clayton Act, § 7, 15 U.S.C.A. § 18.

7. Monopolies ⚷24(17)

On divestiture pursuant to decision of the United States Supreme Court hold-

ing that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, terms of contracts imposed on new company, which was to be formed on divestiture, respecting purchase of gas from various sources should be negotiated by new company under such restrictions as Federal Power Act may impose. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Power Act, § 320 et seq., 16 U.S.C.A. § 791a et seq.

8. Monopolies ⚿24(17)

On divestiture pursuant to decision of the United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, plan of divestiture must establish new company in same or comparable competitive position that pipeline corporation was in when illegal merger obliterated it. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Power Act, § 320 et seq., 16 U.S.C.A. § 791a et seq.

9. Monopolies ⚿24(17)

On divestiture pursuant to decision of the United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, allegations that some $53,000,000 of taxable losses which pipeline corporation had were utilized by natural gas company following illegal merger, if proven, would require remuneration of some kind to new company. Clayton Act, § 7, 15 U.S.C.A. § 18.

10. Monopolies ⚿24(17)

On divestiture pursuant to decision of the United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, new company to be formed on divestiture must be a viable, healthy unit, as able to compete as pipeline corporation when it was acquired by natural gas company by illegal merger. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Power Act, § 320 et seq., 16 U.S.C.A. § 791a et seq.

11. Monopolies ⚿24(17)

On divestiture pursuant to decision of the United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, conditions must be imposed in connection with sale of stock of new company to make sure that natural gas company interests do not acquire controlling interest in new company. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Power Act, § 320 et seq., 16 U.S.C.A. § 791a et seq.

12. Monopolies ⚿24(17)

On divestiture pursuant to decision of the United States Supreme Court holding that acquisition of pipeline corporation by natural gas company violated Clayton Act and directing federal District Court to order divestiture without delay, proposed decree embodying plan for division of country, market, and reserves between new company and natural gas company violated mandate of Supreme Court. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Power Act, § 320 et seq., 16 U.S.C.A. § 791a et seq.

William M. Bennett, San Francisco, Cal., Rollin E. Woodbury, Los Angeles, Cal., and Richard B. Hooper, Seattle, Wash., for appellants.

Daniel Friedman and Gregory A. Harrison, San Francisco, Cal., for appellees.

Richard W. Sabin, Salem, Ore., for State of Oregon, as amicus curiae, by special leave of Court.

Mr. Justice DOUGLAS delivered the opinion of the Court.

When this case was here the last time,[1] we held that the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company violated § 7 of the Clayton Act; and we directed the District Court "to order divestiture without delay." United States v. El Paso Natural Gas Co., 376 U.S. 651, 662, 84 S.Ct. 1044, 1050, 12 L.Ed.2d 12. That was on April 6, 1964. It is now nearly three years later and, as we shall see, no divestiture in any meaningful sense has been directed. The United States, now an appellee, maintains that the issues respecting divestiture are not before us. The threshold question does indeed involve another matter. Appellants were denied intervention by the District Court and came here by way of appeal. 15 U.S.C. § 29. We noted probable jurisdiction. 382 U.S. 970, 86 S.Ct. 528, 15 L.Ed.2d 463.

I.

The initial question concerning intervention turns on a construction of Rule 24(a) of the Federal Rules of Civil Procedure entitled "Intervention of Right." At the time the District Court ruled on the motions that Rule provided in relevant part, "Upon timely application anyone shall be permitted to intervene in an action * * * (3) when the applicant is so situated as to be adversely affected by * * * disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." As amended effective July 1, 1966, subsequent to the time these motions to intervene were denied. Rule 24(a) (2) provides that there may be intervention of right, "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

California, one of the appellants, is a State where El Paso sells most of its gas and its purpose in intervening was to assure that Pacific Northwest, illegally merged with El Paso, or its successor, would be restored as an effective competitor in California. As we noted in the prior opinion, Pacific Northwest had been "a substantial factor in the California market at the time it was acquired by El Paso." 376 U.S., at 658, 84 S.Ct., at 1048. It was to restore that "competitive factor" that divestiture was ordered. Id., at 658–662, 84 S.Ct., at 1048–1050. Southern California Edison, another appellant, is a large industrial user of natural gas purchasing from El Paso sources and desirous of retaining competition in California. Cascade Natural Gas is a distributor in Oregon and Washington, and its sole supplier of natural gas was Pacific Northwest and will be the new company. Cascade maintains that there has been a grossly unfair division of gas reserves between El Paso and the new company, particularly in the southwest field known as the San Juan Basin. Moreover, the District Court approved contracts between El Paso and the new company for delivery of gas both from Canada and from the San Juan Basin, and allowed El Paso unilaterally and without application to the Federal Power Commission, to saddle new and allegedly onerous prices and other conditions on the new company. Moreover, the stock of West Coast Transmission Co., Ltd., was ordered sold for the benefit of El Paso. Pacific Northwest had owned about a fourth of West Coast Transmission's stock and that own-

1. California v. Federal Power Commission, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54, involved another aspect of the same merger; and we held that the Commission should not have approved it until the District Court decided whether it violated § 7 of the Clayton Act.

ership gave Pacific Northwest, it is said, special insight into and access to the Canadian gas supply. These factors, implicating the ability of Pacific Northwest to perform in the future, give Cascade, it is argued, standing to intervene.

[1] Under old Rule 24(a) (3) those "adversely affected" by a disposition of property would usually be those who have an interest in the property.[2] But we cannot read it to mean exclusively that group.

Rule 24(a) (3) was not merely a restatement of existing federal practice at law and in equity. If it had been, there would be force in the argument that the rigidity of the older cases remains unaltered, restricting intervention as of right very narrowly, as for example where there is a fund in court to which a third party asserts a right that would be lost absent intervention. Credits Commutation Co. v. United States, 177 U.S. 311, 316, 20 S.Ct. 636, 638, 44 L.Ed. 782; Central Trust Co. of New York v. Chicago, R. I. & P. R. Co., 2 Cir., 218 F. 336, 339. But the Advisory Committee stated that Rule 24 "amplifies and restates the present federal practice at law and in equity." We therefore know that some elasticity was injected;[3] and the question is, how much. As stated by the Second Circuit Court of Appeals in the *Central Trust Co.* case, "It is not always easy to draw the line." Ibid.

In Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 665, 61 S. Ct. 666, 85 L.Ed. 975, a consent decree was entered in an antitrust suit, designed to protect Panhandle from Columbia which had acquired domination of the former to stifle its competition. The decree sought to assure opportunities for competition by Panhandle. A security holder of Panhandle sought to intervene on Panhandle's behalf when the consent decree was reopened and was denied that right. We reversed, noting at the outset that "the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." Id., at 506, 61 S.Ct., at 668.

2. See Board of Com'rs of Sweetwater County, Wyo. v. Bernardin, 10 Cir., 74 F.2d 809, 816; Dowdy v. Hawfield, 88 U.S.App.D.C. 241, 189 F.2d 637, 638.

3. In 1966 the Advisory Committee when making a revision of Rule 24(a) said:

"Rule 24(a) (3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: 'The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action.' 4 Moore's Federal Practice ¶ 24.09 [3], at 55 (2d ed. 1962), and see, e. g., Formulabs, Inc. v. Hartley Pen Co., 9 Cir., 275 F.2d 52 (9th Cir. 1960). This development was quite natural, for Rule 24(a) (3) was unduly restricted. *If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.* Intervention of right is here seen to be a kind of counterpart to Rule 19(a) (2) (i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, Pleading and Procedure: State and Federal 749-50 (1962)." 4 Moore's Federal Practice (1966 Spec. Supp.), c. 24, pp. 1-2. (Italics added.)

[2-4] We noted that Panhandle's economic independence was "at the heart of the controversy." Ibid. In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture. For it was the absorption of Pacific Northwest by El Paso that stifled that competition and disadvantaged the California interests. It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect. In that sense the present case is very close to *Pipe Line Co.* Apart from that but in the spirit of *Pipe Line Co.* we think these two appellants qualify as intervenors under Rule 24(a) (3). Certainly California and Southern California Edison are "so situated" geographically as to be "adversely affected" within the meaning of Rule 24(a) (3) by a merger that reduces the competitive factor in natural gas available to Californians. We conclude that it was error to deny them intervention. We need not decide whether Cascade could have intervened as of right under that Rule. For there is now in effect a new version of Rule 24(a) which in subsection (2) recognizes as a proper element in intervention "an interest" in the "transaction which is the subject of the action." This Rule applies to "further proceedings" in pending actions. 384 U.S. 1031. Since the entire merits of the case must be reopened to give California and Southern California Edison an opportunity to be heard as of right as intervenors, we conclude that the new Rule 24(a) (2) is broad enough to include Cascade also; and as we shall see the "existing parties" have fallen far short of representing its interests. We therefore reverse the District Court in each of these appeals and remand with directions to allow each appellant to intervene as of right, to vacate the orders of divestiture and to have *de novo* hearings on the type of divestiture we envisioned and made plain in our opinion in 376 U.S. 651, 84 S.Ct. 1044.

II.

The necessity for new hearings needs a word of explanation.

[5] The United States on oral argument stated that the decree to which it agreed and which it urges us to approve was made in "settlement" of the litigation. We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate. United States v. E. I. Du Pont De Nemours & Co., 366 U.S. 316, 325, 81 S.Ct. 1243, 1249, 6 L.Ed.2d 318. Our direction was that the District Court provide for "divestiture without delay." That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market.

We do not undertake to write the decree. But we do suggest guidelines that should be followed:

[6] (1) *Gas Reserves.* The gas reserves granted the new company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the new company. We are told by the intervenors that El Paso gets the new reserves in the San Juan Basin—which due to their geographical propinquity to California are critical to competition in that market. But the merged company, which discovered them, represented the interests both of El Paso and of Pacific Northwest. We do not know what an equitable division would require. Hearings are necessary, followed by meticulous findings made in light of the competitive requirements to which we have adverted.

[7] As already indicated, the proposed decree provides the terms of contracts [4] imposed on the new company respecting the purchase of gas from various sources. It is urged that these contracts are onerous, detrimental to the new company, and partial to El Paso interests. We do not pass upon the wisdom or desirability of the proposed contracts. It is enough to note that they were proposed by El Paso, that the changes, reluctantly acceded to by the Government, will redound to the substantial benefit of El Paso, and that the new company has had no opportunity to evaluate the advisability of the terms or to negotiate for better terms. Nor has the Federal Power Commission had the opportunity to pass upon the contracts. The terms of these contracts should be negotiated by the new company under such restrictions as the Federal Power Act may impose.

[8] (2) *Financial Aspects.* As noted, El Paso is allowed to sell the stock of West Coast Transmission Co., Ltd., brought into the merger by Pacific Northwest, and keep the proceeds, which if stock prices at the time of the proposed divestiture are considered might result, it is alleged, in a profit of $10,000,000 or more, while the new company gets the stock of Northwest Production Co. which from 1960–1963 showed heavy losses. It is charged that by the proposed decree El Paso is saving the cream for itself and foisting the "cats and dogs" on the new company. It is also earnestly argued that the new company will sorely need the valuable and fairly liquid stock of West Coast Transmission if it is to have the working capital necessary to restore the competitive balance that the merger destroyed. These are highly relevant arguments. Certainly a plan of divestiture of the kind we envisaged must establish a new company in the same or comparable competitive position that Pacific Northwest was in when the illegal merger obliterated it.

[9, 10] It is also pointed out that some $53,000,000 of taxable losses which Pacific Northwest had were utilized by El Paso during the years following the ill-starred merger. It is argued that since these tax loss carry-overs were in a real sense an asset of Pacific Northwest utilized by El Paso, the new company should receive other assets or a reduction in debt of equivalent value. These allegations, if proven, require remuneration of some kind to the new company. For it must be a viable, healthy unit, as able to compete as Pacific Northwest was when it was acquired by El Paso.

(3) *Control of El Paso.* The divestiture decree provides that El Paso is to cause the formation of the new company, whose chief executive shall be approved by El Paso, the Government, and the court. The new company is to file an application with the Federal Power Commission "at the earliest possible date" requesting the issuance of a certificate of public convenience and necessity authorizing it to acquire, own, and operate the properties to be received from El Paso.[5] When the necessary certificates, authorizations, and orders are obtained

4. For example, one contract relates to reciprocal gas gathering between the new company and El Paso in the San Juan Basin. Prior to the merger El Paso and Pacific Northwest entered a contract providing that they would develop gathering lines in the basin cooperatively, and that whichever company made greater use of the other's gathering lines would pay a gathering charge of 1.375¢ per Mcf. of extra gas. El Paso did much more gathering for Pacific Northwest than Pacific Northwest did for El Paso. The proposed agreement increases the gathering charge to 4.5¢. The intervenors claim that the increased rate will substantially increase the new company's costs and impair its ability to compete.

5. We are informed that the new company's chief executive has been approved and that the new company has applied to the Federal Power Commission for certification. The FPC proceedings have been continued until this Court has decided this appeal.

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from the FPC, El Paso is to transfer to the new company the properties and assets set forth in the plan of divestiture, generally those which El Paso received from Pacific Northwest. In return, the new company is to assume certain of El Paso's indebtedness and issue to El Paso all its common stock. El Paso is to transfer the new company stock to the new company's chief executive, as voting trustee. The new company's chief executive shall release the stock only in accordance with the plan for divestment of El Paso's interest in the stock. Under the plan, El Paso is ordered completely to divest itself of all interest in the new company stock within three years after the transfer of the assets to the new company. Alternate methods of divestment are provided. (1) El Paso *may*, within 18 months of the transfer, distribute at least 80% of the shares to holders of El Paso common stock who are willing to exchange their El Paso shares for new company shares, and who shall own no other El Paso shares immediately after the exchange. The remainder of new company stock would be disposed of by a public offering. (2) If El Paso does not dispose of the new company stock under the first alternative, it is to dispose of the new company stock "by one or more sales to the public." At such public offering no El Paso officer or director and no owner of El Paso's capital stock, in excess of one-half of one percent of the total shares outstanding, shall be permitted to purchase new company stock.[6]

Thus the El Paso-Pacific Northwest combination will not begin to be severed until the regulatory approvals have been obtained. Complete divestiture is not required until three years after the transfer of assets. An earlier divestiture is permissible, but divestiture is mandatory only after three years. During the interregnum between the entry of the decree and the regulatory approvals, and between the transfer of assets and El Paso's eventual disposition of the new company stock, El Paso will continue to reap the benefits of the illegal combination. Moreover, prior to the eventual disposition of the new company stock, all the stock is to be voted by the new company chief executive. The chief executive is to be approved by El Paso, and El Paso is the beneficial owner of the stock to be voted by him. Even though the chief executive is subject to the ultimate control and supervision of the District Court, there is danger that he may vote the new company stock in a manner calculated to promulgate the very conditions which led us to order severance of the illegal combination.

[11] Even after the mandatory disposition of the new company stock there is considerable danger that El Paso interests may end up controlling the new company. The decree, to be sure, provides that neither El Paso officers and directors nor owners of more than one-half of one percent of El Paso stock shall purchase new company stock at a public offering. But the decree does not prohibit members of the families of such prohibited purchasers from obtaining new company stock. Further, under the terms of the decree, it would be possible for a group of El Paso stockholders, each with less than one-half of one percent of El Paso stock, to acquire at the initial public offering enough new company stock substantially to influence or even to dominate the new company. Or, such a group could combine with the families of prohibited purchasers in order to control the new company. After the exchange or public offering, there is no restriction on the number of new company shares El Paso shareholders may acquire. Thus, there is a danger that

6. El Paso is also enjoined from having as an officer or director any person who is also an officer, director, or employee of the new company or who owns any capital stock of the new company or whose immediate family owns more than one-tenth of one percent of the stock of the new company.

major El Paso stockholders may, subsequent to the exchange or public offering, purchase large blocks of new company stock and obtain effective control. Thus, there has been no studied attempt to ensure the swift severance of the illegal combination or to make sure that the new company's stock does not end up controlled by El Paso interests. Disposition of all of the stock with all convenient speed is necessary and conditions must be imposed to make sure that El Paso interests do not acquire a controlling interest. For if they do, the new company might well be only El Paso under the masquerade of a beard.

The proposed decree by-passes completely the prospect of an outright purchase of the assets of the new company or its stock by outside interests. Two purchasers apparently are anxious and eager; and before the United States knuckled under to El Paso and "settled" this litigation, it represented to the District Court that a "sale to a third party is both a desirable and possible alternative to the El Paso plan." No alternative of that kind was chosen. El Paso carried the day, obtained a decree that promises to perpetuate rather than terminate this unlawful merger, and that threatens to turn loose on the public a new company unable to maintain the competitive role that Pacific Northwest filled before this illegal transaction took place.

The convenience of El Paso would be the easier choice. The enforcement of our mandate and § 7 of the Clayton Act is the harder one; but that is the criterion we follow.

The evil with which the proposed decree is permeated reflects the attitude or philosophy of the District Court which was frankly stated after our remand as follows:

> "The Court: You see, what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That's what the root of this plan is.
>
> "Now, if you're going to get New Company down here in competition in Southern California from the San Juan Basin, you'd upset the whole scheme. To even that situation up, you're going to have to put El Paso up in the Northwest in competition there; and that's a kind of ridiculous thing—long pipelines from these various sources.
>
> "It seems to me to make a lot of sense that New Company operating in the Northwest from very much closer Canadian reserves, and Northwest reserves, and El Paso down in the Southwest, with reserves in the San Juan Basin, serving the Southern California area, among some other areas. That seems to me to make a lot of sense."

[12] The proposed decree in its various ramifications does precisely that. It therefore does the opposite of what our prior opinion and mandate commanded. Once more, and nearly three years after we first spoke, we reverse and remand with directions that there be divestiture without delay and that the Chief Judge of the Circuit or the Judicial Council of the Circuit (28 U.S.C. § 332) assign a different District Judge to hear the case. Cf. United States v. Hatahley, 10 Cir., 257 F.2d 920, 926, 79 A.L.R.2d 668 and its sequel, United States v. Ritter, 10 Cir., 273 F.2d 30, 32; Occidental Petroleum Corp. v. Chandler, 10 Cir., 303 F.2d 55, 57; Texaco, Inc. v. Chandler, 10 Cir., 354 F.2d 655, 657.

Reversed.

Mr. Justice WHITE and Mr. Justice FORTAS took no part in the consideration or decision of these cases.

Mr. Justice STEWART, whom Mr. Justice HARLAN joins, dissenting.

The question presented by these appeals, and the only question, is whether the District Court erred in denying the

appellants' motions to intervene as parties. Because I think the Court's answer to that question is wrong, and because I think the Court has gone further astray in undertaking to address itself to issues which are not here for adjudication, I respectfully dissent.

Intervention of right is governed by Federal Rule of Civil Procedure 24(a). At the time the District Court passed on appellants' motions to intervene,[1] that Rule provided as follows:

> "Rule 24. Intervention
>
> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

I gather it is common ground that neither 24(a) (1) nor 24(a) (2) applies to these cases. No appellant claims any statutory right to intervene under 24(a) (1). And it is clear that no appellant has any right to intervene under 24(a) (2), for in order to intervene under that provision, the applicant for intervention must show that he "may be bound" by the judgment in the Government's action in a res judicata sense. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604; Sutphen Estates, Inc. v. United States, 342 U.S. 19, 72 S. Ct. 14, 96 L.Ed. 19. See Credits Commutation Co. v. United States, 177 U.S. 311, 20 S.Ct. 636, 44 L.Ed. 782. And it is settled that the judgment in a government suit has no res judicata effect on private antitrust claims. Sam Fox Publishing Co. v. United States, supra.

The Court, however, finds that the State of California and Southern California Edison Co. have an absolute right to intervene under 24(a) (3). I disagree for several reasons.

Analysis of the Rule's proper scope must begin with an historical examination of intervention practice, for, as the Court has stated, the Rule constitutes a "codification of general doctrines of intervention." Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 508, 61 S.Ct. 666, 668, 85 L.Ed. 975.[2] Intervention to assert an interest in property within the court's control or custody derives from the English doctrine of appearance *pro interesse suo.* When a court acquired *in rem* jurisdiction over property, by admiralty libel, sequestration, receivership, or other process, a person claiming title or some other legal or equitable interest was allowed to come in to assert his claim to the property. Otherwise, he would have been subjected to the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard. Elements of this procedure were gradually assimilated in this country, e. g., Pennock v. Coe, 23 How. 117, 16 L.Ed. 436, and provided the foundation for intervention doctrine in the federal courts.[3]

Various generalizations about the nature of the property interest that will support intervention of right under this doctrine have been attempted. This

1. The Rule has since been amended. See p. 946, infra.

2. This statement is confirmed by the Rules Advisory Committee, which observed that the Rule "amplifies and restates the present federal practice at law and in equity." Advisory Committee on Rules for Civil Procedure, Notes 25. (March 1938).

3. For a discussion of the English and early American practice, see 4 Moore, Federal Practice, ¶ 24.03; 2 Street, Federal Equity Practice §§ 1364–1370 (1909).

Court has stated that the requisite interest must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." Smith v. Gale, 144 U.S. 509, 518, 12 S.Ct. 674, 676, 36 L.Ed. 521.[4] Other courts have spoken of "a legal interest as distinguished from interests of a general and indefinite character", Radford Iron Co. v. Appalachian Electric Power Co., 62 F.2d 940, 942 (C.A. 4th Cir.), cert. denied, 289 U.S. 748, 53 S.Ct. 691, 77 L. Ed. 1494, or "one that is known and protected by the law, sufficient and of the type to be denominated a lien, legal or equitable", Gross v. Missouri & Ark. Ry. Co., 74 F.Supp. 242, 249 (D.C.W.D.Ark.). These formulations are of limited use in deciding particular cases. More illuminating are examples of particular interests which have been held to support intervention of right under the established practice. These have included the claim of ownership in attached property,[5] the claim of a part owner to personal property being foreclosed under a mortgage,[6] a mortgage lien on a leasehold interest subjected to forfeiture,[7] and the claim of the purchaser of land involved in foreclosure proceedings against the seller.[8] Interests like these have continued to provide a familiar basis for intervention of right since the promulgation of Rule 24(a) (3).[9]

The other traditional basis for intervention under 24(a) (3) derives from interpleader practice; when a number of persons possess claims to a fund which are or may be mutually exclusive, intervention is allowed a claimant. Thus, in Oliver v. United States, 156 F.2d 281 (C.A. 8th Cir.), the United States had acquired certain land and deposited the purchase price in court to be divided among the various owners. A title insurance company which asserted a claim to the proceeds, based on services rendered to the sellers, was allowed to intervene.[10]

Under Rule 24(a) (3) the federal courts have sometimes allowed intervention even though the interest likely to be "adversely affected" was not one that would be recognized under traditional interpretations of the *pro interesse suo* or interpleader types of intervention. A representative case is Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (C.A. 9th Cir.), cert. denied, 363 U.S. 830, 80 S.Ct. 1600, 4 L.Ed.2d 1524. The applicant for intervention had licensed a secret manufacturing process to one of the parties, and the other party was seeking to apply discovery to the process. Finding that the trade secret was "property" subject to the court's control and that the secrecy which was the heart of the applicant's interest in that property might be totally destroyed, the court allowed intervention under 24(a) (3).

But the claims of California and the Southern California Edison Co. in the

4. Quoting with approval Horn v. Volcano Water Co., 13 Cal. 62, 69. Subsequent federal decisions following this formulation include Pure Oil Co. v. Ross, 170 F.2d 651, 653 (C.A.7th Cir.); Dowdy v. Hawfield, 88 U.S.App.D.C. 241, 189 F.2d 637, 638, cert. denied, 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628.

5. Krippendorf v. Hyde, 110 U.S. 276, 4 S.Ct. 27, 28 L.Ed. 145.

6. Osborne & Co. v. Barge, 30 F. 805 (C.C. N.D.Iowa).

7. See United States v. Radice, 40 F.2d 445 (C.A.2d Cir.).

8. Gaines v. Clark, 51 App.D.C. 71, 275 F. 1017.

9. E. g., Plitt v. Stonebraker, 90 U.S.App. D.C. 256, 195 F.2d 39 (intervention granted to creditor asserting security interest in goods seized by marshal).

10. For expansive interpretations of interpleader type intervention, see Barnes v. Alexander, 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530; Peckham v. Family Loan Co., 212 F.2d 100 (C.A.5th Cir.). But see Vaughan v. Dickinson, 19 F.R.D. 323 (D.C.W.D.Mich.), aff'd, Duffy v. Vaughan, 237 F.2d 168 (C.A. 6th Cir.).

cases lie far beyond the reach of even the most imaginable construction of 24 (a) (3). To be sure, the assets of El Paso are "property which is in the custody or subject to the control or disposition of the court" for purposes of the Rule. Sutphen Estates, Inc. v. United States, 342 U.S. 19, 72 S.Ct. 14, 96 L.Ed. 19. But the "interest" in these assets relied upon by the appellants to justify intervention is merely their preference that certain of the assets, particularly the San Juan Basin reserves, end up in the hands of New Company rather than El Paso, on the theory that such an allocation may be conducive to greater gas competition in California. These general and indefinite interests do not even remotely resemble the direct and concrete stake in litigation required for intervention of right. The Court's decision not only overturns established general principles of intervention, but, as will be shown below in detail, also repudiates a large and long-established body of decisions specifically, and correctly, denying intervention in government antitrust litigation.

This Court is all too familiar with the fact that antitrust litigation is inherently protracted. Indeed, it is just such delay which seems to so concern the Court in this case. But nothing could be better calculated to confuse and prolong antitrust litigation than the rule which the Court today announces. The entrance of additional parties into antitrust suits can only serve to multiply trial exhibits and testimony, and further confound the attempt to bring order out of complicated economic issues. For these reasons, federal courts have been most reluctant to grant intervention under 24(a) (3) even in private antitrust litigation. For example, in Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (C.A. 7th Cir.), cert. denied, Illinois v. Commonwealth Edison Co., 375 U.S. 834, 84 S.Ct. 64, 11 L.Ed.2d 64, the State of Illinois, representing consumers' interests in a possible rate rebate, was denied intervention in a suit brought by a utility charging equipment manufacturers with price fixing.[11]

The reasons for denying intervention are even stronger when intervention is sought in an antitrust suit brought by the Government. To the extent that the would-be intervenor seeks to press his own private antitrust claims against the defendant, intervention must be denied because Congress has carefully provided separate statutory procedures for private and public antitrust litigation.[12] As the Court observed in United States v. Borden Co., 347 U.S. 514, 518–519, 74 S.Ct. 703, 706, 98 L.Ed. 903, the thrust of the Clayton Act "is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." [13] The Court has accordingly approved the "unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government". Sam Fox Publishing Co. v. United States, 366 U.S. 683, at 693, 81 S.Ct. 1309, at 1315, 6 L.Ed.2d 604. *A fortiori,* intervention is improper when a private party appears in order to vindicate his theory of the *public* interest in an action brought by the Government.

11. Cf. American Louisiana Pipe Line Co. v. Gulf Oil Corp., 158 F.Supp. 13 (D.C.E.D. Mich.) (county not allowed to intervene on behalf of consumers in private gas contract dispute). See also Philadelphia Electric Co. v. Westinghouse Electric Corp., 308 F.2d 856 (C.A.3d Cir.), cert. denied, Pennsylvania Public Utility Comm. v. Westinghouse Elec. Corp., 372 U.S. 936, 83 S.Ct. 883, 9 L.Ed.2d 767.

12. See 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4; 38 Stat. 731 (1914), 15 U.S.C. § 15; 69 Stat. 282 (1955), 15 U.S.C. § 15a; 38 Stat. 736, as amended, 737, 15 U.S.C. §§ 25, 26; 32 Stat. 823 (1903), as amended, 15 U.S.C. §§ 28, 29.

13. Quoting with approval United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (D.C.S.D.N.Y.).

For as the Court has consistently recognized, it is the "United States which must alone speak for the public interest" in antitrust litigation. Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42, 49, 46 S.Ct. 61, 63, 70 L.Ed. 155.[14] The appellants here seek intervention to press their own version of what the public interest in gas competition in California requires. But the determination of what the public interest requires is the statutory duty and responsibility of the Government. The law explicitly requires that suits brought by the Government for injunctive relief shall be "under the direction of the Attorney General." 15 U.S.C. §§ 4 and 25. That statutory command is violated when private parties are allowed to intervene and control public suits. The Government's discharge of its duties would be completely undermined if its antitrust litigation were cluttered with a myriad of private volunteers, all pressing their own particular interpretations of the "public interest" against the defendant, the Government, and each other.

It has been the consistent policy of this Court to deny intervention to a person seeking to assert some general public interest in a suit in which a public authority charged with the vindication of that interest is already a party. Thus, in In re Engelhard & Sons Co., 231 U.S. 646, 34 S.Ct, 258, 58 L.Ed. 416, intervention was denied to a subscriber seeking to enter a suit between a municipality and a telephone utility involving the validity of the city's rate ordinance and the disposition of rate overcharges. Similarly, in City of New York v. Consolidated Gas Co. of New York, 253 U.S. 219, 40 S.Ct. 511, 64 L.Ed. 870, and City of New York v. New York Telephone Co., 261 U.S. 312, 43 S.Ct. 372, 67 L.Ed. 673, the City of New York was not allowed to intervene on behalf of consumer residents of the city in litigation between state authorities and public utilities over the validity of state rate regulation. The wise principle of those decisions is reflected in many other federal cases decided both before and after the adoption of Rule 24(a) (3).[15]

14. In United States v. Borden Co., 347 N.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903, the Court stated: "The private-injunction action, like the treble-damage action under § 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served."

15. O'Connell v. Pacific Gas & Electric Co., 19 F.2d 460 (C.A.9th Cir.) (intervention denied to ratepayer protesting proposed settlement of litigation between utility and municipality); Radford Iron Co. v. Appalachian Electric Power Co., 62 F.2d 940 (C.A.4th Cir.), cert. denied, 289 U.S. 748, 53 S.Ct. 691, 77 L.Ed. 1494 (business injured by utility's proposed dam denied intervention in suit between utility and FPC); MacDonald v. United States, 119 F.2d 821 (C.A.9th Cir.), aff'd as modified Great Northern Ry. Co. v. United States, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836 (intervention under Rule 24 denied in suit over mineral rights between United States and railroad to one claiming such rights under patent from United States); Reich v. Webb, 336 F.2d 153 (C.A.9th Cir.), cert. denied, 380 U.S. 915, 85 S.Ct. 890, 13 L.Ed.2d 800 (depositors denied 24(a) (3) intervention in proceeding by Federal Home Loan Bank Board against savings and loan association officers); Gross v. Missouri & Ark. Ry. Co., 74 F.Supp. 242 (D.C.W.D.Ark) (24(a) (3) intervention denied municipalities served by railroad involved in reorganization proceedings to which State was a party); Butterworth v. Dempsey, 229 F.Supp. 754, 798–799 (D.C.D.Conn.), aff'd, Town of Franklin v. Butterworth 378 U.S. 562, 84 S.Ct. 1913, 12 L.Ed.2d 1036 (intervention under 24(a) (3) denied overrepresented towns in reapportionment suit brought against state authorities).

The applicability of this principle to intervention in antitrust suits brought by the Government was early recognized by this Court. In the Matter of Leaf Tobacco Board, 222 U.S. 578, 32 S.Ct. 833, 56 L.Ed. 323, denied intervention to enterprises that sold tobacco to defendants in an antitrust suit brought by the Government. From that time since, we have consistently refused to recognize the right to intervene in government antitrust suits.[16] Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188; Partmar Corp. v. United States, 338 U.S. 804, 70 S.Ct. 69, 94 L.Ed. 486; Wometco Television & Theater Co. v. United States, 355 U.S. 40, 78 S.Ct. 120, 2 L.Ed.2d 71; Westinghouse Broadcasting Co. v. United States, 364 U.S. 518, 81 S.Ct. 293, 5 L.Ed.2d 264, dismissing appeal from United States v. Radio Corp. of America, D.C., 186 F.Supp. 776; Sam Fox Publishing Co. v. United States, supra; Bardy v. United States, 371 U.S. 576, 83 S.Ct. 547, 9 L.Ed.2d 537.[17] And we have upheld denial of intervention to a private party who claimed that a decree negotiated between the Government and an antitrust defendant failed to carry out the mandate of this Court. Ball v. United States, 338 U.S. 802, 70 S.Ct. 61, 94 L.Ed. 486.

The results which follow from the Court's rejection of the practical wisdom embodied in these decisions are apparent. There were over 20 applications to intervene in the decree proceedings below. The Court's construction of 24(a)(3) would require the District Court to grant most if not all of them. El Paso gas goes to millions of consumers, and under the Court's decision any or all of them are entitled to intervene as of right. And there is nothing in the Court's opinion which suggests that this right to intervene is limited to litigation over remedy. If consumers and others have an interest in making sure that a government antitrust decree meets their standards of effectiveness, they have an even greater interest in insuring that a violation is found. Thus the Court's reasoning gives any consumer a right to intervene in government antitrust litigation at the very outset. The Court

16. Intervention in this Court was allowed in United States v. Terminal R. R. Ass'n, 236 U.S. 194, 35 S.Ct. 408, 59 L.Ed. 535, but there the "intervenors" were in the practical status of defendants.

Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S.Ct. 666, 85 L.Ed. 975, relied upon by the Court, is completely inapposite. Panhandle Eastern Pipe Line Co. was a competitor of defendants charged by the Government with improperly exercising control over Panhandle to weaken its threat as a competitor. A consent decree was negotiated to protect Panhandle's independence. The decree provided for retention of jurisdiction by the court to enter such "further orders and decrees" as were necessary to carry out its purpose, and stated that "Panhandle Eastern, upon proper application, may become a party hereto" to protect its rights under the decree. When the Government later sought modifications of the decree, we held that the decree gave Panhandle the right to intervene. The Court carefully noted that this right to intervene was bottomed solely on the specific provisions of the decree and not general principles of intervention: "Its foundation is the consent decree. We are not here dealing with a conventional form of intervention * * *." 312 U.S., at 506, 61 S.Ct. at 667. The Court concluded, "Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem." 312 U.S., at 508, 61 S.Ct. at 668.

17. The policy behind these decisions was stated in United States v. American Society of Composers, Authors, and Publishers, 341 F.2d 1003 (C.A.2d Cir.), cert. denied, 382 U.S. 877, 86 S.Ct. 160, 15 L.2d 119, in which ASCAP licensees were denied intervention to assert that ASCAP had violated a decree in an antitrust suit brought by the Government: "The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit * * *." 341 F.2d, at 1008.

invites a scope of intervention that will make the delays in this case seem mercifully short.

The Court's decision would not be of such concern, nor merit so much discussion, if it were simply limited to 24(a) (3), a provision which has been superseded. But the same approach which creates a right to intervene for California and the Southern California Edison Co. under the old Rule 24(a) (3) appears in the Court's construction of the new Rule 24, under which it says Cascade has a right to intervene. The New Rule 24(a) (2) replaces the previous Rule 24(a) (2) and (3), and provides for intervention of right:

> "[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

This and other amendments to the Federal Rules of Civil Procedure were promulgated by this Court to "take effect on July 1, 1966, and * * * govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending * *." 384 U.S. 1031. Since the District Court denied Cascade's motion to intervene in 1965, before the effective date of the amended Rule, the new Rule was inapplicable to Cascade's motion.[18] But even if the new Rule were applicable, neither Cascade nor the other appellants could claim intervention of right under it.

The purpose of the revision was to remedy certain logical shortcomings in the construction of the former 24(a) (2), see Sam Fox Publishing Co. v. United States, supra, and to give recognition to decisions such as Formulabs, Inc. v. Hartley Pen Co., supra, which had expanded intervention under the former 24(a) (3) beyond the strict *pro interesse suo* model it embodied.[19] But an applicant is still required to have an "interest" in the litigation sufficiently direct and immediate to justify his entry as a matter of right. The remote and general concerns that appellants State of California and Southern California Edison Co. have with this government suit have already been discussed. And Cascade's interest is even more insubstantial. While it purchases gas from El Paso in Oregon, it seeks intervention to vindicate gas competition in California.[20] Even if it should be thought that the amended Rule might encompass such remote interests in some conceivable circumstances, it is clear that such interests may never justify intervention of right in public antitrust litigation, where Congress has carefully entrusted the conduct of government suits to the "direction of the Attorney General." But even if Cascade should pass this hurdle, it would also have to show

18. In Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266, the petitioner sought to reopen a default judgment denaturalizing him, relying on amendments to Rule 60(b). Several Justices thought that the petitioner should be able to obtain relief under the amended Rule even though the District Court had denied the petitioner's application before the effective date of the amendments. Cascade's interest here bears no resemblance to the extraordinary hardship and injustice claimed by the petitioner in *Klapprott*, where it could be persuasively argued that it was "more consonant with equitable considerations to judge the case on the basis of the Rule now in force, even though the lower court did not have the opportunity to apply it." 335 U.S., at 629, 69 S.Ct. at 397 (dissenting opinion).

19. See Notes of Advisory Committee on Rules, Fed.Rule Civ.Proc. 24 (1966 Supp.).

20. The FPC will protect Cascade's existing supply of gas when New Company applies for certification. See, e. g., Michigan Consolidated Gas Co. v. FPC, 108 U.S.App.D.C. 409, 283 F.2d 204, cert. denied, 364 U.S. 913, 81 S.Ct. 276, 5 L.Ed.2d 227.

that there was a failure of "adequate representation" by the Justice Department in this case.

The Court states that the Government "knuckled under to El Paso" and has "fallen far short of representing" Cascade's interest. Since the interest that Cascade claims to be representing is that of the public, the Court is charging the Justice Department with dereliction of duty or serious incompetence. I regard this charge as wholly unjustified. The Government did settle for less than all the relief that it sought at the outset. But this is a wholly familiar phenomenon of negotiation. Bargaining for consent decrees and stipulated remedies is a normal and necessary element in the Government's enforcement of the antitrust laws. Moreover, it is perfectly conceivable that in the course of negotiations the Government may become aware of errors in its opening position. If, as the Court's opinion seems to suggest, the Government is required to press its original negotiating position unceasingly and to the bitter end, the number of cases which the Government can afford to undertake will be sharply reduced, and the enforcement of the antitrust laws will ultimately become less effective. And of course the delay in antitrust litigation, which so concerns the Court, will markedly increase.

The Court's standard of "adequate representation" comes down to this: If, after the existing parties have settled a case or pursued litigation to the end, some volunteer comes along who disagrees with the parties' assessment of the issues or the way they have pursued their respective interests, intervention must be granted to that volunteer as of right. This strange standard is not only unprecedented and unwise; it is also unworkable.

The requirement of inadequate representation by existing parties as a precondition of the right to intervene under the new Rule 24 is obviously an adaptation of the similar standard contained in the former 24(a) (2). Decisions under that standard allowed intervention of right when the intervenor could show a conflict of interest between himself and the party supposed to represent his interest,[21] a complete failure of representation by existing parties,[22] or collusion or the likelihood of collusion between them.[23] Mere tactical disagreement over how litigation should be conducted is obviously insufficient to support intervention of right.[24] In ignoring these precedents, the Court also overlooks the sound policies which underlie them. The Court's approach draws judges into the adversary arena and forces them into the impossible position of trying to

21. Pyle-National Co. v. Amos, 172 F.2d 425 (C.A.7th Cir.); Mack v. Passaic National Bank & Trust Co., 150 F.2d 474, 154 F.2d 907 (C.A.3d Cir.); In re Standard Power and Light Corp., 48 F.Supp. 716 (D.C.D.Del.).

22. Pellegrino v. Nesbit, 203 F.2d 463 (C.A. 9th Cir.).

23. Cuthill v. Ortman-Miller Machine Co., 216 F.2d 336 (C.A.7th Cir.); Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (C.A.2d Cir.), cert. denied, 332 U.S. 761, 68 S.Ct. 64, 92 L.Ed. 347; Klein v. Nu-Way Shoe Co., 136 F.2d 986 (C.A. 2d Cir.); Molybdenum Corp. of America v. International Mining Corp., 32 F.R.D. 415 (D.C.S.D.N.Y.); Twentieth Century-Fox Film Corp. v. Jenkins, 7 F.R.D. 197 (D.C.S.D.N.Y.).

24. Alleghany Corp. v. Kirby, 344 F.2d 571 (C.A.2d Cir.), cert. denied, 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335; Stadin v. Union Electric Co., 309 F.2d 912 (C.A. 8th Cir.), cert. denied, 373 U.S. 915, 83 S.Ct. 1298, 10 L.Ed.2d 415; United States v. American Society of Composers, Authors, and Publishers, 202 F.Supp. 340 (D.C.S.D.N.Y.), appeal dismissed, Shenandoah Val. Broadcasting Inc. v. American Soc. of Composers etc., 371 U.S. 540, 83 S.Ct. 519, 9 L.Ed.2d 508, appeal dismissed, 317 F.2d 90, rev'd on other grounds, 375 U.S. 39, 994, 84 S.Ct. 627, 11 L.Ed.2d 467. But cf. Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (C.A. 8th Cir.).

second-guess the parties in the pursuit of their own interests. It is also wasteful and productive of delay, because under this strange standard a person's right to intervene in litigation cannot be ascertained until that litigation is concluded and the existing parties' conduct evaluated.

Wrong as the Court's approach is with respect to litigation generally, it is even more wrong when a would-be intervenor seeks to challenge the adequacy of the Government's representation of the public interest. The separation of powers in our federal system generates principles that make it peculiarly inappropriate for courts to assume the role of supervision over policy decisions of the Executive. Yet the Court presumes to tell the Justice Department that it made tactical errors in conducting litigation, failed in its assessment of the public interest, and cannot settle a lawsuit which it has brought. This Court does not have the constitutional power to second-guess decisions of the Attorney General made within the bounds of his official discretion. That is the responsibility of the President and, ultimately, the electorate. In words appropriate here, we long ago stated in the context of an attack on the Government's settlement of an antitrust case: "* * * we do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." Swift & Co. v. United States, 276 U.S. 311, 331–332, 48 S.Ct. 311, 317, 72 L.Ed. 587. The Court today gives only lip service to these principles. It states that "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here." Ante, 385 U.S. ——, 87 S.Ct. 937, 17 L.Ed.2d ——. But it then proceeds to take the direction of a government lawsuit out of the hands of the Attorney General and into its own.

The Court relies on the fact that we have previously rendered a judgment in this case and cites dictum from the opinion in United States v. E. I. DuPont & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318, to justify the extraordinary course it takes. But in the absence of outright fraud, it has never been thought that the fact that parties have initially resorted to the courts gives judges power to set aside later settlement agreements and impose others on the parties. And certainly when it is the Executive Branch of the Government that has made the settlement as representative of the public interest, only the grossest bad faith or malfeasance on its part could possibly support such a step. Either the Court is saying the Government was guilty of such misconduct—a charge totally without support in the record—or the Court has grossly overreached the permissible limit of judicial power.

Not only concern for the constitutional position of this Court, but more directly pragmatic considerations underlie my disagreement with today's decision. To permit volunteers to intervene and second-guess the Justice Department is especially inappropriate when the issues involved, like those in the antitrust field, require technical experience and an assessment and balancing of interests essentially administrative and political. Formulation of effective and consistent government antitrust policy is unlikely to result from "piecemeal intervention of a multitude of individual complainants" [25] in litigation brought by the Government. Less than six years ago we fully recognized this principle:

> "* * * sound policy would strongly lead us to decline [the] invitation to assess the wisdom of the Government's judgment in negotiating and accepting the * * * consent decree, at least

25. United States v. General Electric Co., 95 F.Supp. 165, 169 (D.C.N.J.).

in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." Sam Fox Publishing Co. v. United States, supra, 366 U.S. at 689, 81 S.Ct. at 1312, 6 L.Ed.2d 604.[26]

Today the Court ignores all this and grants intervention of right to any volunteer claiming to speak for the public interest whenever he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit. I think this decision, which undermines the Justice Department in the discharge of its responsibilities, and invites obstruction and delay in the course of public litigation, is unsupported by the provision of old Rule 24, new Rule 24, or any other conceivably tolerable standard governing intervention as of right. The District Court did not err in denying intervention to the appellants,[27] and these appeals should therefore be dismissed.[28]

But even if I am completely wrong, and the Court is right in concluding that the District Court erred in denying appellants the right to intervene, the proper course would be simply to remand the case to the District Court so that the appellants' contentions may be met by the Government or El Paso and passed on by a trial court that is intimately familiar with the massive record in this case. Instead, the Court brushes aside the "threshold" question of appellants' right to intervene in a few pages and devotes most of its opinion to pronouncements on gas reserves, delivery contracts, and other intricacies of gas competition in the western United States. These issues were never the subject of adversary proceedings in the District Court. They were never resolved through findings by the District Court. Appellees did not directly brief or argue them before this Court. On the basis of what are in effect *ex parte* criticisms of the decree entered below, the Court lays down "guidelines" with respect to complex issues which will shape the future of an important segment of this Nation's commerce. In so doing the Court roams at large, unconfined by anything so mundane as a factual record developed in adversary proceedings.

"The obvious must be restated. We do not sit to draft antitrust decrees *de novo*. This is a court of appeal, not a trial court. We do not see the witnesses, sift the evidence in detail, or appraise the course of extended argument * * *. In short, this Court does not partake of the procedure and is not charged with the responsibility demanded of the court entrusted with the task of devising the details of a decree appropriate for the governance of a vastly complicated situation arising out of unique circumstances."

26. This policy has been given continuing recognition by the lower federal courts. Reich v. Webb, 336 F.2d 153 (C.A.9th Cir.), cert. denied, 380 U.S. 915, 85 S.Ct. 890, 13 L.Ed.2d 800; MacDonald v. United States, 119 F.2d 821 (C.A.9th Cir.), aff'd as modified, Great Northern Ry. Co. v. United States, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836; United States v. General Electric Co., 95 F.Supp. 165 (D.C.D.N.J.). See Wometco Television & Theater Co. v. United States, 355 U.S. 40, 78 S.Ct. 120, 2 L.Ed.2d 71. But cf. Atlantic Refining Co. v. Standard Oil Co., 113 U.S.App.D.C. 20, 304 F.2d 387.

27. The appellants also seek to challenge the District Court's denial of their motions for permissive intervention under Rule 24(b). We have no jurisdiction to consider this challenge. Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188. See Sam Fox Publishing Co. v. United States, 266 U.S. 683, at 688 and n. 3, 81 S.Ct. 1309, 1312, 6 L.Ed.2d 604. And in any event the District Court did not, in the circumstances of this protracted and complex litigation, abuse its discretion in choosing to allow appellants to present their views by *amicus* briefs rather than affording them permissive intervention as full parties.

28. See Sutphen Estates, Inc., v. United States, 342 U.S. 19, 72 S.Ct. 14, 96 L.Ed. 19.

United States v. E. I. DuPont & Co., 366 U.S. 316, 371, 81 S.Ct. 1243, 1273, 6 L.Ed.2d 318 (dissenting opinion).

The Court has decided this case on little more than repugnance for "the attitude or philosophy of the District Court" and the unjustified and extraordinarily opprobrious conclusion that the Government "knuckled under." This is not a happy foundation for radical extensions of intervention doctrine. And it is not a proper basis for deciding how stock in the New Company should be marketed, or how gas reserves in New Mexico should be divided. In its zeal to censure the District Judge and reprimand the Justice Department, the Court has rushed headlong into a jurisprudential quagmire far more dangerous than the "evil" it purports to discern in the decree entered by the trial court.

Finally, I must note my emphatic disagreement with the Court's extraordinary action in directing that further proceedings in this case must be conducted by a different district judge. Federal reviewing courts have taken this serious step only in the rarest circumstances, when the trial judge's personal or emotional involvement in a case has been demonstrated. See Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11; Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (C.A. 10th Cir.), cert. denied, 372 U.S. 915, 83 S.Ct. 718, 9 L.Ed.2d 722. No such involvement by the District Judge in this case is remotely suggested by the record. Nobody has requested his replacement at at any stage of the proceedings. For this Court, on its own motion, to disqualify a trial judge in the middle of a case because it disagrees with his "philosophy" is not only unprecedented, but incredible.