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ELECTRIC POWER IN THE SOUTHWESTERN POWER AREA

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HEARING

BEFORE THE

SUBCOMMITTEE ON
ENERGY PRODUCTION AND SUPPLY

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2249

A BILL TO PROHIBIT DISCRIMINATION IN RATES CHARGED
BY THE SOUTHWESTERN POWER ADMINISTRATION AND TO
REQUIRE DUE PROCESS IN THE CONFIRMATION OF SUCH
RATES BY THE FEDERAL ENERGY REGULATORY COMMISSION

MARCH 9, 1978

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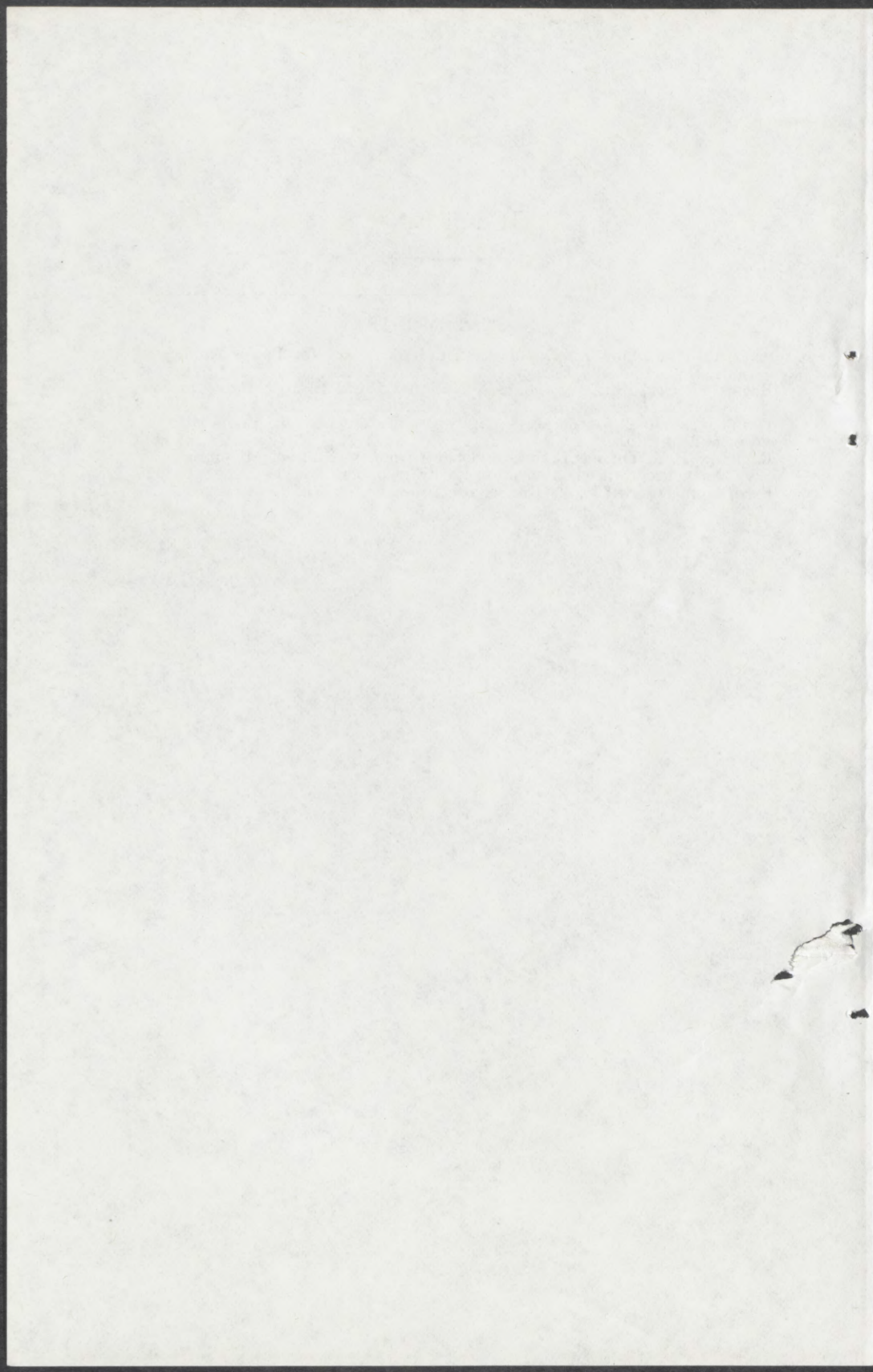
CONTENTS

S. 2249-----	Page 1
--------------	-----------

STATEMENTS

Ahearne, Hon. John F., Deputy Assistant Secretary for Power Applications, Department of Energy-----	4
Bogard, Becky, legislative counsel, National Rural Electric Cooperative Association-----	182, 184
Diddle, Gerald F., general manager, Associated Electric Cooperative, Springfield, Mo-----	103, 108
Eagleton, Hon. Thomas F., a U.S. Senator from the State of Missouri-----	2
Ely, Northcutt, counsel, Associated Electric Cooperative-----	122, 128
Ford, Hon. Wendell H., a U.S. Senator from the State of Kentucky-----	1

(III)



ELECTRIC POWER IN THE SOUTHWESTERN POWER AREA

THURSDAY, MARCH 9, 1978

U.S. SENATE,
SUBCOMMITTEE ON ENERGY PRODUCTION AND SUPPLY,
OF THE COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 8:08 a.m., in room 3110, Dirksen Office Building, Hon. Wendell H. Ford, presiding.

Present: Senators Ford, Hansen, and Eagleton.

Also present: Tom Laughlin, professional staff member.

OPENING STATEMENT OF HON. WENDELL H. FORD, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator FORD. The Committee on Energy and Natural Resources, Subcommittee on Energy Production and Supply will come to order. We will have to conclude at 10 o'clock because of the full Energy Committee meeting here this morning.

We will hear witnesses as it relates to S. 2249, electric power rates in the Southwest power area.

We are pleased to see a couple of country folks here with us this morning, the Senator to my left and the Senator to my right. I think that's wrong terminology.

[Laughter.]

Senator HANSEN. Whatever you say it is, Mr. Chairman.

Senator FORD. Thank you very much. And I appreciate your agreeing with me today since you didn't yesterday.

We're delighted to have all of you here this morning. Senator Hansen, do you have an opening statement you'd like to make?

Senator HANSEN. I do not, Mr. Chairman.

Senator FORD. I will insert at this point in the record a copy of the legislation before us, S. 2249.

[The text of S. 2249 follows:]

[S. 2249, 95th Cong., 1st sess.]

A BILL To prohibit discrimination in rates charged by the Southwestern Power Administration and to require due process in the confirmation of such rates by the Federal Energy Regulatory Commission

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. Power and energy marketed by the Southwestern Power Administration pursuant to section 825s of title 16, United States Code (1970), shall be sold at uniform systemwide rates, without discrimination between customers to whom the Southwestern Power Administration delivers such power and energy by means of transmission lines or facilities constructed with appropriated funds, and

customers to whom the Southwestern Power Administration delivers such power and energy by means of transmission lines or facilities, the use of which is acquired by lease, wheeling, or other contractual arrangements. Agreed points of delivery shall not be changed unilaterally.

Sec. 2. Southwestern Power Administration rate schedules prepared under authority of section 5 of the Flood Control Act of 1944 (58 Stat. 890), as amended, shall be subject to confirmation and approval by the Federal Energy Regulatory Commission on the record after opportunity for an agency hearing.

Senator FORD. We're very pleased to have the distinguished Senator from Missouri here, Tom Eagleton. This is the legislation which he sponsored. I recognize the Senator for his opening statement. And I've asked the Senator to sit with us this morning as part of this committee and feel free to ask any questions at any time as it relates to this legislation and to ask questions of any witness that might appear before us this morning.

Senator Eagleton, you may proceed.

STATEMENT OF HON. THOMAS F. EAGLETON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. Thank you very much, Mr. Chairman. I appreciate your convening this committee at this early hour in accommodation to these witnesses and to the bill that's before the committee and I also appreciate your kind invitation to participate in the questioning of witnesses. And I will announce for the record that Senator Danforth of Missouri desires to be a cosponsor of this legislation.

I'll keep my statement brief and I ask that the remarks that I made on the introduction of S. 2249 be made a part of the hearing record.

Senator FORD. Without objection those remarks will be included in the record.

Senator EAGLETON. Mr. Chairman, on the surface, this bill involves a matter of public power ratemaking, but the real issue is whether a Federal agency is going to be permitted to subvert a contractual commitment which was undertaken at the specific direction of the Congress.

This is the practical effect of the discriminatory transmission service charge imposed on Missouri electric cooperatives by the Southwestern Power Administration in 1970. That charge exactly offsets lease payments which by contract SPA owes to Missouri co-ops for the use of the co-ops' transmission lines.

SPA couldn't simply tear up the contract and refuse to pay the lease charges. That would be patently illegal. So it did the next best thing—it exercised its ratemaking power to impose an offsetting transmission service charge.

The Court of Appeals has ruled that SPA acted within its legal authority, notwithstanding Congressional direction that the lease agreement be entered into. Because those directions were given in Appropriations reports and not in law, the court held that they had no legal force. For the same reason, the court disregarded the congressional policy of a uniform "postage stamp" rate for all power generated within a power marketing system.

Mr. Chairman, if pressed I think that even the SPA would concede the transmission service charge is unfair. But it would nevertheless defend the charge on the ground that there are other unfair provisions in the contract under which the Government is paying too much for the services it receives from the Missouri co-ops.

SPA may be correct. The Missouri co-ops do not agree. I am not familiar with the details of the contract and I have no judgment on my own whether it is good or bad agreement.

But I do know this. It is a contract. It was signed by SPA at the direction and with the approval of Congress. With hindsight, someone in SPA suddenly decided it was a bad contract and in 1970 the agency found a legal loophole by which it could unilaterally nullify that agreement.

Mr. Chairman, I would suggest that if SPA has legitimate problems with its existing contract it should seek to renegotiate the agreement with the Missouri co-ops. In point of fact, SPA has refused to negotiate the issues and has consistently declined the invitation of the Missouri party to sit down and reason it out.

That option remains open today and I think that is the course that Congress should direct the SPA to take. I object strongly to a Federal agency using its rulemaking power to get around a clear policy instruction of Congress and to single out citizens of one State for this unjust and discriminatory charge.

No other State in the Southwest Power system pays that charge and, to my knowledge, no other power-marketing agency imposes such a charge within its jurisdiction. I do not believe Congress can allow the SPA action to stand and I urge the adoption of my bill.

Thank you, Mr. Chairman.

[Senator Eagleton's remarks on the introduction of S. 2249 follow:]

[From the Congressional Record, Oct. 5, 1977]

MR. EAGLETON. Mr. President, the purpose of my amendment is to clarify and reaffirm the intent of Congress with respect to marketing of Federal hydroelectric power by the Southwestern Power Administration under the Flood Control Act of 1944.

The act authorizes the Secretary of the Interior, in the alternative, to construct transmission lines "from funds to be appropriated by Congress" or to use the transmission lines of other utilities to transmit hydroelectric power, that is, the Secretary "is authorized to—acquire, by purchase or other agreement—transmission lines and related facilities."

In implementing the Flood Control Act and other similar acts, the policy of Congress always has been to encourage the Secretary to contract with other utilities to use their transmission lines, rather than to construct transmission lines with appropriated funds. And our policy always has been that rates to ultimate customers should be uniform and nondiscriminatory, whether the power is transmitted over Government-owned lines or lines made available by contract or lease. This is the concept of "postage stamp" rates—uniform rates for power delivered to load centers, regardless of the nature of the transmission lines' ownership.

The State of Missouri represents an example of the policy of Congress. In the 1950's and 1960's, Congress decided not to appropriate funds for constructing transmission lines, in Missouri, but instead Congress directed the Federal marketing agency—the Southwestern Power Administration—to lease the transmission lines of privately owned electric utilities and rural electric cooperatives, paying rentals adequate to carry operating costs and debt service of the money which the cooperatives borrowed from REA. Thus, we were spared the necessity of appropriating millions and millions of dollars to construct transmission lines.

That is how the matter stood until 1970 when the Nixon administration, taking note of growing SPA deficits, ordered a special transmission charge levied on Missouri cooperatives above and beyond the basic SPA rate charged everywhere else.

The rationale was that the payments made by SPA for lease of the Missouri lines was a cost, and since the agency was charged by law to recover all costs, it was only appropriate to offset the lease payments by levying a transmission charge on the cooperatives receiving those payments.

The net effect of this circular argument is that Missouri cooperatives are providing transmission service free of charge to SPA. In the other States served

by SPA, transmission lines either were built with Federal funds or leased from private power companies, but on special cost-recovery charge is levied on customers. Only in Missouri has that been the case.

To add to the inequity, Missourians continue to pay the basic SPA rate which is designed to recover all costs of the system, including amortization of the Federal investment in transmission lines outside of Missouri. In short, Missourians are helping to shoulder the cost of delivering power to other States but are being asked to assume the total cost of delivering SPA power in their own State.

The discriminatory transmission charge would increase the cost per kilowatt to Missouri cooperatives more than 60 percent above the price per kilowatt charged to users of peaking power in other States.

Commitments made by SPA to deliver power to all customers at the same basic rate without distinction as to whether the users were served over Government-owned or Government-leased lines were simply ignored. The long history of congressional approval of the arrangement between SPA and Missouri cooperatives was shunted aside.

With the imposition of the transmission charge, SPA effectively relieves itself of its obligation to compensate Missouri cooperatives for use of their transmission facilities. The cooperatives, however, remained obligated to repay the REA debt which they incurred to build the lines for SPA.

My amendment will remove this discrimination and assure equal treatment for customers in all States in the Southwestern Power Administration system.

Senator FORD. Thank you very much, Senator. I have scrutinized this legislation somewhat and as I read it and I read the statements that have been made, that by the enactment of S. 2249 we have no permanent budgetary impact. The effect of the bill, as I understand it, would redistribute charges now being paid by those served by Associated Electric Cooperatives to other ratepayers in the southwestern power area.

Is that your understanding?

Senator EAGLETON. That's my understanding, Mr. Chairman. I think you have it exactly right.

Senator FORD. All right. I have no further questions. Senator Hansen.

Senator HANSEN. I have none, Mr. Chairman.

Senator FORD. All right. The next witness will be the Honorable John F. Ahearne who is the Deputy Assistant Secretary for Power Applications of the Department of Energy.

Good morning, sir, we're delighted to see you this morning. And if you have an opening statement, we would be delighted to hear it. If you want to highlight it, that will be all right also and we'll incorporate your entire statement into the record. So whatever you prefer, we can proceed.

STATEMENT OF HON. JOHN F. AHEARNE, DEPUTY ASSISTANT SECRETARY FOR POWER APPLICATIONS, DEPARTMENT OF ENERGY

Mr. AHEARNE. Thank you, Senator. Let me—it's a very short statement. Let me just hit the main points.

Senator FORD. Whatever your pleasure is this morning, Mr. Ahearne.

Mr. AHEARNE. Thank you. The bill S. 2249 deals with a subject that is complex and has a history that traces back at least 15 years and perhaps as many as 30.

As mentioned, it effects the provision for a transmission service charge that was adopted by the Department of the Interior with regard to the rate schedules of the Southwestern Power Administration.

The effect of section 1 of the bill would cancel this charge. Section 2 requires the rate schedules of the Southwestern Power Administration to be subject to confirmation and approval by the Federal Energy Regulatory Commission.

The Department of Energy recommends against enactment of section 2 of the bill. But at this time the Department is not prepared to take a position on section 1 for reasons I will now go over.

The first section has several ramifications. The effect of the first section would be to moot a case now pending before a Federal court. At issue in that case is the requirement that Associated pay a transmission service charge incident to its purchase of Federal power and energy under a rate schedule put out by the Secretary of the Interior and approved by the Federal Power Commission. I'm sure the committee is familiar with many of the details of that case and, as I understand, many other witnesses are also and so I won't go into further detail.

The case does involve issue with regard to the intent of Congress, the adequacy of the current rates as well as the issue of cost recovery. In the Energy Department we have only recently begun to review whether the position previously taken by the Federal Government in this case is one which we wish to continue to support, and consequently, I am unable to take a position at this time.

The second ramification is the existing contract Senator Eagleton has mentioned. There is an existing contract between Southwestern and Associated which provides for an annual payment of approximately \$4.6 million to Associated for a variety of services stated in the contract to be rendered by Associated.

In reviewing some of the past lengthy history of the issue, I find that several times the appropriateness of the contract has been questioned, for example, by the General Accounting Office in 1965 and the Federal Power Commission in 1967.

The third ramification is the rates. I find that Southwestern has not had a major rate increase for power and energy since 1957. They are currently preparing a rate proposal to be submitted to the Assistant Secretary for Resource Applications for review and on which we will direct them to hold public hearings in their region.

As the Department has reviewed the issues raised by section 1, we have found many arguments of equity being raised on both sides. I recognize that this issue has been in existence for many, many months and regret that we in the Department who have just become aware of the full breadth of the issue, are not able to take a position at this time.

The subject of the best procedures for the development and review of power and wheeling rates for all five of the power marketing administrations is undergoing active study in the Department. On October 1, or last year upon the date that the Department went into effect, Secretary Schlesinger assigned to the Administrator of the Economic Regulatory Administration the authority formerly in the FPC to confirm and approve Federal rates under section 5 of the Flood Control Act.

The Secretary also assigned to the Administrator the authority formerly held by the Secretary of Interior to make the final decision of rates of the Bureau of Reclamation—now the Western Area Power Administration—under procedural rules that had been adopted by the Interior Department in 1975.

Personnel of my office, of the Economic Regulatory Administration and of the power marketing administrations are now in the process of developing procedures that would apply to all significant Federal rate-making. Therefore, the Department recommends against the mandatory delegation to FERC, section 2.

I do have with me a representative of the Energy Department's General Counsel's Office to speak to the legal issues if you wish, and a technical representative of Southwestern who is prepared to speak to the technical issues.

I must point out that the views represented here represent the views of the Department of Energy and not necessarily those of the administration.

That concludes my statement.

Senator FORD. Mr. Ahearne, I don't want to start asking some questions here that put you on the hot spot, but you're there and I'm here and I might do that.

Mr. AHEARNE. Yes, sir.

Senator FORD. You said in your statement that you had just become aware of the full breadth of this issue, and your comments at the end of section 1—

Mr. AHEARNE. Yes, sir.

Senator FORD [continuing]. Is it just something that hasn't gotten to you or is it new? Why haven't you known about this several weeks ago or months?

Mr. AHEARNE. I only took over this particular job about a week and a half ago.

Senator FORD. Yes, sir.

Mr. AHEARNE. And it was only until the end of last week, over the weekend that the paper work on this began commencing. And that's when I started digging in and trying to understand all of these issues. That's only a personal answer. Clearly the Department has known about it for a long time.

Senator FORD. You know, I forgive you, but it's awful hard to forgive the Department. And I understand your position and that's one reason I wanted to be sure that I didn't delve into something that you haven't had for very long and haven't had the ability to make a personal judgment on.

But do you project or do any of your people project SPA deficits over the next few years? Or is it likely that SPA will recover substantially more than its operating costs?

Mr. AHEARNE. Well, we have submitted recently in the last few weeks a request for additional funds for Southwestern to cover 1978's costs. This is for purchase costs in which the 1978 funds were not adequate. And we are in the process. I think it's now in our Comptroller's Office, for submission for an additional amount to be incorporated in the 1979 budget request for purchase power.

Both of these are related to the low amounts that we're requesting as far as purchase power is concerned. It was just a bad estimate of how much was going to be required because of water conditions being low.

Senator FORD. It was a bad guesstimate?

Mr. AHEARNE. It was both a combination of a bad estimate, and bad practice I believe. Previously the practice was to assume that one could always come back and ask for more money.

Senator FORD. You mean that the message is getting through that you can't come back and ask for more money?

Mr. AHEARNE. Well, we believe we ought to try to do our best to estimate how much money we need and ask for it the first time around.

Senator FORD. I agree with that and that's a very good position for you to take. Mr. Ahearne, in the event of that SPA revenues exceed operating costs in any given year what happens to the surplus?

Mr. AHEARNE. I don't know the answer to that, Senator.

Senator FORD. That's a question I'd like for you to give to this committee in writing if you would, please.

Mr. AHEARNE. I will do that.

[The information follows:]

All revenues received are passed directly to the U.S. Treasury. For repayment purposes gross revenues are applied against O&M cost of the SWPA including purchase power and wheeling, the O&M cost allocated to power at the Corps of Engineer projects, and to pay interest on the investment. Any and all revenue available in any particular year in excess of these costs are credited toward the repayment of the investment.

Senator FORD. See if you can answer this question now. In the event that SPA does not recover its operating costs in a particular year, what happens?

Mr. AHEARNE. I believe that what happens is that the debt payments are deferred. But that's my understanding of it and I again will have to answer that for the record.

[The information follows:]

For repayment purposes the amount credited toward the repayment of the investment is reduced. In some years when the revenue is low, there may be no revenues available to repay the investment after meeting all O&M expenses and there may be insufficient revenues to meet all or part of the interest expense on the investment.

Senator FORD. There's not an immediate initiation of a rate revision proceeding?

Mr. AHEARNE. I know that Southwestern for many years, as I read the past history, had operated such that they weren't even paying their debt. And also, since they didn't have a rate increase since 1957, I'm sure that for many—for some reason they didn't ask for a rate increase.

Senator FORD. They have not had a rate increase since 1957?

Mr. AHEARNE. No rate increase since 1957.

Senator FORD. To date?

Mr. AHEARNE. Yes, sir.

Senator FORD. In the event that S. 2249 is enacted, do you foresee any negative impact on SPA's ability to recover its operating costs?

Mr. AHEARNE. There might be a short-term effect in the sense that for 1 or 2 years until a rate increase went through that whole process. but as I mentioned, we've asked them to come in with a rate proposal and then we will direct them to hold public hearings throughout their area on that rate proposal. But they clearly do need new rates.

So that any effect of this bill or any other bill that might affect the revenues that they currently get or the payments that they currently make, should be picked up in that kind of a rate increase.

Senator FORD. Would there be any negative effect on its ability to repay loans to the Treasury?

Mr. AHEARNE. I would have to say it appears that that would be a short term effect also in the sense until such time as the rates were changed.

Senator FORD. When you say "short term" are you talking about weeks or years?

Mr. AHEARNE. I would—and again, this is an estimate based upon a very short time of experience, but I think that it would take 1 to 2 years only because one has to go through the public hearing process.

Senator FORD. Process. That's my final question, but I'd like for you if you can to go into detail on the nature of the existing contract and in what aspects is it unfair.

Mr. AHEARNE. As far as the many technical details on it—

Senator FORD. What kind of—

Mr. AHEARNE. As far as many of the details on it, I would have to either bring up Mr. Bowers from the Southwestern Power Administration or else reply through the record.

Senator FORD. Would you bring Mr. Bowers to the witness table with you and let him elaborate on that, please, Mr. Ahearne?

Mr. AHEARNE. Sure.

Senator FORD. Do you want to yield to him now and let him—

Mr. AHEARNE. Yes.

Senator FORD. The question that I have asked Mr. Ahearne—I've asked him to go in to detail on the nature of the existing contract and what aspects you feel that it's unfair?

Mr. AHEARNE. This is Mr. Walter Bowers who's the director of power marketing for Southwestern Power Administration. And since I used the word saying that there are many things brought into question, what I would like to do is to ask him to just comment on what those areas are that have been in question rather than specifically asking him to make a judgment as to what is "unfair."

Senator FORD. Somebody's advising you that this contract is unfair. And I don't want to be unfair to you, but I also want—I think the crux of the legislation as I see it is the contention that it is unfair. And if we want to—we need to get those things out on the table and be a part of this record as to what the fairness of it might be.

Mr. AHEARNE. Yes, Senator, there are two charges. One charge is the transmission charge levied on Southwestern and that's the crux of this particular legislation. There's also an existing contract in which Southwestern paid Associated for services.

My point was that there have been questions raised about that contract as to whether those charges are completely justified. And that's what Mr. Bowers would be prepared to address.

Senator FORD. Mr. Bowers, you may proceed.

Mr. BOWERS. The contract that is under question here has a transmission service charge of \$2.6 million a year for the transmission of power to deliver to Associated for their facilities that are owned by Associated.

In addition, it provides a payment to offset reserve generation and suspension of powerplant contracts that had been superseded when this new contract—when this Associated contract went into effect.

Now further, it provides for the transmission of power from SPA to customers of SPA on Associated's facilities. And it does provide for some operation and maintenance of SPA isolated facilities where Associated crews are located in closer proximity to the facilities than SPA's crews are.

In addition, the contract provides for the sale of a substantial block of energy from the Bull Shoals and Table Rock projects, to the Associated Electric Cooperative to the exclusion of the possible use of this energy for the system in general.

The litigation that's going forward is addressing itself particularly to the equity of the \$2.6 million for the transmission of power over Associated's facilities. And it's this then that is believed inequitable.

Senator EAGLETON. I didn't hear just the last part.

Senator FORD. That's not a detailed explanation. What is it—Why isn't it a good contract? Why is it unfair? You just explained the contract to me. I can read that and get that explanation myself. Now we've got the contention on your part that this is unfair and is not a good contract, trying to go around it, usurp it.

There's a definite direction by Congress as to what should be done. Maybe we're getting into a policy question here, but if it's a policy question, the intent of the legislation and the intent of Congress is well known. Now if we have to put policy and intent into law, I think that's what we're attempting to do here. But you've just given me the content of the contract.

Now I'm not a lawyer and I can understand what you just told me by reading the contract. I want to know what's unfair about it. You're making the proposal. You're the, I guess, the plaintiff in the case aren't you?

Mr. BOWERS. Yes, SPA is. That's right.

Senator FORD. All right. Well, then let's hear SPA's side on this then. Tell me what's wrong with it.

Mr. BOWERS. Well, the \$2.6 million on the transmission service charge, we feel, is excessive. Normally our transmission cost for wheeling through power facilities range in the order of 40 cents per kilowatt.

Senator FORD. What is the differential then?

Mr. BOWERS. In the power that is being delivered to Associated it would be roughly \$1.4 million. These costs are running about \$2.6 million that we're paying.

The capacity losses and the energy losses, a component of that \$2.6 million, there is reason to believe that this might be excessive. I can't quantify the amount on that at this time for you.

The other components, the reserve generation, \$1.1 million in reserve generation that's set forth here, in my opinion, some reserve is provided by Associated but the magnitude of the credit of \$1.1 million for that service appears high to me.

The suspension of power plant contracts, \$500,000 a year. I don't know of any reason for this amount being in there.

Transmission to Missouri municipalities, \$278,000. This is based upon the right to move 29 megawatts of power at a price of about 80 cents per kilowatt per month. Compared to the 40 cents the SPA has traditionally charged, this is about twice the rate that you would expect to have for compensation.

I recognize in recent years these prices have gone up, however. These are the general areas, that and the fact that the contract provides that any secondary excess energy that's available from the Bull Shoals-Table Rock projects will be delivered to the Associated Electric Cooperative.

This prevents the proper integration of these projects with the rest of the SPA system. We're talking about energy on the magnitude of 500 million kilowatt hours a year. If this amount of energy were available to operate on the SPA system, it would go a long ways toward reducing the amount of energy SPA has to buy from thermal sources.

We are unable to use this energy on the integrated system and it is sold as what we call supplemental energy, 2 mills per kilowatt hour to Associated. At today's market you can imagine the value of that 2-mill energy.

Senator FORD. It sounds like somebody made a contract and the price has gone up and they're hungry.

Mr. BOWERS. Well, even at the time the contract was made dedicating the secondary energy from these projects to the use of one customer exclusively was not in the best interest of the system operation.

Senator FORD. Mr. Bowers, when was this contract signed?

Mr. BOWERS. 1962.

Senator FORD. What happened since than that you're objecting to all the rates that—or the agreements that were in that contract? What's happened between that time and today that makes you want to change and object to the figures?

Mr. BOWERS. Well, there's been some question about the—

Senator FORD. Well, between 1962 and 1970 I understand.

Mr. BOWERS. Between 1962 and 1970 continually over the history of this contract the validity of these figures has been questioned.

Senator FORD. Well, if the validity of the figures has been questioned and the objections and unfairness of the contract that you have stated here, indicates to me that you object to the charges and certain things. Why is it that you're unwilling to renegotiate?

Mr. AHEARNE. Could I answer that?

Senator FORD. Either one of you. I just want an answer for the record.

Mr. AHEARNE. That's one of the things that I referred to when I said that we at the Department are reviewing as to whether we would recommend the Federal Government to continue to support the positions previously taken.

Senator FORD. You're rethinking it now?

Mr. AHEARNE. Yes, sir.

Senator FORD. As I recall, each change of administration has different policy and some different thinking. And I'm delighted to know that you're rethinking this. And I think history tells us that there has been some changes and when they think through it, they change their mind not necessarily based on any legal aspect of it, but that could be a part of it, but the fairness of it and the contract. The word's been given, the paper has been signed and that sort of thing. There's a different philosophy.

And I hope you do.

Mr. AHEARNE. Yes, sir.

Senator FORD. Could you provide a copy for the committee of SWPA's complaint and Associated's answer to the current litigation for the record?

Mr. AHEARNE. Yes, sir.

Senator FORD. I think this is something that we need and I would expect that since you, I'm sure, have copies of it in your office that we could get that by, say, the first of the week?

Mr. AHEARNE. I don't see why not.

Senator FORD. All right. Well, you make an effort to get it to us then by the first of the week.

Mr. AHEARNE. Yes, sir.

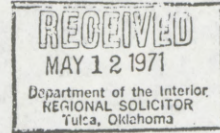
[The information follows:]

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SOUTHWESTERN POWER
ADMINISTRATION
TULSA, OKLAHOMA



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED ELECTRIC COOPERATIVE, INC.,
2814 South Golden Avenue, Springfield, Missouri,

Plaintiff,

v.

ROGERS C. B. MORTON, individually, and as
Secretary of the Interior,
(Department of the Interior, Washington, D. C.),

PETER C. KING, individually, and as
Administrator of the Southwestern Power Administration,
(Department of the Interior, Tulsa, Oklahoma),

JOHN N. NASSIKAS,
LAWRENCE J. O'CONNOR, JR.,
JOHN A. CARVER, JR.,
ALBERT B. BROOKE, JR., and
PINKNEY CALVIN WALKER, individually and
as members of the Federal Power Commission,
(441 G Street, N. W., Washington, D. C.),

Defendants.

Civil Action
No. 2410-70

AMENDED

COMPLAINT FOR
INJUNCTIVE
RELIEF AND
DECLARATORY
RELIEF

Plaintiff alleges as follows:

FIRST CAUSE OF ACTION

1. This is an action for declaratory relief and an injunction. It arises under Section 5 of the Flood Control Act of 1944, as amended, 16 U.S.C. §825s, alleging violations of that Act. It is brought under the powers vested in this Court by Part II of the District of Columbia Code, by 5 U.S.C. §706, 16 U.S.C. §825p, the Declaratory Judgment Act 28 U.S.C. §§2201-02, the Administrative Procedure Act, 5 U.S.C. §702, and the Court's general equity powers. The interest of the plaintiff in the matter in

controversy exceeds, exclusive of interest and costs, the sum of \$10,000. The gravamen of the action, as alleged in more detail in the following paragraphs of this complaint, is that Rogers C. B. Morton, individually and as Secretary of the Interior, and Peter C. King, individually and as Administrator of the Southwestern Power Administration (hereinafter "SPA"), in violation of Section 5 of the Flood Control Act of 1944 (16 U.S.C. §825s), and in violation of a contract between the United States and the plaintiff made pursuant to that Act, have attempted, and will continue to attempt unless enjoined, to cancel certain credits which the United States concedes to be due to the plaintiff under said contract, as consideration for the performance by the plaintiff of services to the United States stated therein, while continuing to demand of the plaintiff, and receive from the plaintiff, the performance of those services. The services so required to be rendered by plaintiff are the transmission of power and energy at plaintiff's expense, from two Government-owned power plants located on the White River near the Arkansas-Missouri boundary, over transmission facilities owned by the plaintiff, to specified distant points of delivery in central and northern Missouri (50 to 300 miles from said dams) where such power and energy is delivered by plaintiff, for the Government's account, to three private power companies, to the United States Bureau of Reclamation's Missouri Basin Power System in northwest Missouri, to six municipalities, and to six Generation and Transmission Cooperatives, which in turn redeliver such power and energy to some forty-three distribution cooperatives. Said distribution cooperatives serve some 300,000 rural customers and thirty-five municipalities in 113 of the 114 counties in Missouri, and 7 counties in Iowa. Said contract also requires plaintiff to furnish, from other sources, power and energy in quantities sufficient to replace the losses of power and energy in transmission from said power plants to said distant points of delivery. For such services, the United States, in said contract, agrees to pay the plaintiff \$2,647,100 annually, in the form of credits against amounts due from plaintiff to the United States for power and energy.

Defendants Morton and King, while purporting to continue to honor the contractual

obligation of the United States to pay or credit plaintiff said \$2,647,100 annually for said services, are attempting nevertheless to nullify said credit, lawfully due, by imposing a new "Transmission Service Charge" upon plaintiff in exactly the same amount, \$2,647,100, which would recapture the whole amount so credited. This is done in the guise of a "rate revision" of SPA's Rate Schedule P-2 annexed to said contract between SPA and plaintiff, although in fact the rates stated in that schedule, on which the new "Transmission Service Charge" is superimposed, are not changed at all in the Revised Schedule P-2. To implement this "Transmission Service Charge," which neither the statute nor the contract authorizes, defendants Morton and King, in the purported revision of the P-2 rate schedule, have, unilaterally, substituted new points of delivery (closer to the dams) for those stated in said contract, and have attempted to impose on the Plaintiff this "Transmission Service Charge" for the transmission of said power and energy from these new points of delivery to those stated in the contract, even though (i) such transmission is in fact effected over plaintiff's own lines, not those of the United States, (ii) all of the services for which the charge is made are furnished by the plaintiff, not the United States, and (iii) furnished at plaintiff's expense, not that of the United States. The effect, unless defendants Morton and King are enjoined, will be to continue to require plaintiff to perform said transmission services, to the distant points of delivery specified in plaintiff's contract with the United States, and require plaintiff, at its own expense, to supply power and energy for replacement of losses in transmission from the Government's power plants to those distant points, but to do so hereafter without compensation, inasmuch as the unlawful exaction of the transmission charge would exactly offset the credit of \$2,647,100 which defendants Morton and King concede to be due from the United States to the plaintiff for those services. The acts here complained of were initiated by defendant Morton's predecessor in office as Secretary of the Interior, Walter J. Hickel, on the recommendation of defendant King, and defendant Morton has ratified, adopted, and continued them, and defendant King has continued said unlawful acts under the

direction of defendant Morton. Said actions of defendants Morton and King are in contravention of federal statutes, are in excess of their lawful authority, and are void. The defendants who are members of the Federal Power Commission, purporting to act under the authority of the Flood Control Act of 1944 (which requires approval and confirmation by the Federal Power Commission of rates established by the Secretary of the Interior), acting without hearing or the taking of evidence, and in disregard to their statutory duty to make an independent investigation and determination, approved the imposition by defendant Morton's predecessor in office, Walter J. Hickel, of said Transmission Service Charge upon plaintiff, to nullify the credits lawfully due from the United States to plaintiff. Said action was in contravention of federal statutes, was in excess of their statutory authority, and was and is void.

2. (1) Plaintiff, Associated Electric Cooperative, Inc. (hereinafter "Associated"), is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and has its principal office and place of business in Springfield, Missouri. Associated is a federation whose members (hereinafter referred to as the "Federated Cooperatives") are:

Central Electric Power Cooperative (hereinafter "Central"), Jefferson City, Missouri;

N. W. Electric Power Cooperative, Inc. (hereinafter "N. W."), Cameron, Missouri;

M&A Electric Power Cooperative (hereinafter "M&A"), Poplar Bluff, Missouri;

Northeast Missouri Electric Power Cooperative (hereinafter "Northeast"), Palmyra, Missouri;

Sho-Me Power Corporation (hereinafter "Sho-Me"), Marshfield, Missouri;

KAMO Electric Cooperative, Inc. (hereinafter "KAMO"), Vinita, Oklahoma.

(2) The service areas of the several Federated Cooperatives are shown on the map annexed as Appendix D.

(3) Central, N.W., M&A and Northeast were all organized and now exist as Generation and Transmission Cooperative corporations (hereinafter "G&T's") under the laws of the State of Missouri. Sho-Me was organized and now exists as a corporation under the laws of the State of Missouri, but functions in like manner as a G&T. KAMO was organized and now exists as a G&T under the laws of the State of Oklahoma.

3. Defendant Rogers C. B. Morton is the duly appointed and acting Secretary of the Interior of the United States. Defendant Peter C. King is the duly appointed and acting Administrator of the Southwestern Power Administration, an agency of the Department of the Interior. Defendants John N. Nassikas, Lawrence J. O'Connor, Jr., John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Calvin Walker* are the duly appointed and acting members of the Federal Power Commission, having its principal place of business in the District of Columbia.

4. Each of the foregoing defendants is sued on account of acts which he has performed or threatens to perform in violation of the provisions of federal statutes, and without statutory authority.

5. By the Flood Control Act of 1941, 55 Stat. 638, the Congress authorized the construction of federal multiple-purpose reservoir projects, including Bull Shoals Dam and Power Plant on the White River in the State of Arkansas, and of Table Rock Dam and Power Plant on the White River in the State of Missouri, and these dams and power plants were constructed. Bull Shoals Power Plant commenced generation of power in 1952,

* Defendant Walker, as of the date of filing of this amended complaint, has been nominated by the President, but his appointment has not yet been confirmed by the Senate.

Table Rock Power Plant in 1959. The flow of the White River is insufficient to operate the hydroelectric generators in said power plants on a dependable basis more than a small fraction of the number of hours in a year, making it necessary to integrate the operation of these hydro power plants with that of steam electric generating plants, and interconnect them with such steam electric generating plants by high voltage transmission lines, in order for the Secretary to market, and obtain maximum utilization of, hydro power produced at Bull Shoals and Table Rock Power Plants.

6. By Section 5 of the Flood Control Act of 1944, 16 U.S.C. §825s, the Congress conferred the following authority upon the Secretary of the Interior:

Sec. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

7. The Secretary of the Interior (hereinafter "Secretary"), by Order No. 1865, dated August 31, 1943 (8 F.R. 12142), created the Southwestern Power Administration (hereinafter "SPA"), and by subsequent orders delegated to the Administrator of SPA the authority conferred upon the Secretary by Section 5 of the Flood Control Act of 1944, for disposition of surplus power and energy generated at various reservoir projects under the control of the Department of the Army, including Bull Shoals and Table Rock Dams.

8. Pursuant to Section 5 of the Flood Control Act of 1944, the Secretary found and determined that, in order to encourage the most widespread use of the power and energy generated at the Bull Shoals and Table Rock Dams and to make such power and energy available in wholesale quantities for sale on fair and reasonable terms and conditions to public bodies, cooperatives, and privately owned companies in the State of Missouri, with due regard to the statutory preference to public bodies and cooperatives, it was necessary that the United States deliver such power and energy to the load centers of said public bodies and cooperatives, at rates which included transmission to such load centers; and, in order to accomplish such deliveries to load centers, to acquire, by contract, the use of transmission lines and related facilities in lieu of construction thereof by the United States; and to secure, by contract, the use of steam electric power plants, integrated with Table Rock and Bull Shoals Power Plants, in order to market power produced at those two plants.

9. The Secretary and SPA, to effectuate the determination referred to in paragraph 8, proposed to the Rural Electrification Administration (hereinafter "REA") and the Federated Cooperatives a plan of various interrelated contracts, and obtained execution of such contracts by certain of the Federated Cooperatives. Plaintiff adopts and alleges the description of said plan and contracts made by this Court in the case of Kansas City Power and Light Co. v. McKay, 115 F. Supp. 402, 407, as follows:

"The contracts...are of three basic types, respectively denominated, (1) loan agreements or contracts, (2) lease-option contracts, and (3) power contracts. All agreements in a system were made in reference to one another.

"By the terms of the loan contracts executed in the name of the United States by the REA, funds are to be advanced to the respective federated cooperatives for the construction of generating and transmission facilities (steam or diesel generating plants, transmission lines and related electrical facilities)...

"The loan agreements provide that before any funds are advanced to the respective cooperatives they must enter into the second type of agreement, namely the lease contract, with SPA, calling for the leasing to SPA for a period of 40 years of the transmission facilities to be constructed from the funds advanced. By the lease contracts SPA obtains control of the facilities

for the 40-year period, and agrees to pay all costs of operation, maintenance, repair and capital replacements, as well as the amortization payments on the loans.

"The loan agreements and lease contracts also call for the execution of the third type of agreement, the power contract which is entered into simultaneously for the same 40-year period as provided in the lease contract. Under the power contracts SPA agrees to purchase the entire output of the steam plants constructed by the funds advanced in the loan agreements, and also agrees to resell power and energy to each of the cooperatives as its members require, at the rate designated in SPA's Rate Schedule 'A', which rate schedule has been confirmed and approved by the Federal Power Commission. Thus, the loan contracts are conditioned on the execution of the agreements with SPA and the SPA agreements are made in contemplation of the loan agreements."

* * * * *

Footnote:

"The loan contracts also provide that the lease and power contracts must be approved by and pledged to the REA as security for the loans."

10. Pursuant to the contracts referred to in paragraph 9, certain of the Federated Cooperatives severally borrowed money from REA and constructed the system of transmission lines and power plants depicted on the map annexed to this complaint as Appendix I-1. The major features consisted of (i) 161 kv transmission lines and related facilities, including transformer substations (hereinafter "Original 161 kv Transmission Facilities"), shown on that map as heavy black lines, (ii) 69 kv transmission lines and 69/13.2 kv substations (hereinafter "69 kv Facilities") shown on that map as light black lines, connecting the 161/69 kv transformer substations with load centers of the Federated Cooperatives, and (iii) steam electric generating plants at Chamois (15,000 kw) and Missouri City (40,000 kw).

11. Pursuant to the contracts referred to in paragraph 9, as subsequently amended from time to time, SPA obtained the use of the facilities described in paragraph 10 for the delivery of power to various municipalities, cooperatives, and private power companies in Missouri, and obligated the United States, at the expense of the United States, (i) to pay or credit to the Federated Cooperatives, severally, amounts sufficient

to enable them to pay installments of principal and interest to the REA on their respective loans, and to pay costs of operation and maintenance of the said facilities; (ii) to provide, at stated rates, firm power and energy in quantities which were in excess of the quantities of firm power and energy which the Government's Bull Shoals and Table Rock power plants were capable of generating with the water supply available, thus obligating SPA to purchase large quantities of power and energy from other sources in order to fulfill said obligation; (iii) to provide peaking power and energy, and when available, energy in excess of the quantities stated in the said contracts; (iv) to cause all such power and energy, (firm, peaking, and excess), to be transmitted to the load centers of the Federated Cooperatives (other than Northeast), that is to say, not only to the points of transformation from 161 kv to 69 kv on the Original 161 kv Transmission Facilities, but, beyond those points, to points on the 69 kv Facilities where voltage is transformed from 69 kv to 13.2 kv, for delivery to distribution cooperatives; (v) to provide from other sources, without added charge, power and energy to replace all losses in transmission from the Government's Bull Shoals and Table Rock Dams to said load centers on the 69 kv Facilities. The rates stated in said contracts, to be paid by the Federated Cooperatives to SPA, were in consideration of all of the foregoing services including specifically the transmission and delivery of power and energy at the cost of the United States to load centers, and the furnishing at the cost of the United States of power and energy to replace all losses of power and energy in transmission from the Government's power plants to said load centers.

12. (1) During the Eisenhower Administration, the Secretary determined, in order to obtain additional revenue and benefits from hydro power, to increase the installed generating capacity of Bull Shoals Power Plant from 160,000 kw to 340,000 kw, and the combined capacity of Table Rock and Bull Shoals Power Plants from 360,000 kw to 540,000 kw, and to attempt to market the entire power and energy production of those dams at rates for peaking power and energy, eliminating the burden of purchasing

steam-generated electric power and energy from other sources, theretofore required to make possible the sale of the major portion of the production of Table Rock and Bull Shoals Power Plants as firm power and energy at normal load factors. To make said 540,000 kw salable as peaking power, it was necessary to obtain the complete integration of the operation of these government plants with power systems in Missouri and Kansas having a total power demand several times as great as the generating capacity of Table Rock and Bull Shoals Power Plants, and having other sources of supply adequate to furnish firm power and energy in sufficient quantities to enable absorption of the entire output of Table Rock and Bull Shoals Power Plants as peaking power and energy.

(2) To effectuate the Secretary's said plan, SPA, in 1960, in the Eisenhower Administration, proposed that the Federated Cooperatives form Associated Electric Cooperative, (Associated) and, through Associated, contract to purchase all of the power and energy generated at Bull Shoals and Table Rock Dams, such power and energy to be delivered by SPA to Associated at said dams, (in lieu of delivery by SPA at the load centers of the Federated Cooperatives, as required by SPA's contracts with those cooperatives), and pay SPA less per year for power and energy delivered at said dams, than the Federated Cooperatives were then paying SPA for such power and energy delivered to load centers. SPA's plan proposed that Associated, when formed, should take over the operation and maintenance of the Original 161 kv Transmission Facilities, construct the Added 161 kv Facilities, and by their use, deliver said power and energy at the load centers of the Federated Cooperatives and other customers of the United States, at a price adequate to repay Associated the costs of such transmission, and of providing power and energy to replace losses in transmission. Under the proposed arrangement, SPA was relieved of all payments to the Federated Cooperatives for use of transmission facilities and thermal generated power. A contract (referred to as "the December 1960 draft") was prepared under the direction of the Secretary, and agreed to by the Federated Cooperatives, but had not been executed at the time of inauguration of

the Kennedy Administration in 1961.

(3) In 1961, in the Kennedy Administration, the Secretary determined that, as a matter of policy, SPA should continue to utilize the Federal Cooperatives' transmission facilities and thermal generated power and to sell power and energy at the load centers of the Federated Cooperatives and other customers, not at the dams, as had been proposed by the Secretary in the Eisenhower Administration. This change in policy is set forth in a letter dated April 20, 1961, from Mr. Kenneth Holum, Assistant Secretary, Water and Power, to Mr. Truman Green, Manager of Central Electric Power Cooperative. A copy of this letter is attached as Appendix E. The Secretary proposed that Associated should transmit such power and energy from the said dams to said load centers to certain Missouri private power companies and municipalities which were customers of SPA, and to a point of interconnection with the United States' Missouri Valley Power System (Bureau of Reclamation), and, as payment for such services, receive a credit from the United States in an agreed amount against amounts to be owed by Associated to SPA for power and energy for use by the Federated Cooperatives and the distribution cooperatives served by them.

(4) To effectuate the Secretary's said 1961 integration and marketing plan, it was necessary that SPA continue to utilize the "Original 161 kv Transmission Facilities" referred to in paragraph 10, and to either construct, or obtain by contract the utilization of certain additional 161 kv transmission facilities in Missouri. In aid of the Secretary's said 1961 plan, the Federated Cooperatives, in 1961, organized Associated Electric Cooperative, and, among other responsibilities, authorized Associated to enter into such contractual arrangements as might be necessary to effectuate such integration and marketing of hydro power by SPA in Missouri and Kansas, including the obligation by Associated:

- (i) To continue to make available the utilization by SPA of the "Original 161 kv Transmission Facilities";
- (ii) To place in operation by specified dates certain additional 161 kv

transmission facilities (hereinafter "Added 161 kv Facilities") to be constructed by certain of the Federated Cooperatives, and to make available to SPA the use of such facilities for the integration and marketing of hydro power in like manner as the "Original 161 kv Transmission Facilities"; and

(iii) To assume the obligation of obtaining such other sources of power as should be required by SPA for the integration of SPA hydro power to provide the Federated Cooperatives and certain Missouri municipalities their total power supply requirements, and to offset losses in transmission.

13. On November 3, 1961, the Secretary presented to the Federal Power Commission his proposed plan for marketing in Missouri and Kansas of 540,000 kw of Bull Shoals and Table Rock power and related energy, as peaking power and energy, at a new P-2 rate schedule (hereinafter described), and by means of proposed contracts with Associated and others to effectuate the integration and transmission necessary to sell that quantity as peaking power and energy, as described in paragraph 12. The Secretary stated therein his determination that the credits properly payable to Associated for its services should be \$4,655,100 annually, and reported to the Federal Power Commission that this contract with Associated, and credits to Associated in this amount, would save the United States in excess of \$2,000,000 annually, in comparison with its existing contracts with the Federated Cooperatives. The detail of the said credits is stated in paragraph 20 (1) of this complaint. On April 30, 1962, the Federal Power Commission approved the Secretary's proposal.

14. (1) On March 28, 1962, certain interrelated contracts, hereinafter described in greater detail, were executed to implement the plan described by the Secretary to the Federal Power Commission November 3, 1961, and in the Commission's order of April 30, 1962, approving that plan. They all became operative August 1, 1962. These were:

(A) A contract between SPA and Associated (hereinafter "SPA-

Associated contract").

(B) A contract (hereinafter "SPA-Companies contract") between SPA and Kansas City Power and Light Company, Missouri Public Service Company, and The Empire District Electric Company (referred to hereinafter collectively as "the Missouri Companies").

(C) A contract (hereinafter "the Missouri Integration contract") between Associated and the Missouri Companies.

Each of the foregoing three contracts was annexed to the other two as an exhibit, and each was to become effective only upon execution of all three.

(D) A contract between SPA and the six Federated Cooperatives, suspending their several agreements with SPA, but providing that if for any reason the SPA-Associated contract is terminated prior to July 1, 1995, the contracts between SPA and each of the Federated Cooperatives shall again become operative, and

(E) Contracts between Associated and each of the six Federated Cooperatives whereby, among other obligations, they severally undertook to perform such services as the SPA-Associated contract required of them, and Associated agreed to compensate them for the use of their facilities in the performance of the SPA-Associated contract and the Missouri Integration contract.

(2) All of the contracts referred to in this paragraph 14 are now in full force and effect, subject to amendments of certain of them which have been executed from time to time but which have not modified them materially with respect to the matters above alleged.

15. The contracts referred to in paragraph 14 effectuated the following allocation of power:

A. Power to be generated at Bull Shoals and Table Rock Dams:

(i) To Associated, for integration with steam-generated

power as required to supply the Federated Cooperatives their total power and energy requirements

180,000 kw

- (ii) To Associated, for integration by Associated in its pooling operations with the Missouri Companies, and use by the Missouri Companies in their power supply operations in Missouri and Kansas, subject to recapture by Associated for uses stated in (i) above

108,000 kw

- (iii) To the Missouri Companies

190,000 kw

- (iv) To named Missouri municipalities

29,000 kw

- (v) For other customers of SPA

33,000 kw

- (vi) Maximum "overload" capacity (Bull Shoals & Table Rock) available to Associated (the power plant's generating capability in excess of name-plate capacity, variable, depending on reservoir elevations)

80,000 kw

Sub-Total

620,000 kw

- B. Power to be interchanged between the power system of SPA and the U. S. Bureau of Reclamation Missouri River Basin Power System:

50,000 kw

Total

670,000 kw

16. Associated, in the SPA-Associated contract, agreed to transmit and integrate the power and energy to be generated at Bull Shoals and Table Rock Power Plants, as described in paragraph 15, in coordination with the Missouri Companies, and to effectuate the interchange of an additional 50,000 kw between SPA and the United States Bureau of Reclamation Missouri Valley System. To accomplish those results for SPA:

- (1) Associated agreed to make available to SPA the Original 161 kv

Transmission Facilities, shown as heavy black lines on the map annexed hereto as Appendix I-1. These include (i) the only transmission line interconnecting the Government's Table Rock Power Plant with the Government's Bull Shoals Power Plant, (ii) the only transmission lines directly connecting those plants with other preference customers of SPA (municipalities) in central and western Missouri, and (iii) the only lines interconnecting those federal power plants with the federal power plants operated by the Bureau of Reclamation in the Missouri River Basin area in the states of North and South Dakota, Montana, and Nebraska.

(2) Associated agreed to cause to be constructed, in accordance with specifications to be approved by SPA, additional 161 kv transmission facilities (hereinafter "Added 161 kv Facilities"), including a transmission line connecting the Original 161 kv Transmission System to a point of interconnection with the United States Bureau of Reclamation's Missouri Valley Power System at Maryville, Missouri, distant about 300 miles from the nearest transmission facilities owned by SPA. The Original 161 kv Transmission Facilities and the Added 161 kv Facilities are referred to hereinafter, collectively, as "Transmission Facilities of Associated Available to SPA." They are shown as red lines on the map hereto annexed as Appendix A.

(3) Associated agreed to transmit, for SPA's account, in coordination with the Missouri Companies and SPA-owned facilities, 190,000 kw of hydro power and related energy to the Missouri Companies, and to deliver the same at five designated points of delivery on the Transmission Facilities of Associated Available to SPA, namely, Missouri City, Salisbury, Norton, Sedalia, and Clinton, at distances varying from 100 to 300 miles from Table Rock and Bull Shoals hydro power plants. In the SPA-Companies contract, annexed to the SPA-Associated contract, those same five points of delivery were described as "points of electrical interconnection between the transmission systems of the Companies and the transmission facilities of Associated available to SPA under the SPA-Associated Contract." They are shown on Exhibit 2-A, as annexed to the said contracts and to this complaint.

(4) Associated agreed to transmit 108,000 kw of hydro power plus up to 80,000 kw of hydro overload capacity to the Missouri Companies. (This obligation is stated in the Missouri Integration Agreement, annexed to the SPA-Associated contract, each contract to become operational only upon execution of the other.)

(5) Associated agreed to transmit 29,000 kw of hydro power and related energy, and to deliver the same, by use of the Transmission Facilities of Associated Available to SPA, to six Missouri municipalities, namely, Poplar Bluff, Sikeston, Lamar, Hermann, West Plains, and Fulton.

(6) Associated agreed, by use of the Transmission Facilities of Associated Available to SPA, to effectuate the interchange of 50,000 kw of hydro power between SPA and the U. S. Bureau of Reclamation's Missouri Valley Power System (and has in fact effectuated the interchange of such power up to 90,000 kw).

(7) Associated agreed to transmit to the Federated Cooperatives, at designated points of delivery on the Transmission Facilities of Associated Available to SPA, 180,000 kw of power and related energy, plus such part of the additional 108,000 kw that Associated might, on stated conditions, recapture from the Missouri Companies. Said points are shown on Exhibit 2, annexed to the SPA-Associated contract and to this complaint.

(8) Associated agreed to bear, and replace from its own generating plants, all losses in power and energy occurring on the SPA-owned transmission facilities in Missouri, and over the Transmission Facilities Available to SPA, including losses of power and energy occurring (i) in the transmission thereof to the Missouri Companies and the Municipalities purchasing power and energy from SPA, as well as to the Federated Cooperatives, and (ii) in the interchange of power and energy between SPA and the U. S. Bureau of Reclamation's Missouri Valley Power System, over some 300 miles of said Transmission Facilities Available to SPA, and (iii) whether such losses occur in the transmission of power and energy from Bull Shoals and Table Rock Power Plants outward to customers of SPA, or in the transmission of power and energy inward to such customers

from sources other than SPA during such hours of the day and month as the power and energy output of Bull Shoals and Table Rock Dams should be insufficient to supply their requirements.

(9) Associated agreed, in an amendment dated July 23, 1962, that SPA might, at any time and at any point, make interconnections with the Transmission Facilities of Associated Available to SPA, and utilize available capacity in such facilities for the transmission, by Associated, of additional power and energy for SPA's own purposes, including delivery to additional customers of SPA, pursuant to the terms of the SPA-Associated contract of March 28, 1962. In March, 1971, defendant King demanded of Associated the right to interconnect the Stockton Dam Power Plant, nearing completion, with the Transmission Facilities of Associated Available to SPA, to effectuate deliveries at any point on that system to customers of the United States, without added compensation to Associated.

17. Associated further agreed, in the SPA-Associated contract and the Missouri Integration contract annexed to the SPA-Associated contract, to perform the following additional services for SPA:

(1) Associated agreed to provide standby and reserve power and energy from its own generating plants, or by purchase or interchange arrangements with the Missouri Companies, so that SPA, during such periods of time as generators or other facilities at Bull Shoals and Table Rock Dams should be out of service, should continue to receive revenues in full from its customers as though SPA were able to supply such power and energy.

(2) Associated agreed (and implemented this in the Missouri Integration Agreement annexed to the SPA-Associated contract) to completely integrate the Bull Shoals and Table Rock Power Plants and the Associated System Available to SPA with electric generating plants owned by Associated, and with the power systems of the Missouri Companies, so that power might flow in from such sources, other than Bull

Shoals and Table Rock Dams, in such quantities and at such times as to make firm power available to all of SPA's customers in Missouri, thereby enabling all of the 540,000 kw of hydro power and related energy to be marketed as peaking power at the P-2 rate, hereinafter described, instead of requiring SPA to purchase steam-generated electric power from such outside sources in quantities and at times required to make possible the marketing of the output of Bull Shoals and Table Rock Power Plants as firm power, as the pre-existing contracts between SPA and the several Federated Cooperatives obligated SPA to do with respect to the major portion of the production of those two power plants.

(3) Associated agreed to operate and maintain a number of isolated facilities owned by SPA.

18. Associated further agreed, in the SPA-Associated contract (and implemented this in the SPA-Federated Cooperatives contract simultaneously executed) that SPA should be relieved, for so long a time as the SPA-Associated contract remained in force, from SPA's obligations which were stated in the various contracts between SPA and the Federated Cooperatives theretofore executed, including the obligations to (i) pay lease rentals and operation and maintenance or wheeling charges on the transmission system beyond the 161/69 kv transformer substations located on the Transmission Facilities owned by SPA and the Transmission Facilities of Associated Available to SPA, (ii) pay lease rentals and operation and maintenance expenses on the Chamois and Missouri City Power Plants, (iii) provide firm power and energy to the Federated Cooperatives, (iv) provide power and energy to meet further growths of load of the Federated Cooperatives, up to stated limits.

19. (1) Associated further agreed, in the SPA-Associated contract, to purchase from SPA 288,000 kilowatts of power and related energy (of this quantity 108,000 kw is passed on to the Missouri Companies, Associated having the right to recall such power and energy as Associated's loads increase and as said power and energy can be efficiently utilized by Associated), and Associated agreed to pay therefor in accordance

with Rate Schedule P-2, annexed to said contract.

(2) Rate Schedule P-2, by its terms, was stated to be applicable to wholesale customers, who, by contract, purchase hydro peaking power service and/or seasonal peaking power service. It stated a demand charge of \$14.40 per year per kilowatt of peaking power, payable at the rate of \$1.20 per month per kilowatt, and an energy charge of \$.002 per kilowatt-hour, and provided that the minimum amount of energy associated with hydro peaking and seasonal peaking power service shall be 1,200 kilowatt-hours per kilowatt of demand during each contract year.

(3) Rate Schedule P-2 required SPA to make delivery "at such point or points of delivery and at such voltages as are specified by contract." The "said points of delivery...specified by contract" were and are those stated in Article II, Section 4, of said SPA-Associated contract, which provides:

"Section 4. Nominal Points of Delivery. The nominal points of delivery for power and energy sold by SPA to Associated hereunder shall be at the points of interconnection which Associated or SPA makes or causes to be made with the existing and proposed 161 kv integrated transmission systems of SPA and Associated as shown on Exhibit '2', attached hereto and made a part hereof, and at the points of interconnection between the systems of SPA and the Companies under the SPA-Companies Contract, as shown on Exhibit '2-A', attached hereto and made a part hereof."

Exhibits 2 and 2-A, referred to in Article II, Section 4 of said contract, are annexed to this complaint, and incorporated herein by reference. The points of delivery so specified and shown on said Exhibit 2 included the following points of interconnection between SPA and the Transmission Facilities of Associated made available to SPA, referred to in paragraph 12 of this complaint: Carthage, Clinton, Doniphan, Idalia, Springfield, and Table Rock, and at 161/69 kv substations on said Facilities at the following points: Fairport, Missouri City, Salisbury, Chamois, Maries, Mansfield, Lebanon, Maryville, Sullivan, Thomas Hill, Carthage, Clinton, Doniphan, Idalia, Springfield, and Table Rock. The points at which SPA thus obligated itself to deliver power and energy to Associated were among those to which SPA had theretofore been obligated to, by its contracts with the

Federated Cooperatives (referred to in paragraph 9 of this complaint) to make such delivery to the Federated Cooperatives and as to these points, the SPA-Associated contract substituted Associated as the party to take delivery, for redelivery at the same points to the same Federated Cooperatives. But SPA, by the enumeration of said points of delivery on the 161 kv transmission lines, at points of transformation from 161 kv to 69 kv, was relieved of its prior obligation to make delivery at some 200 more distant points on the 69 kv Facilities, at points of transformation from 69 kv to 13.2 kv. The points of delivery by SPA to the companies specified in Article II, Section 4 of the SPA-Associated contract were the "points of interconnection between the systems of SPA and the Companies under the SPA-Companies contract, as shown on Exhibit 2-A." Said Exhibit 2-A shows the following six points of such interconnections: Carthage, Missouri City, Salisbury, Norton, Sedalia, and Clinton. Four of these, Missouri City, Norton, Sedalia, and Clinton, are shown on said Exhibit 2-A as points on "Associated System the capacity of which is available to SPA for transmission of power and energy to the companies hereunder," and are at distances of 150 to 300 miles from the Government's Table Rock Dam. Associated thus obligated itself to transmit, for SPA's account, power and energy sold by SPA to the Missouri Companies, from the Government's Table Rock and Bull Shoals Power Plants, to points of interconnection at Missouri City, Norton, Sedalia, and Clinton.

(4) Rate Schedule P-2 further provided that "Delivery of peaking and/or seasonal peaking power service will be from, and at the voltage of, the 138 kv or the 161 kv transmission systems owned by or available to SPA, or at lower or intermediate voltages from substations directly connected to such transmission systems."

(5) Rate Schedule P-2 made no provision for change, by the unilateral action of either party, of the points of delivery by SPA of power and energy to Associated so "specified by contract."

20. (1) SPA agreed, in the SPA-Associated contract, to compensate Associated for the services described in paragraphs 16, 17, 18 and 19 of this complaint by making

credits against the amounts payable by Associated for power and energy. The amount of said credits is \$4,655,100 annually. This is the amount which the Secretary proposed to credit Associated for such services in his presentation to the Federal Power Commission November 3, 1961, approved by that Commission April 30, 1962. It is made up of the following components, as disclosed in said presentation of the Secretary, November 3, 1961:

(A) For transmission services referred to in paragraph 16 of this complaint:	
For use of Original 161 kv Transmission Facilities	\$1,099,000
For use of Added 161 kv Facilities	515,100
Reimbursement to Associated for transmission capacity losses	777,000
Reimbursement to Associated for transmission energy losses	<u>256,000</u>
Sub-Total	\$2,647,100
(B) For reserve generation, suspension of the contracts	
of SPA with the Federated Cooperatives, and	
operation and maintenance of isolated facilities of SPA,	
and transmission at 69 kv to SPA's customers (certain	
municipalities), as referred to in paragraphs 17 and 18	
of this complaint. These are not contested by SPA.	<u>\$2,008,000</u>
Total	\$4,655,100

(2) SPA further agreed in said contract that the above described credits to Associated should continue to be made until all loans of REA to the Federated Cooperatives (referred to in paragraphs 9 and 10 of this complaint) shall have been fully repaid (anticipated to be June 1, 1997), and, commencing with that date, the credits shall be increased or decreased to reflect: (i) changes in the amounts payable by the Federated Cooperatives to REA, and (ii) increases in actual costs incurred by Associated in connection with the operation, maintenance, replacement and renewal of the Associated 161 kv system (that is, the Transmission Facilities of Associated Available to

SPA) in the then current year as compared with the contract year beginning June 1, 1967.

(3) The SPA-Associated contract further provided that it should become effective on the occurrence of stated conditions. It became operative August 1, 1962. It is to remain in force until May 31, 2000, unless sooner terminated on stated conditions. SPA has the option, on five years' written notice, to extend the effective term of the contract after May 31, 2000, for successive five-year terms, but not beyond May 31, 2040.

(4) SPA credited Associated with the agreed amount, \$4,655,100 annually, until May 31, 1970. Since that date, defendant Morton's predecessor, and defendant Morton, while continuing to credit Associated in the amount of \$4,655,100 annually (\$387,925 per month), has demanded repayment of \$2,647,100 annually (\$220,600 monthly), thereof, as a "Transmission Service Charge" equal to the credit owed by SPA for transmission services, as more fully described in paragraphs 22 and 23 of this complaint.

21. Associated has at all times performed its obligations under the SPA-Associated contract, and, as therein required, has at all times performed its further obligations under the Missouri Integration contract.

22. (1) On January 30, 1970, Walter J. Hickel, predecessor of defendant Rogers C. B. Morton, Secretary of the Interior, without giving prior notice or opportunity for hearing to Associated, filed with the Federal Power Commission a document captioned "Rate Schedule P-2, Revised," accompanied by a document captioned "Power Systems Average Rate and Repayment Study." Annexed hereto, as Appendix C, is a strike-and-underscore comparison of Rate Schedule P-2 as annexed to Associated's contract with the United States, and revisions so proposed by the Secretary. "Schedule P-2, Revised," did not in fact revise the rates and charges for either power (\$14.40 per kilowatt per year) or energy (2 mills per kilowatt hour). Instead, "Rate Schedule P-2, Revised," would unilaterally amend the SPA-Associated contract, by: (i) purporting to change the agreed

points of delivery, theretofore reading "at such point or points of delivery and at such voltages as are specified by contract," (shown in Exhibits 2 and 2-A, and enumerated in paragraph 19 of this complaint) to read "at such point or points of delivery and at such voltages from the SPA high voltage grid or beyond the SPA high voltage grid as are specified by contract," (ii) adding a new definition: "The term 'SPA high voltage grid' means the 138 kv and/or 161 kv transmission facilities owned by SPA and/or a substation owned by SPA that is directly connected to 138 kv and/or 161 kv transmission facilities owned by SPA," and (iii) adding a new "Transmission Service Charge," payable by Associated only, for transmission of power and energy, over the Transmission Facilities of Associated Available to SPA, between the newly-defined points of delivery on the SPA-owned facilities and the points of delivery specified in the SPA-Associated contract. The proposal with respect to the added Transmission Service Charge reads:

"Where transmission service is provided beyond the SPA high voltage grid and SPA incurs additional costs therefor (such as by payment, credit, or the construction of federal facilities), the customer shall pay, in addition to the demand and energy charges, a separate Transmission Service Charge each month equal to one-twelfth of the estimated total annual cost to SPA of providing such transmission service. The amount of such total annual cost shall be computed and determined by SPA, and a memorandum copy of each such determination shall be attached to and become a part of this rate schedule."

The "SPA high voltage grid" thus defined is depicted on the map identified as Appendix B to this complaint.

(2) The foregoing unilateral amendments of the SPA-Associated contract, if given effect, would excuse SPA from the obligation, specified in Article II, Section 4 thereof, to deliver power and energy from Bull Shoals and Table Rock Power Plants to Associated for use by the Federated Cooperatives at the following points shown on Exhibit 2: Clinton, Missouri City, Fairport, Maryville, Norton, Sedalia, Salisbury, Chamois, Maries, Mansfield, Lebanon, Sullivan, Thomas Hill, and substitute an obligation to deliver power and energy only at Bull Shoals and Table Rock Dams,

and Springfield, but would obligate Associated to transmit said power and energy from Bull Shoals and Table Rock Dams to said points of delivery specified by said Article II, Section 4.

(3) The foregoing unilateral amendments of the SPA-Associated contract, if given effect, would also excuse SPA from the obligation, specified in Article II, Section 4 thereof, to deliver power and energy to Associated, at the following points shown on Exhibit 2-A for redelivery to the Missouri Companies: Missouri City, Maryville, Norton, Sedalia, Clinton, and substitute an obligation to deliver power only at Bull Shoals and Table Rock Power Plants, and Carthage, but would obligate Associated to transmit said power and energy from Bull Shoals and Table Rock Dams to said points of delivery specified in said Article II, Section 4.

(4) The only interconnection between Bull Shoals Power Plant and Table Rock Power Plant, by means of which power and energy can be transmitted from Bull Shoals Power Plant for use either by the Federated Cooperatives or the Missouri Companies, is Associated's transmission line from Bull Shoals Power Plant to Table Rock Power Plant, constituting a part of the Original 161 kv Facilities, the use of which the Secretary's attempted unilateral amendment of the SPA-Associated contract would require Associated to continue to furnish.

(5) The only interconnection between the Government's SPA system and its Missouri Valley Power System is Associated's Transmission System Available to SPA, which the Secretary's attempted unilateral amendment of the SPA-Associated contract would require Associated to continue to furnish.

(6) Attachment 1 to Rate Schedule P-2, Revised, provides:

"Customer: Associated Electric Cooperative, Inc.
Springfield, Missouri

"Contract No.: 14-02-0001-1002

"Transmission Service Charge: \$2,647,100 per contract year, payable at the rate of \$220,600 per month."

23. (1) The Transmission Service Charge proposed to be assessed against Associated is in exactly the amount of the four credits due from SPA to Associated, identified in paragraph 20 (1) (A) of this complaint, for transmission services rendered by Associated to SPA identified in paragraph 16 of this complaint.

(2) Although the "Power Systems Average Rate and Repayment Study, January 1970," submitted to the Federal Power Commission by defendant Morton's predecessor in support of his request for approval of "Rate Schedule P-2, Revised," and adopted by defendant Morton, properly characterizes these credits as due and payable to Associated in their full amount for the entire duration of the SPA-Associated contract, the mathematical effect of the imposition of a Transmission Service Charge in precisely the same amount of said credits is to recapture and nullify them, with precisely the same effect as though the SPA-Associated contract had been amended to delete them, while leaving Associated obligated to continue to render the services for which said credits were agreed to be paid, but to do so hereafter without compensation. Associated has not agreed to such an amendment and no provision of the SPA-Associated contract authorizes defendants Morton and King to effectuate it.

(3) Section 5 of the Flood Control Act of 1944 restricts the authority of the Secretary to the making of rate revisions, subject to the approval of the Federal Power Commission, and does not authorize unilateral revision of contract terms, or nullification of obligations of the United States. Said action of defendant Morton and his predecessor in office was and is in violation of the Flood Control Act of 1944.

(4) The Transmission Facilities of Associated Available to SPA, of which SPA would continue to receive the use, but for which defendant Morton's proposed revision would nullify all compensation to Associated, are shown in red on the map hereto annexed as Appendix A.

24. On information and belief, plaintiff alleges that defendant Morton has construed his proposed Rate Schedule P-2, Revised, as precluding the collection of the

proposed Transmission Service Charge with respect to power and energy delivered to the Missouri Companies, and power and energy interchanged between SPA and the U. S. Bureau of Reclamation, over the Transmission Facilities of Associated Available to SPA. The mathematical result is that Associated on behalf of the six Federated Cooperatives and the forty-three Distribution Cooperatives which are members of the Federated Cooperatives, must increase their payments to SPA \$2,647,100 annually to completely offset all of the compensation which the United States, in said contract between SPA and Associated, agreed to credit to Associated for transmission services rendered by Associated to SPA for the transmission of power from Government power plants to the Missouri Companies and interchange of power and energy between SPA and the U. S. Bureau of Reclamation, as well as in the transmission of power and energy for use by preference customers, while those Companies and the United States Bureau of Reclamation are excused from bearing any part of the costs incurred by Associated's transmission of their power.

25. On May 28, 1970, the defendant members of the Federal Power Commission, denying Associated's request for a hearing and opportunity to present evidence, and without any independent investigation, approved and confirmed Rate Schedule P-2, Revised, for a period of one year. Associated duly filed a petition for rehearing. It was denied July 24, 1970.

26. Plaintiff has exhausted all of its administrative remedies.

27. Defendants Morton and King have demanded payment from Associated of the added Transmission Service Charge of \$220,600 per month (stated also as \$2,647,100 per year), and Associated has refused to pay that addition, but has paid, when due, rates and charges as provided in Rate Schedule P-2, annexed to the SPA-Associated contract.

28. (1) The acts (i) of defendant Morton and his predecessor alleged in paragraphs 22, 23 and 24 of this complaint, and (ii) of the defendant members of the Federal Power Commission in confirming and approving the same, and (iii) of defendants Morton

and King in demanding payment thereof, and each of said acts, are without statutory authority.

(2) The acts alleged in paragraphs 23 and 24 of this complaint were and are in violation of specific requirements of Section 5 of the Flood Control Act of 1944 (16 U.S.C. §825s) in that:

(i) Section 5 requires that: "Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the project) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years." The so-called Transmission Service Charge would deny to Associated the funds promised by SPA's contracts with the Federated Cooperatives to be made available to amortize the capital investment allocated to power which they undertook at SPA's request in the form of debts to the Rural Electrification Administration, to construct the Transmission System of Associated Made Available to SPA, leaving those cooperatives obligated to pay the principal and interest on those debts, as stated in paragraphs 9 and 10 of this complaint, without receiving the amounts which SPA agreed with them and with Associated to provide for that purpose, in the form of credits to Associated, as stated in paragraph 20 (1) (A) of this complaint.

(ii) Section 5 requires that: "Preference in the sale of such power and energy shall be given to public bodies and cooperatives." Defendants Morton and King, with the approval of defendant members of the Federal Power Commission, by exempting power companies from payment of a transmission service charge upon the power and energy transmitted to them over Associated's system, while imposing upon Associated a Transmission Service Charge not only with respect to power and energy transmitted by Associated to preference customers of the United States, but also a Transmission Service Charge (payable by Associated) with respect to power

and energy transmitted by Associated to said private power companies, have created discriminatory and preferential terms in favor of said private companies, at the cost of the so-called preference customers.

(iii) Section 5 requires that the Secretary of the Interior "make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies." Defendants Morton and King have violated that statutory mandate by unfairly imposing upon Associated the cost of transmitting power and energy to private companies and to the facilities of the United States Bureau of Reclamation in the Missouri Basin, as well as other customers of the United States, and the cost of supplying power and energy to replace all losses in transmission to said customers, none of whom are required by defendants Morton and King to bear the cost of replacing such losses incurred by Associated in the transmission of their power.

(iv) Section 5 of the Flood Control Act of 1944 restricts the Secretary's power of revision of contracts to the revision of rates and charges owed to the United States. The Transmission Service Charge demanded of Associated by defendants Morton and King is not a revision of any rate or charge owed by the United States. The transmission services for which the new charge is demanded of Associated are not services rendered by the United States to Associated, but services rendered, in accordance with contract, by Associated to the United States. Neither the Flood Control Act of 1944 nor any other federal statute authorizes defendants Morton and King, or any other federal officer, to unilaterally nullify said contractual obligations of the United States to Associated.

(3) The acts alleged in subparagraph (1) of this paragraph 28 were in violation of the requirements of the Administrative Procedure Act, 5 U.S.C. §551 et seq., in that defendant Morton's predecessor refused to give Associated notice or opportunity

to be heard in opposition to the amendment of its contract by imposition of a Transmission Service Charge and failed and refused to make or furnish findings of fact and conclusions of law. Defendant Morton has ratified those acts of his predecessor.

(4) The acts of defendants Morton and his predecessor, and of defendant King, alleged in this complaint are subject to review by this Court pursuant to 5 U.S.C.A. §706, in that they were and are unlawful, being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in excess of statutory jurisdiction and authority, without observance of procedure required by law, and unsupported by substantial, or any, evidence.

29. The defendant members of the Federal Power Commission, and their predecessors, violated the provisions of Section 5 of the Flood Control Act of 1944 in that:

(1) They are restricted by that statute to the confirmation of rates and charges which conform to the statutory criteria stated in paragraph 28 (2) of this complaint. They acted in excess of their statutory authority in purporting to confirm and approve the imposition of a Transmission Service Charge which is not a rate revision at all, but an exaction deliberately and precisely calculated to nullify an admitted obligation of the United States, in violation of each of said statutory criteria. Such acts of said defendants were and are ultra vires and void.

(2) The Federal Power Commission is without statutory authority to pass upon the justification of the charges made by an electric cooperative corporation, such as Associated, for its services, including transmission services. A fortiori, that Commission and its defendant members were without statutory authority to effectuate a reduction to zero of the compensation due from the United States to Associated for transmission services performed by Associated pursuant to its contract with the United States, by their approval of a new Transmission Service Charge calculated without regard to any transmission services rendered by the United States, but only calculated to equal and nullify precisely the amount, \$2,647,100, which the United States, by contract, had agreed to

pay Associated for transmission services rendered by Associated.

(3) The Federal Power Commission, and its defendant members, violated the provisions of the Administrative Procedure Act, in that they failed and refused to afford to Associated an opportunity to present evidence, to cross-examine witnesses presented on behalf of the Secretary of the Interior, or to be heard, and failed and refused to make findings of fact and conclusions of law.

(4) The acts of the defendant members of the Federal Power Commission alleged in this complaint are subject to review by this Court pursuant to 5 U.S.C.A. §706, in that they were and are unlawful, being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in excess of statutory jurisdiction and authority, without observance of procedure required by law, and unsupported by substantial, or any, evidence.

30. Plaintiff has no plain, speedy, or adequate remedy at law.

31. Wherefore, plaintiff prays for the relief stated in paragraph 36.

SECOND CAUSE OF ACTION

32. Plaintiff incorporates by reference in this Second Cause of Action paragraphs 1 to 31, inclusive, of this bill of complaint as though herein repeated at length.

33. Associated, in reliance upon the Secretary's agreement to credit Associated with \$2,647,100 annually for its transmission services, changed its position to its detriment in the following respects, among others:

(1) Associated obligated itself, by contracts with certain of the Federated Cooperatives, to pay them sums amounting to many millions of dollars for debt service and operation and maintenance expenses on the Original 161 kv Transmission Facilities, which Associated thereupon made available to SPA, as required by the SPA-Associated contract.

(2) Debts amounting to many millions of dollars were incurred by certain of the Federated Cooperatives to construct the Added 161 kv Facilities required by the SPA-Associated contract to be constructed, including the interconnection between SPA and the U. S. Bureau of Reclamation's Missouri Valley Power System, and Associated obligated itself to said Federated Cooperatives, by contract, to pay said cooperatives the amounts required for debt service and cost of operation and maintenance of said Added 161 kv Facilities, which Associated thereupon made available to SPA, as required by the SPA-Associated contract.

(3) Debts amounting to many millions of dollars were incurred by Associated to construct, as required by the SPA-Associated contract, steam electric generating facilities and related facilities in order (i) to keep SPA whole with respect to losses of power and energy in transmission, and (ii) to make possible the marketing by SPA of the entire output of 540,000 kw of power and related energy produced at the Bull Shoals and Table Rock Dams as peaking power.

34. Defendants Morton and King have accepted, and continue to accept, on behalf of the United States, the benefits of the debts and expenditures incurred by Associated to perform the SPA-Associated contract, including, without limitation:

(1) Integration of 540,000 kw of power production of Bull Shoals and Table Rock Dams with other sources of power and energy in such manner as to make the entire 540,000 kw marketable as peaking power, whereas the water supply available at those power plants is insufficient to make available the production of more than one-third of that quantity on a dependable basis for sale as firm normal load factor power.

(2) Relief of SPA from the necessity of purchasing steam-generated electric power and energy in excess of the generating capability of the Bull Shoals and Table Rock Dams in order to meet its pre-existing contract obligations in Missouri.

(3) Transmission of power and energy over the Transmission Facilities of Associated Available to SPA, to customers of SPA other than Associated.

(4) Interchange of as much as 90,000 kw of power and related energy between SPA and the U. S. Bureau of Reclamation's Missouri Valley Power System, thereby obtaining for each of said power systems the advantages of diversity of their respective loads. Plaintiff alleges, on information and belief, that the reasonable value of the said interchange service, rendered by Associated to the government, is not less than \$1,250,000 annually.

(5) The furnishing, from sources of power owned by Associated or available to Associated by contract with third parties, of power and energy to offset all losses in power and energy incurred in transmission of power and energy over transmission facilities owned by SPA and the Transmission Facilities of Associated Available to SPA between Bull Shoals and Table Rock Dams and points of delivery to SPA's customers for use in Missouri and Kansas, including customers other than Associated, and transmission losses incurred in interchanging power and energy between SPA and the U. S. Bureau of Reclamation, to the end that SPA may receive payment in full for all power and energy

produced at Bull Shoals and Table Rock Power Plants and sold, notwithstanding such losses in transmission.

35. Defendants Morton and King are thereby estopped from nullifying the agreed credit of \$2,647,100 to Associated either directly, or indirectly by imposition of a "Transmission Service Charge" which recaptures the amount of that credit.

36. Wherefore, plaintiff prays:

(1) That defendant Morton's proposed SPA Rate Schedule P-2, Revised, be declared unlawful, in violation of statutory authority and in violation of the contract between SPA and Associated Electric Cooperative dated March 28, 1962, as amended;

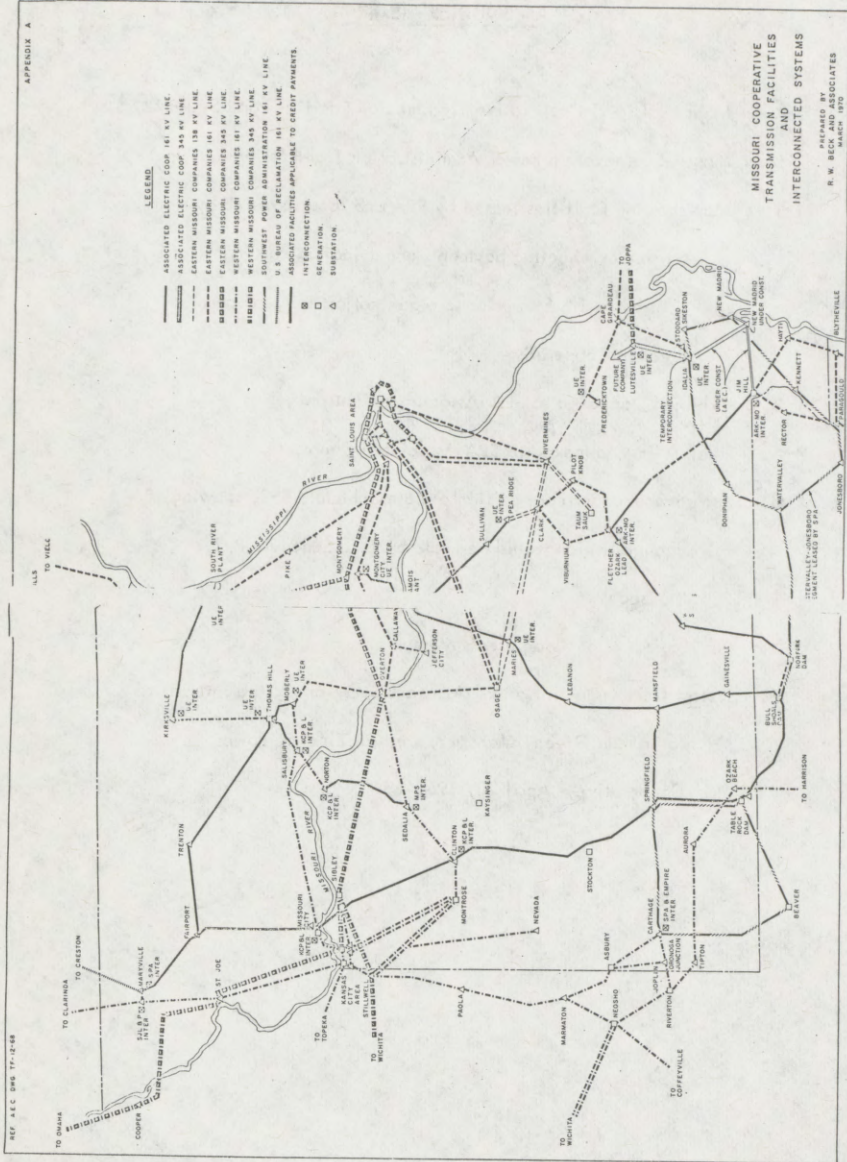
(2) That enforcement and collection of a Transmission Service Charge as illegally proposed by defendant Morton in SPA "Rate Schedule P-2, Revised," and of any similar transmission service charge, in any amount, be enjoined;

(3) That the order of May 28, 1970, approving said Rate Schedule P-2, Revised, issued by defendant members of the Federal Power Commission, be declared unlawful.

Northcutt Ely
Attorney for the Plaintiff,
1200 Tower Building,
Washington, D. C.
Telephone: (202) 638-6474

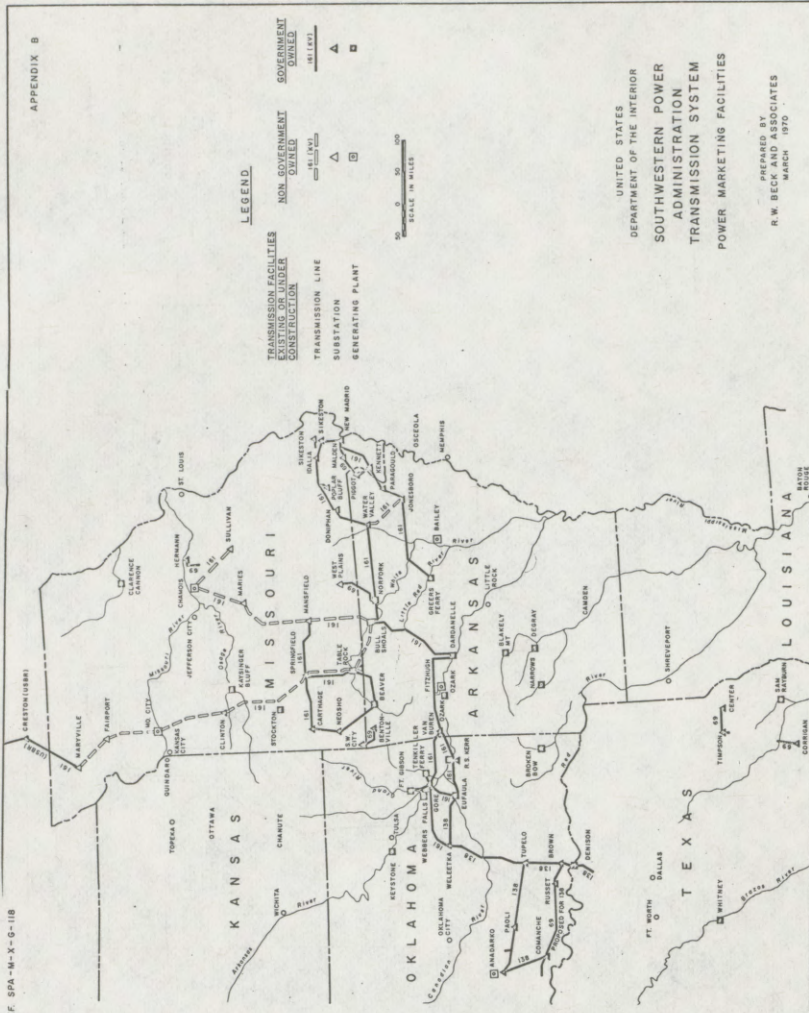
APPENDIXES (Exhibits)

- A. Map: Missouri Cooperative Transmission Facilities and Systems
- B. Map: Southwestern Power Administration Transmission System
- 1-1. Map showing facilities leased by SPA and those covered by
service or wheeling payments under individual G&T
contracts with SPA prior to organization of Associated
Electric Cooperative
- 2. Exhibit 2, annexed to SPA-Associated Contract
- 2-A. Exhibit 2-A, annexed to SPA Associated Contract
- C. Strike-and-underscore edition of Rate Schedule P-2, showing
changes which would be made by Rate Schedule P-2,
Revised
- D. Service Areas of Associated's Members
- E. Letter from Kenneth Holum, Assistant Secretary of the Interior,
to Truman Green, Manager, Central Electric Power
Cooperative, April 20, 1961

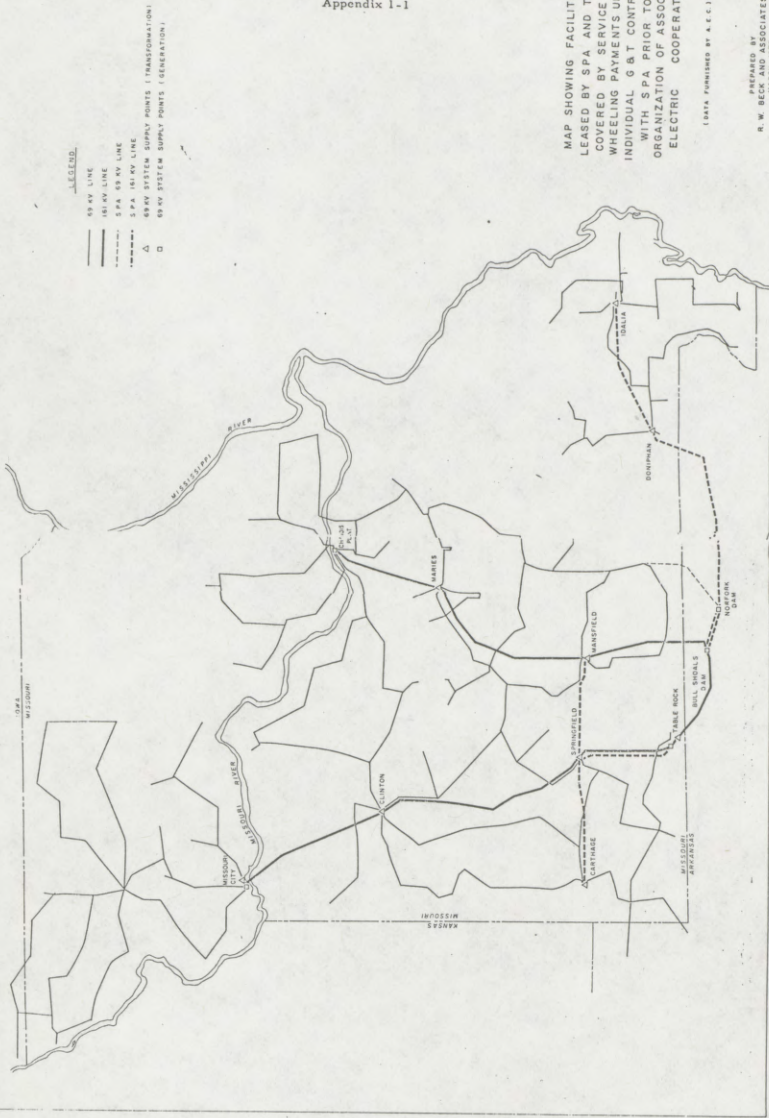


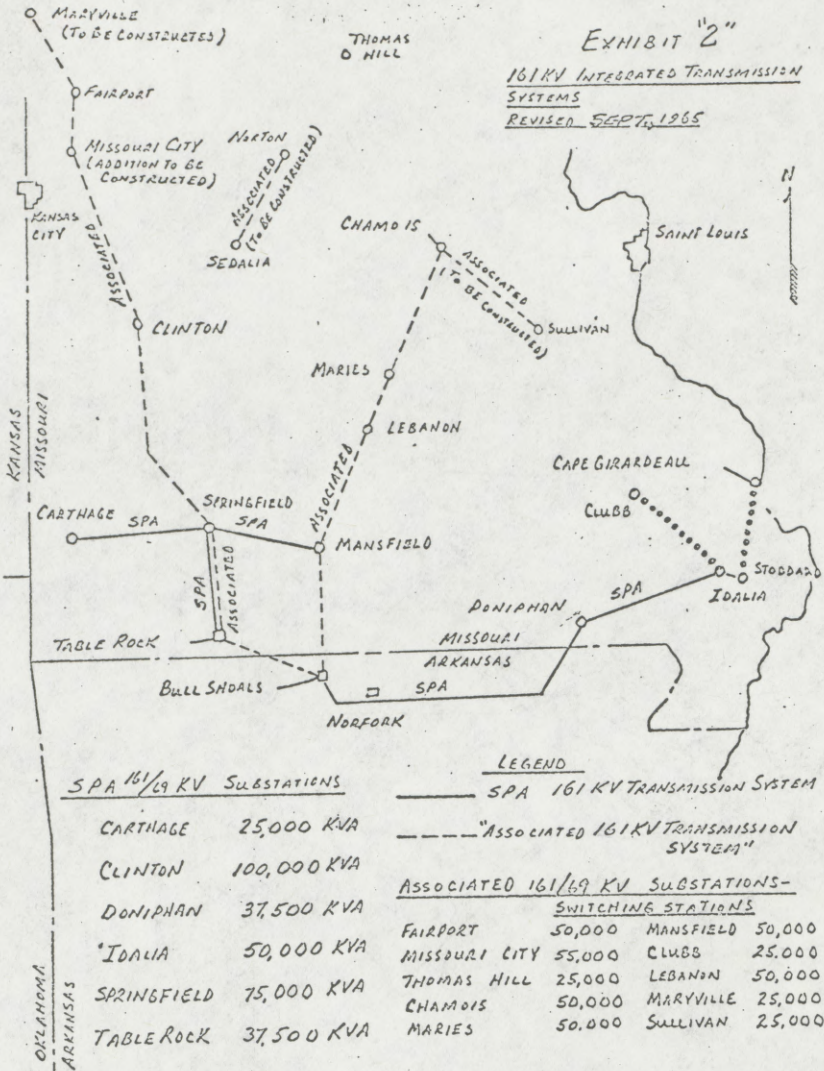
REF. SPA-M-X-G-11B

APPENDIX B



Appendix 1-1





NOTE: The Stoddard Substation and the 161 kv transmission line from Stoddard to Cape Girardeau are not a part of the "Associated 161 KV System", but are shown only for purposes of Subparagraph (A), Section 1(b), Article V. The 161 kv transmission line from Idalia to Clubb shall become a part of the "Associated 161 KV System" when (but not before) conditions set forth in Subparagraph (B), Section 1(b), Article V, are fulfilled.

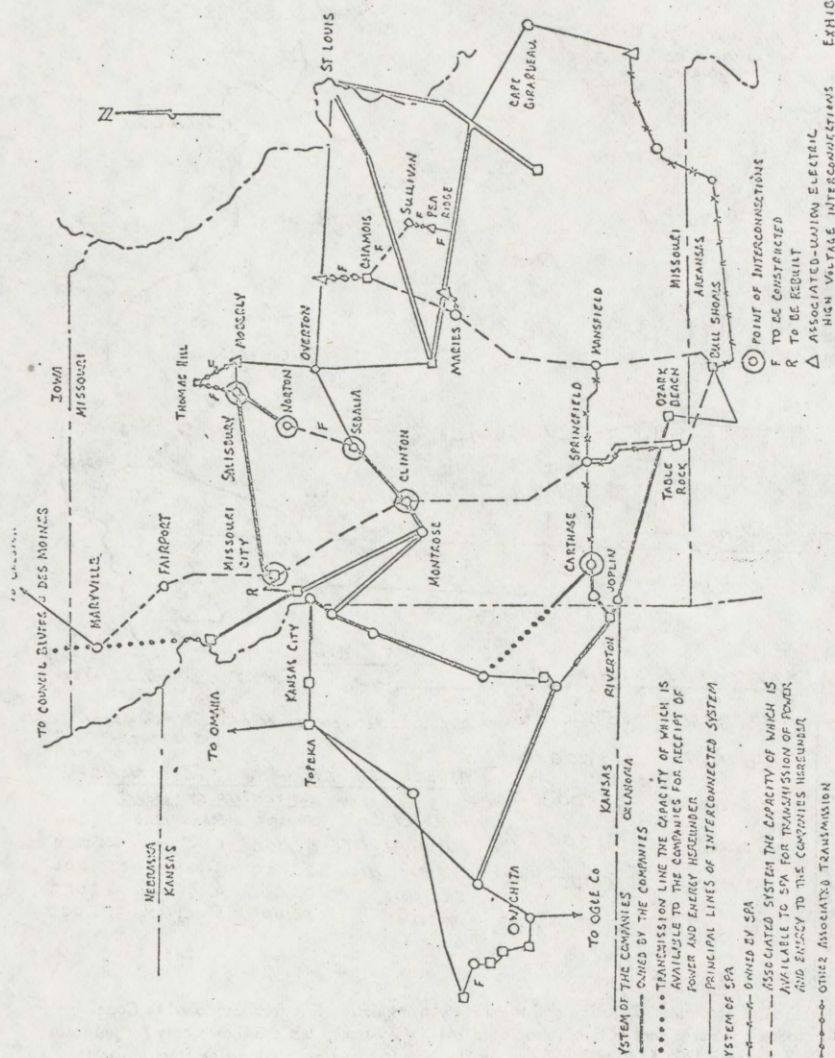


EXHIBIT No. 2A
REVIS-6 SEPT, 1965

Exhibit 2-A.

APPENDIX C

(Rate Schedule P-2 as amended by Rate Schedule P-2
(Revised); delete matter struck through, add matter underscored)

RATE SCHEDULE P-2
(REVISED)

UNITED STATES
DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION

SCHEDULE OF WHOLESALE RATES FOR
HYDRO PEAKING POWER SERVICE AND
SEASONAL PEAKING POWER SERVICE

EFFECTIVE:

~~During the period from the date of approval by the Federal Power Commission to July 1, 1967, in accordance with the order issued by the Federal Power Commission on April 30, 1962.~~

During the period from _____, 1970, to _____,
19____, in accordance with the Order of the Federal Power Commission dated
_____, 1970 (Docket No. _____).

AVAILABLE:

In the area served by the Southwestern Power Administration (SPA).

APPLICABLE:

~~To wholesale power customers who, by contract, purchase hydro peaking power service and/or seasonal peaking power service.~~

To any wholesale power customer purchasing Hydro and/or Seasonal Peaking Power.

RATES: 1/

DEMAND CHARGE: \$14.40 per year per kilowatt of hydro and/or seasonal peaking power per contract year payable at the rate of \$1.20 per month per kilowatt of peaking and/or seasonal power. Peaking Contract Demand.

ENERGY CHARGE: \$0.002 per kilowatt-hour of Peaking Energy and Supplemental Peaking Energy.

TRANSMISSION
SERVICE CHARGE:

Where transmission service is provided beyond the SPA high voltage grid and SPA incurs additional costs therefor (such as by payment, credit, or the construction of federal facilities), the customer shall pay, in addition to the demand and energy charges, a separate Transmission Service Charge each month equal to one-twelfth of the estimated total annual cost to SPA of providing such transmission service. The amount of such total annual cost shall be computed and determined by SPA, and a memorandum copy of each such determination shall be attached to and become a part of this rate schedule.

AMOUNT OF ENERGY WITH HYDRO AND SEASONAL PEAKING POWER SERVICE:

The minimum amount of energy associated with hydro peaking and seasonal peaking power service shall be 17,200 kilowatt-hours per kilowatt of demand during each contract year which shall be a twelve-month period as specified by contract. Hydro capacity in addition to hydro peaking power and seasonal peaking power may be made available for delivery of energy to a customer which by contract purchases energy in excess of 17,200 kilowatt-hours per kilowatt of demand during each such contract year.

AMOUNT OF PEAKING ENERGY TO ACCOMPANY HYDRO AND/OR SEASONAL PEAKING POWER:

A minimum of 1,200 kilowatt-hours of Peaking Energy per kilowatt of Peaking Contract Demand per contract year shall be furnished to each customer purchasing Hydro and/or Seasonal Peaking Power.

Supplemental Peaking Energy, in addition to Peaking Energy, may be by contract purchased by a customer purchasing Hydro and/or Seasonal Peaking Power. Additional Hydro and/or Seasonal Peaking Power, without accompanying Peaking Energy, may be by contract purchased on a month-to-month basis for utilization in scheduling Supplemental Peaking Energy so purchased.

CHARACTER OF SERVICE:

Hydro and/or seasonal peaking power service will shall be delivered as three-phase alternating current at approximately sixty cycles per second, at such point or points of delivery and at such voltages from the SPA high voltage grid or beyond the SPA high voltage grid as are specified by contract. The term "SPA high voltage grid" means the 138 kv and/or 161 kv transmission facilities owned by SPA and/or a substation owned by SPA that is directly connected to 138 kv and/or 161 kv transmission facilities owned by SPA.

1/ The order of presentation in this Appendix conforms to the existing P-2 Rate Schedule. The proposed schedule lists "CHARACTER OF SERVICE" and "AMOUNT OF PEAKING ENERGY TO ACCOMPANY HYDRO AND/OR SEASONAL PEAKING POWER" before "RATES."

CONDITIONS OF SERVICE: 2/

Delivery of hydro and/or seasonal peaking power service will be from and at the voltage of the 138 kv or the 161 kv transmission systems owned by or available to SPA, or at lower or intermediate voltages from substations directly connected to such transmission systems.

MINIMUM BILL:

\$1.20 per month per kilowatt of Peaking Contract Demand, plus the Transmission Service Charge, if any.

PEAKING CONTRACT DEMAND:

The Peaking Contract Demand shall be the maximum rate in kilowatts which SPA is, by contract, obligated to deliver Peaking Energy and Supplemental Peaking Energy associated with Hydro and/or Seasonal Peaking Power during any particular month.

BILLING DEMAND CHARGE:

Except as otherwise provided by contract, the Billing Demand Charge for any month shall be the Peaking Contract Demand times the Demand Charge.

ADJUSTMENT IN DEMAND CHARGE FOR REDUCTION IN SERVICE:

Except as otherwise provided by contract, in the event of one or more reductions by SPA of the amount of in hydro and/or seasonal peaking power capacity scheduled by any customer during any month, each of which continues for two hours or more, due to the inability of SPA to supply deliver such service power by reason of an "Uncontrollable Force" as defined by contract, or by reason of the necessary installation, maintenance, repair, and replacement of equipment, the Billing Demand Charge for such month shall be reduced for each such reduction in service by an amount equal to the product of the monthly Demand Charge times the number of kilowatts or reduction in hydro and/or seasonal peaking power times the number of hours of each such reduction, divided by 100; Provided, That the amount of such reduction in Demand Charge for any particular reduction shall not be greater than an amount equal to the monthly Demand Charge times the number of kilowatts of such reduction in hydro and/or seasonal peaking power. Provided further, That the total amount of any such reductions in the Billing Demand Charge for any month shall not be greater than an amount equal to the total Billing Demand Charge for such month.

2/ This section would be deleted in the proposed schedule but the subject is discussed in the new "CHARACTER OF SERVICE" section.

Rate Schedule P-2 (Revised)
ATTACHMENT - 1

Customer: Associated Electric Cooperative, Inc.
Springfield, Missouri

Contract No.: 14-02-0001-1002

Transmission Service Charge: \$2,647,100 per contract year, payable at the rate of \$220,600 per month.



SERVICE AREAS
OF
ASSOCIATED'S MEMBERS

Prepared by
R. W. BECK and ASSOCIATES
ENGINEERS and SURVEYORS

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

Appendix E.

April 20, 1961

Dear Mr. Green:

At our meeting on April 11 in Washington among representatives of the six Missouri G&Ts, the Rural Electrification Administration, Southwestern Power Administration, and the Department, the results of a preliminary review by the Department of the December 1960 draft of a proposed arrangement to market power from Bull Shoals and Table Rock Hydroelectric Projects to the G&Ts was discussed.

The Department finds that certain provisions in the December draft do not fit into the power program of the new Administration. We outlined an arrangement that we believe is sound and more consistent with the new Federal power marketing policy while also providing essentially the same benefits to all parties.

At our previous meetings on March 16 and 17 you gave the Department a list of objectives that you considered would be accomplished under the December draft. You stated that modifications of the draft within these conditions would be considered. These were discussed at our recent meeting and we stated that it appeared that the Government could meet all of the appropriate objectives. We were concerned to suggest an arrangement which would obtain your objectives, be more acceptable to the Government, and provide essentially the same benefits embodied in the December draft, to all parties.

It is believed that a three-party arrangement might be developed among the G&Ts acting through Associated Electric Cooperative, the private utility companies, and the Government, which would be workable. There could, of course, be a variation from the three-party arrangement, but this seems reasonable for discussion purposes. We presented a proposal covering the following matters:

1. Sale of Hydroelectric Power and Energy

The Government will deliver from the 161 kv facilities of the G&Ts and the Government, and sell to the Associated Electric Cooperative and the Companies, a quantity of power and energy considered to be equivalent to the power and energy that can be produced from Table Rock and Bull Shoals Hydroelectric Projects in the White River Basin when operated to serve the loads of the G&Ts and the Government in Missouri

when operating in an integrated power system, thereby obtaining maximum benefits from Federal hydroelectric power produced from these projects in the White River Basin.

The Government will sell Associated Electric Cooperative and the Companies 540,000 kw of nameplate hydroelectric capacity, of which 349,000 kw is dependable, and 191,000 kw is non-dependable, and approximately 1280 million kwh of average annual energy. Any of the dependable capacity sold to the Companies would be withdrawable on reasonable notice by the Government for the G&Ts and other customers of the Government, and any of the remaining capacity sold to the Companies would be withdrawable on reasonable notice by the Government for the G&Ts use.

Associated Electric Cooperative and the Companies each would pay \$14.40 per kilowatt per year for all capacity plus 2 mills per kilowatt hour for energy.

Scheduling would be agreed upon to produce the maximum benefits for all parties. In the Southwest in order to accomplish this and market Federal hydroelectric power having a minimum of usable hours of operation for the maximum benefit of customers of the Government using normal load factor power it is necessary to coordinate the hydroelectric production with a large portion of power produced from thermal sources within an operating area.

Additional benefits are obtained when releases of stored water from the reservoirs in a particular river basin are fully coordinated with overall power operations in an area. The arrangement will, therefore, require scheduling of reservoir releases and hydroelectric production to accomplish the maximum utilization of Federal hydroelectric power production from projects in the White River Basin to produce the maximum benefits for all parties.

2. 161 KV Transmission Facilities

The Government would continue paying under the existing arrangements for the use of the capacity in the Central and N. W. 161 kv lines with no substantial modification from the present contractual rights and obligations of the parties.

It is proposed that the arrangement provide for use of specific 161 KV facilities among the parties to operate in a "transmission pool." Our studies have not proceeded sufficiently to permit more specific elaboration of the details involved. The intent, however, is to permit Associated Electric Cooperative and the Companies to utilize the capacity in facilities that the Government owns or leases in order to achieve the economies of larger plant installations and other appropriate purposes.

The arrangement should indicate the additional 161 KV facilities needed to carry out the purposes and the parties who will construct these facilities and approximate timing of such construction.

3. Services for the Government

Associated Electric Cooperative will provide a number of services for the Government. These will include the providing of necessary reserves, energy and capacity losses, the use of the capacity of the existing Central and N. W. 161 KV lines, delivery of power over the 69 KV systems of the members of Associated Electric Cooperative, the operation and maintenance of the Government's isolated transmission facilities and consideration to the Government of the reduction in its financial obligations regarding the 69 KV facilities of the G&Ts. It is proposed that the contract provide for a payment to Associated Electric Cooperative for these services. Additional studies need to be made by the Department to determine the amount and the most appropriate manner in which such payments are to be made, taking into consideration possible future conditions and changes.

The Government will have the right to purchase back firm power and energy for the loads of a specified list of existing customers of the Government and for other customers of the Government of firm power and energy that is not required by Associated Electric Cooperative.

A provision would be incorporated either in the three-party arrangement or in separate arrangements between the Government and the G&Ts, which would provide for the use by the Government of the surplus capacity in the 69 KV transmission system of the G&Ts, to serve the list of existing customers of the Government.

We also visualize a contractual floor to the amount of firm power and energy available to Associated Electric Cooperative based upon the anticipated loads of the members of Associated Electric Cooperative at a time beyond the period when the full nameplate capacity of 540,000 kw is available. If the arrangements between Associated Electric Cooperative and the Companies involve alternating installation of thermal generation, resulting in a temporary reduction in the amount of dependable power used by Associated Electric Cooperative, such short-term reduction would not be subject to withdrawals by Government.

Regarding the use of 69 KV transmission capacity of the G&Ts for other customers of the Government, the arrangement would provide for Associated Electric Cooperative to make determination as to service for other customers of the Government.

4. Other Matters

- a. The existing lease of capacity or service arrangement in effect between the G&Ts and the Government would become inoperative.
- b. The present arrangements between the Government and Central and N. W., regarding the output of the recent thermal generating plants would become inoperative.
- c. The contract would provide for netting out of payments.
- d. The arrangement outlined above would be applicable when the 540,000 kw of nameplate capacity is available at Table Rock and Bull Shoals. It will be necessary to provide for an appropriate provision covering the interim period when the 540,000 kw is not fully available.

If the above proposed basis for an arrangement is considered to be acceptable to you, we will prepare, within a month or six weeks, a

first draft of a contract to accomplish such purposes. We shall submit your reply before proceeding with the draft.

Sincerely yours,

(sgd) Kenneth Holum

Kenneth Holum
Assistant Secretary

Mr. Truman Green
Manager
Central Electric Power Cooperative
Jefferson City, Missouri

MAChase/KJPlucknett:mp
4-20-61

Copy to: Secretary's Files
Secretary's Reading File

Law Offices of
 Northcutt Ely
 1200 Tower Building
 Washington, D.C. 20005
 (202) 638-6474

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

ASSOCIATED ELECTRIC COOPERATIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 2410-70
ROGERS C. B. MORTON, individually, and as	)	
Secretary of the Interior,	)	
	)	REPLY TO
PETER C. KING, individually, and as	)	COUNTERCLAIM
Administrator of the Southwestern Power Administration,	)	
	)	
JOHN N. NASSIKAS,	)	
LAWRENCE J. O'CONNOR, JR.,	)	
JOHN A. CARVER, JR.,	)	
ALBERT B. BROOKE, JR., and	)	
PINKNEY CALVIN WALKER, individually and	)	
as members of the Federal Power Commission,	)	
	)	
Defendants,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Intervening Defendant.	)	

REPLY OF PLAINTIFF TO THE COUNTERCLAIM
OF THE UNITED STATES

FIRST DEFENSE TO THE COUNTERCLAIM

---The counterclaim of defendant, the United States of America, fails to state a claim upon which relief can be granted.

SECOND DEFENSE TO THE COUNTERCLAIM

1. The counterclaim is in violation of the SPA-Associated contract, referred to in the counterclaim, in the following respects:

A. Defendants Rogers C. B. Morton, individually and as Secretary of the Interior, and Peter C. King, individually and as Administrator of the Southwestern Power Administration (hereinafter "SPA"), in violation of Section 5 of the Flood Control Act of 1944 (16 U. S. C. §825s), and in violation of the contract between the United States and the plaintiff made pursuant to that Act (the SPA-Associated contract of 1962, referred to in the counterclaim) have attempted, by means of a charge of \$2,647,100 annually, for which the counterclaim is demanded, to cancel credits in exactly that amount which the United States concedes to be due to the plaintiff under said contract, as consideration for the performance by the plaintiff of services to the United States stated therein, while continuing to demand of, and receive from, the plaintiff the performance of those services.

B. The services so required to be rendered by plaintiff are the transmission of power and energy at plaintiff's expense, from two Government-owned power plants located on the White River near the Arkansas-Missouri boundary, over transmission facilities furnished by the plaintiff, to specified distant points of delivery in central and northern Missouri (50 to 300 miles from said dams) where such power and energy is delivered by plaintiff, for the Government's account, to customers of SPA: that is, to three private power companies, to the United States Bureau of Reclamation's Missouri Basin Power System in northwest Missouri, to six municipalities, and to six Generation and Transmission Cooperatives, which in turn redeliver such power and energy to some forty-three distribution cooperatives. Said

distribution cooperatives serve some 300,000 rural customers and thirty-five municipalities in 113 of the 114 counties in Missouri, and 7 counties in Iowa. SPA obtained these services by contract with Associated pursuant to a determination by the Secretary of the Interior that he was under a statutory obligation to deliver power and energy to said customers at their load centers, specified in the SPA-Associated contract.

C. Said contract also requires plaintiff to furnish, from other sources power and energy in quantities sufficient to replace the losses of power and energy in transmission from said Government-owned power plants to SPA's customers at said distant points of delivery.

D. For the foregoing services, the United States, in said contract, agrees to pay the plaintiff \$2,647,100 annually, in the form of credits against amounts due from plaintiff to the United States for power and energy.

E. Defendants Morton and King, while purporting to continue to honor the contractual obligation of the United States to pay or credit plaintiff said \$2,647,100 annually for said services, have attempted nevertheless to nullify said credit, lawfully due, by imposing a new exaction, denominated by them a "Transmission Service Charge," upon plaintiff in exactly the same amount, \$2,647,100, which would recapture the whole amount so credited. This is done in the guise of a "rate revision" of SPA's Rate Schedule P-2 annexed to said contract between SPA and plaintiff, although in fact the rates stated in that schedule, on which the new "Transmission Service Charge" is superimposed, are not changed at all in the Revised Schedule P-2.

F. To implement this "Transmission Service Charge," which neither the statute nor the contract authorizes, defendants Morton and King, in the purported revision of the P-2 rate schedule, have, unilaterally, substituted new points of delivery (closer to the dams) for those stated in said contract,

and have attempted to impose on the plaintiff this "Transmission Service Charge" for the transmission of said power and energy from these new points of delivery to those stated in the contract, even though (i) such transmission is in fact effected over plaintiff's own lines, not those of the United States, (ii) all of the services for which the charge is made are furnished by the plaintiff, not the United States, and (iii) such services are furnished at plaintiff's expense, not that of the United States.

G. The effect, if said counterclaim is collected from plaintiff, will be to continue to require plaintiff to perform said transmission services, to the distant points of delivery specified in plaintiff's contract with the United States, and require plaintiff, at its own expense, to supply power and energy for replacement of losses in transmission from the Government's power plants to those distant points, but to do so hereafter without compensation, inasmuch as the unlawful exaction of the transmission charge would exactly offset the credit of \$2,647,100 which the United States concedes to be due from the United States to the plaintiff for those services.

2. For greater particularity, plaintiff refers to, and incorporates herein by reference as though here fully stated, the allegations contained in paragraphs 2 to 24, inclusive, of plaintiff's amended complaint in this action.

THIRD DEFENSE TO THE COUNTERCLAIM

1. SPA, and therefore the United States, is estopped from nullifying the contractual credit of \$2,647,100 annually, due from SPA to Associated by collection of a counterclaim which recaptures the amount of said credit, in that Associated and its members, in reliance on SPA's agreement to pay said credits, have changed their position to their detriment in the following respects:

A. Associated's members incurred debts of many millions of dollars to the United States Rural Electrification Administration (REA), for the construction of transmission facilities (hereinafter the "Original 161 kv Facilities") at SPA's request, to make possible the delivery of power and energy from the Government's Bull Shoals and Table Rock power plants, and made such facilities available to SPA, in reliance upon SPA's promise to pay or credit those cooperatives annually stated amounts required to meet the annual instalments of principal and interest due REA upon such loans, and to pay costs of operation and maintenance of such facilities so made available to SPA

B. The SPA-Associated Contract of 1962 required Associated to (i) continue to make available to SPA the Original 161 kv Facilities, and (ii) to construct and make available to SPA certain additional transmission facilities (hereinafter the "Added 161 kv Facilities") for the purpose, among others, of enabling SPA to interconnect its Bull Shoals and Table Rock power plants with the United States Bureau of Reclamation's Missouri Valley power system. By concurrent agreements between said members of Associated and SPA, and said members and REA, said members agreed to borrow amounts from REA to construct said Added 161 kv Facilities, and they did so borrow money and construct said Added 161 kv Facilities and make the same available, through Associated, to SPA, all in reliance upon SPA's promise to credit annually to Associated amounts adequate to pay annual instalments of principal and interest due REA on the Original 161 kv Facilities and the Added 161 kv Facilities, and costs of operation and maintenance of both. Said amounts would be recaptured in their entirety by the counterclaim.

C. SPA has accepted, and continues to accept, on behalf of the United States, the benefits of the debts and expenditures incurred by Associated and

its members to perform the SPA-Associated contract, and the use of the facilities constructed with the proceeds of said indebtedness.

D. Associated has at all times performed its obligations in the SPA-Associated contract in all respects.

2. For greater particularity, reference is made to paragraphs 8 to 20, inclusive, and 33 to 35, inclusive, of the amended complaint, hereby incorporated by reference in this third defense to the counterclaim as though here stated at length.

FOURTH DEFENSE TO THE COUNTERCLAIM

1. The counterclaim is founded upon an act of the Secretary of the Interior which was in excess of his statutory authority, and void.

2. Section 5 of the Flood Control Act of 1944 restricts the Secretary of the Interior's power of revision of contractual terms and obligations to the revision of rates and charges owed to the United States. The exaction demanded of plaintiff by defendant Morton, and in the counterclaim, is not a revision of any rate or charge owed by the plaintiff to the United States, but a unilateral revision of a contractual credit owed by the United States to plaintiff for services rendered by plaintiff to the United States, and was and is without statutory authority. This is accomplished by the unilateral substitution of new points of delivery (closer to SPA's generating plants) of power and energy from SPA to Associated for those stated in the SPA-Associated contract (at customers' load centers), and the unilateral amendment of the SPA-Associated contract to exact from Associated the amount of the counterclaim, \$2,647,100 annually, for transmission from the newly established delivery points to the agreed delivery points, notwithstanding that all such transmission is effected by Associated over its own system.

Defendant Morton has no statutory or contractual authority to change the points of delivery specified in the SPA-Associated contract, and defendant members of the Federal Power Commission are without statutory authority to validate such a change in the SPA-Associated contract.

3. The counterclaim is for phantom services never in fact rendered by the United States, and is in such an odd amount (\$2,647,100) that the only explanation for the charge is that it exactly equals and nullifies the amount of the credit stipulated in the SPA-Associated contract.

4. For greater particularity, reference is made to paragraphs 2 to 24, inclusive, and 28(2)(iv) of the amended complaint, hereby incorporated by reference in this fourth defense to the counterclaim as though here stated at length.

FIFTH DEFENSE TO THE COUNTERCLAIM

1. The counterclaim is in violation of the statutory requirement of Section 5 of the Flood Control Act of 1944 that "[r]ate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years." The capital investment so required to be allocated to power includes moneys loaned, at SPA's request, by the United States Rural Electrification Administration (REA) to members of Associated for the construction of transmission lines for use by SPA, pursuant to agreements between said members and SPA, and between said members and REA, whereby SPA agreed to pay said members (and subsequently, in the SPA-Associated contract, agreed to pay Associated in the form of credits) amounts required for the amortization of the amounts so borrowed, and, in return, said members (and

subsequently Associated, in the SPA-Associated contract) agreed to pay SPA for power and energy delivered by SPA at their load centers through the use of said facilities so made available to SPA by Associated. The counterclaim, if collected, would have the effect of requiring said customers to pay a rate so calculated as to provide SPA moneys adequate to amortize the capital investment allocated to power over a reasonable period of years, as the statute requires, but to excuse SPA from the application of the moneys so collected to the amortization of the capital investment in transmission lines made by REA and said members of Associated in reliance upon SPA's promise to pay Associated credits in the amounts required to amortize said REA loans. The United States has not offered to cancel that indebtedness owed REA. Associated and the Federated Cooperatives would thus remain liable to pay to the United States, through REA, the debts incurred by them at SPA's request to construct facilities made available to SPA, but would be deprived of the amounts that SPA agreed to provide for such debt service, in the form of credits to Associated. Such deprivation would be effectuated by means of collection of a charge in the exact amount of the agreed credits, the amount of the counterclaim having no other explanation or rationalization.

2. For greater particularity, reference is made to paragraphs 2 to 24, inclusive, and 28(2)(i) of the amended complaint, hereby incorporated by reference in this fifth defense to the counterclaim as though here stated at length.

SIXTH DEFENSE TO THE COUNTERCLAIM

1. The counterclaim is in violation of the statutory requirement of Section 5 of the Flood Control Act of 1944 that "[p]reference in the sale of such power and energy shall be given to public bodies and cooperatives."

Plaintiff is a cooperative, and, as such, is entitled to said preference. Performance by SPA of that statutory mandate requires not merely that preference be given to public bodies and cooperatives in the allocation of power and energy, but also that such power and energy be made available to public bodies and cooperatives at prices and on terms at least as favorable as those at which like services are provided by SPA to privately owned (i.e., nonpreference) customers. Rate Schedule P-2, Revised, imposes a "Transmission Service Charge" of \$2,647,100 annually on Associated, but does not impose any such charge on three privately owned companies in Missouri to which Associated, by the terms of the SPA-Associated contract, is obligated to, and does, transmit power and energy for the account of SPA. The imposition of the so-called "Transmission Service Charge" on Associated, and the exemption of three privately owned Missouri Companies therefrom in the Secretary's P-2 Rate Schedule (Revised), would result in the exaction from preference customers (Associated, the six Federated G&T Cooperatives comprising Associated, the 43 distribution cooperatives served by said Federated Cooperatives, and a substantial number of municipalities served by Associated and said G&T Distribution Cooperatives) of the cost incurred by Associated in transmitting power and energy for SPA from the Government's power dams to the Missouri Companies, which are SPA's customers. These include the following costs of service for which the SPA-Associated contract promises reimbursement from SPA to Associated in the amount of \$2,647,100 annually, but all of which would be recaptured by imposition of a new "Transmission Service Charge" on Associated in the same amount:

A. Transmission of power and energy from SPA generating plants to SPA's private company customers (herein "the Missouri Companies") at

seven specified points of delivery on Associated's system;

B. Furnishing of power and energy to replace losses in transmission from SPA's generating plants to SPA's customers, including the Missouri Companies;

C. Furnishing of standby power, from generating plants not owned by SPA, to supply power and energy to SPA's customers, including the Missouri Companies, during such times as SPA's generating plants may be shut down by reason of emergencies, or for maintenance, together with power and energy in such amounts as may be necessary to offset losses in transmission of such power and energy from outside sources to SPA's customers, including the Missouri Companies.

2. The denial of compensation to Associated is proposed to be effected by the counterclaim, in the exact amount of the contractual credit agreed to be paid by SPA to reimburse Associated for the debt service and expenses of operation and maintenance incurred by Associated and its members in the construction, operation and maintenance of such facilities. The result is a discriminatory increase (\$2,647,100), exceeding 40 percent, in the cost of power and energy supplied by SPA to Associated, contrasted with no increase whatsoever in the cost of power and energy supplied by SPA to the Missouri Companies over Associated's transmission system, and without reimbursement to Associated either from those companies or SPA for such use of Associated's transmission system for the benefit of SPA's non-preference customers. Such discrimination against public bodies and co-operatives, and in favor of privately owned power companies, violates the statutory mandate that "preference in the sale of such power and energy shall be given to public bodies and cooperatives."

3. For greater particularity, reference is made to paragraphs 2 to 24, inclusive, and 28(2)(i) of the complaint, hereby incorporated by reference in this sixth defense to the counterclaim as though here stated at length.

SEVENTH DEFENSE TO THE COUNTERCLAIM

1. The acts of defendants Morton and King in promulgating "Rate Schedule P-2, Revised," implementing the "Transmission Service Charge," for which the counterclaim is demanded, and of the defendant members of the Federal Power Commission in confirming the same, are invalid and unlawful, being (i) arbitrary, capricious, without observance of procedure required by laws and unsupported by substantial, or any evidence, (ii) unsupported by findings of fact and conclusions of law; (iii) implemented without the benefit of an independent cost of service study, determining the merits of the Secretary's proposal, by the Federal Power Commission; and (iv) performed without affording a hearing to Associated either in the Department of the Interior or the Federal Power Commission.

2. For greater particularity, reference is made to paragraphs 28 and 29 of the amended complaint, hereby incorporated by reference in this seventh defense to the counterclaim as though here stated at length.

EIGHTH DEFENSE TO THE COUNTERCLAIM

Responding further to the counterclaimant's allegations, plaintiff replies as follows:

- (1) Plaintiff admits the allegations in paragraph 1 of the counterclaim.
- (2) Plaintiff denies that payments are due from plaintiff to defendant under a contract or otherwise, but admits the other allegations of paragraph 2 of the counterclaim.

(3) Plaintiff admits the allegations in paragraph 3 of the counterclaim.

(4) Plaintiff admits the allegations in paragraph 4 of the counterclaim.

(5) Plaintiff admits the allegations in paragraph 5 of the counterclaim.

(6) Plaintiff admits the allegations in paragraph 6 of the counterclaim.

(7) Plaintiff admits that the contract referred to provided, among other things, for the purchase and sale of power and energy, but alleges that it also provides for additional services by plaintiff, and compensation by the United States to plaintiff therefor, which compensation would be exactly nullified by the imposition of the additional charges stated in the counterclaim.

(8) Plaintiff admits that paragraph 8 of the counterclaim states some but not all, of the provisions of Section 5 of the Flood Control Act of 1944, to which plaintiff refers for greater accuracy.

(9) Plaintiff denies each and every allegation of paragraph 9 of the counterclaim, and alleges that final jurisdiction to review rates proposed by the Secretary is vested in the courts of the United States, and alleges that the additional charges demanded in the counterclaim are not rates for power and energy, but amounts required to offset and nullify contractual obligations of the United States to plaintiff for services performed by plaintiff, not by the United States.

(10) Plaintiff denies each and every allegation in paragraph 10 of the counterclaim.

(11) Plaintiff denies the allegations in paragraph 11 of the counterclaim, for the reason that the exaction demanded in the counterclaim is not a rate increase. The Secretary has proposed, and the Commission has confirmed, the continuation of the rates stated in plaintiff's contract with the United States, that is, \$1.20 per kilowatt per month of power, and 2 mills per kilowatt hour of energy. Plaintiff has paid and is paying these rates.

The counterclaim is not for the amount of these rates, but for an additional exaction to nullify credits in the amount of \$2,647,100 annually due from the United States to plaintiff for transmission services performed by the plaintiff, not by the United States.

(12) Plaintiff admits the allegations in paragraph 12 of the counterclaim.

(13) Plaintiff admits the allegations in paragraph 13 of the counterclaim.

(14) Plaintiff admits that the Commission has approved temporary extensions of the P-2 rate, but denies all other allegations in paragraph 14 of the counterclaim.

(15) Plaintiff denies each and every allegation in paragraph 15 of the counterclaim.

(16) Plaintiff denies each and every allegation in paragraph 16 of the counterclaim.

(17) Plaintiff denies each and every allegation in paragraph 17 of the counterclaim.

(18) Plaintiff admits that the additional exaction proposed by the Secretary is \$2,647,100 annually, payable in monthly instalments of \$220,600, but denies that the said exaction is for transmission costs, and alleges that it is an amount so calculated as to exactly offset and cancel a contractual obligation of the United States to plaintiff.

(19) Plaintiff admits that the Commission purported to approve the action proposed by the Secretary, but alleges that the Commission had no jurisdiction to validate the Secretary's unilateral cancellation of the contractual obligation of the United States to compensate plaintiff for plaintiff's services. Plaintiff admits the issuance of the cited orders, but denies the

legal effect attributed to them in the counterclaim, and alleges further that said orders were issued without affording due process to plaintiff, and are void.

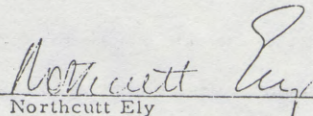
(20) Answering paragraph 20, plaintiff admits that the United States has demanded payment of \$220,600 per month from plaintiff, commencing June 1, 1970, but denies that said amounts, or any amounts, are due and owing from plaintiff to the United States.

(21) Answering paragraph 21, plaintiff admits that it has refused to pay said amounts, alleges that they are unlawful exactions, and denies all other allegations in said paragraph.

(22) Answering paragraph 22, plaintiff admits that it continues to receive power and energy under the SPA-Associated contract, denies that it has paid only part of the amount due therefor, alleges that it has paid in full all amounts lawfully due, admits that it refuses to pay the amount attributable to the so-called "Transmission Service Charge," and denies that any amount whatever is due or payable to the United States, for any reason whatsoever.

(23) Plaintiff denies each and every allegation in paragraph 23 of the counterclaim.

Wherefore, plaintiff prays that the counterclaim be dismissed.

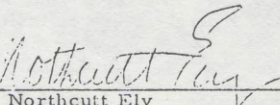


Northcutt Ely
Attorney for Plaintiff
Associated Electric Cooperative, Inc.
1200 Tower Building
Washington, D. C. 20005

August 16, 1971

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August 1971, I mailed a copy of the foregoing pleading to each of the following: (1) Tracy J. Whitaker, Esquire, Attorney for defendants, Rogers C. B. Morton, Peter C. King, and intervenor, the United States of America, Civil Division, Department of Justice, Washington, D. C. 20005; (2) James R. Tourtellotte, Esquire, Attorney for defendants, members of the Federal Power Commission, c/o Federal Power Commission, 441 G Street, N. W., Washington, D. C. 20426.



Northcutt Ely
Attorney for Associated
Electric Cooperative, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

ROGERS C. B. MORTON, individually, and
as Secretary of the Interior,

PETER C. KING, individually, and as
Administrator of the Southwestern
Power Administration,

Civil Action

No. 2410-70

JOHN H. MASSIMAS.

LAWRENCE J. O'CONNOR, JR.,

JOHN A. CARVER, JR.,

ALBERT B. BROOKE, JR., and

PURSEY CALVIN WALKER, individually and
as members of the Federal Power Commission,

Defendants,

UNITED STATES OF AMERICA,

Intervening Defendant.

AMENDED ANSWER OF THE INTERVENING DEFENDANT
AND ORIGINAL ANSWER OF DEFENDANTS #1 AND #2

Come now the intervening defendant (the United States of America),
defendant #1 (Rogers C. B. Morton, individually, and as Secretary of the
Interior), and defendant #2 (Peter C. King, individually, and as Adminis-
trator of the Southwestern Power Administration), by their undersigned
counsel, and respond as follows to the amended complaint filed by the
plaintiff herein:

FIRST DEFENSE

The amended complaint fails to state a claim upon which relief can
be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of plaintiff's
suit.

- 2 -

THIRD DEFENSE

The United States of America has not waived its sovereign immunity with respect to the relief sought by the plaintiff and has not consented to this suit. Plaintiff cannot evade this jurisdictional defense by the device of suing Government officers individually.

FOURTH DEFENSE

Neither injunctive nor declaratory relief can be granted directly against the United States of America. Such relief also cannot be granted against the Government officers named herein, since they have at all times acted within the scope of their authority.

FIFTH DEFENSE

Plaintiff improperly seeks to circumvent existing restrictions on suits against the United States involving its contracts by seeking injunctive and declaratory relief against its officers.

SIXTH DEFENSE

The Court lacks jurisdiction over the persons of defendants #1 and #2, in that they are Government officers who have at all times herein acted lawfully and within the scope of their authority and who accordingly are not personally liable to the plaintiff.

SEVENTH DEFENSE

By agreeing to the SPA-Associated contract, which, among other things, permits the Secretary, subject to the approval of the Federal Power Commission, to increase the rates in the P-2 Rate Schedule or in any superseding rate schedule, plaintiff is estopped to rely upon prior contracts between SPA and the individual cooperatives, upon alleged Secretarial determinations or plans, or upon alleged approvals by the Federal Power Commission of Secretarial determinations or plans.

EIGHTH DEFENSE

The provisions of the SPA-Associated contract purporting to obligate SPA to credit or pay plaintiff a stated amount each year for the term of the contract, including the sum of \$2,647,100 for supposed transmission

- 3 -

services, as an offset to the charge for Federal power and energy sold to plaintiff under the contract, without confirmation or approval of such annual offset by the Federal Power Commission, are invalid because such annual offset is an integral component of the rate for the sale of such power that is not made subject to the confirmation and approval of the Federal Power Commission within the meaning and intent of Section 5 of the Flood Control Act of 1944; and therefore such contract provisions are not operable to prevent the Secretary from adopting, and the Commission from approving, the Rate Schedule P-2 (Revised) and Attachment - 1 thereto.

NINTH DEFENSE

The provisions of the SPA-Associated contract purporting to obligate SPA to credit or pay plaintiff a stated amount each year for the term of the contract, including the sum of \$2,647,100 for supposed transmission services, as an offset to the charge for Federal power and energy sold to plaintiff under the contract, without provision for equitable adjustment of the amount of such annual offset at least every five years, are invalid because such annual offset is an integral component of the rate for the sale of such power that is not made subject to equitable adjustment at least every five years within the meaning and intent of Section 5 of the Flood Control Act of 1944; and therefore such contract provisions are not operable to prevent the Secretary from adopting, and the Federal Power Commission from approving, the Rate Schedule P-2 (Revised) and Attachment - 1 thereto.

TENTH DEFENSE

The provisions of the SPA-Associated contract purporting to obligate SPA to credit or pay plaintiff a stated amount each year for the term of the contract, including the sum of \$2,647,100 for supposed transmission services, as an offset to the charge for Federal power and energy sold to plaintiff under the contract, are invalid because such annual offset is an integral component of the rate for the sale of such power that was

- 4 -

not drawn having regard to the recovery of the costs of producing and transmitting Federal power and energy within a reasonable period of years within the meaning and intent of Section 5 of the Flood Control Act of 1944; and therefore such contract provisions are not operable to prevent the Secretary from adopting, and the Federal Power Commission from approving, the Rate Schedule P-2 (Revised) and Attachment - 1 thereto.

ELEVENTH DEFENSE

The provisions of the SPA-Associated contract purporting to obligate SPA to credit or pay plaintiff a stated amount each year for the term of the contract as an offset to the charge for Federal power and energy sold to plaintiff under the contract are invalid because such annual offset is an integral component of the rates for the sale of such power that is not consistent with sound business principles within the meaning and intent of Section 5 of the Flood Control Act of 1944, in that the said credits are for alleged services to the United States that are fictitious, that have no value to the Government, or that exceed the reasonable value to the Government and the reasonable costs to the plaintiff and to the Federated Cooperatives; and therefore such contract provisions are not operable to prevent the Secretary from adopting, and the Federal Power Commission from approving the Rate Schedule P-2 (Revised) and Attachment - 1 thereto.

TWELFTH DEFENSE

The provisions of the SPA-Associated contract purporting to obligate SPA to credit or pay plaintiff a stated amount each year for the terms of the contract, including the sum of \$2,647,100.00 for supposed transmission services, as an offset to the charge for Federal power and energy sold to plaintiff under the contract, are invalid because they obligate the United States to acquire and pay for transmission capacity which is not necessary to make Federal power available for sale on fair and reasonable terms to facilities owned by plaintiff and others; and therefore, such contract provisions are not operable to prevent the Secretary from adopting, and

the Federal Power Commission from approving, the Rate Schedule P-2 (Revised) and Attachment - 1 thereto.

THIRTEENTH DEFENSE

Further responding to the affirmative allegations of plaintiff's amended complaint, the intervening defendant and defendants #1 and #2 answer as follows:

1. They admit that this action arises under Section 5 of the Flood Control Act of 1944, as amended, 16 U.S.C. 825s, and that the matter in controversy exceeds the sum or value of \$10,000, but they otherwise deny the allegations of paragraph 1 of the amended complaint.
2. They admit the allegations of paragraph 2.
3. They admit the allegations of paragraph 3.
4. They deny the allegations of paragraph 4.
5. They admit the allegations of the first two sentences of paragraph 5 and deny the allegations of the third sentence thereof.
6. They admit the allegations of paragraph 6.
7. They admit the allegations of paragraph 7.
8. They deny the allegations of paragraph 8.
9. They admit that certain contracts were entered into in 1949-1951 generally as described in paragraph 9, but they otherwise deny the allegations thereof.
10. They admit that individual cooperatives constructed certain steam plants and transmission facilities in Missouri, but they otherwise deny the allegations of paragraph 10.
11. They admit that certain contracts between SPA and some of the individual cooperatives obligated SPA to pay certain costs for the amortization, operation, and maintenance of certain steam plants and transmission facilities constructed by such cooperatives in Missouri and to provide firm power and energy at stated rates, but they otherwise deny the allegations of paragraph 11.

12. They admit that a proposed contract, referred to as the "December 1960 Draft", was prepared by the Administrator of SPA and the Federated Cooperatives and that the letter of April 20, 1961, attached to the amended complaint as Appendix E, describes the basis for the negotiation of the substitute SPA-Associated contract that eventually was executed, but they otherwise deny the allegations of paragraph 12.

13. They deny the allegations of paragraph 13.

14. They admit that on March 28, 1962, the Administrator of SPA and the parties executed the SPA-Associated contract, the SPA-Companies contract, and the SPA-Federated Cooperatives contract, and that contracts between Associated and the Companies and between Associated and the individual cooperatives were executed at the same time, but they otherwise deny the allegations of paragraph 14.

15. They deny the allegations of paragraph 15.

16. They deny the allegations of paragraph 16.

17. They deny the allegations of paragraph 17.

18. They deny the allegations of paragraph 18.

19. They admit that plaintiff agreed in the SPA-Associated contract to purchase from SPA 288,000 kilowatts of power and varying amounts of energy and to pay therefor in accordance with Rate Schedule P-2, or any superseding rate schedule, less the credits; they further admit that Rate Schedule P-2 contains provisions as described in subparagraph (2) of paragraph 19 of the amended complaint and as quoted in subparagraphs (3) and (4) thereof (except that the first word "peaking" should be "hydro"); but they otherwise deny the allegations of paragraph 19.

20. (1) They admit that worksheets prepared and adopted by the parties in connection with the drafting and negotiation of the SPA-Associated contract allocated the annual credit, which the contract provided as an offset to the charge to plaintiff for Federal power and energy purchased by it, generally as follows:

- 7 -

(A) For transmission services:

For use of original 161-kv transmission facilities	\$1,099,000
For use of added 161-kv facilities	515,100
For transmission capacity losses	777,000
For transmission energy losses	<u>256,000</u>
Subtotal	\$2,647,100

(B) For other purposes:

For reserve generation	1,152,000
For suspension of the contracts of SPA with N.W. and Central relating to steam-generating plants	493,000
For operation and maintenance of isolated facilities of SPA	85,100
For surplus transmission capacity to certain delivery points serving SPA's municipal customers	<u>278,000</u>
Subtotal	\$2,008,000
GRAND TOTAL	\$4,655,100

but otherwise deny the allegations of subparagraph (1) of paragraph 20.

(2) They admit that subsection 1(c) of Article V of the SPA-Associated contract states that it is the intention of the parties that the annual credit to plaintiff in the full amount stated in the contract shall continue to be made until termination of the contract except for a minor adjustment no earlier than June 1, 1997 on the basis set forth in said subsection, but otherwise deny the allegations of subparagraph (2) of paragraph 20.

(3) They admit the allegations of subparagraph (3) of paragraph 20.

(4) They admit that subparagraph (4) of paragraph 20 is generally correct although it contains minor errors in dollar amounts and in phraseology.

- 8 - 8

21. They deny the allegations of paragraph 21.

22. They admit that on January 30, 1970, the Secretary of the Interior filed with the Federal Power Commission a document entitled "Power Systems Average Rate and Repayment Study" which included, among other things, the Rate Schedule P-2 (Revised) and Attachment - 1 thereto, and requested Commission approval of said rate and repayment study and said rate schedule and attachment, but they otherwise deny the allegations of paragraph 22.

23. They admit the allegations of subparagraph (1) of paragraph 23 of the amended complaint and deny the allegations of subparagraphs (2), (3) and (4) thereof.

24. They deny the allegations of paragraph 24.

25. They deny that the Federal Power Commission did not make an independent investigation of its own, but they otherwise admit the allegations of paragraph 25.

26. They admit the allegations of paragraph 26.

27. They admit the allegations of paragraph 27.

28. They deny the allegations of paragraph 28.

29. They deny the allegations of paragraph 29.

30. They deny the allegations of paragraph 30.

31. They deny that plaintiff is entitled to any relief sought in paragraph 36 of the amended complaint, as referred to in paragraph 31 thereof.

32. They admit the incorporation of allegations by paragraph 32 of the amended complaint but deny those allegations except as heretofore admitted.

33. They deny the allegations of paragraph 33.

34. They deny the allegations of paragraph 34.

35. They deny the allegations of paragraph 35.

36. They deny that plaintiff is entitled to any relief sought in paragraph 36.

- 10 - 9

COUNTERCLAIM

For its counterclaim against the plaintiff, the intervening defendant United States of America as counterclaimant alleges:

1. This Court has independent jurisdiction of this counterclaim under the provisions of 28 U.S.C. 1345, since the counterclaimant is the United States of America. The amount in controversy exceeds \$50,000.

2. This counterclaim seeks to recover payments due under a contract. The counterclaimant also seeks a declaratory judgment, pursuant to 28 U.S.C. 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

3. The plaintiff, Associated Electric Cooperative, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and has its principal office and place of business at 2814 South Golden Avenue, Springfield, Missouri.

4. The plaintiff also constitutes a federation whose members are the Central Electric Power Cooperative, Jefferson City, Missouri; the N. W. Electric Power Cooperative, Inc., Cameron, Missouri; the M&A Electric Power Cooperative, Poplar Bluff, Missouri; the Northeast Missouri Electric Power Cooperative, Palmyra, Missouri; The Sho-Me Power Corporation, Marshfield, Missouri; and the K&M Electric Cooperative, Inc., Vinita, Oklahoma. Central, N. W., M&A and Northeast were all organized and now exist as Generation and Transmission Cooperative corporations ("G&T's") under the laws of the State of Missouri. Sho-Me was organized and now exists as a corporation under the laws of the State of Missouri, but functions in the like manner as a G&T. K&M was organized and now exists as a G&T under the laws of the State of Oklahoma. Plaintiff furnishes and delivers electric power and energy to its members [hereinafter referred to as the "G&T's"].

5. On July 25, 1962, the Secretary of the Interior (hereinafter the "Secretary") approved Contract Number 14-02-0001-1002 (hereinafter referred

- 11 - 10

to as the "SPA-Associated contract") between the United States of America, acting through the Secretary and represented by the Administrator of the Southwestern Power Administration (hereinafter referred to as "SPA"), and the plaintiff. This written contract, which was entered into by counterclaimant and plaintiff for a valuable consideration, provided, among other things, that it would become operative on the first day of the first month commencing after such Secretarial approval, to wit, August 1, 1962. The initial term of the contract as stated therein runs until midnight, May 31, 2000, a period of approximately 38 years.

6. SPA is an agency within the Department of the Interior, headed by an Administrator to whom has been delegated, subject to the supervision of the Secretary, the authority conferred upon the Secretary by Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, for the disposition of surplus power and energy generated at various reservoir projects under the control of the Department of the Army in the States of Missouri, Arkansas, Oklahoma and Texas. The marketing area of SPA includes the aforesaid states and Kansas and Louisiana.

7. Pursuant to the SPA-Associated contract, SPA agreed to sell and the plaintiff agreed to buy large quantities of federal hydroelectric power and energy. The contract provides that plaintiff will make payment for such power and energy pursuant to the rates set forth in Rate Schedule P-2 or in any superseding rate schedule; and that plaintiff will be granted an offsetting credit against these payments in an amount initially of \$4,140,000 per year, increasing upon the occurrence of certain conditions stated therein, as subsequently amended, to the amount of \$4,655,100 for fiscal year 1968 and most of fiscal year 1969, and \$4,645,404 for fiscal year 1970 and subsequent years.

8. The authority of the Secretary to enter into the SPA-Associated contract on behalf of the United States derived from the said Section 5 of the Flood Control Act of 1944, under which the Congress (a) ordered

- 12 - 11

federal hydroelectric power delivered to the Secretary (b) for disposal by him through sale to local utilities like the defendant and others (c) at the lowest possible prices to consumers consistent with sound business principles, and (d) subject to the duty to recover for the United States its costs of production and transmission, including amortization of the capital investment allocated to power over a reasonable period of years.

9. Sole jurisdiction to review the rates proposed by the Secretary to be charged the plaintiff was and is conferred by the statute on the Federal Power Commission (hereinafter referred to as the "Commission"), which must confirm and approve rate charges before they become effective.

10. The power of the Secretary to increase the rates charged the plaintiff under the SPA-Associated contract to carry out the statutory purposes is inherent in the authorizing statute and is expressly recognized and retained in Art. III, Sec. 1(b) of the contract, and any change in the rates charged plaintiff would become effective and binding on the plaintiff upon confirmation and approval by the Commission.

11. Pursuant to the SPA-Associated contract, if the plaintiff did not wish to pay any such rate increase it retained the right to terminate such contract with proper notice (Art. III, Sec. 1(e)).

12. By the terms of a companion contract between SPA and the G&T's (see also item (5) in Article I of the SPA-Associated contract), any termination of the SPA-Associated contract would automatically reinstate certain prior contracts between SPA and each of the G&T's.

13. In 1962 the Commission approved the original proposal of the Secretary for the use of Rate Schedule P-2 to be applied to the SPA-Associated contract for a period of five years to June 1, 1967.

14. Since 1965, the Commission has approved only temporary extensions of Rate Schedule P-2, as applicable to the plaintiff, because it determined that SPA was not meeting its Congressional mandate to recover costs through its existing costs-revenues structure. Further, the Commission singled out

- 13 - 12

the substantial amounts being credited to plaintiff under the SPA-Associated contract as a primary cause of that failure.

15. In 1968 the Commission again singled out the SPA-Associated contract as a subject of concern and ordered the Secretary to review SPA's operations for the purpose of modifying existing contract provisions so that application of the rate schedules would actually recover costs in conformity with the governing statute.

16. In 1970 the Secretary, in the proper exercise of his statutory authority and responsibility, adopted a modification of Rate Schedule P-2, denominated Rate Schedule P-2 (Revised), which included provision for a transmission service charge covering costs incurred by SPA in transmitting power to individual customers beyond the SPA-owned high-voltage transmission grid.

17. Such a charge is applicable to the plaintiff because SPA incurs costs under the SPA-Associated contract in the form of "credits" to the plaintiff for transmission of federal power and energy to the plaintiff beyond the SPA high-voltage grid.

18. The annual additional charge to the plaintiff for transmission costs under the new Rate Schedule P-2 (Revised), as shown in Attachment - 1 to said schedule, was (and is) \$2,647,100.00, payable in monthly installments of \$220,600.00.

19. The Commission reviewed the Secretary's action and recognized it as the Secretary's effort to increase the net revenues to SPA under the SPA-Associated contract. By order issued on May 28, 1970, the Commission confirmed Rate Schedule P-2 (Revised) and Attachment - 1 as consistent with the statutory standards, and approved their application for one year, that is, from June 1, 1970, until May 31, 1971. On March 15, 1971, the Secretary requested extension of Commission confirmation and approval of Rate Schedule P-2 (Revised) and Attachment - 1 for an additional period of three years.

- 14 - 13

20. Commencing in July 1970, and each month thereafter, counterclaimant has duly demanded from the plaintiff payment for the amounts due and owing counterclaimant each month for the transmission service charge under Rate Schedule P-2 (Revised) and Attachment - 1, which took effect on June 1, 1970, together with the other amounts due counterclaimant under the SPA-Associated contract.

21. Plaintiff refused to so pay and has since entirely failed, neglected and refused to pay amounts attributable to the transmission service charge. Plaintiff also failed to exercise its right to terminate the SPA-Associated contract.

22. Plaintiff continues to receive federal power and energy under the SPA-Associated contract but has paid only part of the amount due therefor and refuses to pay that portion attributable to the transmission service charge. As of the end of March 1971 there was due and payable the amount of \$2,426,600.00, representing the transmission service charge for eleven months (June 1970 thru April 1971) at the rate of \$220,600.00 per month.

23. Counterclaimant has duly performed all the conditions of the SPA-Associated contract on its part.

WHEREFORE, the intervening defendant and defendants #1 and #2 pray that the plaintiff's amended complaint and affirmative action be dismissed; and with respect to the counterclaim asserted herein by the intervening defendant, such defendant demands judgment against plaintiff for the sum of \$2,426,600.00, together with any additional monthly installments which may have accrued by the time such judgment is entered, plus interest and costs; and such defendant further requests the Court to declare that plaintiff owes the United States of America the sum of \$220,600.00, attributable to transmission service charges, for each subsequent month that SPA delivers power to the plaintiff under the SPA-Associated contract for so long as Rate Schedule P-2 (Revised) and Attachment - 1 are in effect;

- 28 - 14

and the intervening defendant and defendants #1 and #2 also seek such other and further relief as the Court may deem just and proper.

L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General
Civil Division

Russell Chapin
RUSSELL CHAPIN, Chief
General Claims Section
Civil Division

David V. Seaman
DAVID V. SEAMAN

Tracy J. Whitaker
TRACY J. WHITAKER

Of Counsel:

THOMAS A. FLANNERY
United States Attorney

Attorneys, Civil Division
Department of Justice
Washington, D. C. 20530
Attorneys for the Intervening
Defendant and for Defendants
#1 and #2
Telephone: 739-3364

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of July, 1971, I mailed a copy of the foregoing pleading to each of the following: (1) Northcutt Ely, Esquire, Attorney for Plaintiff, 1200 Tower Building, Washington, D. C. 20005; (2) James R. Tourtellotte, Esquire, Attorney for Defendants #3 (members of the Federal Power Commission), c/o Federal Power Commission, 441 G Street, N. W., Washington, D. C. 20426.

Tracy J. Whitaker
TRACY J. WHITAKER, Attorney
Department of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED ELECTRIC COOPERATIVE, INC.,)
2814 South Golden Avenue, Springfield, Missouri,)

Plaintiff,)

v.)

ROGERS C. B. MORTON, individually, and as)
Secretary of the Interior)
(Department of the Interior, Washington, D.C.),)

PETER C. KING, individually, and as)
Administrator, Southwestern Power Administration,)
(Department of the Interior, Tulsa, Okla.))

JOHN N. NASSIKAS)
LAWRENCE J. O'CONNOR, JR.,)
JOHN A. CARVER, JR.,)
ALBERT B. BROOKE, JR., and)
PINKNEY CALVIN WALKER, individually, and as)
members of the Federal Power Commission)
(441 G Street, N.W., Washington, D.C.),)

Defendants)

Civil Action

No. 2410-70

AMENDED
ANSWER

* AMENDED ANSWER OF THE DEFENDANTS
MEMBERS OF THE FEDERAL POWER COMMISSION

Comes now the defendants, John N. Nassikas, Lawrence J. O'Connor, Jr., John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Calvin Walker, members of the Federal Power Commission, and present the following amended answers to the allegations set forth in plaintiff's amended complaint. The responses are not intended to imply that the Court has jurisdiction over the cause of action asserted by plaintiff and are not in derogation of the pending Motion To Be Dropped As A Party Defendant filed by said defendants. Defendants:

1. Admit that this action arises under Section 5 of the Flood Control Act of 1944, as amended, 16 U.S.C. 825s, and that

-2-

the matter in controversy exceeds the sum or value of \$10,000, but otherwise deny the allegations of paragraph 1 of the amended complaint.

2. Admit paragraph 2 of the amended complaint.

3. Admit paragraph 3 of the amended complaint.

4. Deny paragraph 4 of the amended complaint.

5. Admit the first two sentences of paragraph 5 of the amended complaint but deny the third sentence.

6. Admit paragraph 6 of the amended complaint.

7. Admit paragraph 7 of the amended complaint.

8. Deny paragraph 8 of the amended complaint.

9. Admit that certain contracts were entered into in 1949-1951 generally as described in paragraph 9 of the amended complaint, but otherwise deny the allegations of paragraph 9 of the amended complaint.

10. Admit that individual cooperatives constructed certain steam plants and transmission facilities in Missouri, but otherwise deny the allegations of paragraph 10 of the amended complaint.

11. Admit that certain contracts between SPA and some of the individual cooperatives obligated SPA to pay certain costs for the amortization, operation, and maintenance of certain steam plants and transmission facilities constructed by such cooperatives in Missouri and to provide firm power and energy at stated rates, but otherwise deny the allegations of paragraph 11 of the amended complaint.

-3-

12. Admit that a proposed contract, referred to as "December 1960 Draft", was prepared by the Administrator of SPA and the Federated Cooperatives and that the letter of April 20, 1961, attached to the amended complaint as Exhibit E, describes the basis for the negotiation of the substitute SPA-Associated contract that eventually was executed, but otherwise deny the allegations of paragraph 12 of the amended complaint.

13. Deny paragraph 13 of the amended complaint.

14. Admit that on March 28, 1962, the Administrator of SPA and the parties executed the SPA-Associated contract, the SPA-Companies contract, and the SPA-Federated Cooperatives contract, and that contracts between Associated and the Companies and between Associated and the individual cooperatives were executed at the same time, but otherwise deny the allegations of paragraph 14 of the amended complaint.

15. Deny paragraph 15 of the amended complaint.

16. Deny paragraph 16 of the amended complaint.

17. Deny paragraph 17 of the amended complaint.

18. Deny paragraph 18 of the amended complaint.

19. Admit that plaintiff agreed in the SPA-Associated contract to purchase from SPA 288,000 kilowatts of power and varying amounts of energy and to pay therefore in accordance with Rate Schedule P-2, or any superseding rate schedule, less the credits; further admit that Rate Schedule

P-2 contains provisions as described in subparagraph (2) of paragraph 19 of the amended complaint and as quoted in subparagraphs (3) and (4) thereof (except that the first word "peaking" should be "hydro"); but otherwise deny the allegations of paragraph 19 of the amended complaint.

20. (1) Admit that worksheets prepared and adopted by the parties in connection with the drafting and negotiation of the SPA-Associated contract allocated the annual credit, which the contract provided as an offset to the charge to plaintiff for Federal power and energy purchased by it, generally as set forth in subparagraphs (A) and (B), but otherwise deny the allegations of subparagraph (1) of paragraph 20 of the amended complaint.

(2) Admit that subsection 1(c) of Article V of the SPA-Associated contract states that it is the intention of the parties that the annual credit to plaintiff in the full amount stated in the contract shall continue to be made until termination of the contract except for a minor adjustment no earlier than June 1, 1997 on the basis set forth in said subsection, but otherwise deny the allegations of subparagraph (2) of paragraph 20 of the amended complaint.

(3) Admit subparagraph (3) of paragraph 20 of the amended complaint.

(4) Admit that subparagraph (4) of paragraph 20 of the amended complaint is generally correct although it contains minor errors in dollar amounts and in phraseology.

- 5 -

21. Deny paragraph 21 of the amended complaint.

22. Admit that on January 30, 1970, the Secretary of the Interior filed with the Federal Power Commission a document entitled "Power Systems Average Rate and Repayment Study" which included, among other things, the Rate Schedule P-2 (Revised) and Attachment-1 thereto, and requested Commission approval of said rate and repayment study and said rate schedule and attachment, but otherwise deny the allegations of paragraph 22 of the amended complaint.

23. Admit subparagraph (1) of paragraph 23 of the amended complaint and deny subparagraphs (2), (3) and (4).

24. Deny paragraph 24 of the amended complaint.

25. Deny that the Federal Power Commission did not make an independent investigation of its own, but otherwise admit the allegations of paragraph 25 of the amended complaint.

26. Admit paragraph 26 of the amended complaint.

27. Admit paragraph 27 of the amended complaint.

28. Deny paragraph 28 of the amended complaint..

29. Deny paragraph 29 of the amended complaint..

30. Deny paragraph 30 of the amended complaint.

31. Deny that plaintiff is entitled to any relief sought in paragraph 36 of the amended complaint, as referred to in paragraph 31 thereof.

32. Admit incorporation of allegations by paragraph 32 of the amended complaint, but deny those allegations except as heretofore admitted.

- 6 -

- 33. Deny paragraph 33 of the amended complaint.
- 34. Deny paragraph 34 of the amended complaint.
- 35. Deny paragraph 35 of the amended complaint.
- 36. Deny that plaintiff is entitled to any relief sought in paragraph 36 of the amended complaint.
- 37. Deny each and every allegation in the complaint, not herein admitted, controverted or specifically denied.

FIRST DEFENSE

- 38. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

- 39. The Court lacks jurisdiction over the subject matter of plaintiff's suit.

THIRD DEFENSE

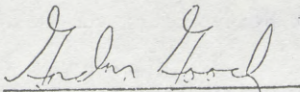
- 40. SPA Rate Schedule P-2 (Revised), and Attachment-1 thereto, superseding Rate Schedule P-2 for application to all SPA customers purchasing peaking power and energy from and under contract with SPA, was a rate schedule within the intent and meaning of Section 5 of the Flood Control Act of 1944 and was approved by the Federal Power Commission in accordance with all applicable statutory procedural requirements in the lawful exercise of powers vested in the Commission by Section 5 of the Flood Control Act of 1944.

WHEREFORE, defendants John N. Nassikas, Lawrence J. O'Connor, Jr., John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Calvin Walker, members of the Federal Power Commission, pray judgment that the complaint and affirma-

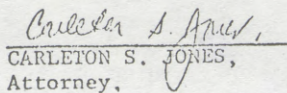
- 7 -

tive action of the plaintiff be dismissed with costs awarded to the defendants.

Dated: August 17, 1971


GORDON GOOCH,
General Counsel,

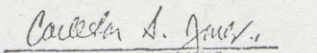

JAMES R. TOURTELLOTTE,
Attorney,


CARLETON S. JONES,
Attorney,

Federal Power Commission
441 G Street, N. W.
Washington, D.C. 20426
Members of the Federal Power
Commission
Telephone (202) 386-6489

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 1971, I mailed a copy of the foregoing pleading to each of the following: (1) Northcutt Ely, Esquire, Attorney for Plaintiff, 1200 Tower Building, Washington, D.C. 20005; (2) Tracy J. Whitaker, Esquire, Attorney for the Intervening Defendant and for Defendants #1 and #2, c/o Civil Division, Department of Justice, Washington, D.C. 20530.


CARLETON S. JONES,
Federal Power Commission

Senator FORD. I have no further questions. Senator Hansen, do you have some questions?

Senator HANSEN. Just some rather general questions, Mr. Chairman. Your concluding statement, Mr. Ahearne, is that—and I read it:

The views represented herein represent the views of the Department of Energy and not necessarily those of the administration.

Now has this policy statement or the statement you made here been cleared with Secretary Schlesinger?

Mr. AHEARNE. Well, I speak for the Secretary. It has been cleared up to the Deputy Secretary. So as far as the Department of Energy is concerned, this is a cleared statement, yes, sir.

Senator HANSEN. What should we infer then as to the policy of the administration or are we privileged to make any inference as to what the administration's policy might be?

Mr. AHEARNE. Senator, I think you're privileged to make any inference. What that type of statement normally means is that there—once one says policy is under review, there are, in this particular case for example, the Justice Department already being involved in litigation, when the final stages of the policy are finally reached it's going to have to be a joint agreement between several agencies of the Government including Energy and Justice for a final policy.

Senator HANSEN. That's because of the unique involvement between two or more agencies of the Federal Government that might possibly be on different sides of an issue. Is that what you're saying here now?

Mr. AHEARNE. They might not be on different sides. But certainly they are involved in the issue. That's the reason, yes, sir.

Senator HANSEN. What would be the position of the administration on an issue that would not be one involving more than one agency of the Federal Government? In that situation would the Secretary speak for the administration?

Mr. AHEARNE. I would think so, but I'm having a little difficulty exactly seeing what the issue is. But in general if it's a narrowly drawn issue limited to one department, then the Secretary of that department speaks for the administration.

Senator HANSEN. I would assume that. Well, let me be more specific then. The Secretary has been participating in negotiations, I understand, that's going on, on the issue of natural gas deregulation. Does the Secretary speak for the administration?

Mr. AHEARNE. Senator, I have nothing to do with those negotiations and I really can't answer that.

Senator HANSEN. I didn't mean to suggest that you had anything to do with it. I just wanted to know what the or—how much latitude or for whom the Secretary may speak. You've chosen in this instance to pronounce that the Secretary does not necessarily speak for the administration here.

Mr. AHEARNE. Yes, I'm sure in this case of what I said. When I move on into the next—those negotiations, that is a complexity that is far beyond me at the moment. I really can't answer that question.

Senator HANSEN. In your opinion, will passage of Senator Eagleton's bill affect the rates paid by Southwestern Power Administration customers other than those in the State of Missouri?

Mr. AHEARNE. It is certainly possible. There has to be a rate change in Southwestern, the regions that I mentioned.

Senator HANSEN. I'm having trouble hearing you.

Mr. AHEARNE. Oh, I'm sorry. As I mentioned, there has to be a rate change in Southwestern because of the fact that they have not really had a rate change since 1957.

Senator HANSEN. Well, have there been other rate changes in other areas that might possibly be affected? I don't know that there are or that other areas would be affected by this. My question is could it affect other areas? Or will it affect other areas?

Mr. AHEARNE. It is certainly possible, but without looking in detail at the results I would imagine since the immediate effect would be to, as I understand it, to reduce revenues by \$2.6 million. There would be an immediate effect as far as the total income, outgo of Southwestern. How that will end up being incorporated, whether it would be through a request for further appropriations or how it would be embedded in the rate structure and whether such an issue has been mentioned, whether the contract would be revised would—all of those things would have to take place before one would be sure what the effect would be.

Senator HANSEN. If I could go back to my first question then, let me ask you this. You have stipulated in this instance that the opinions expressed by you are not necessarily those of the administration. And as a member of the legislative branch of Government, would we be well advised each time to ask the Secretary, if not someone else, but the Secretary if he speaks for the administration or for only the Department? I want some verification to know what I am to believe. You've left me somewhat confused with your answer.

Mr. AHEARNE. Well, Senator, in general our testimony is that last phrase is not included, then that means the individual is representing the administration.

Senator HANSEN. So unless the Secretary would include this sort of disclaimer, am I to understand that we may presume that the Secretary would be speaking for the administration?

Mr. AHEARNE. That is sufficiently a broad question that covers so much more than I'm prepared to answer. I would prefer to get you—

Senator HANSEN. I must say that your skill in spotting the questions might be a recommendation for another office. You do pretty well. Thank you, sir.

Senator FORD. Don't let him kid you. He's doing pretty well. He's trying to get off this subject onto another one. [Laughter.]

Senator Eagleton, do you have any questions of Mr. Ahearne or his counsel?

Senator EAGLETON. Yes, I have a few questions if I may, Mr. Chairman. I'll be brief. I, too, like Senator Hansen was initially a bit perplexed by that last sentence "The views represented herein represent the views of the Department of Energy and not necessarily those of the administration."

I think though that I can explain it. These are the views of the Department of Energy but since this matter has been the subject of litigation there was not sufficient time to have views cleared by the Department of Justice as well. So it's a sort of a slight caveat isn't it?

The Department of Energy backs up the views of your 2½ page statement.

Mr. AHEARNE. That's right.

Senator EAGLETON. But the Department of Justice hasn't raised its hand and sworn to it at this point in time. Is that correct?

Mr. AHEARNE. That's correct, sir.

Senator EAGLETON. All right. Now further followup to Senator Hansen's appropriate question, he said would the enactment of this bill in any way affect rates charged by SPA in other parts of the system. And your answer was it might or possibly could.

Assuming that SPA operates as it now is with a \$4 million surplus and assuming this bill were enacted to the tune of \$2.6 million, assuming those figures, would the enactment of this bill then affect the rates charged in the other five States of the system?

Mr. AHEARNE. I'm not aware of a surplus. But certainly if there is a surplus making your assumption, then it would appear that it would not.

Senator EAGLETON. Right.

Mr. AHEARNE. In other words, the surplus is I just had to answer—

Senator EAGLETON. Right. We'll ask Mr. Bowers or you to supply for the record whatever surplus, say, for the past 5 years of SPA. Just year by year for the last 5 years.

If it's above \$2.6 million in those years, it wouldn't affect the rates so to speak. If any of those years is below \$2.6 million, it could affect the rates.

Mr. AHEARNE. Yes, sir.

[The information follows:]

There are no surplus revenues under the repayment practices used by the Power Marketing Administrations. All of the revenues are credited against O&M and interest expense with any remaining revenue credited toward repayment of the investment. Due to the variable quantity of power available for sale from year to year from the hydroelectric resources, fixed amortization payments are not required. The Power Marketing Administrations' requirement is to repay each investment with interest within 50 years. As of October 1, 1977, SWPA had repaid only a net of \$29.8 million of the total investment of \$680 million after 34 years of operation. If the present rates continue SWPA will not even be able to meet the interest on that investment except during periods of unusually high streamflow. In order to be responsive to the question, the following table, using data from our current Power Repayment Study, is submitted:

Fiscal year	incurred	Interest paid	Gross amount paid on investment
Actual:			
1973	14.8	14.8	3.7
1974	15.6	15.6	15.8
1975	15.2	15.2	20.1
1976	14.8	14.8	21.3
1976 1Q	3.5	1.6	0
1977	15.0	4.5	0
Projected with present approved rates:			
1978	15.7	15.7	2.7
1979	16.1	16.1	1.1
1980	18.6	17.6	0
1981	21.4	14.6	0
1982	22.2	12.3	0

¹ These large payments on investment resulted from unusually good water conditions which made power purchases for the system unnecessary and made large quantities of supplemental hydroelectric power available for sale.

Yes, the loss of the \$2.6 million transmission charge will affect the rates of other customers. As can be seen from the table, present rates will be insufficient to repay the investment and fall short of meeting interest expenses. SWPA studies indicate approximately \$18 million per year is needed to meet repayment requirements. The loss of the transmission service charge will increase this need by \$2.6 million per year. This amount of money will need to be recovered from all customers by SWPA.

Senator EAGLETON. The special transmission service charge in Missouri marks a departure from the longstanding congressional policy of a uniform so called "postage stamp rate." My question is do you know of any other case in SPA or other power marketing area where such departures have occurred or is the "postage stamp rate" the normal way of doing business?

Mr. AHEARNE. Let me ask Mr. Bowers that.

Senator EAGLETON. Do you want me to repeat it, Mr. Bowers?

Mr. BOWERS. As I understand your question, we have a "postage stamp rate" and you want to know if the "postage stamp rate" is the normal—

Senator EAGLETON. Yes, could you pull in the microphone a little bit, Mr. Bowers, thank you.

Mr. BOWERS. Is the "postage stamp rate" normal rate SPA uses?

Senator EAGLETON. Yes.

Mr. BOWERS. For rating principal, yes, we use the "postage stamp rate."

Senator EAGLETON. So the "postage stamp rate" is the normal routine way of doing business insofar as SPA is concerned. Is that correct?

Mr. BOWERS. That's right.

Senator EAGLETON. OK. Has SPA ever in the course of this dispute over the contract with Associated suggested sitting down to negotiate the differences? There's been this dispute since 1962, right, between SPA and Associated? Now has SPA ever suggested sitting down and negotiating the differences?

Mr. BOWERS. Yes, it has.

Senator EAGLETON. Did this occur before or after the imposition of the transmission service charge?

Mr. BOWERS. This occurred before the transmission service charge.

Senator EAGLETON. Now before imposing the service charge did SPA or the Federal Power Commission conduct any public hearings or give an opportunity for the co-ops to be heard?

Mr. BOWERS. The normal Federal Power Commission proceedings were followed. I don't recall that there was any hearings held by the Federal Power Commission. However, the customers were made aware of the pending rate adjustment.

Senator EAGLETON. I think the record will show that there were no Federal Power Commission hearings and we'll tidy up the record in that regard. I'm rather certain there were no hearings and I'm sure the other witnesses can back that up when they testify.

Is it your view that because Government is involved in litigation is cannot reconsider its position when a new administration with a different point of view comes into office?

Mr. AHEARNE. I'd like to answer that.

Senator EAGLETON. Yes, sir, Mr. Ahearne.

Mr. AHEARNE. In general I don't believe that a new administration ought to be fixed to the policies of the old administration. The questions of how one approaches that issue in litigation is one that we have to work out with the Justice Department.

Senator EAGLETON. I understand. I'll just note for the record just another experience of my own with respect to an analogous situation.

When the Carter administration came in, there had been a previous ruling by the Department of Transportation to locate a new Metropolitan St. Louis Airport in Columbia Waterloo, Ill. It was such a contentious issue that many of us took it to court. The case was pending. In fact, I'd argued part of the case, I being one of the named complainants.

The Carter administration came in, reviewed the situation, canceled the designation of Columbia Waterloo and the suit was withdrawn. I just cite it as an example of where an a new administration even with the pendency of litigation sees fit to take a different policy point of view and that could well be the case in this situation.

Can you tell the committee what the view of the present SPA Administrator or Acting Administrator is on this issue? Does he think the service charge is fair? Do you think it's fair?

Mr. AHEARNE. As far as the—Mr. Hammet was the Acting Administrator. I would like to have him provide that for the record.

Senator EAGLETON. All right. That will be supplied in the record. [The information follows:]

The total credit payments of \$4.6 million made by SWPA to the Associated Electric Cooperative have been criticized by the General Accounting Office and the Federal Power Commission, and we consider the \$4.6 million credited to Associated by SWPA to be excessive. The application of the \$2.6 million transmission service charge was an effort to bring equity to the contract after failing to do so through negotiations.

While I have been an employee of SWPA during the period that the SWPA-Associated contract has been in operation, I have not personally been involved with the litigation. It is my understanding, however, that all of the arguments against the transmission service charge were presented to the Court of Appeals and considered by it in reaching the decision that assessing such a transmission service charge did not discriminate against Associated. It is also my understanding that the forthcoming trial in the District Court is for the purpose of determining whether the credit payments to be recovered in the transmission service charge represent costs incurred by SWPA for the benefit of Associated.

If these costs are not recovered by SWPA from Associated, in order to comply with the Flood Control Act, they will have to be recovered either from certain other customers or in increased rates to all other SWPA customers.

Senator EAGLETON. The very first words that Mr. Browers uttered when he came to the witness table, he said he thought the transmission charge of \$2.6 million was excessive. I think I noted that down. In my opening statement I said at present I think the SPA would see the transmission charge as unfair.

You strike the word "unfair" and put in the word "excessive" and my opening statement would have been accurate. By the way, could you give us—we asked for the past figures on the surplus that the SPA had in the 5 preceding years. Could you give us your anticipated projections a year or two out as to what you project surpluses, if any, to be in future years?

Mr. AHEARNE. Yes, sir.

[The information follows:]

There are no surplus revenues under the repayment practices used by the Power Marketing Administrations. All of the revenues are credited against O&M and interest expense with any remaining revenue credited toward repayment of the investment. Due to the variable quantity of power available for sale from year to year from the hydroelectric resources, fixed amortization payments are not required. The Power Marketing Administrations' requirement is to repay each investment with interest within 50 years. As of October 1, 1977, SWPA had repaid only \$29.8 million of the total investment of \$680 million after 34

years of operation. If the present rates continue SWPA will not even be able to meet the interest on that investment except during periods of unusually high streamflow. In order to be responsive to the question, the following table, using data from our current Power Repayment Study, is submitted:

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¹ These large payments on investment resulted from unusually good water conditions which made power purchases for the system unnecessary and made large quantities of supplemental hydroelectric power available for sale.

Yes, the loss of the \$2.6 million transmission charge will affect the rates of other customers. As can be seen from the table, present rates will be insufficient to repay the investment and fall short of meeting interest expenses. SWPA studies indicate approximately \$18 million per year is needed to meet repayment requirements. The loss of the transmission service charge will increase this need by \$2.6 million per year. This amount of money will need to be recovered from all customers by SWPA.

Senator EAGLETON. Thank you very much, Mr. Chairman.

Senator FORD. I have one little thing that bothers me here, Mr. Ahearne. You and Mr. Bowers may want to answer this. Are you taking a look or are you considering changing policy as it relates to the "postage stamp rate"?

Mr. AHEARNE. Not to my knowledge, no.

Senator FORD. There is no anticipation policy change as it relates to the "postage stamp rate"?

Mr. AHEARNE. Not to my knowledge.

Senator FORD. Well, that little flag flew for me when I was listening to you and I'm not sure that—I just wanted to get that into the record.

Thank you, Mr. Ahearne, Mr. Bowers. We appreciate your being here with us this morning.

Our next witness is Mr. Gerald Diddle, general manager, Associated Electric Cooperative, Springfield, Mo. Mr. Diddle, I believe you will be accompanied by Mr. Ely and Mr. Plucknett. Is that correct? Mr. Ely is the attorney for the cooperatives and Mr. Plucknett is the executive secretary for the Committee on Power from the Southwest.

Mr. DIDDLE. Mr. Chairman, we'd also like to have Mr. James E. McNab who's the manager of engineering operations for Associated—

Senator FORD. James E. McNab?

Mr. DIDDLE. Yes, sir.

Senator FORD. We are delighted to have Mr. McNab with us today. Mr. Diddle, you can do one of two things. As we have with the other witnesses, we'll take your statement in total, file it for the record, you may highlight it or you may read it. We have about 1 hour and

5 minutes before we have to leave and we would like to get into some questions.

Mr. ELY. As counsel for Mr. Diddle, I'll strongly recommend that he highlight it.

Senator FORD. He's not only counsel for Mr. Diddle, he's also coach. [Laughter.]

Senator FORD. You may proceed. You either take your coach's advice or your counsel's advice.

**STATEMENT OF GERALD F. DIDDLE, GENERAL MANAGER,
ASSOCIATED ELECTRIC COOPERATIVE, SPRINGFIELD, MO.**

Mr. DIDDLE. Well, I'm going to take the coach's advice but this involves a lot of relationships between these rural electric systems and the U.S. Government and I want to be sure to make the chronolog understandable to you, Mr. Chairman, and to members of the committee.

If possible, I would like for both my comments and Mr. Ely's and maybe they'll answer some of the questions that you have in your mind before we begin the question period. Naturally, we're here in support of Senator Eagleton's bill, S. 2249.

Associated Cooperative is a statewide federation of cooperatives. It is obligated by its contract with SPA to provide facilities capable of transmitting some 557,000 kilowatts of Government-generated hydro-power for SPA's accounts for distances of 50 to 300 miles, over transmission lines that the cooperatives in Missouri own, to specified delivery points in that contract.

Of this 557,000 kilowatts, 288,000 kilowatts is earmarked for six generation and transmission cooperatives in Missouri who provide power at wholesale for 43 rural electric systems. There are 40 of them in Missouri and three in south Iowa.

These rural electric distribution systems in turn provide electric service to 380,000 rural customers, farms, homes and ranches in Missouri and southern Iowa. We provide 190,000 kilowatts of transmission space to three private utilities, 29,000 kilowatts to five municipals and Associated is obligated to make 50,000 kilowatts of transmission space available to enable SPA to interchange power with another Government agency the U.S. Bureau of Reclamation's Missouri River basin system.

The 288,000 kilowatts that Associated buys and transmits for cooperatives is only a part of the total quantity of power that we are obligated to transmit for SPA.

Senator Eagleton's bill, S. 2249, would do three things. First, it would reinstate the principle of the "postage stamp" rate. Second, it would prohibit the Secretary from unilaterally changing agreed points of delivery. And third, it would require due process in the hearings for confirmation of SPA's rates.

This history does go back some time and I guess we deal with section 5 of the Flood Control Act in which the Secretary had a right under that act to transmit power from hydroelectric facilities under one of three arrangements. Either the Government could appropriate funds and build these lines or two, it could acquire such lines by purchasing them or it could require the right to use lines belonging to others by wheeling or rental lease charge.

This is the case in Missouri. Congress in appropriating—in considering appropriation bills after enactment of the 1944 act, made a series of policy decisions. One of these was a decision not to appropriate funds for construction of transmission lines, if wheeling arrangements were obtainable. This was the case in Missouri.

The Congress also established a policy of the “postage stamp rates”. That is that everyone regardless of their location respective to Federal facilities were to pay the same basic rate.

In the present case, in 1950 the Congress had refused to appropriate funds for transmission lines in the State of Missouri. And at that time the Secretary of Interior, proposed a different arrangement. His proposal was that the rural electric systems would borrow the money from the Rural Electrification Administration to construct the lines desired by the Secretary.

And he would lease these lines, paying rental charges adequate to pay the REA debt service until that debt would be fully repaid plus operating expenses. And next, he would sell the capacity or sell the electricity to the cooperatives delivered over these leased lines at their load centers, at the “basic SPA rate.”

And thus the Government was relieved of the burden of appropriating money to construct these lines and the customers would receive service over these lines as though the Congress had appropriated the money to construct the facilities.

The cooperatives borrowed the money from REA to build the lines, in reliance on this promise that the Government would pay the rental charges and credit them on their power bills; and second, they would receive power under the “postage stamp” arrangement.

The 1950 Interior Department Appropriations Act added an authorization for appropriations to pay the wheeling charges on these lines.

In the fiscal year of 1956 appropriation act, after these arrangements had been suspended for 2 years because of a lawsuit brought by certain utilities, Congress “reactivated” these contracts. In so doing the House Appropriations Committee report gave specific instructions to the Secretary to amend the agreements in the following language.

And I would like to read that language in that committee report. It says:

This action makes it possible to reactivate valid and legal contracts which certain G and T cooperatives have with SPA. These contracts at their inception were examined by the Congress and funds were available to carry them out thru the Continuing Fund for fiscal years 1950 thru 1953.

The contracts in question have been tested in the courts.

In reactivating the contracts with the G and T cooperatives, the Department of the Interior is instructed . . . The contracts are also to provide three things. One, that it is the G and T cooperatives will operate and maintain their own transmission systems under lease to the SPA. Two, that the SPA and the G and T cooperatives will settle accounts for power purchased and sold on the basis of net-balances as is done under existing contracts to which SPA and private utilities are parties. And three, that the power and energy will be delivered to the load centers of all G and T contracting systems at the basic SPA rate.

The conference report on that same appropriation bill contained comparable language.

A succession of Secretaries in both administrations faithfully carried out these arrangements for over 20 years—from 1950 to 1970. In 1961, these contracts were changed at the request of the Secretary of Interior.

He proposed that the Missouri cooperatives federate or get together as Associated Electric Cooperative and enter into a contract with him which would enable SPA to sell all of its power as peaking power accompanied by limited quantities of energy instead of as firm power to the rural electric systems as they had done previously.

In regards to what SPA now says about those contracts, at that time, they reported to the Congress that this new contract with SPA was a great economic benefit to the Government.

To accomplish this change from firm power to peaking power where SPA under a peaking power rate that could gear its obligation under these contracts to the water flows available to those projects rather than supplying firm power if you could buy steam capacity at high prices to fill in the valleys where they didn't have water to run their hydroprojects.

To accomplish this change from firm power to peaking power, it was necessary for—that the Government hydrogeneration be integrated into that of investor-owned thermal-powered systems having five to six times the generating capacity of the Government's hydroplants. And Associated's lines would be employed to do this.

The Secretary would sell peaking power to three large investor-owned companies in Missouri to be delivered over Associated's lines. In addition, Associated would borrow money from REA to extend its lines to enable interconnection between SPA and the Government's Missouri basin system, some 300 miles away.

Associated would wheel power to six municipalities. Associated would furnish the power to take care of the transmission losses of transmitting SPA power and Associated would buy standby power in the case of the failure of the Government's generating facilities.

SPA in 1962 would continue to sell power to the cooperatives delivered at their load centers at the basic SPA "postage stamp rate" as before, but this rate would be the basic rate but now would be for peaking power and not firm power. And Associated was relieved of the costly obligation of supplying their firm power requirements.

This 1961 agreement reaffirmed the obligation to pay Associated \$2,647,100 annually for its transmission service charge. The Secretary reported to Congress the success of his plan which he said was greatly to the advantage of the Government as well as the power customers of the region and Congress repeatedly appropriated money to carry out this 1962 contract.

Because of these wheeling agreements and advantages of integration gained through SPA's contracts with Associated, Congress did not have to appropriate funds to construct new Government lines in Missouri. Now it's true that there were appropriations and there were transmission facilities to build in Missouri, in the southern part of Missouri, but these were built on the Secretary's representation and I quote that these new appropriations for new transmission lines were "to implement the Associated and the Missouri companies contracts."

In 1970, however, a new Secretary, without notice or hearing, pro-

mulgated a new "transmission service charge" applicable to Associated alone in the amount of \$2,647,100 annually. And this new charge, it increased Associated's charge from \$14.40 to \$23.59, a 64-percent increase.

Associated's rates to the three private utilities, to the six municipals and to the Bureau of Reclamation, with which SPA is interconnected via Associated's transmission lines, were not increased at this time. They pay no transmission service charge for the use of Associated's 161-kilovolt system.

I would like to make a comment. First of all, that the postage stamp rate in itself is calculated to cover all the Government's transmission costs. It always has been whether these lines were built with Government funds or whether these lines were leased and the use of this capacity made available to the Government.

But the new transmission charge, the new charge accomplished for the Secretary indirectly was not—that which he could not accomplish directly, that is to cancel an admittedly valid obligation. He would continue to show \$2.6 million as a credit but simultaneously to the transmission service charge he would take it back.

The cooperatives were saddled with the obligation to pay the service charge to REA until 1997 on the money that he'd borrowed to build these lines on the faith of the Secretary's promise that he would pay the rentals in the amount required to pay the debt service plus operating expenses.

It is important to note that while calling this a rate revision, the SPA did not in fact change the postage stamp P-2 rate schedule for peaking power to all of SPA's customers. It remained at \$14.40 and 2 mills per kilowatt hour for all energy.

The new charge is increasing costs about—of electricity to the Missouri cooperatives only and it is designed to accomplish exactly this discrimination. The Federal Power Commission, without hearing, approved the transmission charge "simultaneously," as it said, with its denial of Associated's petition to intervene.

Associated sued to enjoin collection of the transmission service charge, Judge Hart of the district court, after hearing cross motions for summary judgment, grated the summary judgment in Associated's favor holding that one, "the transmission service charge imposed by the United States and the Secretary of Interior is not a rate revision authorized by the section 5 of the Flood Control Act of 1944 or other statutes."

"Second, that the United States is not authorized by law to unilaterally reduce the amounts contractually owed to Associated for its transmission services.

"And three, that the actions of the Secretary were arbitrary, capricious and in abuse of discretion."

The Court of Appeals reversed in all three respects, and remanded the case to the district court for determination of the value of the services rendered by Associated, these values to be substituted for the correct amount of the \$2,647,100.

The court's rationale was that the Secretary was not bound by the directives of the congressional committees, even though he included them in his contracts because these directives were contained in committee reports, not in an act of Congress, and that his change of

deliver points, plus the imposition of a charge for transmitting power from the new points to the agreed points, was a rate revision within his statutory authority.

Mr. Ely is here and he will be glad to discuss the legal questions with respect to those court proceedings.

I would like to conclude by making a couple of observations. Quite aside from the merits of this particular case, the court of appeals decision presents Congress with a serious institutional problem. The court has held that the Secretary was not bound by the directions of congressional appropriations committees in 1956 that he amend his contracts with the Missouri cooperatives to assure them power at the systemwide postage stamp rate and that to do this, he should agree to pay the cost of transmitting power to them over these leased lines.

The reason given by the court was that these directives were contained in committee reports, not the statute. It should be noted parenthetically that these directives were restated in a conference report which was voted upon by the two Houses.

But the broader institutional question is whether a new Secretary, after 20 years of obedience by his department to the conditions and instructions which the Appropriations Committee attached to their appropriations and which were the basis for votes of both Houses to finance the Secretary's rental scheme, can lawfully thumb his nose at this congressional decision.

And that's what brings us here today. We ask that the Congress itself say to the Secretary, we really meant it when we told you to deliver power to all customers at systemwide postage stamp rates, without discrimination.

Thank you.

[The prepared statement of Mr. Diddle follows:]

Statement of Gerald F. Diddle
General Manager, Associated Electric Cooperative
Springfield, Missouri

Before
The Committee on Energy and Natural Resources
United States Senate
March 9, 1978

In support of
Senator Eagleton's Bills,
S. 2249, S. 437, 95th Congress

My name is Gerald F. Diddle. I am General Manager of Associated Electric Cooperative, Springfield, Missouri. I am accompanied by our special counsel, Northcutt Ely, Esquire, Washington, D.C.

We appear in support of Senator Eagleton's bill, S. 2249, "A bill to prohibit discrimination in rates charged by the Southwestern Power Administration and to require due process in the confirmation of such rates by the Federal Energy Regulatory Commission." This bill is similar in objectives to his earlier measure, S. 437, 95th Congress.

Associated Electric Cooperative is a statewide federation of cooperatives. It is obligated by its contract with SPA to provide facilities capable of transmitting some 557,000 kilowatts of government-generated hydropower for SPA's account for distances of 50 to 300 miles, over transmission facilities owned by Associated or its member cooperatives, for delivery at points specified in the contract. Of this, 288,000 Kw is earmarked for six G & T cooperatives which serve rural areas in 114 of Missouri's 118 counties, 190,00 Kw for three private utilities, 29,000 Kw for five municipalities, and Associated is obligated to make 50,000 Kw of its transmission capacity available to enable exchanges of power between the SPA and the U.S. Bureau of Reclamation's Missouri Valley system. The 288,000 Kw that Associated buys and transmits for the cooperatives is thus only part of the total quantity of power it is obligated to transmit for SPA.

Senator Eagleton's bill, S. 2249, would do three things:

- 2 -

First, it would reinstate the principle of the "postage stamp" rate, that is, the uniform system-wide rate which prevailed in this area until it was changed by the Nixon administration. To this end, the bill would prohibit discrimination between customers to whom the Secretary delivers electricity over lines constructed by the United States, and customers to whom such electricity is delivered over lines the use of which is acquired by the United States by lease, wheeling, or other contractual arrangements. We are in the latter category. There has been such discrimination since 1970, as I will explain later.

Second, the bill would prohibit the Secretary from unilaterally changing agreed points of delivery. I will explain the relationship between this and the discrimination problem as we move along.

Third, it would require due process in the proceedings for confirmation of SPA's rates. In our case, the discriminatory exaction of which we complain was approved by the FPC "simultaneously," as it acknowledged, with its denial of Associated's petition to intervene in the confirmation proceedings.

The facts are as follows:

Section 5 of the Flood Control Act of 1944 authorizes the Secretary of the Department of Energy to receive from the Secretary of the Army electricity generated by the Corps of Engineers at flood control dams, and to transmit and sell it. Under the act, the Secretary can transmit and dispose of such hydroelectric power and energy in either of three ways: (1) by constructing

transmission lines, or (2) by acquiring such lines, by purchase, or (3) by acquiring the right to use lines belonging to others, by rental or wheeling (transmission) agreements. Our case is of the third type, as I have indicated.

Congress, in considering appropriation bills after enactment of the 1944 act, made a series of policy decisions. One of these was a decision not to appropriate funds for construction of transmission lines, if wheeling agreements were obtainable. This proved to be the case in Missouri.

Congress also early established a policy of "postage stamp rates" for power generated at flood control dams, that is, that rural customers of federal power projects, situated at a distance from government power plants, should pay no more for electricity than those located closer to the points of generation, and that this should be true whether customers are served over government-owned or government-leased lines. This is also, as I understand it, the policy of the Bonneville Administration and TVA.

In the present case, in 1950, Congress, having refused appropriations to construct transmission lines to deliver electricity from government power plants to rural electric cooperatives and other preference customers in Missouri, approved an alternate plan offered by the Secretary of the Interior, who then had the jurisdiction in these matters which is now lodged in the Secretary of Energy. He proposed, and Congress approved the Secretary's proposal, that (1) the rural electric cooperatives would borrow money from the Rural Electrification Administration

(REA) to construct the lines desired by the Secretary; (2) he would lease these lines, paying rentals adequate to pay the REA debt service until that debt should be fully repaid, plus operating expenses; (3) he would sell electricity to the cooperatives, delivered over these leased lines to their load centers, at the "basic SPA rate." The government was thus relieved, as Congress insisted, of the burden of appropriating money to construct these lines, and the customers received power at the same cost as though Congress had made the construction appropriations.

The cooperatives borrowed the money from REA to build the lines, in reliance on the Secretary's twin promises to pay the agreed rentals or credit them on the cooperatives' power bills until the REA debt is fully paid, and to deliver electricity to the cooperatives over these lines at the system-wide "postage stamp rate" as though the government had built them with appropriated funds. The lines were built and put to use by the Secretary, as he had proposed. The REA debt will not be fully repaid until 1997.

The 1950 Interior Department appropriations act added an authorization for appropriations to pay the wheeling charges on these lines. It is now codified as 16 U.S.C. 825s-1.

In the fiscal year 1956 appropriation act, after these arrangements had been suspended for two years because of a lawsuit brought by certain utilities, Congress "reactivated" these contracts. In so doing the House Appropriations Committee report gave specific instructions to the Secretary to amend

- 5 -

the agreements in the following language, which is important:

"This action makes it possible to reactivate valid and legal contracts which certain G and T (Generating and Transmission) cooperatives have with SPA. These contracts at their inception were examined by the Congress and funds were available to carry them out thru the Continuing Fund for fiscal years 1950 thru 1953.

"The contracts in question have been tested in the courts.

"In reactivating the contracts with the G. and T. cooperatives, the Department of the Interior is instructed The contracts are also to provide: (1) that the G. and T. cooperatives will operate and maintain their own transmission systems under lease to the SPA; (2) that the SPA and the G. and T. cooperatives will settle accounts for power purchased and sold on the basis of net-balances as is done under existing contracts to which SPA and private utilities are parties; and (3) that power and energy will be delivered to the load centers of all G. and T. contracting systems at the basic SPA rate." (Emphasis added.)

The Conference Report on that same appropriation bill contained comparable language.

A succession of Secretaries in the Truman, Eisenhower, Kennedy and Johnson administrations faithfully carried out these arrangements for over 20 years (from 1950 to 1970), and Congress repeatedly appropriated money to pay the stipulated rentals.

In 1961 the Secretary expanded these arrangements in the following way, to the government's great advantage, as he reported to Congress:

He proposed that the Missouri cooperatives, statewide, should federate as Associated Electric Cooperative, and enter into a contract with him which would enable SPA to sell all of its power as "peaking" power, accompanied by limited quantities

of energy, instead of firm power as previously. Indeed, as he reported to Congress, our contract was the justification for appropriations to add 180,000 Kw to SPA's generating capacity. I should perhaps explain the difference between firm power and peaking power. When SPA, or any utility, sells firm power and energy, this means that it must be prepared to supply the customer's demands at all times, 24 hours per day. The SPA hydro dams cannot do this, because the water supply is so meager that it can spin the turbines at full capacity only about 14% of the hours in the year (1200 out of 8760 hours). SPA must, therefore, buy, at high cost, thermally generated energy to fill in the gaps if it sells its power as firm power. But hydropower, even in these circumstances, is valuable to a purchaser which has very large generating capacity of its own, because the hydro capacity can be used to meet peak loads on its system, i.e., paid for and used as "peaking power," not as firm power. To accomplish this change from firm power to peaking power, it was necessary that the government hydro generation be integrated into that of investor-owned thermal-powered systems having five or six times the generating capacity of the government's hydro plants. Associated's lines would be employed to do this. The Secretary would contract to sell peaking power to three large investor-owned companies (the Missouri Companies), to be delivered over Associated's lines. In addition, Associated would borrow money from REA to extend its lines to enable interconnection between

- 7 -

SPA and the government's Missouri Basin system, some 300 miles away from SPA. Associated would wheel power to six municipalities. It would furnish power from other sources to make good all transmission losses. Associated would furnish "standby" power, in case of failure of government generating facilities. SPA would continue to sell power to the cooperatives, delivered at their load center, at the basic SPA "postage stamp rate," as before, but this rate would be the basic SPA rate for peaking power, not firm power. SPA was relieved of the obligation to supply their firm power requirements.

The government promised to pay Associated \$2,647,100 annually for its transmission services, 1/ in the form of credits against payments for power and energy at the basic SPA rate for peaking power. This amount included, as before, the annual debt service to REA (increased to build the interconnections stipulated by SPA), and operating costs, and it provided reimbursement to Associated for the power and energy Associated furnished to replace transmission losses. The contract would obligate the Secretary specifically to continue to pay (credit) this amount annually until the REA debt is fully paid (1997).

The cooperatives accepted the Secretary's proposal.

The Secretary reported to Congress the success of his plan, which he said was greatly to the advantage of the Government as well as the power consumers of the region, and Congress repeatedly

1/ The contracts provided for other credits for other services, but these are not in dispute.

appropriated money to carry it out.

Because of these wheeling arrangements and advantages of integration gained through SPA's contracts with Associated, Congress did not have to appropriate funds for the construction of new government-owned lines for Missouri. The only construction appropriations requested and granted were, on the Secretary's representations, appropriations to construct minor facilities to "implement the Associated and Missouri Co.'s contracts."

In 1970, however, a new Secretary, without notice or hearing, promulgated a new "Transmission Service Charge," applicable to Associated alone, in the amount of \$2,647,100 annually. It is cast in the form of a charge for transmitting power beyond the government-owned transmission grid. The intent and the effect were to discriminate between SPA's customers to whom SPA delivers electricity by means of transmission lines constructed at government expense, who would continue to pay the postage stamp rate, and customers to whom SPA delivers electricity over lines which it leases, or obtains the right to use by means of "wheeling" contracts. These customers would pay not only the postage stamp rate, but also the added lease rentals or wheeling charges. Associated was the only SPA customer intended to be affected. Its cost per kilowatt, of its 288,000 Kw, was increased \$9.19 per year, or about 64 percent, above the postage stamp rate of \$14.40, to a new total of \$23.59. SPA's rates to the three private utilities, the six municipalities, and the Bureau

of Reclamation, with which SPA is connected via Associated's lines, were not increased. They pay no transmission service charge for use of Associated's 161 Kv system.

I would add four comments: First, that the postage stamp rate itself is calculated so as to recover for the United States all transmission costs, everywhere on the SPA system, including costs of service over leased lines, so that the new scheme would require those customers who are served over leased lines to pay twice for the same transmission service. Second, that the cost of transmitting power via wheeling or leasing is less than the cost of constructing and operating government lines to do the same thing, as Congress has repeatedly found and decided. 2/ Third, that it happens, not by coincidence, that this new transmission service charge of \$2,647,100 annually is the precise amount, to the dollar, that the Secretary's contract obligates him to pay Associated. The new charge would thus accomplish indirectly what the Secretary concededly cannot do directly, that is, cancel an admittedly valid obligation. He would continue to show the credit of \$2,647,100, but simultaneously take it back by the transmission service charge. Fourth, that the cooperatives were left saddled with the obligation to pay debt service to REA until 1997 on the money borrowed to build these lines on the faith of the Secretary's promise, now repudiated, that he would

2/ For example, on Reclamation Bureau projects, the so-called Keating Amendment, repeated in every appropriation act, prohibits use of appropriated funds for construction and operation of transmission lines if the same service can be provided by contract with owners of other transmission lines.

pay rentals in the amount required to service that debt, plus operating expenses.

SPA's motivation was brazen and plain:

"Administrator King feels that under present conditions all power presently marketed under the Associated contract could be sold without any service charges being paid by the Government, in which case SPA could save over \$4.5 million annually. He intends to make every effort to eliminate them." (Ex. 32, R. Vol. II at 479.)

It is important to note that the Secretary, while calling this a "rate revision," did not in fact change the postage stamp P-2 rate for peaking power charged by SPA to all customers, including these cooperatives. It remained at \$14.40 per kilowatt year of capacity, 2 mills per kilowatt hour of energy. The new charge is an increase in cost of electricity to the cooperatives alone, and it was designed to accomplish exactly this discrimination. It bears repetition, that the cost to the three investor-owned power companies, the six municipalities, and the U.S. Bureau of Reclamation, to which Associated was obligated to wheel SPA power was left untouched. Associated must bear the cost of making facilities available to transmit SPA's power to these SPA customers, without reimbursement either by SPA or SPA's customers.

The Federal Power Commission, without a hearing, approved the transmission charge "simultaneously," as it said, with its denial of Associated's petition to intervene.

Associated sued to enjoin collection of the Transmission Service Charge.

- 11 -

Judge Hart of the district court, after hearing cross motions for summary judgment, granted that of Associated, and denied that of defendants and the United States, holding that:

"1. The Transmission Service Charge imposed by defendants on plaintiff is not a rate revision authorized by Section 5 of the Flood Control Act of 1944 or other statute;

"2. Defendants are not authorized by law to unilaterally reduce the amounts contractually owed to plaintiff for its transmission services; and

"3. Defendants' actions were arbitrary, capricious and in abuse of discretion."

The court of appeals reversed in all three respects, and remanded the case to the district court, for determination of the value of the services rendered by Associated, these values to be substituted for the contract amount of \$2,647,100 annually.

The court's rationale was that the Secretary was not bound by the directives of the congressional committees, even though he included them in his contracts, because these directives were contained in committee reports, not in an act of Congress, and that his change of delivery points, plus imposition of a charge for transmitting power from the new points to the agreed points, was a rate revision within his statutory authority.

Mr. Ely will discuss the legal questions, but the practical effect of the court of appeals decision is that the discrimination between customers served over government-owned lines and government-leased lines, established by the Secretary, is found to be within his discretion. Two things follow:

- 12 -

First, Associated will be allowed to keep only that portion of the newly determined compensation which related to its transmission services to SPA for customers other than the cooperatives.

Second, the portion of the newly determined payments which relates to transmission of government power to the cooperatives will be taken back, by adding this exact amount to their power bills as a transmission service charge.

We are thus forced into a "no win" situation: whatever the amount that the district court determines the Secretary properly owes Associated for transmitting power to the cooperatives will be taken back by a transmission service charge in the same amount. The principle of discrimination against customers served over leased lines or through wheeling contracts will prevail, overruling the principle of the postage stamp, non-discriminatory rate ordered by Congress. The court of appeals decision would permit the Secretary to disown SPA's obligation, undertaken at the direction of the Appropriations Committees, to pay the debt service on the REA loans which financed the lines made available to SPA in lieu of federal appropriations to construct them, and to deliver electricity to them at the "basic SPA rate," as though congressional construction appropriations had been required.

I shall conclude shortly, but before I do I would like to make an observation that may be of particular interest to this Committee.

- 13 -

Quite aside from the merits of our particular case, the court of appeals decision presents Congress with a serious institutional problem. The court has held that the Secretary was not bound by the directions of congressional appropriations committees in 1956 that he amend his contracts with the Missouri cooperatives to assure them power at the system-wide postage stamp rate and that, to do this, he should agree to pay the cost of transmitting power to them over these leased lines. The reason given by the court was that these directives were contained in committee reports, not the statute. It should be noted, parenthetically, that these directives were re-stated in a conference report which was voted upon by the two Houses. But the broader institutional question is whether a new Secretary, after 20 years of obedience by his department to the conditions and instructions which the Appropriations Committees attached to their appropriations, and which were the basis for the votes of the two Houses to finance the Secretary's rental scheme, can lawfully thumb his nose at this congressional decision. That is what brings us here. We ask that the Congress itself say to the Secretary, "we really meant it when we told you to deliver power to all customers at system-wide postage stamp rates, without discrimination."

This time, let it be said in a statute, as Senator Eagleton proposes.

Senator FORD. Thank you very much, Mr. Diddle. Other members—Mr. Ely, do you want to make any statement.

Mr. ELY. Yes, Mr. Chairman, if I may.

Senator FORD. Yes, sir, you may proceed.

STATEMENT OF NORTHCUTT ELY, COUNSEL, ASSOCIATED ELECTRIC COOPERATIVE

Mr. ELY. There are really four issues involved in what the Secretary undertook to do in the next administration after the 1970's.

The first is the institutional question that Mr. Diddle referred to. Congress during the Truman administration approved the Truman policy that power generated at the Southwestern Power Administration or flood control dams should not be sold at the bus bar, the powerplants, as a privately owned utility wanted, but should instead be transmitted to the load centers of the preference customers, the cooperatives, and the municipalities.

And so at those points of delivery had a postage stamp rate. An effort was made by an amendment in the Senate when the Flood Control Act of 1944 was passed to require power to be sold at the bus bar. And this was defeated.

However, President Truman took to implement this sale at postage stamp rates at the point of delivery or points of use of the public agency, he had a mixed bag of success. Congress did appropriate money to build the backbone transmission lines in other States, but it did not do so in Missouri for reasons I need not speculate about.

In order to enable the power to be transmitted to the 113, 114 counties in Missouri, the Truman administration proposed a rather ingenious substitute for Federal appropriations.

There were in existence five maybe six generations and transmission cooperatives whose areas included all of Missouri. And he proposed that they borrow from REA the money to build these lines that Congress had refused to appropriate money for. And that SPA would enter into contracts with the cooperatives to lease these lines and pay rentals adequate to service the REA debts plus operation and maintenance.

Now this was done. The money was borrowed. The lines were built. The lease contracts were entered into. The Secretary entered into contracts to deliver power at the postage stamp rate at points 50 to 300 miles away from dams and isolated points of Missouri. And it all went well for a time.

The utilities, these private utilities, still discontented with this solution brought suit here in the District of Columbia attempting to have the courts say the whole scheme was unlawful. They failed. The court sustained the Truman administration's arrangements I've just described.

For 2 or 3 years, Congress has suspended making appropriations to pay these rentals while this litigation was underway. When the government and the cooperatives won, Congress in 1956 Appropriation Act resumed to authorize the appropriations to pay these rentals. And in so doing, the Congress reviewed the whole Truman administration policy of postage stamp rates and approved them and directed that the contracts be amended to provide that the power would be sold

specifically at the load centers of the cooperatives at the basic SPA rate. And they reaffirmed the commitment of the Secretary to pay rentals until the REA was fully paid. That would be 1997.

The debt service, if I may say, is being paid right now on the order of \$1 million a year. These directives were written into the contracts, supposedly contracts under which both sides performed.

In 1962 the Secretary had become aware of the fact that these hydro-projects were located on rivers that could furnish only a fragment of the power that he had undertaken to sell in the firm contracts. Out of the 8,760 hours every year the water supply in the two or three dams here and in SPA generally, would supply power for only about 1,200 hours for 14 to 15 percent of the time.

He was then and is now obligated under firm power contracts to meet the customer's loads 24 hours a day. And buying thermal generated power at high costs to make good on these commitments. And he's doing it right now. As the cost of energy has increased you can visualize the impact on the Federal Treasury.

In 1961 the Secretary decided he was going to bail out of this firm power flypaper, at least in Missouri, and so he extended the Truman administration scheme of use of Associated's transmission system to interconnect the SPA dams with three privately owned power companies and others who could provide generating capacity five or six times his rate of the SPA dams involved here.

Therefore, it would enable the power companies to absorb this hydropower as peaking power available only a few hours of the day. Peaking power is very valuable. It worked. The Secretary of Interior was able to report to Congress he had succeeded negotiating this magnificent 1962 contract with the Associated, the integration agreement with the utilities and the Federal Government was some \$2½ million better off, power would flow all through the region and gave a glowing report to Congress.

All went well until 1970 when the Nixon administration decided to reverse this policy, the Truman policy of the postage stamp rate. Now how the Secretary went about it in 1970 is rather interesting.

The 1962 contract provided that as compensation for the use of Associated's system the Government would pay, not write checks, but pay their grant credits against power bills. Now there are eight of these credits. Four of them related to transmission and the other four related to other services.

The ones that were related to transmission, integration services, added up to \$2,647,100. Now the Secretary did not attack, as Mr. Bowers has here today, the equity of these items. To the contrary, he continued them and he continues to this day to credit the full amount of these amounts, these credits, against Associated's bills for electric energy. They are credited every year.

Senator FORD. Mr. Diddle, was Mr. Bowers in the 1970?

Mr. ELY. I don't know Mr. Bowers. But in any event instead of attacking the credits, he—and instead of raising the P-2 rate, he left it exactly where it was \$14.40 per kilowatt per year for power and 2 mills per kilowatt hour for energy.

What he did was to impose a transmission service charge in precisely the amount down to the dollar of the credits whose validity he did not dispute. Now the technique was rather interesting. He estab-

lished new points of delivery. Instead of the delivery points established by the Truman administration by direction of the committee from Congress, namely the load centers of the cooperatives, 50 to 300 miles away from the dams, he changed the points of delivery to the SPA grid which for all practical purposes in our case is the dams.

The very thing that private utilities had demanded and the Congress had rejected in passing the Flood Control Act. And he imposes a new transmission service charge for transmitting power from these new points of delivery unilaterally imposed out to the contract points of delivery fixed in the Truman administration.

And that is what we are quarreling about. Associated brought suit in the district court to enjoin the collection of this surcharge. The district court agreed with us and the court of appeals did not. And the grounds of the court of appeals reversal of Judge Hart are very interesting.

It said that the Secretary is not obliged to hold any hearings. He held none. As a matter of fact, his negotiating team was in Springfield, Mo. purportedly to negotiate with Associated on the revision of this contract. Now on the very day when Secretary Smith for the Nixon administration sent the transmission service charge to the FPC for approval.

I know this because I was in Secretary Smith's office that day by accident and was shown the proposal he was sending to the FPC. And I urged him not to do that until Associated could be heard. He said you'll have your hearings in the FPC. We never did. The Federal Power Commission approved the Secretary's proposed transmission charge on the same day, and as it said in this order, still tends it will deny Associated's petition to intervene.

We were denied the right to even be heard. And had we been heard by the Secretary of the Commission, the glaring errors in his proposal we would have had a chance to explore by cross-examination. Let me illustrate one of them.

I think you have before you a map. This map shows in red the Associated lines that Congress refused to appropriate money for so that the Secretary in the Truman administration had failed to raise the rates, but there are the rates.

The SPA lines are shown in black. You'll notice that there is no connection in black. No SPA connection at all between the two major dams that generate 515,000 kilowatts involved here. There are Table Rock Dam and Bull Shoals. It's only Associated's lines that connects those two dams to each other. Look at the top of the map where it shows USBR. That is the point of interconnection between SPA and the U.S. Bureau of Reclamation at the Missouri Valley System.

The interconnection between SPA, 300 miles long, to the Bureau of Reclamation is Associated's lines. Now I asked Secretary Smith on that day, how do you justify declining to pay us for the rentals of our lines which are the only interconnection between your two major dams, Table Rock and Bull Shoals, and the only interconnection between your system and the Bureau of Reclamation.

But he said I'm not going to go into that with you. Tell the Federal Power Commission. I have never had the chance to tell the Federal Power Commission in the cross-examination filed petition intervened which they rejected.

Nevertheless, the court of appeals held that this was within the Secretary's power because under the Flood Control Act of 1944 he had authority to revise the rate which he does. And that the change of the points of delivery was in effect a rate revision that he was required by the statute to recover all Government costs and this was his scheme of how to do it.

The fact that there might have been other ways of doing it didn't concern the court. And as to our pleas that he was reversing and violating the directions of Congress of the postage stamp rate, the Court said these are contained in the committee report, not in the statute. He is not bound by it. He can reverse it.

So to pause there for a moment, the Congress every year in the appropriation act committee reports gives the Secretary of Interior directions of various kinds. I've never heard it before of the Secretary having the affrontry to say he is not bound by the limitations placed by the appropriation committees on the expenditure of appropriated funds.

But the board of appeals is never wrong about that. And that the committee reports do not bind the Secretary, only the statute can. So Senator Eagleton's bill proposes to write into the statute, instead of the committee reports, the direction that power be sold without discrimination at the postage stamp rate and that we shall indeed have due process before the Secretary under the new Department of Energy hereafter.

In view of the general agreement, that the postage stamp rate is the way SPA ought to operate there can't be much objection to writing it into the statute because that's not the way they're operating with respect to the Missouri projects. As to the plea that somehow this would cost somebody money, let me say that \$14.40 per kilowatt per year charged for the capacity which we pay is exactly the same that every other user pays is itself calculated as Mr. Diddle said deliberately to recover all costs including the rental costs of these lines like ours as well as the cost of amortizing the investments made under the appropriated funds to build transmission lines.

We are paid twice. If we're relieved of the duplicate payment, it is not a matter that casts any tremendous burden on anyone else whether SPA is in surplus or whether it is not. So there, gentlemen, is our case.

Let me just add in closing that on August 25, before Judge Hart, the court of appeals remanded the case to Judge Hart and said it was troubled by the fact that even if the Secretary was right to wiping out the postage stamp rate and so forth, the Court was troubled by the fact that we buy only about 52 percent of the energy that we in fact transmit through SPA. The balance of it is transmitted to three power companies in their reclamation to six small municipalities. And said unless the total, Judge Hart, and ascertain the value of Associated's transmission service in integrating SPA power to these other—demands on these other users. That's the issue before Judge Hart.

In a procedural hearing on August 25, he was told the pendency of Senator Eagleton's bill. And he said what's the status of that? I said, well, it's on the back burner at the moment. He said move it to the front burner. Let's get rid of the case. So I would urge you to do that.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ely follows:]

Statement of Northcutt Ely
of the Law Offices of Northcutt Ely
Washington, D.C.
Attorneys for Associated Electric Cooperative

Before
The Committee on Energy and Natural Resources
United States Senate
March 9, 1978

In support of
Senator Eagleton's Bills,
S. 2249, S. 437, 95th Congress

My name is Northcutt Ely. I am senior partner in the Washington law firm which bears my name. We are attorneys for Associated Electric Cooperative. I appear in support of Mr. Gerald F. Diddle, general manager of that cooperative. We urge enactment of Senator Eagleton's bill, S. 2249, "A bill to prohibit discrimination in rates charged by the Southwestern Power Administration and to require due process in the confirmation of such rates by the Federal Energy Regulatory Commission." This bill, introduced October 27, 1977, is a revision of his earlier bill S. 437. Both reach the same result, but S. 2249, introduced after the Department of Energy was authorized, is preferable.

This case presents an extraordinary three-cornered controversy among the Congress, the executive departments, and the courts, as to the law and the policy which govern, or ought to govern, the disposition of power by the Southwestern Power Administration. It requires a legislative solution.

Four issues are involved:

The Disregard of Congressional Directives

The first issue is whether the Secretary of the Interior was bound by directives which the Appropriations Committees, in their reports on appropriation bills in 1950 and 1956 (directives which were confirmed, in the latter case, by a conference report voted upon by the two Houses), instructed him to write into certain contracts, or whether he is free to disregard those directives, notwithstanding his incorporation of them into the contracts, as

- 2 -

required. The court of appeals held that he was not bound by the committees' instructions, because they were not incorporated in a statute, but only in committee reports. In view of the time-honored practice of the Congress to attach conditions and instructions, in committee reports, on the expenditure of appropriated funds, this is an institutional problem of serious magnitude. Be that as it may, Senator Eagleton's bill meets the court's point by incorporating in a statute the committees' policy instructions, now of nearly thirty years' standing.

The Reversal of the Postage Stamp Rate Principle

Second, having regard now to the particular committee instructions which the Secretary decided to flout, in 1970 (after his department had conformed to them for fifteen years in one instance, twenty years in the other), the question is whether the non-discriminatory postage stamp power rate concept, ordered by the committees, is to be replaced by a new scheme which charges more for SPA power which is delivered to SPA's customers by means of wheeling arrangements over non-government transmission lines, than is charged for the delivery of power over government-owned lines. This, notwithstanding the fact that, in this case, Congress refused appropriations to build transmission lines, and the committees directed the Secretary to enter into the wheeling arrangements and postage stamp power contracts that he repudiated in 1970. The result is particularly unjust here, because, in reliance upon the Secretary's twin promises to pay rentals for

- 3 -

the use of these lines which would repay to REA the money that the cooperatives borrowed to build them, and to deliver power to their load centers at the postage stamp rates, the cooperatives borrowed the money and built the lines. The transmission service charge, assessed against Associated alone, is grossly discriminatory.

SPA sells hydropower to seven customers other than Associated under the P-2 rate schedule: Kansas City Power and Light Co., The Empire District Electric Co., Missouri Public Service Co., City of Springfield, Missouri, City of Carthage, Missouri, Arkansas Electric Cooperative, Oklahoma Gas and Electric Co. In no instance has SPA assessed the transmission service charge against any of them.

The first three are the "Missouri Companies," to which Associated is obligated to transmit 190,000 Kw by its 1962 contract with SPA, and which it built facilities to serve as that contract required. The Secretary would increase the cost of power to the cooperatives 60 percent above that charged to the private companies which are served over these same lines, or are served by government-owned lines.

As to those three SPA customers (as well as the Bureau of Reclamation and the municipalities) to which Associated is obligated to wheel power over its lines, the transmission service charge discriminates against the cooperatives, which receive less than 52 percent of the power that Associated transmits, by burdening them with 100 percent of the transmission service charge,

- 4 -

while totally exempting from that charge the private utilities and others who are entitled by their contracts with SPA to 48 percent thereof, via transmission facilities furnished at the expense of the cooperatives. It thus not only flatly contradicts the congressional directive of 1956, but violates the mandate of section 5 of the Flood Control Act of 1944 that rates must be fair and reasonable, and it is void for both reasons.

But there is an even deeper issue of discrimination. The question is whether Congress intended that SPA's customers who are served at the P-2 rate by transmission lines built at the taxpayers' expense with appropriated funds, e.g., the Arkansas Electric Cooperative and Oklahoma Gas and Electric Company (to name two outside Missouri) shall receive power at less cost delivered than shall the Missouri cooperatives, simply because Congress appropriated funds to build transmission lines in Arkansas and Oklahoma, whereas it elected to cause the lines in Missouri to be built with federal loans, secured by SPA's rentals. With respect to the three Missouri companies, if it were assumed, as the Secretary has contended that new SPA transmission lines have been built at taxpayers' expense to serve the companies, supplanting the use of Associated's lines, the discrimination would be accentuated. Plainly Congress intended no such discrimination, but flatly forbade it, when it directed that power be delivered to the Missouri cooperatives at their load centers at the basic SPA

- 5 -

rate. Senator Eagleton's bill directs, as the committees did, that SPA power be sold at systemwide postage stamp rates, whether delivered over government-owned lines or via wheeling contracts.

The Unilateral Change in Delivery Points

The third issue relates to the devious technique used by the Secretary. Instead of a straightforward rate increase, which he had authority to make, but which would have applied to all SPA customers, private as well as public, he employed the clever scheme (upheld by the court of appeals as within his authority) of maintaining the rates as they were, but changing the points of delivery from the locations named in the contracts, at or near load centers, 50 to 300 miles from the government transmission grid, as specifically required in the committee directives, to points on the government grid. If the Secretary has this authority to unilaterally change delivery points, it applies generally on all projects, and it applies to unilateral changes from one delivery point to another with respect to customers served over government-owned as well as -leased lines. Senator Eagleton's bill denies to the Secretary the claimed authority to unilaterally change agreed delivery points.

Due Process and Fair Play

The fourth question is one of due process. The facts in the present case are shocking. The Secretary raised the cost of power to the cooperatives, but not to the private companies, 60 percent, in an order which he released to the cooperatives on the

- 6 -

day that he sent it to FPC for approval. They had no notice or opportunity to be heard. The FPC refused to permit them to intervene and be heard, denying their petition simultaneously with approving the Secretary's discriminatory transmission service charge. The court of appeals held that this course of action was lawful. If so, it is high time that the law is corrected. Senator Eagleton's bill would require the new Federal Energy Regulatory Commission, in proceedings to confirm the Secretary's proposed SPA rates, to follow the due process requirements of the Administrative Procedure Act. There is no reason why he should be exempt from the requirements of fair play applicable generally to all federal administrators. This is particularly so in his rate proceeding, which may affect literally millions of individuals.

LEGISLATIVE BACKGROUND OF THE CONTRACTS
BETWEEN SOUTHWESTERN POWER ADMINISTRATION
AND THE MISSOURI COOPERATIVES

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of
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Legislative Background
of SPA's contracts with the Missouri Cooperatives

SPA's contracts with the Missouri Cooperatives (1950, 1956, 1962) incorporate several instructions from congressional committees, e.g., directing (1) that power be sold at uniform system-wide rates, delivered to load centers (not at the dams); (2) that Congress would not be required to appropriate funds to build transmission lines, but instead would appropriate money to pay rentals on leased lines; (3) that, to build the required lines, the cooperatives would borrow funds from REA, and the Secretary would lease them, paying rentals (appropriated by Congress) in the amounts required to service that debt, plus operation and maintenance, etc.; (4) a modification of the latter directive to require offsetting (net billing) of the rentals due from SPA to the cooperatives, against power bills the latter owes SPA, to minimize appropriations; (5) an amplification of these arrangements in 1962, to require the cooperatives (now federated as Associated Electric Cooperative) to make its transmission system available to SPA to enable SPA power to be sold as peaking power to three Missouri Companies and exchanged with the Bureau of Reclamation. Congress appropriated money (1) to pay Associated for certain of these costs; and (2) to build certain facilities, as the Committee Reports said, to "implement" the Associated contract; (3) to add 180,000 Kw of installed capacity to the SPA system to generate peaking power which could be sold because of the availability of Associated's trans-

mission system under the 1962 contract.

Details follow.

The legislative history is in diametric conflict with a new decision of the Secretary of the Interior in 1970, referred to below in imposing a "transmission service charge" on Associated.

The "Transmission Service Charge" is in the precise amount of money which the Secretary concedes is owed by the Southwestern Power Administration to Associated, under their contract of 1962, for services performed by Associated in transmitting power and energy for SPA's account to the cooperatives, municipalities, power companies and the U.S. Bureau of Reclamation at points of delivery specified in the contract, and which is paid to plaintiff in the form of credits on its bills for power purchased from SPA. The new charge would thus offset and annul the payments owed plaintiff in the same amount.

The facts fall into five categories, relating to: (1) the 1944 Flood Control Act and policy determinations thereunder, (2) the 1950-51 legislation, (3) the 1956 legislation, (4) the 1962 contract and Appropriation Acts implementing it, (5) the proposed Transmission Service Charge.

1. The 1944 Flood Control Act

Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, in addition to authorizing the Secretary to sell power and energy generated at federal flood control dams, authorized the Secretary of the Interior to utilize transmission lines to deliver hydro-

- 3 -

electric power to his customers. The Act states that the "Secretary of the Interior is authorized, from funds to be appropriated by Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms. . . ." (Emphasis added.)

The rejected Bailey Amendment

The quoted language was adopted after rejection by the Senate, 42-27, of the Bailey amendment which would have provided:

"The sale of such electric power as may be generated at reservoir projects shall be made at the point of production, without special privilege or discrimination, so as to provide for the complete coordination of such power and energy with other power developments, . . ." (Emphasis added.) (90 Cong. Rec. 8369 (1944).)

Policy determinations in the Truman Administration

The Truman Administration announced policy determinations that would control the administration of the Act, including two of particular significance here:

In November 1945, it declared:

"3. Adequate transmission and distribution facilities must be made available either by utilizing existing facilities or the construction of new facilities to bring the power from the interconnected hydro-electric developments to the load centers of the area, and to prospective users of the electric service if the most wide-spread use of the electric power and energy at the lowest possible rates to consumers is to be secured." (Emphasis added.) (Report on Comprehensive Plan of Power Distribution and Sales from Hydro-Electric Projects, as Authorized by Flood Control Act, December 1944 (H.R. 4485) in the Southwestern Region, U.S. Department of the Interior, Southwestern Power Administration, p. 95, Nov. 1945.)

- 4 -

In January 1946, the Secretary declared:

"(c) Wholesale rate schedules shall be nondiscriminatory and shall be designed to bring power at the lowest possible rates to distributors that are principally serving domestic and rural customers." (Emphasis added.) (Memorandum of Power Policy, Secretary of the Interior, Harold L. Ickes, Jan. 3, 1946; Ex. P-13, App. Vol. II, 412.)

Appropriations were accordingly sought to construct transmission lines from the dams to the municipalities and to the load centers of the rural electric cooperatives in the SPA service area, which included areas in Missouri, Oklahoma, Arkansas, Texas, Kansas, and Louisiana. These efforts succeeded in some states, but Congress refused to appropriate funds to build the "backbone" transmission lines in Missouri.

2. The 1950 and 1951 Appropriation Acts, and Contracts Made Pursuant Thereto

The Secretary's plan

The Secretary in 1949 developed an alternate plan for construction of transmission lines in Missouri, centered on his authority under section 5 of the Flood Control Act to "acquire, by purchase or agreement" the necessary transmission facilities. It was as follows:

(1) The Rural Electrification Administration (REA) would lend to certain Generation and Transmission (G & T) cooperatives the money required to build a "backbone" 161 kv transmission system in Missouri, plus two steam plants (for which SPA had unsuccessfully sought federal appropriations), as well as 69 kv lines connecting these 161 kv lines with the load centers of the G & T's;

- 5 -

(2) SPA would lease these facilities from the cooperatives, and SPA would operate them, paying the cooperatives rentals so calculated as to service the REA debt, and reimburse costs of operation, maintenance and replacements;

(3) SPA would sell power from Bull Shoals and Table Rock Dams to the cooperatives at their load centers, delivering such power over this federally financed system, at the SPA system-wide rates, just as though the lines had been constructed with appropriated funds.

The plan was reviewed and approved by the Solicitor of the Interior Department in an opinion dated July 15, 1949, which was reported to Congress. 95 Cong. Rec. 11449 (1949). It was similarly reviewed and approved in two opinions of the Solicitor of the Department of Agriculture (that Department having supervision of REA). 1/

The Interior Department's Solicitor's conclusion, as received by the Secretary and Congress, was that:

"In so far as the rental of transmission lines and appurtenant facilities is concerned, the plain language of section 5 seems clearly to authorize the Secretary of the Interior (and the Southwestern Power Administration in

1/ Opinion of Nov. 18, 1949, Hearings on Agriculture Appropriations for F.Y. 1951 Before a Subcomm. of the Senate Comm. on Appropriations, 81st Cong., 2d Sess., at 1362 (1950) (Joint Session with Interior Appropriations Subcomm.); Opinion of Jan. 30, 1950, id. at 1370. The Interior Department Solicitor's opinion appears at 1436.

the exercise of the Secretary's delegated authority) to enter into such agreements. The section provides that the Secretary may 'construct or acquire, by purchase or other agreement,' transmission lines and related facilities if it is necessary to do so in order to accomplish the objectives stated by the Congress in the enactment of section 5.

". . . [T]he Secretary (or the agency exercising his authority under section 5) is not required to construct the necessary transmission lines and related facilities, but. . . he may acquire them already constructed, if that is possible and seems advisable. . . . [I]n acquiring transmission lines and related facilities, the Secretary is not restricted to acquisition by purchase, but . . . he may acquire them by any other form of agreement--such as, for example, a rental agreement. Hence the rental of transmission lines and related facilities by the Southwestern Power Administration, . . . under section 5 of the Flood Control Act . . . , within a prescribed region, seems to be plainly provided for in section 5." (Emphasis supplied.) (Ex. P-14, App. Vol. II, 415.)

The "Continuing Fund"

The House, in enacting the Interior Department appropriation bill for F.Y. 1950 (H.R. 3838) included provision for a "Continuing Fund," applicable to the SPA area, out of which the Secretary was authorized to make expenditures for the purposes, among others, for "purchase of electric power and energy and rentals for the use of transmission lines and appurtenant facilities of public bodies, cooperatives, and privately owned companies." A Committee amendment was offered in the Senate to strike the entire authorization for the Continuing Fund. It was defeated, 45-38. 95 Cong. Rec. 12036 (1949).

Instead, the Senate adopted, 47-35 (id.), an amendment offered by Senator Kerr, reading "and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies." Id. at 12023. Senator Kerr explained his amendment as being intended to delete authority "to rent generating facilities from rural

- 7 -

cooperatives and others," (id. at 12023, 12032), while

"... It is the purpose [of this legislation] to permit him [the Administrator of SPA] to build transmission lines to carry Government power to preferred customers. It is the purpose of the Administrator to make contracts with private utilities, where it can be done on an equitable basis, to eliminate the necessity for the Government building these lines." (Emphasis added.) 2/

The Interior Department Appropriation Act for F.Y. 1952

In considering the Interior Department Appropriation Bill for F.Y. 1952, the Senate first adopted a Committee amendment which, in effect, repealed so much of the Continuing Fund language, enacted in the previous year, as authorized the use of the Fund for the purchase of electric power and rentals for the use of facilities for the transmission and distribution of electric power and energy (97 Cong. Rec. 7864 (1951)) but immediately thereafter adopted an amendment offered by Senator Kerr which provided that \$500,000 of the amount appropriated should be available for purchase of electric power and energy "and for leasing of transmission lines and related facilities of others." 97 Cong. Rec. 7868 (1951).

The conferees of the two houses resolved the issue by recommending, and securing approval of, the language which now appears in 16 U.S.C. sec. 825s-1, plus an appropriation from the fund of \$250,000. Id. at 10210. During the debate on the conference report in the House, the sharp exchange between two Missouri congressmen, Mr. Cannon and Mr. Short, made it clear that Congress had the problems of getting power to the Missouri cooperatives very much in mind. Mr. Short said (p. 10207):

2/ This amendment, along with the 1951 amendment, is codified in 16 U.S.C. §825-1.

". . . My amendment which passed by an overwhelming vote here has been stricken by the conferees. It would have prohibited the expenditure of money for the construction of certain parallel lines in southwest Missouri."

Mr. Cannon responded (p. 10208):

"If contracts can be negotiated for using transmission lines of other Government agencies, of REA cooperatives, or of privately owned electric companies, thereby avoiding construction of lines by the Southwestern Power Administration, or by other Government agencies in other areas, that may be well and good, provided--and this is the important part--provided that all the emphasis is upon getting power to the customers preferred under the law at the lowest possible rates. The advocates of a mandatory 'wheeling' policy do not emphasize those points, and it is obvious that they have in mind no such emphasis or results or objectives.

"It is too clear and too well established by law and practice to be altered or amended by speech-making or adroit phrases that the power policy of the United States Government and the Congress is to get publicly generated power to the customers preferred by law, to get it to them without delays, to get it to them in adequate volume for their needs and without burdensome restrictions on its use, and to get it to them at the cheapest possible rates consistent with self-liquidation of the Government's investment in power facilities."

It is clear, from this legislative history of what has come to be known as the Continuing Fund statute, that Congress made a decision in favor of the policy advocated by Mr. Cannon, and that the intent was to use the device of rentals of transmission lines, in lieu of appropriations for construction of such lines, as a method for getting power to the rural cooperatives at the same price as though the lines had been built with appropriated funds.

It is evident, also, that Congress acted in 1950 and 1951 with acute awareness of SPA's contracts with Central Electric Cooperative and N.W. Electric Cooperative (now members of Associated), which called for payments by SPA which the proposed Transmission System

- 9 -

Charge would now rescind. In 1950, as the result of complaints by 14 utility companies that these arrangements among SPA, REA, and the cooperatives were illegal, exhaustive hearings on these allegations were held before committees of the Senate and House. ^{3/} The utility representatives sought action which would prevent the making of REA loans to the Central and N.W. cooperatives. They did not obtain any such congressional action. Instead, the Continuing Fund statute was enacted. Its relevant provisions, as now codified, read:

"Continuing fund, power transmission facilities . . . the Treasury shall set up and maintain . . . a continuing fund of \$300,000, . . . to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies." ^{4/}

³ The battle brought by the power companies fighting public power raged in the Interior Department Appropriation hearings for years, starting in 1949. *E.g.*, Hearings, Agriculture Subcommittee, House Committee on Appropriations, on Department of Agriculture Appropriations, F.Y. 1951, Part 4, p. 974 *et seq.*, particularly the defense of the arrangements by Secretary of Agriculture Wickard, pp. 992-96, and the opinions of the Solicitors of the Departments of Interior and Agriculture on these contracts, pp. 996-1000. In the Senate, hearings were held in a joint meeting of the Appropriations Committee's Subcommittee on Agriculture Department and Subcommittee on Interior Department Appropriations (Hearings, Appropriations for the Department of Agriculture, Senate, F.Y. 1951, p. 1057 *et seq.*). The private power companies' attack against competition from public power also was carried to the Senate and House floors. *E.g.*, 97 Cong. Rec. 7783-7788, 7792-7801, 7840-7869, 10203-10210.

⁴ Appropriations have been made from this fund repeatedly to pay the compensation for the use of the "original 161 kv facilities" and the "additional 161 kv facilities" referred to below in connection with the 1962 contract, in those years in which the net balance was in favor of the cooperatives. *E.g.*, Interior Department Appropriations Acts for F.Y. 1950-52, 1954-66. The \$300,000 figure is the minimum balance to be maintained in this revolving fund. See Treasury Department definition at 95 Cong. Rec. 12034 (1949).

- 10 -

The REA loans: construction of the facilities here involved

Pursuant to the plan of the Secretary above described, the G & T cooperatives, in 1950-51, obtained loans from the Rural Electrification Administration to construct generation and transmission facilities. Design was based on SPA's specifications. (Art. I, sec. 2 and Art. II, sec 2.) The transmission lines were constructed.

SPA's lease of the REA-financed lines of the cooperatives

SPA leased the lines from the G & T cooperatives, as Congress had authorized.

The lease contract recitals explained:

"[T]he Government . . . determined that the transmission and appurtenant facilities . . . are necessary and desirable in order to permit the Government to market the . . . power available to the Government from the reservoir projects under control of the Secretary of the Army in the area assigned by the Secretary of the Interior to the Southwestern Power Administration in accordance with the requirements of law, . . ." ("Whereas" clause in the Central-SPA lease contract, p. 2.)

Power sales contracts

Under separate power sales contracts, the coops purchased SPA power at SPA system rates. It was Rate Schedule "A", approved by FPC order, February 13, 1947, Docket No. IT-5971; 6 F.P.C. 407, 408 (1947), which stated that "proposed rate schedule A provided in substance that it shall be applicable in the entire territory served by SPA and shall be available to any customer purchasing power in wholesale quantities for firm power service and contracting for a specific number of kilowatts." (Emphasis added.) Thus,

- 11 -

the cooperatives purchased hydro power from SPA, delivered to the cooperatives' load centers, at a system-wide rate available to all SPA customers. 5/

The power companies' suits

The Secretary's authority to enter into these agreements was attacked by certain utility companies, but was sustained, in Kansas City Power & Light Co. v. McKay, 115 F.Supp. 402 (D.D.C. 1953), judgment vacated for lack of plaintiff's standing to sue, 96 U.S. App. D.C. 273, 225 F.2d 924 (D.C. Cir. 1955). The District Court's opinion accurately described in some detail the relationship between the contracts (115 F.Supp. 402, 417).

5/ This has remained the federal program for over 20 years, until repudiated by the present administration in the 1970 order here under review. See "Report on Comprehensive Plan of Power Distribution and Sales from Hydro-Electric Projects, as Authorized by Flood Control Act in the Southwestern Region (Nov. 1945)" as quoted in our Statement of Facts before the District Court, para. 11, App. Vol. I, 223; "Memorandum on Power Policy, Secretary of the Interior," Ex. P-13, App. Vol. II, 410.

- 12 -

3. The 1956 Legislation

During the pendency of the foregoing litigation, appropriations to the Continuing Fund were suspended.

The decision of Congress in F.Y. 1956

After the McKay decision in the Court of Appeals, Congress resumed appropriations to the Continuing Fund for F.Y. 1956 (Statement, para. 33, App. Vol. I, 225), and ordered that the lease contracts be reactivated, noting that it approved them, but instructing the Secretary as to the terms of certain amendments desired by the congressional committee. The House Committee on Appropriations in its Report to Accompany H.R. 6766, the Public Works Appropriation Bill for F.Y. 1956 (Rep. No. 747, 84th Cong., 1st Sess.), pp. 5-6, said:

"This action makes it possible to reactivate valid and legal contracts which certain G and T (Generating and Transmission) cooperatives have with SPA. These contracts at their inception were examined by the Congress and funds were available to carry them out thru the Continuing Fund for fiscal years 1950 thru 1953.

"The contracts in question have been tested in the courts.

"In reactivating the contracts with the G. and T. cooperatives, the Department of the Interior is instructed to delete any provisions providing for the option to purchase G. and T. transmission lines or other facilities by the Southwestern Power Administration. The contracts are also to provide: (1) that the G. and T. cooperatives will operate and maintain their own transmission systems under lease to the SPA; (2) that the SPA and the G. and T. cooperatives will settle accounts for power purchased and sold on the basis of net-balances as is done under existing contracts to which SPA and private utilities are parties; and (3) that power and energy will be delivered to the load centers of all G. and T. contracting systems at the basic SPA rate." (Emphasis added.)

- 13 -

The Conference Report on that same appropriation bill contained comparable language. (H.R. Rep. No. 1085, 84th Cong., 1st Sess.) 6/ It was adopted by the votes of both houses.

Three points of controlling significance in the foregoing account of the reports of the House Committee and the conferees on the 1956 bill: (1) Congress determined that the contractual payments now attacked by the Secretary were "valid and legal"; (2) Congress determined that power should be delivered to the load centers of the cooperatives over lines rented by SPA and

6/ Chairman Cannon of the House Committee on Appropriations wrote the Secretary of the Interior August 1, 1955 (Ex. P-18, App. Vol. II, 420):

"... The House committee made the following statement with respect to this point:

"In reactivating the contracts with the G. and T. cooperatives, the Department of the Interior is instructed . . . and (3) that power and energy will be delivered to the load centers of all G. and T. contracting systems at the basic SPA rates."

"We thought this made it perfectly clear what we wanted done.

"The conference committee made the following statement on this matter:

"The conferees are in agreement that if not already included in existing contracts provisions are to be inserted to require that power and energy be delivered to load centers of all generating and transmission contracting systems, if practical, at the basic Southwestern Power Administration rate."

"The words, if practical, were added because Mr. Wright, the Administrator, has indicated before the Senate committee that there were some engineering problems which might make it impractical. . . . So far as the committee is concerned, we believe the practicality of the operation should be dismissed since it has actually been in operation.

* * * * *

"We trust this problem will not arise with the other G.T. by excluding any segments of their systems."

- 14 -

priced there at the basic SPA rate, applicable everywhere on the transmission grid owned by SPA; (3) the net balance arrangement was intended simply to reduce the amount which Congress might otherwise have to appropriate to pay the rentals on the transmission lines, but certainly was not a device to enable the Secretary to reduce, at will, the amounts that Congress told him to pay the cooperatives to amortize the REA loans, undertaken at his behest, and to support the operating costs of those lines. The contracts were amended as required by Congress

The contract language of an August 12, 1955, amendment reflected the intent of Congress. An amendment of October 22, 1956 specified that:

"WHEREAS, in appropriating funds for the Department of the Interior for the fiscal year 1956 under Title II of the Public Works Appropriation Act, 1956 (69 Stat. 356), the Congress provided necessary funds and evidenced a desire that the Lease Contract be reactivated, and the Lease Contract was, in conformity with the intent of the Congress reactivated by the parties hereto under a Letter Agreement dated August 12, 1955 (Ispa-305-3); and

"WHEREAS, the Senate Report (Senate Report No. 700, 84th Cong., 1st Sess.) to accompany H.R. 6766, which became the Public Works Appropriation Act, 1956, supra; the House Report to accompany H.R. 6766 (House Report No. 747, 84th Cong., 1st Sess.); and the statement of the managers on the part of the House accompanying the Conference Report (House Report No. 1085, 84th Cong., 1st Sess.) to H.R. 6766, recommended, in substance, that the contracts between the parties hereto be amended upon reactivation (i) to delete the provisions granting to the Government an option to purchase the Transmission System of the Cooperative, (ii) to allow the Cooperative to operate and maintain its Transmission System, (iii) to allow the Government and the Cooperative to settle accounts on a net-balance basis, and (iv) to require that power and energy be delivered to the load centers of all generating and transmission contracting systems, if practical, at the basic Government rate; and"

- 15 -

The contracts made pursuant to these directives uniformly contained stipulations that the SPA payments would continue until the REA debt is fully repaid. See, e.g., SPA's agreement with Central Electric Cooperative (Art. VI, sec. 4). (These contracts of SPA with the cooperatives were suspended, not cancelled, by the 1962 agreement between SPA and Associated.)

The reason for such a stipulation was stated by Chairman Cannon of the House Appropriations Committee in testimony in 1955 before a subcommittee of the House Committee on Government Operations:

"... They [the cooperatives] would not have taken on such a financial burden but for the fact that they had a solemn and binding contract with the Government extending over a period of 40 years, under which they would receive sufficient income to amortize the loan from the Government and pay back every dollar with interest." (Hearings on Effect of Administration Acts and Policies of Department of Interior and Rural Electrification Administration on Rural Electric Cooperatives, Public Bodies, and Municipal Electrics, Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 84th Cong., 1st Sess. at 5 (1955).)

The contracts were amended from time to time thereafter, for various reasons, but the foregoing principles were never changed. 7/

The "net billing" arrangement

The effect of the system of offset or net billing, ordered by Congress in 1956, was to reduce the amounts required to be appropriated from the Continuing Fund to pay rentals, but for twenty years (from 1950 to 1970) the principle was never challenged that SPA owed the rentals, whether these were greater or less than the

7/ For example, Article VI, section 4 of Central's 1957 agreement, executed to implement the 1956 congressional directive, provided:

"The Government shall pay to Central each month as compensation for the lease of the capacity of the 154 Kilovolt Transmission System ... which payments are intended to amortize during the period of Central's REA loan the actual cost of the 154 Kilovolt Transmission System the capacity of which is leased by the Government pursuant to the terms of this agreement." (App. Vol. II, 117.)

- 16 -

revenue it received from SPA's power sales to the owner of the rented facilities. The Interior Department's justification for appropriations each year made this crystal clear, tabulating separately the amounts owed by each party to the other, and striking a balance.

For example, the report of the Senate Committee on Appropriations on the Public Works Appropriations Bill for F.Y. 1958 explained:

"The committee recommends concurrence in the House provision authorizing the use of \$5,000,000 of the revenues from the sale of power for the purchase of energy and rental of transmission facilities. These funds are used to implement existing contracts with utilities and preferred customers in the area.

"The decrease of \$1,400,000 is the result of amendments to certain contracts providing for the settling of accounts on a 'net basis.'" (Emphasis added.) (S. Rep. No. 609, 85 Cong., 1st Sess. 40 (1957).)

This brings us to the 1962 contract, and the proposals of the then Secretary of the Interior which brought it into existence.

4. The 1962 Contract and Appropriations Acts Implementing It

The Secretary's 1961 proposal

In 1961, SPA turned to the Missouri cooperatives for assistance in a plan to expand the generating capacity of the Bull Shoals-Table Rock power plants by 180,000 Kw (to 540,000 Kw), and to market all this power as "peaking power." To do this required the integration of these power plants into power systems having five to six times as much generating capability. This was

- 17 -

for the reason that the water supply is only adequate to enable the full 540,000 Kw of capacity to be operated some 15 percent of the hours in the year (1200 of 8760) and only a very large power system can absorb that much "peaking capacity" during the short periods when the government can supply hydro energy to accompany it.

In a letter dated April 20, 1961, to the cooperatives, the Secretary proposed "that a three-party arrangement be developed among the G&T's acting through Associated Electric Cooperative [a federation to be formed for this purpose], the private utility companies, and the Government."

It was the scheme finally consummated in the 1962 contract.

The Secretary proposed in 1961 that the six Generation and Transmission cooperatives in Missouri with which SPA had contracted (see above), should federate into one organization, Associated Electric Cooperative, and that, with Associated's cooperation, (1) the 540,000 Kw to be generated by Table Rock and Bull Shoals Dams be sold as peaking power, rather than firm power, thus relieving the Government of the expense of purchasing energy from outside sources to supply customers' loads during the periods when the Government's hydroenergy was inadequate to do so; (2) peaking power and energy would be delivered at uniform stated rates to SPA's customers over the integrated transmission system of Associated, SPA, and the Missouri Companies; (3) of the 540,000 Kw, Associated would purchase 288,000 Kw, three private utilities

- 18 -

190,000 Kw, six named Missouri municipalities 29,000 Kw, and SPA would reserve 33,000 Kw for others; (4) SPA would have the use of Associated's transmission lines to deliver power to SPA's customers; (5) Associated would provide power and energy from other sources to replace losses in transmission to all SPA's customers; (6) Associated would provide from other sources reserves or standby to the extent of 15 percent of the 540,000 Kw, or 80,000 Kw; (7) Associated would operate and maintain certain isolated facilities owned by SPA; (8) the existing contracts of SPA with the G&T cooperatives would be suspended.

Compensation to Associated

As compensation for SPA's use of the transmission lines now in controversy, the Kennedy Administration proposed:

"2. 161 KV Transmission Facilities

"The Government would continue paying under the existing arrangements for the use of the capacity in the Central and N.W. 161 KV lines with no substantial modification from the present contractual rights and obligations of the parties.

* * * * *

"The arrangement should indicate the additional 161 KV facilities needed to carry out the purposes and the parties who will construct these facilities and approximate timing of such construction. 8/

"3. Services for the Government

"Associated Electric Cooperative will provide a number of services for the Government. These will include the providing of necessary reserves, energy and capacity losses, the use of the capacity of the existing Central and N.W. 161 KV

8/ These "additional 161 kv facilities" were later determined to include extension of the cooperatives' transmission lines to interconnect with the U. S. Bureau of Reclamation lines near the northern Missouri border, to enable interchange of power between the two government (SPA and the Bureau) systems, separated some 300 miles.

lines, delivery of power over the 69 KV systems of the members of Associated Electric Cooperative, the operation and maintenance [of] the Government's isolated transmission facilities and consideration to the Government of the reduction in its financial obligations regarding the 69 KV facilities of the G&Ts. It is proposed that the contract provide for a payment to Associated Electric Cooperative for these services. Additional studies need to be made by the Department to determine the amount and the most appropriate manner in which such payments are to be made, taking into consideration possible future conditions and changes."

The cooperatives and the Missouri Companies accepted the Secretary's proposal. The Secretary thereupon prepared contract drafts, and negotiations proceeded to the consummation of agreements consistent with his proposal.

Rate Schedule P-2

The Secretary, prior to executing the contracts, submitted his plan to the Federal Power Commission for its approval, accompanied by a proposed Rate Schedule P-2, for peaking power sales, which would apply uniformly to power and energy to be taken by Associated, the Missouri Companies, and other customers of SPA in the Southwest.

Rate Schedule P-2 stated a demand charge of \$14.40 per Kw per year, payable at the rate of \$1.20 per month, and an energy charge of 2 mills per Kwh, for electricity delivered at points of delivery specified by contract. The minimum amount of energy associated with peaking power would be 1200 Kwh per Kw. All of SPA's costs, i.e. operation, maintenance, administrative and transmission, are encompassed by the P-2 rate. It is a rate covering production and transmission costs, whether power is transmitted over lines built with appropriated funds or lines "acquired by lease or otherwise. It has never been changed.

The Secretary's explanation to FPC of the credits to Associated

The Secretary accompanied his 1961 submission to the Federal Power Commission with an explanatory memorandum. It gave the following details of the proposed payments to Associated for its services:

<i>"Southwestern Power Administration Summary Payments SPA to Associated Electric Cooperative</i>	
<i>"Contract Credits to Associated</i>	<i>Annual Payments</i>
<i>"1. Transmission Service</i>	
161 kv (Existing) ^{9/}	\$1,099,000*
161 kv (New Facilities) ^{10/}	516,000*
69 kv (SPA's Customers)	278,000
<i>"2. Power and Energy Transmission Losses (10%) ^{11/}</i>	
Capacity	777,000*
Energy	256,000*
<i>"3. Reserve Generation (Standby)</i>	1,152,000
<i>"4. Suspension of Contracts (Power Plants)</i>	493,000
<i>"5. Operation and Maintenance, SPA Isolated Facilities</i>	85,000
<i>"Total</i>	<i>\$4,656,000"</i>

The obligations marked above with an asterisk would be cancelled out by the proposed Transmission Service Charge, in exactly the same amount, \$2,647,100.

^{9/} These are the facilities built in the 1950's, referred to in the legislative history of the 1950-51 and 1956 Interior Department Appropriation Acts.

^{10/} These are the additional facilities, proposed by Secretary Holm in 1961 (supra) to accomplish, among other things, interconnection of the SPA and U.S. Bureau of Reclamation systems.

^{11/} To perform this obligation, Associated must either buy energy from other utilities or generate it in its own thermal plants.

- 21 -

The reasons for these transmission obligations of SPA, the Secretary told the Commission in 1961, were:

" . . . Associated Cooperative and the Companies will pool the hydro power purchased from SPA for integration and utilization on the area loads. Under the arrangement, Associated cooperative will provide 161 KV transmission service for SPA to make deliveries of hydro power in the Missouri area to Associated Cooperative, other preference customers of SPA, and the Companies."

He made it explicit that the credits for use of the 161 Kv facilities of both categories were calculated in the amounts necessary to reimburse Associated for (i) the debt service for the REA loans, (ii) the operation, maintenance, taxes and general administration costs, and (iii) the costs of replacements, thus utilizing exactly the system of "net balances" ordered by the House Appropriations Committee in 1956.

On March 28, 1962, five contracts were signed, to carry out the Secretary's plan. They became simultaneously operative on August 1, 1962. These were:

- (1) The SPA-Associated contract, accompanied by:
- (2) An agreement between Associated and the six Federated Cooperatives by which they severally undertook to perform such services as the SPA-Associated contract required of them.
- (3) A contract between SPA and the six Federated Cooperatives, suspending their several agreements with SPA so long as the new SPA-Associated contract should be in force, but providing, with respect to each cooperative, that:

"If at any time prior to July 1, 1995, the SPA-Associated Contract is for any reason terminated, then and in that event the aforesaid contracts dated _____ shall again become operative and in full force and effect as of the effective date of such termination of the SPA-Associated Contract."

- 22 -

(4) A contract between SPA and three Missouri Companies (Kansas City Power and Light Company, Missouri Public Service Company, The Empire District Electric Company), referred to as the "SPA-Companies Contract."

(5) The "Missouri Integration Contract" between Associated and the three western Missouri Companies.

The SPA-Associated contract, the SPA-Companies contract, and the Associated-Companies contract are each attached to the others as exhibits, and all were to go into effect simultaneously. They are inseparable in operation and in legal effect.

The 1962 contract, like its predecessors, stipulates that the Secretary's payments shall continue until the REA debt is fully repaid. Article V, Section 1(c) (Ex. P-8, App. Vol. II, 196-97) says:

"(c) It is anticipated by the parties hereto that by June 1, 1997, all loans made to the Federated Cooperatives by the Rural Electrification Administration and utilized by the Federated Cooperatives to construct the 'Associated 161 Kv System' set forth in Exhibit '2' will be fully repaid, it being the intention of the parties hereto that the annual credit to Associated shall continue to be made in amounts computed under Subsections (a) and (b) of this Section 1, until such REA loans have been fully repaid." 12/

The Nixon administration's "Transmission Service Charge" would repudiate this "solemn and binding contract with the Government." 13/

¹² The predecessor contracts contained similar stipulations, e.g., SPA's 1957 agreement with Central (Art. VI, sec. 4, App. Vol. II, 117). These were suspended, not cancelled, by the 1962 contract. (SPA-Federated contract, Ex. 7 to the SPA-Associated contract).

¹³ The courts have been careful to protect power contracts between power companies and their customers from unilateral revision by the company, not specifically authorized by the contract. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

- 23 -

This, notwithstanding that the Interior Department's justifications to the Appropriations Committees for 14 years (1956 to 1970) uniformly and properly construed the SPA-Associated contract and the predecessor contracts between SPA and the other cooperatives, by showing the two obligations separately, and striking a net balance. See, for example, those for F.Y. 1958, and (subsequent to the 1962 contract) F.Y. 1964.

Indeed, the Secretary's "Payout Study," submitted to the Federal Power Commission shows the obligation to Associated as continuing in its full amount to 1997, when the REA debt will have been repaid. The credits are contractual compensation for plaintiff's services, as shown in the Department's justifications, and do not lose that status by being offset against plaintiff's power bills.

On the execution of these 1962 contracts, Secretary of the Interior Udall announced:

"A far-reaching arrangement assuring a steady flow of electric power to more than one million customers in Missouri through the pooling of generating and transmission facilities of the Federal Government, rural electric cooperatives, and private utilities was announced today by Secretary of the Interior Stewart L. Udall with the signing of contracts between the Government and Missouri cooperatives. The systems will have a capability of approximately three million kilowatts of power.

"The arrangement, to continue for a 23-year period, will permit the Department, through its Southwestern

Power Administration, to gross \$10 million a year in revenues.

"Contracts approved by Secretary Udall are between the SPA and the newly formed Associated Electric Cooperative, Inc., a coordinator for six REA power cooperatives in Missouri. Simultaneously, three private utilities have agreed to an interchange arrangement with the Associated Electric Cooperative.

"The contracts between the Department of the Interior and the electric cooperatives establish terms under which each may use the transmission facilities of the other party. The contracts also provide for the potential interconnection with the Bureau of Reclamation system in the Missouri Basin of the SPA system over transmission lines owned by the cooperatives involved in the present agreement.

"This transmission grid, involving many hundreds of miles of high-voltage lines and more than a score of thermal and hydro-electric power plants, will assure service on a scale that could not be approached with separate, unrelated functioning of power segments, Secretary Udall said.

"The arrangement is a positive step forward toward President Kennedy's goal of knitting together the Nation's power capabilities—public and private—for the good of all users," Secretary Udall said. "Every facility involved in the Missouri arrangement will stand to benefit, and this benefit moves down right to the individual customer, who can plan on a steady supply of electricity the year around for years to come."

"The Southwestern Power Administration will pour 540,000 kilowatts of electricity into the systems, drawing from Federal dams in Oklahoma, Arkansas, and Missouri.

* * * * *

"Fluctuating flows of the White River of Arkansas and other streams serving the Federal dams and the fact that the dams were built primarily for flood control limit the firm power they can produce. However, when their peak periods of output are fed into a system

comprising thermal plants, the thermal plants can cut back while the water-powered generators take a heavier load. As the hydroelectric plants drop in capability at low water periods, the thermal plants move into the system with greater outputs.

"This switching of the power loads and the ability to move power through a wide area makes for a wholly rational and workable arrangement," Secretary Udall said. "We are always interested in maximizing the public benefits from the publicly owned power facilities the Department administers."

- 26 -

Transmission between SPA and the U.S. Bureau of Reclamation

Article IV, section 2, of the 1962 contract was amended July 23, 1962, to provide, subject to certain conditions, that SPA and Associated should each have the right to make and maintain, at any point of the 161 kv system of the other party, "such electrical interconnections as may be necessary or desirable." Pursuant thereto, the United States, with Associated's concurrence, caused an 80-mile long line to be built to connect the U.S. Bureau of Reclamation Missouri Valley system with Associated's at Maryville, Missouri, for interchange of power with SPA over Associated's lines. Benefits to the United States were estimated by the Department in 1962 as \$720,000 annually, on the assumption that 50,000 kw would be transmitted over Associated's lines. (Hearings, House Committee on Appropriations, Public Works Appropriation Bill for F.Y. 1963, pp. 823-24.) The Secretary's payout study in this case confirms this, claiming half of it, \$360,000, for SPA, the other half being credited to the Missouri Valley system. The flow has actually reached 90,000 kw. From December 1965, when this connection was placed in operation, through May 1972, approximately 1.78 billion kwh have been transmitted over Associated's system and metered into the U.S. Bureau of Reclamation system at Maryville, for credit to SPA.

- 27 -

As to transmission of power and energy generated at other government dams

Pursuant to the same contract provision, SPA has caused interconnections to be made between the Associated system and a number of power plants at new dams, which have come into service since the SPA-Associated contract of 1962. These include Stockton Dam (45,000 kw) and Cannon Dam (56,000 kw). Power and energy from these dams is transmitted over Associated's lines. Truman Dam (160,000 kw), now under construction, will have the same opportunity.

The Secretary reported the contracts to Congress. See, e.g., SPA's testimony, Hearings, Subcommittee of the House Committee on Appropriations, F.Y. 1963, 87th Cong., 2d Sess., Part 3, p. 815:

"I wish to announce that in the Missouri area we are completing contractual arrangements involving seven G. & T.'s; involving all the power companies west of St. Louis into a contract in which our systems will be fully integrated, and the G. & T.'s will provide their generation and the companies will provide the generation to make the integration work; and the companies will provide the reserves for the G. & T. thermal plants. The entire operation is one that will save the area somewhere between \$2.5 million and \$7 million a year in electric power costs. Somebody is going to have that much in benefits.

"I anticipate that the Government itself, under the present arrangements we have, will have a benefit of between \$1 million and \$2.5 million a year depending on how accurately and perfectly we make this thing work."

The Secretary's representative called the particular attention of Congress to the advantages which would accrue to the United States (\$720,000 annually) from construction

of an intertie between SPA and the U.S. Missouri Basin System to be made possible by Associated's construction of an extension of its system to Maryville, Missouri, to meet a line which the Secretary proposed to build south from the Missouri Basin System, for which the Department sought (and obtained) an appropriation of \$2,650,000. (Hearings, House Committee on Appropriations, Public Works Appropriations Bill for F.Y. 1963, pp. 823-24.)

P. 823:

"We have extra energy and extra water in the winter-time and the Bureau has only navigational releases in the wintertime, so that by exchanging power and jointly pooling our reserves . . . we can sell—and I will sell if I can have it all—50,000 kilowatts more power if we have that connection.

"In a nutshell here is what it means: On my system 50,000 kilowatts are worth \$14.40 a year. That in round numbers is \$720,000.

* * * * *

"I am perfectly willing to split 50-50 and give the Bureau half of these benefits if they will let me have the other half. . . .

"This interconnection is by far the best and most feasible thing that we have looked at in any regional interconnection yet."

Congressional appropriations to fund the 1962 contract

After the execution of the Associated contract, Congress appropriated money from the Continuing Fund expressly for the purpose of paying Associated the net balance owed to Associated, *i.e.*, the amount of the credits (disowned by the Nixon Administration) minus the amounts owed by Associated to SPA for power and energy. The net balance was in Associated's favor for the fiscal years 1962 through 1966 because the contract provided for a gradual build-up of the quantities of power to be purchased by Associated during this period. The Department's justification to Congress for appropriations to the Continuing Fund for F.Y. 1964 shows the continuity of payments for transmission services, etc., to the Missouri G & T's and thereafter to Associated. Showing a net balance of \$1,031,000 due to Associated (out of a total of \$4,500,000), it said:

"JUSTIFICATION, CONTINUING FUND POWER PURCHASE
AND WHEELING CHARGES, \$4,500,000

"Obligations to be incurred during the fiscal year 1964, under the continuing fund, are based upon contractual arrangements for the purchase and sale of power, including *service charges for transport of power to private utilities and municipalities in the area*, and for the purchase of power from power cooperatives and private utilities in the area. Estimated fund requirements by activity are listed below.

"Purchase of energy and wheeling charges

Associated Electric Cooperative, Inc.	\$1,031,000
.	
Total	\$4,500,000

"The estimated fund requirements have been calculated in accordance with provisions with individual contracts and are presented herewith.

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- 30 -

"Associated Electric Cooperative:

Purchase of power and service charges	\$4,011,000	\$4,757,000
Sales to cooperatives	<u>—3,150,000</u>	<u>—3,726,000</u>
Payment from continuing fund	\$ 861,000	\$1,031,000"

* * * * *

(Emphasis added.) *Hearings on Public Works Appropriations for 1964 Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 1st Sess., pt. 3, at 699-700 (1963).

The Appropriations Act for F.Y. 1964 (Pub. L. No. 88-257) provided:

"Continuing Fund

"Not to exceed \$4,500,000 shall be available during the current fiscal year from the continuing fund for all costs in connection with the purchase of electric power and energy, and rentals for the use of transmission facilities." (U.S. Code Cong. & Admin. News, at 591 (1963).) (Emphasis added.)

Similar provisions have appeared in the departmental justifications and in the appropriation acts for subsequent fiscal years. 14

14 Appropriations have been made to the Continuing Fund each year down to and including F.Y. 1970, although no appropriations have been needed to fund the Associated contract since 1967, because of the increasing quantities of power purchased by Associated under the terms of that contract. *E.g.*,

Public Works Appropriation Act for 1970, Pub. L. 91-144, 83 Stat. 323, U.S. Code Cong. and Admin. News at 359 (1969).

Public Works Appropriation Act for 1969, Pub. L. 90-479, 82 Stat. 705, U.S. Code Cong. and Admin. News at 821 (1968).

Public Works Appropriation Act for 1968, Pub. L. 90-479, 82 Stat. 705, U.S. Code Cong. and Admin. News at 510 (1967).

Public Works Appropriation Act for 1967, Pub. L. 89-639, 80 Stat. 1002, U.S. Code Cong. and Admin. News at 1188 (1966).

Public Works Appropriation Act for 1966, Pub. L. 89-299, 79 Stat. 1096, U.S. Code Cong. and Admin. News at 1108 (1965).

Public Works Appropriation Act for 1965, Pub. L. 88-611, 78 Stat. 682, U.S. Code Cong. and Admin. News at 785 (1964).

Public Works Appropriation Act for 1964, Pub. L. 88-257, 77 Stat. 843, U.S. Code Cong. and Admin. News at 591 (1963).

Public Works Appropriation Act for 1963, Pub. L. 87-880, 76 Stat. 1216, U.S. Code Cong. and Admin. News at 1429 (1962).

Public Works Appropriation Act for 1962, Pub. L. 87-330, 75 Stat. 722, U.S. Code Cong. and Admin. News at 819 (1961).

Public Works Appropriation Act for 1961, Pub. L. 86-700, 74 Stat. 743, U.S. Code Cong. and Admin. News at 1099 (1960).

Public Works Appropriation Act for 1960, Pub. L. 86-143, 73 Stat. 491, U.S. Code Cong. and Admin. News at 547 (1959).

Congressional appropriations to build facilities to "implement" the Associated contract

The Nixon Administration contended that it no longer needed to use Associated's system to serve the three Missouri Companies, or the six Missouri Municipals, or to exchange power with the Bureau of Reclamation because SPA has since become able to do this over lines that it has constructed with appropriated funds.

If, indeed, the Department has built such lines for the purpose of supplanting the services that his predecessor hired Associated to perform, it has violated the representations the Department made to Congress in seeking the appropriations. His Department's representations to Congress, in seeking funds to build transmission lines in Missouri, after the date of the SPA-Associated contract in 1962, were that the appropriation for the SPA facilities at Carthage, Missouri (the point at which the defendants say they now serve the Missouri Companies, without using Associated's lines), "are required to provide for terminal equipment, for an additional transmission line interconnection with The Empire District Electric Company at the Carthage Substation, in order to implement the Associated and Missouri Cos.' contracts" (with SPA). (Emphasis added.) Hearings on the Interior Department Appropriation Bill for 1964 Before Subcomm. of the Senate Comm. on Appropriations, 88th Cong., 1st Sess., at 143 (1963).

The same 1964 departmental justification represented (as to a new transmission line and related facilities, for which \$2,400,000 was asked and obtained) that such lines were to

"implement the contract with Associated Electric Cooperative."

(Emphasis added.) Id.

Yet, in the very hearings last cited, the Department sought (and obtained) an appropriation of \$4,500,000 "for the purchase of power and service or wheeling charges, and for the leasing of transmission capacity under contractual agreements with certain generating and transmission cooperatives." Id. at 149. This included \$1,031,000 for payment to Associated. Id. at 150.

Similarly, the Department's justification to the House, in support of the same appropriations, said of a new line: "This will implement the contract with the Associated Cooperatives, Inc., . . ." Hearings on Public Works Appropriations for 1964 Before a Subcomm. of the House Comm. on Appropriations, 88th Cong., 1st Sess., pt. 3, at 691-92 (1963).

The Department's spokesman, speaking of the contract with Associated, told the House Committee (id. at 708): "You will note that because of our rearranged contracts, we have been able to reduce the limitation required for the Continuing Fund from \$5,000,000 to \$4,000,000," and, at p. 710:

" . . . In the case of the Missouri contracts, the Federal Court held and agreed that the contracts were right and proper, and we proceeded with Congressional approval and provision of funds for them." (I.e., the approval given in the Interior Department's Appropriations Act for F.Y. 1956, supra, Part I of this brief.)

Nothing in these hearings or in any later hearings on appropriation acts informed Congress that the money it was appropriating

- 33 -

for construction of transmission lines to "implement" the Associated contract would be spent to construct lines to supplant the services rendered under that contract, as now contended. And, of course, there was no such intent, on the part of either the Department or Congress, and no such authorization was asked or given.

Moreover, Section 5 of the Flood Control Act of 1944 withholds from the Secretary the authority to construct transmission lines to supplant service rendered by existing lines. It says that the Secretary:

"... is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said project available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately-owned companies." (Emphasis added.)

Congress was led to believe that funds that it was asked to appropriate were within this authorization because the lines to be built were "only" (the restriction in the 1944 Act) to "implement" (as the 1964 departmental justification said) the Associated contract. And that is the only purpose that they could lawfully serve.

And even if, contrary to fact, SPA were now able to serve the private utilities and its other customers by other transmission lines, that would be no excuse for renegeing on contractual obligations that the House Committee on Appropriations called valid and binding (see Part I), that commit the Secretary to pay compensation equal to the debt service to REA that the cooperatives incurred

at his behest to build the lines that he hired, and which his contract obligates him to continue to pay until the REA loan is completely repaid (Ex. P-8, Art. V, sec.1(c), App. Vol. II, 196). So also with his commitment to pay operating costs. It is as though the Secretary, having induced a landowner to borrow money to construct a building, on the security of the Secretary's agreement to pay rent for the duration of the loan, should cease to pay, after several years occupancy, on the ground that he has found other space.

- 35 -

5. The Transmission Service Charge

Mr. Peter King became Administrator on July 1, 1969 (King Aff., para. 1). It quickly became apparent that he was under orders of the Nixon Administration to break the Associated contract. He had difficulties.

Mr. King's first difficulty was a report of the Southern Engineering Company, commissioned by the Secretary of the Interior, dated June 1969. That study informed the Administrator that the SPA payments to Associated for Associated's services are "substantially below the costs incurred by SPA for similar service over its own system and considerably less than SPA pays under contracts for transmission service."

Next, the expert hired by Mr. King (Mr. Williams), after making the requested investigation, rendered a report to Mr. King which demolished Mr. King's rationale for attacking the contractual credits to Associated. Mr. Williams pointed out that the SPA-Associated contract was only part of the Missouri integration arrangements, made possible by SPA's use of Associated's transmission system, and that the aggregate result of this Missouri "package" was favorable to SPA, although, of course, if all of the cost of obtaining this revenue from the integrated Missouri operations (i.e., disposition of the Bull Shoals-Table Rock output plus the interchange with the Bureau of Reclamation) were charged to the Associated contract alone (which disposes of only 52 percent thereof), a deficit might appear.

Mr. King, noting that his predetermination of November 1969 was contradicted by Mr. Williams' report, dismissed him.

- 36 -

Mr. King thus adhered to the error that Mr. Williams had identified (and which the Secretary's present brief repeats), namely, the debiting of the expense of transmitting 557,000 Kw (288,000 Kw to the cooperatives, 190,000 Kw to the three companies, 29,000 Kw to the municipalities, 50,000 Kw interchanged with the U.S. Bureau of Reclamation) against the revenues received from sale of 52 percent of that quantity, the 288,000 Kw sold to Associated. The net revenues from the Missouri "package" had been over \$28,000,000, not \$4,000,000.

Mr. King thereupon gave instructions for the preparation of a new "Rate and Repayment Study," to replace that of March 1969. This was done.

On January 30, 1970, the Secretary, without affording a hearing to Associated, submitted to the Federal Power Commission his so-called "Rate Schedule P-2--revised," showing it to Associated for the first time that same day. It would change the points of delivery specified in the SPA-Associated contract, at distances of 50 to 300 miles from the power plants, to points on the government-owned grid (effectively, the power plants), and add a charge (applicable to Associated alone) of \$2,647,100 annually for transmitting power from the new points of delivery to those specified in the contract. The prices are left unchanged, \$14.40 per kilowatt of capacity per year, and 2 mills per kilowatt-hour of energy.

The intended effect is to wipe out, by this indirect device, the agreed compensation to Associated for transmitting SPA power "for the account of SPA" not only to the cooperatives, but to the

- 37 -

companies and SPA's other customers. The transmission service charge was in the exact amount of the agreed compensation, to the dollar.

The Federal Power Commission, on May 28, 1970, approved the Secretary's proposal, "simultaneously," as it concedes, with its denial of Associated's petition to intervene and be heard.

It is important to note the device by which the agreed compensation to Associated was wiped out, while leaving Associated saddled with the same obligations as before. The Secretary did not rescind the credits.

The Secretary has not changed the prices of \$14.40 per Kw and 2 mills per Kwh stated in the P-2 rate.

While the Secretary has not purported to change the dollar prices, and has not changed the 13 specified points of delivery to the customers other than the cooperatives, he has attempted to unilaterally change the 10 specified points of delivery to the cooperatives to points on the lines owned by SPA, instead of on lines available to SPA, charging them the agreed rates, but for delivery at new points, charging them for transmitting power from the new points to the agreed ones. Since Associated takes its SPA power primarily from the Bull Shoals and Table Rock plants, this changes the points of delivery for all practical purposes, to the bus bars of the power plants, as the Bailey amendment to the Flood Control Act of 1944, rejected by the Senate in 1944, would have done. The transmission service charge would require the cooperatives, and only them, to pay a second time for transmitting electricity from the power plants to the same points of delivery to which the original P-2 rate of \$14.40 per Kw per

year and 2 mills per Kwh applies. Congress, in 1956, directed that delivery should be made over these same lines, to the load centers of the cooperatives, and should be priced there "at the basic SPA rate." The amounts stated in uniform P-2 rate annexed to the 1962 contracts constituted then, and are now, the "basic SPA rate." The Secretary would add \$2,647,100 to it, by changing the delivery points while keeping the same dollar amounts in the rate.

Senator FORD. Thank you, Mr. Ely. Mr. Diddle, I have two or three questions that I would like to ask and hopefully it'll bring some bearing on this. And I agree with Mr. Ely's statement and assure the position of the Senator from Missouri that we expedite this piece of legislation.

I want to make it absolutely clear in my mind that the position of those utilities which might be negatively affected by passage of S. 2249 is supportive of this legislation; is that correct?

Mr. DIDDLE. That's correct.

Senator FORD. It is my understanding that several electric cooperatives constructed the transmission lines affected by S. 2249. I guess pursuant to the form established by the House and the Senate Appropriations Committee, in the 1950s, the courts have indicated that because of the amplification of the Congress intent within the report and not in the language of statute itself, it is not binding. Is this an accurate portrayal of the facts as you see them?

Mr. DIDDLE. Yes, sir, that's the facts as given by the courts.

Senator FORD. I'm not a lawyer and I've always heard that in trying to develop some language that I hope you're around 20 years from now or 30 years from now so that you'll be able to express the intent of whatever we're doing.

I think Mr. Ely brings that point very clear in his statement as to the intent. And I thought that rather than putting all this into a voluminous statute that it had been the procedure and it was the intent of Congress that their statute be carried out this way.

So the intent now is rather than being written in the committee report, the conference committee's report, signed into law by the President of the United States, that we now have to set in concrete the intent. And this disturbs me considerably. I hope that we can somehow get around it, but apparently you have a direction from the courts.

I received a direction from the court when I was Governor to redistribute the population in the state as it related to the congressional seats, and we tried to do that and we were 31½ percentage points different in some districts than in others. So the court directed me to bring it under 1 percent so I did. And that was pretty tough when you split a precinct or take half a county and it gets pretty frustrating.

Once you bring that before the court, they accept it, then you see a 5-percent variation, and a 10-percent variation and maybe a 15-percent variation. The people come back and want to know what you were doing when you developed that—when you reapportioned the State. So I guess we get back to the policy of the administration.

Let me ask this Mr. Diddle. What if any aspects of the current contract do you view to be questionable or unfair?

Mr. DIDDLE. Mr. Chairman, I don't view any of them to be questionable or unfair. In fact, I think there are many pluses in that contract for the U.S. Government. And we so reported back when this contract was signed.

For example, in transmission service charges in Missouri where they pay the \$2.6 million a year, that covers the cost of amortizing those lines at a fixed cost for operations and maintenance. A cost based upon a figure developed back in 1962.

And I submit that the Government gets better value out of these lines than the lines that were built with Government appropriations

in terms of the cost of operations and maintenance of those lines. I don't know of any part of that contract that I view——

Senator FORD. On its face, to me anyway, it would indicate that the cost of construction in 1962 and the cost of today that the 1962 contract was a good deal.

Mr. DIDDLE. You got a bargain.

Senator FORD. Yes. What circumstances changed them in 1962 which led to a new contract?

Mr. DIDDLE. The basic change in leading to a new contract was to enable the Government to sell its power, its peaking power, instead of the obligation to sell its firm power around the clock and having to buy expensive energy from thermal powerplants to fill in when they didn't have the water to do it.

And if they were still buying that power today under today's rising costs of oil fired, gas fired and coal fired generations, the Government would be—would have a tremendous expense compared to the way they're now operating those projects.

They were able to shift from supplying firm power to supplying peaking power only as they had water supply and for 1,200 hours a year as specified in the contract.

Senator FORD. Peaking power is a very valuable asset as I understand.

Mr. DIDDLE. Sure. But you have to have thermal capacity to meet what we call your baseload. And then use the peaking effects to take care of those peaks in summer and winter and to match those with the hours that this generation is available.

And the Government is relieved of meeting the year round ups and downs of the power needs of its customers.

Senator FORD. How are these circumstances related then to the questionable aspects of the contract?

Mr. DIDDLE. Well, Mr. Chairman, I don't know what the questionable aspects of the contract are. The only one that they really have brought out since 1962 and attempted to recover costs on is the transmission service charge. They have never questioned the other provisions of that contract.

Now we have set down—it's true that we sat down with them since I've been manager of Associated since 1973, but those negotiations were broke off when the court of appeals reversed the district court and remanded us back to the lower court for hearing. Then those hearings were broken off and the Government refused to negotiate longer.

Senator FORD. Is any other aspect of the contract other than these in the contract itself—just these certain aspects of the contract other than the transmission service—they haven't said any terms of the contract were unfair except these?

Mr. DIDDLE. No, sir. We have negotiated with them and we have discussed certain aspects and they, of course, have wanted to take away rights which I feel belong to Missouri.

They wanted to just abrogate the whole contract. Now in negotiations—if you're going to renegotiate a contract it has to be fair to both sides. And the Government's position or SPA's position is we want to abrogate the whole contract. Let's throw it out. It's a bad contract. Let's throw it out.

And we just refuse to do that. We're willing to set down and negotiate to find out what the Government's problems are and relate—and Associated's problems and try and negotiate to come to some mutual agreement. But we have been unable to do that.

Senator FORD. Well, it appears that the Government has had its ups and downs and had its downs on the decision of the district court when they started negotiating and then the circuit court made its decision, they had their ups. They quit didn't they?

Mr. DIDDLE. That's exactly true.

Senator FORD. If this legislation is passed then, are you still willing to sit down and work out things?

Mr. DIDDLE. Yes, sir.

Senator FORD. I have no further questions. Senator Eagleton.

Senator EAGLETON. I just think I'll emphasize it for the record by reiterating just the last question that Senator Ford asked. Could you state for the record that Associated would negotiate in good faith with SPA if the transmission service charge is withdrawn or rescinded?

Mr. DIDDLE. Yes, sir, Senator. We're very willing to do that.

Senator EAGLETON. And one other question, a brief one. I understand the courts have ordered Associated to put \$20 million in escrow. Tell us how that money will be raised and what kind of increase does it mean to the average world customer?

Mr. DIDDLE. The court handed down a decision that we put immediately one-half of the amount that had accrued since 1970 in this transmission service charge, which now is \$20 million, we put into escrow immediately \$10 million.

We have done that. We borrowed the money to do that. And that the court further says that we pay currently into this escrow \$220,000 a month which is the monthly charge—monthly portion of the \$2.6 million a year. So we paid the \$10 million on the promise that we may get that refunded if we're successful.

And second, we're putting in currently \$220,000 a month.

Senator EAGLETON. And have charges been increased to the customers to accommodate to those payments?

Mr. DIDDLE. We have not done that yet, Senator. We borrowed the money and we've been waiting for the outcome of this case we go back to the Missouri customers and attempt to charge them for—

Senator EAGLETON. But sometime in the future if Congress doesn't act and if the court of appeal's opinion goes into full effect, sometime or other you're going to have—if pressed to the wall, you're going to have to try to recover that by increasing the rates.

Mr. DIDDLE. That's exactly right.

Senator EAGLETON. You can't give us any estimate as to what kind of a rate increase that might entail. Is that too speculative at this time?

Mr. DIDDLE. No, sir. We borrowed that under a 5 year loan at 9 percent interest so we must—we've got to recover the 10 million. I'm not talking about the 20 million now. We've only paid 10 at this point.

We've got to recover that \$10 million. It means that we'd have to recover about \$4.9 million a year plus the \$2.6 million that will be currently. And we'd have to recover about \$7½ million a year from these customers.

Senator FORD. Is that just for Missouri?

Mr. DIDDLE. Just for Missouri ratepayers.

Senator FORD. Ratepayers.

Mr. DIDDLE. Just for Missouri ratepayers. It's about somewhere between 7 and 10-percent increase. I don't have to tell you that with all of these problems in the coal strike and from the losses this year suffered from that, if we have to pay this plus all these other costs, there will be a substantial increase for Missouri ratepayers.

Senator EAGLETON. 7- to 10-percent as a result of this situation alone?

Mr. DIDDLE. Right.

Senator EAGLETON. Then you're going to account other increased costs as you're coming down the pike anyway as the price of energy goes up?

Mr. DIDDLE. That's correct. That does not include the other \$10 million. We're assuming that may be we would be relieved of the other \$10 million on the basis that we don't use all of the energy generated by these two dams.

Senator EAGLETON. That's all I have, Mr. Chairman. Thank you very much.

Senator FORD. The old saying, we forgot to drain the swamp is upon us isn't it. I have no further questions, Mr. Diddle, Mr. Ely, and others.

Mr. DIDDLE. Mr. Chairman, we do have a statement here from the group called the Committee on Power of the Southwest which includes all the customers, all the ratepayers of the Southwest Power Administration, Mr. Knoland Plucknett who is the executive secretary of that group is here and has a resolution from that committee.

Senator EAGLETON. I ask, Mr. Chairman, that that resolution which expressed the interests of all the other ratepayers to the five other States, is that correct?

Mr. DIDDLE. Yes, sir.

Senator EAGLETON. And the supporting Associated's presentation here today.

Mr. DIDDLE. Yes, sir.

Senator FORD. Is that the one of Texas, Oklahoma and others in the resolution that was passed—

Senator EAGLETON. What five States are involved, sir?

Mr. PLUCKNETT. Kansas—our organization represents the consumer owned utilities in Kansas, Missouri, Oklahoma, Arkansas, most of Texas, and Louisiana.

Senator EAGLETON. Could that resolution be made a part of the record?

Senator FORD. Yes; it certainly will. I've read the resolution. It is very pointed and very factual and I think you gave the members of either the president or executive vice president of each one of them—I was looking for that statement. I had it here just a moment ago and I had glanced through it. Here it is, right here.

Committee on Power for the Southwest, Inc. located in Tulsa, Okla. And it gives each of the manager, the superintendents, either general manager and city manager as it relates. This is the one that you're referring to?

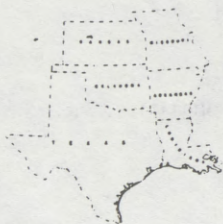
Mr. PLUCKNETT. Yes, Mr. Chairman. I had listed in here the members of the board of trustees.

Senator FORD. Yes.

Mr. PLUCKNETT. And the way the organization functions there's a representative of the rural co-ops and the representative of the municipal consumer owned organizations in each State that belongs to the board. We represent approximately 175 rural electric co-ops and 60 municipal electric systems in the six States.

Senator FORD. All right. This will be made a part of the record. We appreciate you being here today. And it will be part of the record.

[The statement and resolution follow:]



COMMITTEE ON POWER FOR THE SOUTHWEST, INC.

5541 EAST SKELLY DRIVE - SUITE 17
TULSA, OKLAHOMA 74135
918/663-8388

I am Knoland J. Plucknett, Executive Director of the Committee on Power for the Southwest, Incorporated. The office of the CPSW is located at 5541 East Skelly Drive, Tulsa, Oklahoma.

The CPSW represents 175 rural electric cooperatives and 60 municipal electric consumer-owned power systems operating in the States of Kansas, Missouri, Oklahoma, Arkansas, Texas and Louisiana. In 1977 the combined electric load of these systems totalled about 18 million kilowatts with about 12 million kilowatts of this capacity owned by these consumer-owned utility systems.

The CPSW was formally organized as a non-profit educational and coordinating organization under Oklahoma laws in May 1976. Prior to that time there was an informal organization known as the Southwest Advisory Group that meet when necessary to discuss and support electric power problems of the consumer-owned electric utility systems in these six states.

The Board of Trustees of the CPSW are elected by the membership. The membership of the Board of Trustees for the 1977-78 year are as follows:

ARKANSAS

Millard Goff, Manager
Ozarks Electric Coop.
Fayetteville, Arkansas

Alternate

John H. McDaniel, Manager
Light Plant Commission
Paragould, Arkansas

KANSAS

Howard Sell, Manager
Radiant Electric Coop. Inc.
Fredonia, Kansas

Louis Stroup, Jr.
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Kansas Municipal Utilities, Inc.
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City of Lafayette Utilities
System
Lafayette, Louisiana

MISSOURI

Walter E. Oestreich
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Callaway Electric Cooperative
Fulton, Missouri

J. A. Lucky Roberts
Superintendent
City of Lamar
Lamar, Missouri

OKLAHOMA

B. Dean Sanger
General Manager
KAMO Electric Coop., Inc.
Vinita, Oklahoma

Buddy Veltema
City Manager
Walters, Oklahoma

TEXAS

Joe Lytle
Manager
Farmers Electric Cooperative, Inc.
Greenville, Texas

Wayne DuBose, City Manager
City of Jasper
Jasper, Texas

I wish to read a resolution that was adopted at a regular quarterly meeting of the Board of Trustees of the CPSW which is in support of S.2249. It is as follows:

"RESOLVED: That since 1970, the Missouri Rural Electric Cooperatives have been engaged in long, expensive litigation in an effort to get the U.S. Government to live up to its long-term contract.

At that time, the Secretary of the Interior extinguished his admitted contractual obligation to pay \$2,647,000 annually for the use of certain transmission lines by the device of superimposing, unilaterally, a 'special transmission charge' in

precisely the same amount upon his sale of electric power to the rural electric cooperatives which own these lines. This action by the Secretary breached a solemn agreement between these cooperatives and the Department of Interior entered into at the direction of the U.S. Congress.

We reinforce the action taken by this committee in August of 1976 and urge the Congress to pass legislation like S.2249 introduced by Senator Eagleton, D-Mo. which will reaffirm congressional intent with respect to disposition of power and energy by the Southwestern Power Administration."

Senator FORD. I hope my heart doesn't override my mind here, Senator Eagleton, because I remember in 1933 when they started drilling holes across our farm to bring electricity to our farm and it was a great, great day for me. And we sat on the front porch and watched them bring it in.

I've got more than just a passing feeling for rural electric co-ops. And I appreciate you all being here. Thank you all very, very much.

Mr. DIDDLE. Thank you. We appreciate your courtesy.

Senator FORD. Thank you. The next witness that we will have this morning from the National Rural Electric Cooperative Association is Becky Bogard.

Becky, I was torn, Becky, considerably whether to put you on first and get the bad last. But I decided to put on the bad first and let the good come last.

Ms. BOGARD. Thank you.

Senator FORD. Not only are you good looking but you're intelligent, and we're delighted that you're here this morning.

Ms. BOGARD. Thank you very much.

STATEMENT OF BECKY BOGARD, LEGISLATIVE COUNSEL, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Ms. BOGARD. My name is Becky Bogard. I am Legislative Counsel for the National Rural Electric Cooperative Association. We are the national service association for the more than 1,000 rural electric cooperatives in 46 States. Among these are, of course, the rural electric cooperatives in Kentucky and the 40 cooperatives, as well as Associated, in the State of Missouri.

We also have members in the other States that are served by the Southwestern Power Administration. I think you all have heard plenty about the history of the situation, so I will skip over that and just briefly outline why NRECA supports Senator Eagleton's bill, S. 2249.

First of all, the court's decision destroys the principle of the "postage stamp rates" for Federal power sold to the Missouri cooperatives. Statutes establishing preference rights for the cooperatives and municipally owned utilities have also put forth the policy that rates charged to these customers shall be systemwide and not calculated on different points of delivery.

By imposing the transmission charge on Associated, the principles of the postage stamp rates for Missouri rural electric cooperatives has been violated. And what is even worse, in our way of thinking, is that the investor-owned systems which receive power over Associated lines continue to pay only the basic SPA rate while the Missouri preference customers are paying almost double that rate because of the transmission charge.

The imposition of this charge on the Missouri cooperatives is even less understandable when one realizes that the basic SPA rate was calculated to recover all transmission costs from the entire SPA system. What the transmission service charge to Associated does it make those customers pay double.

Second, and I think perhaps most disturbing to you as members of Congress, particularly to you Senator Eagleton as you serve on the

appropriations committee is the fact that the court's decision ignored what the intent of Congress as outlined in the appropriations report was.

Congress in its reports instructed SPA very clearly to enter into these arrangements in order to be able to deliver power to Missouri preference customers. The cooperatives in the Missouri relied on the intent of Congress and entered into long term obligations with REA to construct transmission lines. Under the existing court decision, these cooperatives are saddled with a substantial obligation without income they had anticipated to assist in paying that obligation.

It appears that the court chose to ignore what was clearly the intent of Congress because it was expressed in the report language rather than in the statute. Senator Ford, I share your concern that you have to write every single intent into the statute. I think much legislation today is too long anyhow and if you're going to have to start writing all your intents into the bills, I think we're going to have some real problems in drafting legislation.

Of course, the purpose of Senator Eagleton's bill is to put that intent into statute and hopefully with these intentions in plain English, the courts and SPA should have no further basis for imposing this transmission charge on Associated.

Finally, I would like to comment on the second part of Senator Eagleton's bill and that is dealing with procedural aspects and the need for a forum of SPA—rather for Associated to have in dealing with the SPA rate increase.

At the time the Federal Power Commission had the authority to review and confirm the rates of the Federal power marketing agencies. In this case they did so with little notice and no hearing. It is our understanding that the Department of Energy is trying to establish procedures for the review and confirmation of Federal power marketing rates.

While S. 2249 calls for this review with respect to SPA to be with the Federal Energy Regulatory Commission, I believe right now that the Economic Regulatory Administration is now delegated as the body within DOE to review and confirm these rates.

NRECA believes that the initial decisions on rates should be made at the local level with input from the customers of the power marketing agencies. With respect to the review of these rates, we are concerned principally that the review be undertaken in a fair manner using the Administrative Procedures Act and giving interested parties an opportunity to comment.

The review and confirmation decisions should not be made in an arbitrary and capricious manner as this one seems to have been in 1962. Reasons for these determinations on Federal Power marketing rates should be based on facts in the hearing record. Whether it is the REA or FERC that reviews these decision is not nearly as important as the procedures used to review and confirm the rates.

I am attaching to my statement a resolution regarding the SPA situation which was passed by the delegates at NRECA's 36th annual meeting this past February. It is important to note that this resolution supporting Associated's position was adopted by representatives from rural electric cooperatives from all over the United States.

I appreciate the opportunity to appear before you today.

[The prepared statement of Ms. Bogard follows:]

STATEMENT OF
BECKY BOGARD, NRECA LEGISLATIVE COUNSEL
BEFORE SENATE ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON ENERGY PRODUCTION AND SUPPLY
ABOUT S. 2249
MARCH 9, 1978

My name is Becky Bogard. I am Legislative Counsel for the National Rural Electric Cooperative Association. NRECA is the national service organization representing more than 1,000 rural electric cooperatives in 46 states.

NRECA supports the passage of legislation like S. 2249 which would prohibit discrimination in rates charged by the Southwestern Power Administration (SPA) to Associated Electric Cooperative. Associated, a generation and transmission cooperative, not only generates power for Missouri rural electric cooperatives but also acts as the contractor for power available to the Missouri cooperatives as preference customers of SPA.

The history of the situation which has brought about the need for this legislation goes back to 1950. At that time Congress set forth the principal that it would not appropriate funds for constructing transmission lines for the delivery of power to preference customers if it could make wheeling arrangements over existing utility lines or other transmission arrangements to allow power to be delivered to agreed upon location. It was an arrangement of the latter kind which was entered into by SPA and the Missouri cooperatives in 1950. In reliance on a contract with SPA the cooperatives borrowed money from the Rural Electrification Administration (REA) to build transmission lines with the understanding that SPA would pay the cooperatives for the use of those lines to transmit Federal power to

-2-

specified delivery points. This arrangement was reaffirmed in 1962 with Associated, a federation of Missouri generation and transmission cooperatives. At the same time, Associated agreed to borrow funds from REA to construct transmission lines which connected with the Bureau of Reclamation's Missouri River Basin transmission grid and which were needed for delivery of SPA power to some investor owned and municipally owned systems. Again, SPA agreed to pay Associated for the use of these lines.

In 1970, the SPA administrator unilaterally imposed a "transmission service charge" which was equal to the amount that SPA had been paying to Associated for the use of its lines. SPA claimed that the formerly agreed upon points of delivery were no longer necessary and that Associated would now have to pay for transmission of power beyond delivery points. These new delivery points just happened to be right where the Associated transmission lines began. As you have been told by other witnesses, the SPA action has been the subject of litigation.

NRECA firmly believes that the decision from this litigation ignores the intent of Congress and that Congress should take action to correct the inequitable result.

First of all, the court's decision destroys the principle of "postage stamp" rates for Federal power sold to Missouri cooperatives. Statutes establishing preference rights for the cooperatives and municipally owned utilities have also put forth the policy that rates charged to these customers shall be systemwide and not calculated on different points of delivery. By imposing the transmission charge on Associated, the principle of postage stamp rates for Missouri rural electric cooperatives has been violated. What is even worse is that the investor owned systems which receive power over Associated lines continue to pay only the basic SPA rate while the Missouri cooperative preference customers are paying almost double that rate.

-3-

The imposition for this charge on the Missouri cooperatives is even less understandable when one realizes that the basic SPA rate was calculated to recover transmission costs from the entire SPA system. What the transmission service charge to Associated does is make Associated's customers pay a double transmission charge.

Secondly, and perhaps most disturbing to you as members of Congress, is the fact that the court's decision ignored what was the intent of Congress as outlined in appropriations reports. Congress in its reports instructed SPA to enter into these arrangements in order to be able to delivery power to Missouri preference customers. The cooperatives in Missouri relied on the intent of Congress and entered into long term obligations with REA to construct transmission lines. Under the existing court decision, they are saddled with a substantial obligation without income they had anticipated to assist in paying this obligation.

It appears that the court choose to ignore what was clearly the intent of Congress because it was expressed in the report language rather than the statute. The purpose of Senator Eagleton's bill, S. 2249, is to put that intent into statute. With these intentions in "plain English", the courts and SPA should have no further basis for imposing this unfair transmission charge on Associated.

Finally, one of the procedural aspects of this situation was the lack of a forum in the executive branch for Associated to turn to with its grievance. The Federal Power Commission, which at that time had authority to review and confirm the rates of Federal power marketing agencies, merely "rubber stamped" this additional transmission charge without notice of hearing. It is our understanding that the Department of Energy is trying to establish procedures for the review and

confirmation of Federal power marketing rates. While S. 2249 calls for this review with respect to SPA to be with the Federal Energy Regulatory Commission, I believe that the Economic Regulatory Administration is now delegated as the body within DOE to review and confirm these rates.

NRECA believes that the initial decisions on rates should be made at the local level with input from the customers of the power marketing agencies. With respect to review of these rates, we are concerned principally that the review be undertaken in a fair manner using the Administrative Procedures Act and giving interested parties an opportunity to comment. The review and confirmation decisions should not be made in an arbitrary and capricious manner. Reasons for these determinations should be made based on facts in the record. Whether it is the REA or FERC that reviews these decisions is not nearly as important as the procedures used to review and confirm the rates.

I am attaching to my statement a resolution regarding the SPA situation which was passed by the delegates at NRECA's 36th Annual Meeting held in February, 1978. It is important to note that this resolution, supporting Associated's position, was adopted by representatives from rural electric cooperatives from all over the United States.

I appreciate the opportunity to appear before you today.

Opposition to Southwestern Power Administration's Transmission Service Charges

Since 1970, the Missouri cooperatives have been engaged in long, expensive litigation in an effort to get the U.S. Government to live up to its long-term contracted commitments.

At that time, the Secretary of the Interior extinguished his admitted contractual obligation to pay \$2,647,000 annually for the use of certain transmission lines, by the device of superimposing, unilaterally, a "transmission service charge" in precisely the same amount upon his sales of electricity to the rural electric cooperatives which own these lines. This action by the Secretary breached a solemn agreement between these cooperatives and the Department of the Interior entered into at the direction of Congress.

We urge the U.S. Congress to pass legislation live S. 2249 introduced by Senator Eagleton (D., Mo.) which will reaffirm Congress' intent with respect to disposition of power and energy by the Southwestern Power Administration.

NOTE: This resolution was passed by delegates at the NRECA 36th Annual Meeting, February, 1978.

Senator FORD. Becky, is this the annual meeting—was it held in Texas, that national meeting?

Ms. BOGARD. It was in a meeting that was held in Las Vegas.

Senator FORD. I'm sorry I asked. What was the date, Becky?

Ms. BOGARD. It was February 5 through 8. The one next year is in Pasadena.

Senator FORD. OK. But this the national meeting and you have national approval or support of Missouri's position and Senator Eagleton's bill?

Ms. BOGARD. Yes, sir. Our resolution process is such that this resolution was considered by a committee composed of representatives from the different regions of the country who work with rural electric systems either in the capacity of a director or a manager.

And then the final resolution was passed by all the voting delegates the last day of the meeting. And it was passed unanimously.

Senator FORD. Fine. You have a very concise and pointed statement. I have no further questions of you. Senator Eagleton.

Senator EAGLETON. I have no questions, Mr. Chairman. Ms. Bogard is a superb witness and once again I want to thank you for your courtesy in convening this hearing today.

Senator FORD. I'm delighted to do it. Look here, we're getting out 12 minutes of 10 and that's certainly unusual. Thank you very much, Becky, we appreciate your appearing here.

[Whereupon, at 9:48 a.m., the hearing was adjourned.]

