CSSS

SB 22

(11)

HOUSE COMMITTEE REPORT

Date referred: 5/15/87

FURTHER REFERRALS:

DATE: 5-17-87

The Finance Committee has considered CSSSSB 22(Fin)

"An Act exempting certain telephone and electric utilities and certain transactions from regulation by the Alaska Public Utilities Commission; restricting the authority of the Alaska Public Utilities Commission in considering certain costs in connection with rates charges by a utility and with calculating power cost equalization; and providing for an effective date."

RECOMMENDS:

[X] replace with HCS CSSS SB 22(FIN) [X] the same title

[ ] attached amendment(s) [ ] a new title

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ________ Committee

ADOPTS: [ ] ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ________

[X] same as previous zero fiscal note published ________

SIGNING DO PASS:

[signatures]

SIGNING OTHER RECOMMENDATIONS:

[signature] - No Rec

Pat [signature] no rec

[signature] - DO NOT PASS

Fay Brown - DO NOT PASS

Mike [signature] DO NOT PASS

[signature]

Chairman's signature

IN THE SENATE BY THE FINANCE COMMITTEE

HOUSE CS FOR CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 22 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act exempting certain telephone and electric utilities and certain transactions from regulation by the Alaska Public Utilities Commission; restricting the authority of the Alaska Public Utilities Commission in considering certain costs in connection with rates charged by a utility and with calculating power cost equalization; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.05.431(b) is amended to read:

(b) Except as provided in (c) of this section, a [A] wholesale power agreement between public utilities is subject to advance approval of the commission. After a wholesale power agreement is in effect, the commission may not invalidate any purchase or sale obligation under the agreement. However, if the commission finds that rates set in accordance with the agreement are not just and reasonable, the commission may order the parties to negotiate an amendment to the agreement and if the parties fail to agree, to use the dispute resolution procedures contained in the contract.

* Sec. 2. AS 42.05.431 is amended by adding a new subsection to read:

(c) A wholesale agreement for the sale of power between the Alaska Power Authority and a public utility from a project licensed for construction by the Federal Energy Regulatory Commission on or before January 1, 1987, is not subject to review or approval by the

commission.

* Sec. 3. AS 42.05.511 is amended by adding a new subsection to read:

(d) Power costs incurred by a utility in connection with a contract with the Alaska Power Authority that is exempted from commission review under AS 42.05.431(c) shall be allowed in the rates charged by the utility.

* Sec. 4. AS 42.05.711(e) is amended to read:

(e) Notwithstanding any other provisions of this chapter, an [ANY] electric or telephone utility that does not gross $50,000 annually or that has fewer than 500 retail subscribers is exempt from regulation under this chapter unless 25 percent of the subscribers petition the commission for regulation. The commission may not combine the revenue or subscribers of an electric and a telephone utility owned by the same company when determining whether a utility is exempt under this subsection.

* Sec. 5. AS 42.05.711 is amended by adding a new subsection to read:

(m) The Alaska Power Authority is not a public utility under this chapter.

* Sec. 6. AS 44.83.090(b) is amended to read:

(b) The authority is not subject to the jurisdiction of the Alaska Public Utilities Commission. Nothing in this chapter [AS 44.-83.010 - 44.83.425] grants the authority any jurisdiction over the services or rates of any public utility or diminishes or otherwise alters the jurisdiction of the Alaska Public Utilities Commission with respect to any public utility, including any right the commission may have to review and approve or disapprove contracts for the purchase of electricity by a public utility other than a wholesale power agreement for the purchase of power from the authority under AS 42.05.431(c).

* Sec. 7. AS 44.83.162 is amended by adding a new subsection to read:

(p) In calculating power cost equalization, the commission may not consider validated costs or kilowatt-hour sales associated with a United States Department of Defense facility.

* Sec. 8. Sections 1, 2, and 5 - 7 of this Act are retroactive to June 7, 1986.

* Sec. 9. This Act takes effect immediately under AS 01.10.070(c).

No118

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HCS CSSSSB 22 (FIN)
Publish Date: 3-12-87

REQUEST:

Revision Date: March 10, 1987
Title: Act exempting certain telephone utilities and certain transactions from APUC regulations

Agency Affected: Commerce & Econ. Dev.
BRU: Alaska Public Utilities Commision
Components: Operations

Sponsor:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Passage of this version of SB 22 will return the Alaska Public Utilities Commission to the level of activity which it had prior to the passage of the legislation last year concerning AS 42.05.431(b). Therefore, there will be no increased costs associated with this legislation.

Prepared by: T.S. Moninski II, Executive Director
Phone: 276-6222
Division: Alaska Public Utilities Commission
Date: March 11, 1987

Approved by Commissioner: D. Anthony Smith, Commissioner
Date: March 11, 1987
Agency: Department of Commerce and Economic Development

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

5535W31187a

MEMORANDUM State of Alaska

TO: Marvin R. Weatherly, Chairman
Alaska Public Utilities Commission
420 "L" Street #100
Anchorage, Alaska 99501

DATE: February 18, 1987
FILE NO: 663-87-0365
TELEPHONE NO: (907)465-3600

THRU:

SUBJECT: Power purchase contract between Alaska Power Authority and Municipal Light & Power

FROM: Grace Berg Schaible
Attorney General

By:
Richard D. Monkman
Assistant Attorney General

You have asked for our opinion on whether a power purchase contract between the Alaska Power Authority (Authority) and Municipal Light & Power (ML&P) is subject to approval by the Alaska Public Utilities Commission (Commission) under AS 42.05.431(b). In brief, our review indicates that the analysis in the Commission's Order No. 3 in Case U-86-96 is correct, and that this contract is subject to review by the Commission under AS 42.05.431(b).

First, it appears undisputed that the Authority is a "public utility" as that term is defined in AS 42.05.720(4)(A). The Authority is a public corporation empowered to operate and maintain power projects and "to enter into contracts with any person . . . for the purchase, sale, exchange, transmission, or use of power from a project[.]" AS 44.83.020; AS 44.83.080(5), (11). This fits squarely within the definition of a public utility: a corporation (including a public corporation) "that owns, operates, manages or controls any plant, pipeline or system for . . . furnishing, by generation, transmission or distribution, electrical service to the public for compensation[.]" AS 42.05.720(4)(A). 1/

The Authority is an unregulated public utility, exempt from the Commission's jurisdiction by operation of

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1/ The "public" is defined in AS 42.05.720(3)(B) as including "any utility" which resells power to a group of 10 or more consumers, a definition which would include Anchorage's Municipal Light & Power.

AS 44.83.090(b). The exemption was apparently intended to enhance the ability of the Authority to obtain bond financing for its projects. See 1984 Memorandum to Larry Crawford (July 31; C. Jones, AAG) ("APUC jurisdiction over APA power sales agreements"), attached, and legislative history cited therein.

However, while the Authority is exempt from Commission jurisdiction by AS 44.83.090(b), ML&P is not. ML&P is a regulated public utility and is subject to the Commission's jurisdiction. The exemption provided to the Authority by AS 44.83.090(b) specifically states that:

> Nothing in AS 44.83.101 -- 44.83.425 [the Alaska Power Authority statutes]. . . diminishes or otherwise alters the jurisdiction of the Alaska Public Utilities Commission with respect to any public utility, including any right the commission may have to review and approve or disapprove contracts for the purchase of electricity by a public utility.

AS 44.83.090(b) (emphasis supplied).

The question posed, therefore, is whether the Commission has "any right . . . to review and approve or disapprove contracts for the purchase of electricity" by ML&P, including the contract at issue.

Our 1984 memorandum concluded that the Commission did not have authority at that time to review, approve, or disapprove electric power purchase contracts by a public utility. 1984 Memorandum, supra (attached). 2/ Since the Commission did not have "any right . . . to approve or disapprove contracts for the purchase of electricity" by a public utility, electric power purchase contracts between regulated public utilities and the Authority were not subject to the Commission's review.

However, as you note, the legislature has since passed AS 42.05.431(b), sec. 5, ch. 104, SLA 1986. This section states

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2/ "[W]e can find no authority in AS 42.05 which would permit the Commission to review these wholesale purchase agreements from the point of view of the utility as a purchaser" (emphasis in original).

that a "wholesale power agreement between public utilities is subject to advance approval" of the Commission. The new statute gives the Commission the "right" to review electric power purchase contracts by regulated public utilities which was lacking at the time of our 1984 opinion.

The primary guide in statutory interpretation is "the language used, construed in light of the purpose of the enactment." Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486, 489-90 (Alaska 1984). The proposed power purchase contract is "for the purchase of electricity by a public utility." AS 44.83.090(b). It is a contract between "public utilities," and all such contracts are "subject to advance approval of the commission." AS 42.05.431(b). The plain words of these statutes indicate that the proposed agreement would be subject to review and prior approval by the Commission.

The "purpose of the enactment" in this instance does not conflict with the plain language. The 1986 enactment of AS 42.05.431(b) was in House Bill 314, which began as a short "sunset" re-authorization bill for the Commission. HB 314 grew into a complex, lengthy, and controversial package of amendments to the Commission statute, see, e.g., 1986 House J. 3181-90, 3197-209, but was drastically shortened again before final passage. Compare HB 314 with CSHB 314(Fin) and SCS HB 314(Fin). AS 42.05.431(b) surfaced without comment in the House Finance Committee version of the bill, and remained unchanged in all material respects from the date of its introduction until final passage.

The only comment we have found on the purpose of this section is in a letter from Attorney General Brown to Governor Sheffield, reviewing HB 314 after it was passed by the legislature. The letter states, "The commission's authority to approve wholesale power agreements would be made explicit" by AS 42.05.431(b). Letter, June 4, 1986, A.G. File No. 883-86-0135. This is in accord with our conclusion that the plain meaning of the statute gives the Commission authority to review the contract at issue.

We note also that the powers of the Commission are to be "liberally construed." AS 42.05.141. Review of a ten-year electric power purchase contract by a regulated public utility appears to be within the authority of the Commission under AS 42.05.431(b). Therefore, we conclude that the Commission does have the authority to review this contract.

We are informed by the Authority that Commission review of its contract with ML&P will adversely affect the Authority's ability to obtain bond financing for the Bradley Lake hydroelectric dam project in a timely manner. We suggest that the Commission promptly contact the Authority and discuss possible legislative action which would resolve the situation in the best interests of the public.

RDM:nb

attachment

cc: Alaska Power Authority

MEMORANDUM

To: Rep. John Sund
Chairman
House Judiciary Committee

Date: May 7, 1987

Through: Becky Bear
Information Officer
DC&ED

From: Ted Moninski II
Executive Director
Alaska Public Utilities Commission

Subject: CS for SSSB22

This memorandum is submitted as a supplement to the previous written comments which have been directed at the various versions of SB22 (copies of the earlier comments which remain relevant are attached).

In particular, the Commission wishes to present its response to the recent amendments to the bill which were added during proceedings before the Senate Finance Committee and are now reflected as Sections 3 and 7 of the Committee Substitute.

Section 3 -- Amending AS 42.05.511

In an earlier memorandum to the Senate, the Commission requested clarification regarding the impact of the Sponsor Substitute (which would remove all Alaska Power Authority (APA) wholesale power transactions from Commission review) on the Commission's responsibilities under Section .511 of the statute. Section .511 requires consideration of the prudence of utility costs within the context of a specific rate case. The Commission's confusion centered on not having the ability to pass upon the wholesale power agreements in the first instance, yet at the same time being required by law to consider the prudence of costs incurred under those agreements for ratemaking purposes.

While the Commission appreciates the Senate's efforts at providing the requested clarification, the language of Section 3 simply goes far beyond any concern for protecting the integrity of costs attributable to the APA or the income stream necessary to guarantee adequate revenue to service the debt associated with APA projects. In fact, Section 3 can only be read to "open the floodgate" which will result in the inclusion of virtually any utility cost that can even remotely be argued to be associated

with wholesale power transactions and thereby eliminating and public interest review of these expenses.

In its previous comments, the Commission estimated that removing Commission jurisdiction over APA wholesale power transactions could result in the effective deregulation of up to 50% of a regulated utility's revenue requirement (depending on the specific circumstances of the utility and the degree to which it relied upon APA generated power). The almost unlimited ability to flow through costs that would accompany adoption of Section 3 would certainly expand the "deregulation" effect already alluded to.

The Commission has repeatedly stated that it would not take an advocacy position regarding the underlying policy questions of SB22, but Section 3 speaks to a new set of issues which deviate substantially from the basic intent of the balance of the bill. The Commission must go on record as opposing the language now included in Section 3.

Section 7 -- Amending AS 44.83.162

Section 7 really has nothing to do with the deregulation of certain utilities or utility transactions, but rather presents specific legislative guidance on the method by which the Commission will calculate a utility's assistance entitlement under the state's Power Cost Equalization (PCE) program. The amendment would remove the "...costs of kilowatt-hour sales associated with a United States Department of Defense facility." (DOD) from APUC consideration in the PCE calculation.

The Commission believes that it understands the intent of this provision and does not oppose it on any policy grounds. The language of section 7 is somewhat ambiguous, however, and may not necessarily produce the result the sponsor intended. Specifically, both the revenues and the costs associated with such DOD transactions should be removed from the PCE calculation. Further the Commission should be required to validate the cost component by some "cost of service" methodology which will ensure the accurate identification of the costs to be excluded.

MEMORANDUM

TO: Sen. Don Bennett
Sen. Johne Binkley
Co-Chairmen
Senate Finance Committee

Date: April 2, 1987

Through: Becky Bear
Information Officer
DC & ED

From: Ted Moninski
Executive Director
Alaska Public Utilities Commission

Subject: Impact Analysis - SSSB22

Attached is the APUC's impact statement for the above referenced bill. Also attached is a copy of the Commission's reply to a letter from Rep. Kay Brown which addresses some of the same substantive issues evaluated in the impact statement. The Commission had previously submitted separate fiscal notes for the original bill and the sponsor substitute. To avoid confusion, I have merged these two notes and have included the new, combined fiscal note with this impact statement.

It is my understanding that the Senate Finance Committee will consider SSSB22 during a Committee hearing now scheduled for Tuesday, April 7, 1987, at 9:00 a.m. This hearing will, I am advised, be teleconferenced through the Legislative Teleconference Network. I would appreciate your distributing this memorandum and its attachments to the other members of the Finance Committee at your earliest convenience.

In light of the fact that a formal case touching upon many of the same issues to be considered in SSSB22 is now pending before the Commission, no Commissioner will provide testimony on Sections 1,2,4,5 and 6 of the Bill. Prior testimony on Section 3 has been given and further comment on Section 3 is included with this impact statement.

The Commission has asked that I be present to provide any necessary testimony or clarification for the attached materials. I will, therefore, be available for comment at the Anchorage LIO at the date and time referenced above. Please inform me of any schedule changes or any other information you may require prior to the Committee meeting.

Impacts of Sections 1,2,4;5,6 of SSSB22

The following is an evaluation of the probable impacts of adopting or not adopting the policies contained in the above referenced sections of SSSB22. The Commission's comments are directed at its own regulatory responsibilities and are not intended to reflect a comprehensive consideration of all issues.

If Passed:

Wholesale power sales transactions between regulated utilities and the APA are exempt from Commission oversight. The public interest responsibility for evaluating these transactions would reside solely with the APA and the various review mechanisms used to evaluate specific project proposals. Regardless of its other merits/demerits, this approach would lack the broader overview of power supply decisions which could be provided by the Commission.

Also, this Bill does not purport to alter the Commission's authority to judge the prudence of a utility's purchased power costs at the time of a specific rate case, under AS 42.05.511(a).[1] However, even if the Commission continues to have the authority to make case-specific adjustments, ratepayers and utility owners of cooperative and municipal utilities are one and the same, making any after-the-fact disallowance of APA-related costs for these entities relatively meaningless.

The proposed jurisdictional changes would effectively remove from Commission review a substantial percentage of a utility's costs which, as stated above, might be directly passed through to the ratepayers by operation of law. For retail utilities under the four-dam pool arrangement, for example, there are instances of APA-supplied power costs which account for as much as 50 percent or more of a utility's rates for service. Even under first-cut and conservative projections for Bradley Lake-supplied power, the range of impact, assuming sign-up of the full complement of railbelt utilities, appears to be between 8 percent and 20 percent of a utility's rates.

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[1] The Commission believes that this issue needs further consideration and clarification to determine whether the Commission can, in fact, disallow APA contract costs in rates after the contracts are in place, or whether all APA-related costs must be included in rates without any Commission review or adjustment.

To the extent that the purpose of this bill is to eliminate all Commission oversight for contractual transactions involving an APA project, that objective may not be achieved. Under the federal Public Utilities Regulatory Policies Act (PURPA), a utility is required to purchase power from a "Qualifying Facility" (QF). By Congressional delegation, the Commission is responsible for enforcing that obligation. Because of this, even if the authority over APA-utility contracts is removed by legislative action in Alaska, the Commission may still be required to act under federal law to prohibit purchases by regulated utilities where such purchases would threaten to subvert the intent of the federal statutes. QF's could also seek a remedy in the federal courts or before the Federal Energy Regulatory Commission to ensure that their rights are protected. Thus, the jurisdictional limits on the Commission established by this bill do not guarantee that there will be no impediments to APA contracting or financing.

If Not Passed:

The Commission would have to approve all future wholesale power contracts between regulated utilities and the APA.

The contract review process would entail a public notice period of thirty days, preliminary Staff investigation of the contract and Commission action based on any public comment and the initial Staff analysis. The Commission may approve, reject or suspend the contract, stating its findings and conclusions for taking action. Assuming the request for approval contains sufficient information, the Commission could take action within 45 days of the date of filing. In the event a party objects to Commission approval of the contract, procedures to effect an adjudicatory proceeding would ensue.

COMMISSION POSITION STATEMENT RE: SECTION 3 OF SSSB22

Under Section 3 of the bill (the original SB22 as amended), which would deregulate certain electric and telephone utilities, the Commission continues to believe that as a matter of public policy, the statutory procedure already in place is superior to automatic deregulation. AS 42.05.711(f) gives consumers a choice of what level of regulatory protection best serves their individual circumstances through an election. Consumers of five utilities affected by this bill have held deregulation elections. Of the five, the consumers of two utilities, Tanana Power and Iliamna-Newhalen Electric Cooperative, Inc., have voted to retain regulation. If Section 3 is adopted, it is not clear what continuing effect the previous vote to continue APUC jurisdiction would have in light of the "blanket" deregulation provided for in this proposal. However, if adoption of this section results in their deregulation, it will be in direct conflict with a democratic vote of the affected consumers.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

ALASKA PUBLIC UTILITIES COMMISSION

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

420 "L" STREET
SUITE 100
ANCHORAGE, ALASKA 99501
(907) 276-6222

March 31, 1987

Representative Kay Brown
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: APUC authority over APA Power Sales; Proposed Qualifying Facilities in Alaska.

Dear Representative Brown:

In a recent inquiry you asked for: 1) additional information concerning Qualifying Facilities under PURPA which have been proposed for the Railbelt, and 2) comment on the legal status of Qualifying Facilities under federal law.

The Commission is aware of four private sector power projects proposed in the Railbelt. AEM Corp. proposes a 25 MW project located at the Healy coal mine and fired by "waste coal." Power from the AEM proposed facility would be sold to Golden Valley Electric Association, Inc., in the Fairbanks area. SGI International, Inc., proposes a 50 MW project, also fired by waste coal, with the output to be sold to Anchorage Municipal Light and Power. Mat-Su Energy Corporation proposes a 20 MW facility fired by peat from the Mat-Su Valley, with the output to be sold to Matanuska Electric Association, Inc. Valley Energy Corporation proposes a 15 MW facility fired by wood chips from forests in the Mat-Su Valley, with the output sold to MEA.

The developers of all four of these projects have filed complaints with the Commission against the utility to which they seek to sell power. Each complaint seeks to have the Commission determine the "avoided cost" which, under federal law (PURPA), the utility must pay for power generated by Qualifying Facilities.[1] The complaints, and particularly the SGI complaint, also seek to prohibit the utilities from making other power purchases, such as from the Bradley Lake Hydroelectric Project, which would eliminate the need for power from the private project. In the SGI case, ML&P disputes whether the SGI project is actually a Qualifying Facility under PURPA.

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[1] AEM's proposal has been before the Commission since November 1, 1984, much longer than the other three proposals.

PURPA requires a public utility to purchase electric power and energy from Qualifying Facilities at the utility's "avoided cost." Avoided cost means, in essence, the costs which the utility will avoid by purchasing power from the Qualifying Facility rather than generating the power itself or purchasing the power elsewhere.

PURPA also requires the Commission to enforce the obligation of regulated utilities to purchase power from Qualifying Facilities at avoided cost. Thus, whether or not state statutes exempt APA power project sales from Commission jurisdiction, federal law still requires the Commission to enforce the obligation of utilities to purchase power from Qualifying Facilities. In its case, SGI contended that it has a priority over other potential sellers of power to ML&P and that, based on PURPA, the Commission should prohibit ML&P from purchasing any other power, particularly from the APA's Bradley Lake Hydroelectric Project. Although properly before this Commission, the PURPA argument has not yet been addressed because the issue was resolved based on State law. It is highly probable that SGI will be able to continue to advance its position before the APUC based on the federal statutes even if SSSB22 is enacted. Federal law would require the Commission to decide the issue based on the rights granted by PURPA.

One final point needs clarification. The reason that SGI wishes to prevent ML&P from purchasing power from Bradley Lake concerns, in part, the "avoided cost" determination. A cost is an "avoided cost" only if it can actually be avoided by a utility. Thus, for example, a utility cannot avoid the cost of generating facilities which have already been installed; then, if the utility needs no further generating facilities, there is no avoided capacity cost of an additional generating plant (there might still be an avoided cost for the fuel the plant would burn). Similarly, after ML&P has signed a contract which requires it to pay for power from Bradley Lake, that cost is no longer an avoided cost. In this sense it is not entirely correct that SGI feels it "can't compete" with a subsidized project such as Bradley Lake. SGI may be willing to sell its electricity for the same price as the APA would sell electricity from Bradley Lake. However, once ML&P is already committed to purchase from Bradley Lake, ML&P may need no further capacity and the avoided cost would then be less than the price of power from Bradley Lake.

I have also attached a copy of our impact statement concerning SBSB22, which addresses some of the same issues which you have raised.

Sincerely,

ALASKA PUBLIC UTILITIES COMMISSION

T.S. Moninski II
Executive Director

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

BIII Version: SSSB22
Publish Date:
Agency Affected: Commerce & Economic Development, Alaska Public Utilities Commissic
BRU: ADPU
Components: Operations

REQUEST:
Revision Date: April 2, 1987
Title: An Act exempting certain telephone and electric utilities and cooperative transactions from regulation by the APUC
Sponsor:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

(See Attachment 2)

Prepared by: T.S. Maninski, II Executive Director
Phone: 276-6222
Division: Alaska Public Utilities Commission
Date:

Approved by Commissioner:
Date:
Agency: Commerce & Economic Development

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

page ___ of ___

7

PREFACE:

This fiscal note replaces all previous fiscal notes for Senate Bill 22 and Sponsor Substitute for Senate Bill 22. Specifically as it relates to Section 3 of the Bill, the Commission notes that while there may be some minimal workload reduction associated with deregulating certain electric and telephone utilities, the APUC has lost 13 of its 53 authorized positions during the last three fiscal years and the relatively small reduction in caseload will be used to assist in the Commission's attempt to cope with the reduction in force.

Sections 1,2,4,5 6 and 7:

Passage of these sections will have no workload impact upon the Commission and, therefore, no fiscal impact.

Section 3. AS 42.05.711(e) and Amendment to Line No. 28 (as shown on page 576 of the legislative journal).

The number of utilities affected by this section were 13 before the amendment to line 28. The amendment raised that number by 4 to a new total of 17. This is a very insignificant number of utilities (17 of 307) and there will be a very minor decrease in workload if this section is passed.

Impacts of Section 1,2,4,5,6 of SSSB22

The following is an evaluation of the probable impacts of adopting the policy considerations contained in the above referenced sections of SSSB22. The Commission's comments are directed at its own regulatory responsibilities and are not intended to reflect a comprehensive consideration of all issues.

If Passed:

Wholesale power sales transactions between regulated utilities and the APA are exempt from Commission oversight. The public interest responsibility for evaluating these transactions would reside solely with the APA and the various review mechanisms used to evaluate specific project proposals. Regardless of its other merits/demerits, this approach would lack the broader overview of power supply decisions which could be provided by the Commission.

Also, this Bill does not purport to alter the Commission's authority to judge the prudence of a utility's purchased power costs at the time of a specific rate case, under AS 42.05.511(a).[1] However, even if the Commission continues to have the authority to make case-specific adjustments, ratepayers and utility owners of cooperative and municipal utilities are one and the same, making any after-the-fact disallowance of APA-related costs for these entities relatively meaningless.

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[1]The Commission believes that this issue needs further consideration and clarification to determine whether the Commission can, in fact, disallow APA contract costs in rates after the contracts are in place, or whether all APA-related costs must be included in rates without any Commission review or adjustment.

COMMISSION ACTION			
Referred to	Circle NO,	Initials	Date
Weatherly	NO		4/21/87
Grimes	OK		4/21/87
Knowles	OK		4-2-87
Adl	OK		4-2-87
Pitcher	OK		4-3-87

The proposed jurisdictional changes would effectively remove from Commission review a substantial percentage of a utility's costs which, as stated above, might be directly passed through to the ratepayers by operation of law. For retail utilities under the four-dam pool arrangement, for example, there are instances of APA-supplied power costs which accounting for as much as 50 percent or more of a utility's rates for service. Even under first-out and conservative projections for Bradley Lake-supplied power, the range of impact, assuming sign-up of the full complement of railbelt utilities, appears to be between 8 percent and 20 percent of a utility's rates.

To the extent that the purpose of this bill is to eliminate all Commission oversight for contractual transactions involving an APA project, that objective may not be achieved. Under the federal Public Utilities Regulatory Policies Act (PURPA), a utility is required to purchase power from a "Qualifying Facility" (QF). By Congressional delegation, the Commission is responsible for enforcing that obligation. Because of this, even if the authority over APA-utility contracts is removed by legislative action in Alaska, the Commission may still be required to act under federal law to prohibit purchases by regulated utilities where such purchases would threaten to subvert the intent of the federal statutes. QF's could also seek a remedy in the federal courts or before the Federal Energy Regulatory Commission to ensure that their rights are protected. Thus, the jurisdictional limits ~~established for~~ on the Commission established by this bill do not guarantee that there will be no impediments to APA contracting or financing.

If Not Passed:

The Commission would have to approve all future wholesale power contracts between regulated utilities and the APA.

The contract review process would entail a public notice period of thirty days, preliminary Staff investigation of the contract and Commission action based on any public comment and

the initial staff analysis. The Commission may approve, reject or suspend the contract, stating its findings and conclusions for taking action. Assuming the request for approval contains sufficient information, the Commission could take action within 45 days of the date of filing. In the event a party objects to Commission approval of the contract, procedures to effect an adjudicatory proceeding would ensue.

ELECTRIC AND TELEPHONE UTILITIES IMPACTED BY SB 22

I. 250 OF FEWER SUBSCRIBERS

Name of Electric Utility	Number of Users
Andreanof Electric Corporation	37
Aniak Light & Power Company, Inc.	170
Arctic Utilities, Inc.	25
Bettles Light & Power, Inc.	50
Egegik Light and Power Homer Lee Leonard d/b/a	65
I-N-N Electric Cooperative, Inc.	226
Levelock Electric Cooperative, Inc.	57
Manley Utility Company, Inc.	70
McGrath Light & Power Company[1]	220
Northway Power & Light, Inc.	91
Pelican Utility Company[2]	76
Tanana Power Company, Inc.	178
Teller Power Company[1]	73

Name of Telephone Utility	Number of Main Access Lines
Whittier Telephone Company	178

II. 251 TO 750 SUBSCRIBERS

Name of Electric Utility	Number of Users
Gwitchyaa Zhee Utility Company	296
Haines Light & Power Company, Inc.	740
Yakutat Power, Inc.	298

Name of Telephone Utility	Number of Main Access Lines
Bristol Bay Telephone Cooperative, Inc.	730
Bush-Tell, Incorporated	347
Yukon Telephone Company	533

Information derived from the Alaska Public Utilities Commission's 1985 Annual Report.

1 Based on 1984 information

2 Based on 1983 information

Sent to Becky Bee
2/13/87

To: Becky Bear
Information Officer
Dept. of Commerce

Date: February 10, 1987

From: T.S. Moninski II
Executive Director
Alaska Public Utilities
Commission

Subject: Position Statement SB22

The Commission opposes SB22. From a public policy perspective, the Commission believes its current statute AS 42.05.711(f) is superior to the proposed legislation because it enables consumers of small electric and telephone utilities to decide whether or not the benefits of regulation; i.e., public protection, outweigh the costs of regulation by providing for a deregulation election to be held.[1]

In addition, the proposed legislation appears to have the effect of deregulating Alaska Electric Generation and Transmission Cooperative, a generation electric utility which has two customers but provides wholesale power to potentially all the ratepayers of the railbelt utilities. It is also not clear what effect this legislation would have on Alascom, which may directly provide service to less than 250 subscribers but through the local exchange telephone utilities provides long distance service throughout Alaska.

In its fiscal note, the APUC stated that this proposal, if adopted, would affect only 13 of 307 certificated utilities. Given the relatively small number of impacted utilities and the nearly 25% reduction in staff resources already absorbed by the Commission over the past three fiscal years, a further reduction in staffing would not be expected as a result of the changes proposed in this bill.

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[1]Note that this legislation does not address the impact on utilities which have previously held deregulation elections and their consumers have voted to maintain economic regulation of their utilities by this Commission; i.e., Tanana Power Company and Iliamna-Newhalen Electric Cooperative.

ALASKA POWER AUTHORITY

Position Paper

SPONSOR SUBSTITUTE FOR SENATE BILL NO. 22

The Alaska Power Authority supports enactment of SSSB 22. Specifically, Sections 1, 2, 4 and 5 of the bill, provide for amendments which would exempt wholesale power agreements between the Alaska Power Authority and a public utility from review or approval by the Alaska Public Utilities Commission (APUC). Enactment of this legislation is essential to the program of revenue bond financing of the Bradley Lake Hydroelectric Project.

The need for enactment of SSSB 22 is due to a 1986 amendment to APUC legislation. The amendment gives the APUC authority to review in advance and approve wholesale power agreements between public utilities. Once the agreements are in effect, the APUC may also order the parties to the agreement to renegotiate the agreement if the APUC determines that the retail power rates are not just. Where the parties are unable to agree to an amendment, the APUC may order the parties to proceed under the agreement's dispute resolution procedures.

The 1986 amendment was part of a complex, lengthy and controversial package of amendments within the "sunset" reauthorization bill for the Alaska Public Utilities Commission. The effect of the amendment on the Alaska Power Authority, its wholesale power agreements, and the Bradley Lake agreement in particular, was never addressed to the 1986 Legislature. Consequently, we are now presented with a statutory conflict. The Power Authority is exempt by statute from the APUC's jurisdiction. On the other hand, the APUC has jurisdiction over wholesale power agreements to which the Power Authority is a party.

Without an amendment to correct this anamoly, general civil construction cannot commence this season. Bond financing will be jeopardized for at least two reasons. The lengthy hearing process and any subsequent litigation arising out of the APUC's orders would delay construction of Bradley and ultimately jeopardized timely bond financing of the project. Moreover, if the APUC can order negotiation of power sales contracts in effect, bondholders will not be able to rely on the power sales contracts and the rates which are the basis for the contracts.

The Alaska Power Authority Board of Directors met on February 27, 1987, and unanimously adopted attached Resolution 1987-05, which supports legislation to be introduced during the 1987 Legislative session, for the purposes of clarification that the Alaska Power Authority and its wholesale power agreements would be specifically excluded from the jurisdiction of APUC.

Additional background information outlining the need for enactment of SSSB 22 is provided in the attached memorandum (dated March 9, 1987) from the Alaska Power Authority bond counsel of Wohlforth, Flint, and Gruening.

8629/663/1

Alaska Power Authority

Addendum to Alaska Power Authority Position Paper
SSSB 22

If SB 22 is enacted:

- Allows Bradley contracts to be signed and executed in a timely basis for construction to meet utilities' schedules of need.
- Provides certainty to wholesale power rate based on terms and provisions fixed in contract and not subject to future adjustment.
- Prevents duplication of review by State agencies. Public interest already served by Alaska Power Authority involvement.
- Lowers costs to consumers through lower interest rates on long-term debt.
- Lowers APUC review costs.
- Eliminates possibility of conflicting interpretations of contractual terms by two state agencies both assisted by the Dept. of Law

If not enacted:

- The provision for adjusting rates in the future lowers the rating of the long-term debt to less than investment grade (A-rated to "junk" bond.)*
- Unable to have former contracts until APUC re-reviews all power supply option studies already performed by OMB, legislature, utilities and their respective boards, and Alaska Power Authority and its Board (including four commissioners).
- No basis for future decisions.
- Delaying Bradley Lake by one year could increase construction costs by approximately $10 million (less any additional arbitrage earnings.)

---

* Interest rate could increase 1.5 to 2.0 percent.
Based on $175 million in debt and 8.0 percent and 9.75 percent interest rate for with and without exemption, respectively, debt service would increase by approximately $2.7 million per year - $81 million over life of bonds.

3652/723/1

RESOLUTION 87-05

WHEREAS the Alaska Power Authority is an instrumentality of the State of Alaska and created by the legislature , in the interests of promoting the general welfare and public purposes of all the people of the state, to reduce consumer power costs and otherwise to encourage the long-term economic growth of the state, including the development of its natural resources, through the establishment of power projects;

WHEREAS the Alaska Power Authority is not subject to the jurisdiction of the Alaska Public Utilities Commission;

WHEREAS the Alaska Power Authority is authorized by statute to borrow money and issue bonds the principal and interest on which are payable from the income and receipts or other money derived from projects financed with the proceeds of the bonds and from revenue-producing contracts including a contract providing for the security of the bonds made by the authority with any person;

WHEREAS the Alaska Power Authority is currently concluding negotiations with the Railbelt utilities for the sale of project capacity and power from the Bradley Lake hydroelectric project;

WHEREAS a portion of the project's construction costs will be financed with the proceeeds of a $175,000,000 bond issuance by the Alaska Power Authority;

WHEREAS execution of the Bradley Lake agreement by June, 1987 is necessary in order that civil construction of the project may commence during this construction season;

WHEREAS, during the 1986 legislative session, the Legislature enacted AS 42.05.431(b) as part of a complex, lengthy and controversial package of amendments within the "sunset" reauthorization bill for the Alaska Public Utilities Commission;

WHEREAS AS 42.05.431(a) provides that a wholesale power agreement between public utilities is subject to advance approval of the commission and the Alaska Public Utilities Commission has ordered Anchorage Municipal Light and Power to submit the Bradley Lake power sales agreement to the commission for advance approval;

WHEREAS AS 42.05.431(b) permits the Alaska Public Utilities Commission to issue a comparable order to other Railbelt utilities who will be purchasers under the Bradley Lake wholesale power agreement;

WHEREAS AS 42.05.431(b) further provides that, once a wholesale power agreement is in effect and the commission determines that the rates set in accordance with the agreement

are not just and reasonable, the commission may order the parties to negotiate an amendment to the agreement, or to use the dispute resolution procedures contained in the agreement;

WHEREAS there now exists an anomaly between AS 44.83.090(b) which provides that the Alaska Public Utilities Commission does not have jurisdiction over the Alaska Power Authority and AS 42.05.720(4)(A) which seemingly gives the commission the authority to order the Alaska Power Authority to renegotiate its wholesale power agreements and to proceed under the contract's dispute resolution procedures;

WHEREAS the effect of AS 42.05.720(4)(A) on the Alaska Power Authority and its wholesale power agreements was never addressed to the 1986 Legislature;

WHEREAS AS 42.05.720(4)(A) creates a statutory conflict with the legislation authorizing the authority to finance the establishment of power projects through the issuance of bonds and with the legislation exempting the authority from the jurisdiction of the Alaska Public Utilities Commission;

WHEREAS prolonged hearings before the Alaska Public Utilities Commission and litigation subsequent to the hearings would jeopardize timely bond financing of the project, and

WHEREAS bondholders would be unable to rely on the rates agreed upon in a power sales agreement where there is a prospect of the Alaska Publid Utilities Commission ordering a change in an agreement already in effect;

IT IS HEREBY RESOLVED that the Alaska Power Authority will ask the 1987 Alaska Legislature to enact legislation clarifying that wholesale power agreements for the sale of project capacity or power from a public works project of the state are not subject to review or approval by the Alaska Public Utilities Commission.

IT IS FURTHER RESOLVED that the Alaska Power Authority will ask for statutory language as provided in Option ___ and considered today at this meeting.

The resolution having been submitted to a vote, the vote thereon was as follows:

YEAS: Rae, Halloran, Wilson, Schaeffer, Hofman, Mathis, Nunn

NAYS: Ø

ABSENT: Ø

And the resolution was declared adopted on this the 27th day of February, 1987.

ALASKA POWER AUTHORITY

BY: _____
Lee R. Nunn, Chairman

BY: _____
Robert D. Heath, Secretary

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JANICE COLEMAN GRAHAM**
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ROGER A. LUBOVICH
BRADLEY E. MEYEN
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PATRICK RUMLEY
JAMES R. SZENDER

*JUNEAU OFFICE
**ADMITTED IN NEW YORK ONLY

OF COUNSEL
ROGER G. CONNOR
RICHARD W. GARNETT, III

MEMORANDUM

TO: Mr. Robert E. LeResche
Executive Director
Alaska Power Authority

FROM: Wohlforth, Flint & Gruening GGW

RE: Sponsor Subtitute for Senate Bill No. 22

DATE: March 9, 1987

Enactment of the above Bill, which would exempt wholesale power agreements between the Alaska Power Authority and a public utility from review or approval by the Alaska Public Utilities Commission, is essential to the program of revenue bond financing of the Bradley Lake Hydroelectric Project.

The $267,500,000 of Variable Rate Demand Bonds issued in October, 1985, are presently outstanding to provide short-term financing for the Bradley Lake Hydroelectric Project. These Variable Rate Demand Bonds, which are secured by Letters of Credit from three large Japanese banks, initially are due in 1991 and are subject to two one-year extensions. In order for successful long-term take-out financing to be marketed so as to retire the Variable Rate Demand Bonds, power sales agreements with the utilities to be served must be entered to secure the long-term debt.

Revenue bond financing of power generating facilities throughout the rest of the country is typically secured by power sales agreements, such as those which are in course of negotiation with the utilities to be served by Bradley Lake. The public body which is the authorizing entity and the participant utilities must be free to enter into the wholesale

power agreements unfettered by regulatory powers of a public utilities commission. Power sales agreements pledged to secure long term debt, once entered into, cannot be disturbed while the debt is outstanding. The provisions of AS 42.05.-031(b), which provide for initial approval and continuing Commission jurisdiction, would seriously impede and perhaps make impossible conventional revenue bond financing secured by power sales agreements of the Bradley Lake Project. Enactment of Sponsor Substitute for Senate Bill No. 22, eliminating these provisions, is therefore essential to financing of the project pursuant to power sales agreements with the utilities.

EEW:jg

Enclosure: Sponsor Substitute for
Senate Bill No. 22.

RESOLUTION 87-05

WHEREAS the Alaska Power Authority is an instrumentality of the State of Alaska and created by the legislature , in the interests of promoting the general welfare and public purposes of all the people of the state, to reduce consumer power costs and otherwise to encourage the long-term economic growth of the state, including the development of its natural resources, through the establishment of power projects;

WHEREAS the Alaska Power Authority is not subject to the jurisdiction of the Alaska Public Utilities Commission;

WHEREAS the Alaska Power Authority is authorized by statute to borrow money and issue bonds the principal and interest on which are payable from the income and receipts or other money derived from projects financed with the proceeds of the bonds and from revenue-producing contracts including a contract providing for the security of the bonds made by the authority with any person;

WHEREAS the Alaska Power Authority is currently concluding negotiations with the Railbelt utilities for the sale of project capacity and power from the Bradley Lake hydroelectric project;

WHEREAS a portion of the project's construction costs will be financed with the proceeeds of a $175,000,000 bond issuance by the Alaska Power Authority;

WHEREAS execution of the Bradley Lake agreement by June, 1987 is necessary in order that civil construction of the project may commence during this construction season;

WHEREAS, during the 1986 legislative session, the Legislature enacted AS 42.05.431(b) as part of a complex, lengthy and controversial package of amendments within the "sunset" reauthorization bill for the Alaska Public Utilities Commission;

WHEREAS AS 42.05.431(b) provides that a wholesale power agreement between public utilities is subject to advance approval of the commission and the Alaska Public Utilities Commission has ordered Anchorage Municipal Light and Power to submit the Bradley Lake power sales agreement to the commission for advance approval;

WHEREAS AS 42.05.431(b) permits the Alaska Public Utilities Commission to issue a comparable order to other Railbelt utilities who will be purchasers under the Bradley Lake wholesale power agreement;

WHEREAS AS 42.05.431(b) further provides that, once a wholesale power agreement is in effect and the commission determines that the rates set in accordance with the agreement

are not just and reasonable, the commission may order the parties to negotiate an amendment to the agreement, or to use the dispute resolution procedures contained in the agreement;

WHEREAS there now exists an anomaly between AS 44.83.090(b) which provides that the Alaska Public Utilities Commission does not have jurisdiction over the Alaska Power Authority and AS 42.05.720(4)(A) which seemingly gives the commission the authority to order the Alaska Power Authority to renegotiate its wholesale power agreements and to proceed under the contract's dispute resolution procedures;

WHEREAS the effect of AS 42.05.720(4)(A) on the Alaska Power Authority and its wholesale power agreements was never addressed to the 1986 Legislature;

WHEREAS AS 42.05.720(4)(A) creates a statutory conflict with the legislation authorizing the authority to finance the establishment of power projects through the issuance of bonds and with the legislation exempting the authority from the jurisdiction of the Alaska Public Utilities Commission;

WHEREAS prolonged hearings before the Alaska Public Utilities Commission and litigation subsequent to the hearings would jeopardize timely bond financing of the project, and

WHEREAS bondholders would be unable to rely on the rates agreed upon in a power sales agreement where there is a prospect of the Alaska Publid Utilities Commission ordering a change in an agreement already in effect;

IT IS HEREBY RESOLVED that the Alaska Power Authority will ask the 1987 Alaska Legislature to enact legislation clarifying that wholesale power agreements for the sale of project capacity or power from a public works project of the state are not subject to review or approval by the Alaska Public Utilities Commission.

IT IS FURTHER RESOLVED that the Alaska Power Authority will ask for statutory language as provided in Option ___ and considered today at this meeting.

The resolution having been submitted to a vote, the vote thereon was as follows:

YEAS: Fae, Halloran, Allison, Schaeffer, Huffman, Mathis, Nunn

NAYS: Ø

ABSENT: Ø

And the resolution was declared adopted on this the 27th day of February, 1987.

ALASKA POWER AUTHORITY

BY: _____
Lee R. Nunn, Chairman

BY: _____
Robert D. Heath, Secretary

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

May 15, 1987

MEMORANDUM

TO: Representative John Sund

ATTN: John Hartle

FROM: Ginny Fay
Legislative Analyst

RE: Alaska Public Utilities Jurisdiction and Senate Bill 22
Research Request 87.291 (Supplemental Information)

You asked me to respond to testimony raising questions regarding House Research Memorandum 87.291. The testimony was offered during the May 8, 1987 House Judiciary Committee meeting on Senate Bill (SB 22). The points presented in the testimony are listed below with pertinent additional information immediately following.

1) **Federal Energy Regulatory Commission (FERC) jurisdiction over wholesale power rates applies only to interstate sales.**

The U.S. Code Chapter 12, Subchapter II-Regulation of Electric Utility Companies Engaged in Interstate Commerce generally provides for FERC jurisdiction over interstate wholesale electrical power sales based on the policy that this jurisdiction is "necessary in the public interest" [§824(a)].[1] **Under Subchapter II, FERC jurisdiction over wholesale power rates is limited to interstate sales and thus does not apply under Alaska's current system.** Under §824(b)(1), FERC authority over electrical generation and transmission facilities in intrastate commerce is limited based on state jurisdiction over intrastate wholesale power sales. This limitation is supported by case law.[2]

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[1]Appropriate sections are attached in Attachment A.

[2]Federal Power Commission v. S. Cal. Edison Co., 84 S.Ct. 644, 376 U.S. 205, 11 L.ED.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183; Ark. Elec. Co.-op. Corp. v. Ark. Public Com'n, Ark.1983, 103 S.Ct. 1905, 461 U.S. 375, 76 L.Ed.2d 1.; Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258; Gross Income Tax Div., Ind. Dept. of St. Rev. v. Chicago District Elec. Generating Corp., 1956, 139 N.E.2d 161, 236 Ind. 117.

My May 8 memorandum did not state that FERC regulates all wholesale transactions. The memorandum stated that while intrastate and government facilities are exempted from FERC jurisdiction under Subchapter II, FERC jurisdiction under Subchapter I-Regulation of Development of Water Power and Resources (§812) and Title II of the Public Utility Regulatory Policy Act (PURPA) of 1978 [§824a-3(h)(2)(B)] provide for FERC jurisdiction over intrastate agreements if state jurisdiction is removed (see Attachment A for these sections).

Subchapter I, §812 provides that any FERC licensee--as a condition of the license--must abide by state regulation of service and rates of electrical power.[3] If a licensee is "within a State which has not authorized and empowered a commission or other agency or agencies within said State to control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefore, or the amount or character of securities to be issued by said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control" (emphasis added). This section implies that as a condition of the Bradley Lake FERC license, the Alaska Power Authority (APA) must abide by laws and regulations the State has conferred upon the Alaska Public Utilities Commission (APUC) or the FERC may exercise regulatory authority.

2. In most states, electric cooperatives and their rates are not regulated by the states' public utilities commission.

Of the 50 states, 45 have electrical cooperatives. Twenty-five of the states (56 percent) regulate electric cooperatives. Of the 20 states that do not regulate cooperatives, one (Minnesota) allows for members to elect to be regulated, another (Nevada) exempts cooperatives only if all their sales are to members, and a third (Wisconsin) regulates a cooperative if its activities include functions that make it a public utility under Wisconsin statute. The majority of states do regulate electrical cooperatives. See Attachment B, Research Request 85.250, for more information.

3. There are no cases in the country where the rates for electrical power sold to cooperatives from a federal or state power project are regulated by the state public utility regulatory agency.

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[3] "Licensee" means any person, state, or municipality licensed under provisions of section 797 of this title, and any assignee or successor in interest thereof [USC 16 § 796(5)].

This statement is true, but may be a bit misleading--the few states with major federal or state electrical power projects (i.e., Pacific Northwest and New York) are states that do not regulate electrical cooperatives. The FERC, however, has jurisdiction over the wholesale rates of these projects.[4]

4. Section three of SB 22 removes APUC retail regulatory authority only over the portion of a utility's sales that are from Bradley Lake.

Section three is much broader than this statement implies. The language [CSSSSB 22 (Fin), 4/21/87] refers to all costs of all APA projects and deems them prudent. This would include past APA projects (i.e., four dam pool) as well as future projects. Although Bradley Lake power sales may constitute a relatively small portion of a utility's supply, separating these costs will at best be a difficult process for the APUC.

5. Securities that bond holders have for repayment of bonds on electrical power generation is the revenue from contracts for the purchases of power. The Big Rivers Electric Cooperative (BREC) is an example where utility regulatory oversight resulted in the inability of an electric cooperative to meet its debt obligations.

In the Big Rivers case, the electrical cooperative had a large, federal Rural Electrification Association (REA) loan to construct a generating station (D.B. Wilson generating station). In April 1984, during the construction of this facility, the BREC filed for a rate increase before the Kentucky Public Service Commission (KPSC) but withdrew the case before it was heard because of resistance from aluminum smelters that make up 70 percent of its power sales. The aluminum smelters opposed the rate increase because of the simultaneous decline in the aluminum industry and their inability to pay additional electrical costs.[5]

In November 1984, BREC again appeared before the KPSC for a small rate increase but did not include any of the costs of the Wilson generator. In November 1984, REA stopped the draw down of any additional REA funds for the completion of the BREC Wilson project. As a result of the stoppage of REA funds, BREC began using internal funds to complete their Wilson facility and discontinued repayment of the outstanding REA loan. On January 3, 1985, REA notified BREC that it was in default on its loan; later that month, the U.S. Justice Department notified BREC of their failure to make payments on the REA loan. In May 1985, the KPSC denied the requested rate

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[4]Robert Fitzgibbons, Associate General Counsel, Federal Energy Regulatory Commission, personal communication, May 7, 1987.

[5]Aaron Greenwell, Public Utility Financial Analyst, Kentucky Public Service Commission, personal communication, May 14, 1987.

increase but directed the BREC and aluminum smelters to negotiate for a balanced, economically viable solution.[5] The KPSC also directed the BREC to develop a long-term plan for solving their financial difficulties. In August 1986, the BREC submitted a plan and filed for a rate increase to help pay their REA loan that was then over 18 months in default. The plan was considered inadequate by the KPSC because it included unlikely sales to nonmembers, required continual rate increases to aluminum smelters that could not meet these increases because of the industry economic conditions, and merely postponed a solution to the problem. In March 1987, the KPSC determined that it would not grant a rate increase without an improved long-term plan to solve the cooperative's financial problems. At that time, the REA halted further loans in Kentucky until the matter was resolved.[7]

While there has been no formal ruling in the Kentucky case, the problem is occurring in a climate where load growth has not occurred as utilities predicted and excess capacity is requiring utilities to carry additional debt service without sufficient revenues to meet these costs.[8] This is not unlike the situation mentioned in the May 8 memorandum: the failure of the Washington Public Supply System was attributed to excess capacity in the region that jeopardized utilities' ability to pay for power and thus retire revenue bonds.

6. **A number of investor owned utilities deregulated under SB 22 cannot vote for deregulation.**

Under AS 42.05.711(f) investor owned utilities that gross less than $325,000 annually may elect to be exempt from provisions of Alaska Statute 42.05.211-281 in the same manner as cooperatives. Reregulation is possible under the same procedures. Senate Bill 22 would automatically deregulate investor owned utilities with fewer than 500 subscribers [CSSSSB 22 (Fin), 4/21/87] . Without an expansion of AS 42.05.712, any deregulated investor owned utility with fewer than 500 subscribers that grosses more than $325,000 annually would not be able to vote for regulation. Thus, this category of investor owned utilities would be permanently deregulated. These statutes are attached (Attachment C).

If you have any questions or would like additional information, please contact this agency.

Attachments

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[6]Kentucky Public Utility Commission, Docket No. 9163.

[7]Ibid.

[8]Aaron Greenwell, Public Utility Financial Analyst, Kentucky Public Service Commission, personal communication, May 14, 1987.

ATTACHMENT A
Federal Code - Regulation of Power

(d) Violation of terms of exemption

Any violation of a term or condition of any exemption granted under subsection (a) of this section shall be treated as a violation of a rule or order of the Commission under this chapter.

(June 10, 1920, c. 285, § 30, as added Pub.L. 95-617, Title II, § 213, Nov. 9, 1978, 92 Stat. 3148.)

Historical Note

References in Text. The Fish and Wildlife Coordination Act, referred to in subsec. (c), is Act Mar. 10, 1934, c. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this Title and Tables volume.

The Commission, referred to in text, means the Federal Energy Regulatory Commission. See section 2602(3) of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-617, see 1978 U.S. Code Cong. and Adm. News, p. 7659.

Cross References

Exemption from licensing requirements of this subchapter to 5,000 kilowatts hydroelectric power project subject to environmental limitations of this section, see section 2705 of this title.

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in

commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847, and amended Nov. 9, 1978, Pub.L. 95-617, Title II, § 204(b), 92 Stat. 3140.)

Historical Note

1978 Amendment. Subsec. (b) Pub.L. 95-617, § 204(b)(1), designated existing provisions as par. (1) and, in par. (1) as so designated, inserted "except as provided in paragraph (2)" following "in interstate commerce, but" and added par. (2)

jurisdiction solely by reason of section 824i, 824j, or 824k of this title)" following "under this subchapter"

Transfer of Functions. The Federal Power Commission was terminated and its functions with regard to the establishment, review and enforcement of rates and charges for the

ing determinations on construction work in progress under this subchapter were transferred to the Federal Energy Regulatory Commission by sections 7172(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare.

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

Prior Actions; Effect On Other Authorities. Section 214 of Pub.L. 95-617 provided that:

"(a) Prior Actions.—No provision of this title or of any amendment made by this title [which enacted sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amended this section and sections 796, 824a, 824d, and 825d of this title and enacted provisions set out as notes under sections 824a, 824d and 825d of this title] shall apply to, or affect, any action taken by the Commission before the date of the enactment of this Act [Nov. 9, 1978].

"(b) Other Authorities.—No provision of this title or of any amendment made by this title [which enacted sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amended this section and sections 796, 824a, 824d, and 825d of this title and enacted provisions set out as notes under sections 824a, 824d and 825d of this title] shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title."

Legislative History. For legislative history and purpose of Pub.L. 95-617, see 1978 U.S. Code Cong. and Adm. News, p. 7659.

Cross References

Ratemaking proceedings for sale of nonfirm electric power outside Pacific Northwest region, rates effective upon review by Federal Energy Regulatory Commission, see section 839e of this title.

Statutory basis for procedures used in establishing rates, see section 839e of this title.

Library References

Commerce ⇐62.1.
Electricity ⇐1, 2, 3, 11.3.

C.J.S. Commerce §§ 85, 98.
C.J.S. Electricity §§ 1 to 10.

Notes of Decisions

1. Constitutionality

U.S.C.A. Const. Art. 1, § 8, cl. 3, did not prohibit Congress from enacting subsec. (b) of this section even though Congress may legislate with respect to some states and exempt others pursuant to subsec. (b) of this section, in that nothing requires that U.S.C.A. Const. Art. 1, § 8, cl. 3, be exercised in a totally uniform manner geographically. Appeal of New England Power Co., 1980, 424 A.2d 807, 120 N.H. 866.

2. Construction of section

Exceptions to primary grant of jurisdiction to Commission of authority over interstate sales of electricity would be strictly construed. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

This subchapter must be given a reasonable construction and one which will carry out the purpose of Congress to insure adequate and effective regulation of wholesale rates for electric energy in interstate commerce. Safe Harbor Water Power Corp. v. Federal Power Commission, C.A.3, 1949, 179 F.2d 179, certiorari denied 70 S.Ct. 980, 339 U.S. 957, 94 L.Ed. 1368.

Where subsec. (b) of this section disjunctively conferred jurisdiction on Commission over interstate transmission, or interstate wholesale sales of electrical energy, the disjunction could not be disregarded because the preamble referred conjunctively to business of transmitting and selling electric energy. Hartford Electric Light Co. v. Federal Power Commission, C.C.A.1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698.

3. Construction of section with other laws

Fact that electric utility was a licensee under section 791a et seq. of this title and therefore subject to regulation thereunder did not preclude its regulation under this subchapter as a public utility engaged in interstate commerce and sale of electric energy at wholesale, and it was also subject to regulation under section 791a et seq. of this title, where the Commission found, on substantial evidence, that the states were unable to agree within the meaning of section 811 of this title. Pennsylvania Water & Power Co. v. Federal Power Commission, App.D.C.1952, 72 S.Ct. 843, 343 U.S. 414, 96 L.Ed. 1042.

Provision of subsec. (a) of this section that federal regulation of business of transmission and sale of electric energy in interstate commerce should extend only to those matters which were not subject to state regulation did not apply to provisions of section 824(a) of this title forbidding acquisition of securities of public utilities subject to this subchapter by any other such utility without authorization of the Commission, and did not exempt acquisition of securities otherwise within this subchapter, because of fact that the purchaser could be, and the transfer was regulated by, N.J.S.A. 48:3-10. Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

4. Purpose

Primary purposes of this subchapter were to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. Gulf States Utilities Co. v. Federal Power Commission, Dist.Col.1973, 93 S.Ct. 1870, 411 U.S. 747, 36 L.Ed.2d 635, rehearing denied 93 S.Ct. 2767, 412 U.S. 911, 37 L.Ed.2d 369.

The primary purpose of this subchapter was to give a federal agency power to regulate the sale of electric energy across state lines. Jersey Central Power & Light Co. v. Federal Power Commission 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

Primary aim of this chapter is protection of consumers from excessive rates and charges, and that purpose is best served by expeditious resolution of rate discrimination claims. Town of Alexandria, Minn. v. Federal Power Commission, 1975, 555 F.2d 1024, 181 U.S.App.D.C. 83.

The purpose of this subchapter is to regulate areas not open to state control. Federal Power Commission v. Arizona Edison Co., C.A.Ariz.1952, 194 F.2d 679.

This subchapter is intended to supplement and not to supersede the regulatory power of

821, 81 U.S.App.D.C. 178, reversed on other grounds 67 S.Ct. 963, 330 U.S. 802, 91 L.Ed. 1261, rehearing denied 67 S.Ct. 1090, 330 U.S. 856, 91 L.Ed. 1297.

The purpose of this subchapter is to correct abuses of write-ups, inflation of accounts, and similar practices which have on occasion been found in the utility industry. Connecticut Light & Power Co. v. Federal Power Commission, 1944, 141 F.2d 14, 78 U.S.App.D.C. 356, reversed on other grounds 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

This subchapter is aimed primarily at federal regulation of interstate sale of electric energy. Dunk v. Pennsylvania Public Utility Commission, 1969, 252 A.2d 589, 434 Pa. 41, certiorari denied 90 S.Ct. 99, 396 U.S. 839, 24 L.Ed.2d 89.

Real reason for passage of this subchapter was to fill the gap of unregulated wholesale sales of electric energy in interstate commerce, and its purpose was to regulate areas not closed to state control and to supplement, not supersede, the regulatory powers of the state. Dunk v. Pennsylvania Public Utility Commission, 1967, 232 A.2d 231, 210 Pa.Super. 183, affirmed 252 A.2d 589, 434 Pa. 41, certiorari denied 90 S.Ct. 99, 396 U.S. 839, 24 L.Ed.2d 89.

5. Policy

A statement of policy underlying this subchapter would not nullify clear and specific grant of jurisdiction to Commission to regulate interstate sales of electricity even if particular grant were inconsistent with broadly expressed purpose. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

The policy declaration of subsec. (a) of this section that federal regulation is to extend only to those matters which are not subject to regulation by the state cannot nullify a specific grant of jurisdiction, even if particular grant seems inconsistent with the broadly expressed purpose, but the declaration cannot be wholly ignored and it is entitled to respect as a guide in resolving any ambiguity in the specific provisions which purport to carry out its intent. Connecticut Light & Power Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

Provision of subsec. (a) of this section that federal regulation of business of transmission and sale of electric energy in interstate commerce should extend only to those matters

ty, and cannot nullify a clear and specific grant of jurisdiction, even if particular grant seems inconsistent. Duke Power Co. v. Federal Power Commission, 1968, 401 F.2d 930, 130 U.S.App.D.C. 389.

6. Law governing

In determining the bearing of state law on the ability of a party unilaterally to alter contractually specified electric rates, the guiding principle is that state law is relevant only to the extent intended by the parties; neither state law nor conflict of law principles summoning state law operate of their own force on contracts subject to the Commission's regulatory jurisdiction. City of Oglesby v. Federal Energy Regulatory Commission, 1979, 610 F.2d 897, 197 U.S.App.D.C. 378.

7. Repeals

This subchapter superseded and repealed any regulation under Boulder Canyon Project Act, section 617 et seq. of Title 43, by Secretary of The Interior or states of interstate wholesales of electric energy subsequently made of Hoover Dam power. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638.

The limitations on the new powers conferred by this subchapter relating to regulation of electric utility company engaged in interstate commerce do not repeal by implication the powers over licensees contained in section 791a et seq. of this title relating to regulation and development of water power and resources. Federal Power Commission v. Idaho Power Co., App.D.C.1952, 73 S.Ct. 85, 344 U.S. 17, 97 L.Ed. 15, rehearing denied 73 S.Ct. 326, 344 U.S. 910, 97 L.Ed. 702.

8. State regulation or control—Generally

Although it was not inconceivable that particular rate structure required by Arkansas Public Service Commission might be so unreasonable as to disturb appreciably the interstate market for electric power, such possibility was hypothetical, and Commission's mere assertion of regulatory jurisdiction over rural electric cooperative, though it was tied into interstate grid, was not shown to be violative of U.S.C.A. Const. Art. 1, § 8, cl. 3, or to have been preempted by this chapter or administrative actions taken thereunder. Arkansas Elec. Co-op. Corp. v. Arkansas Public Com'n, Ark.1983, 103 S.Ct. 1905, 461 U.S. 375, 76 L.Ed.2d 1.

Legislative history of this subchapter demonstrated that Congress displaced prior state

er Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183 (2 mems).

This subchapter empowers the Commission to regulate "the sale of electric energy at wholesale in interstate commerce"; on the other hand, retail sales are regulated by state commissions. Cities of Batavia, Naperville, Rock Falls, Winnetka, Geneva, Rochelle and St. Charles, Ill. v. Federal Energy Regulatory Commission, 1982, 672 F.2d 64, 217 U.S.App.D.C. 211.

It could not be said that state regulation of utilities, although pervasive, was sufficient to immunize regulated utilities from antitrust liability. New York State Elec. & Gas Corp. v. Federal Energy Regulatory Commission, C.A.2, 1980, 638 F.2d 388, certiorari denied 102 S.Ct. 105, 454 U.S. 821, 70 L.Ed.2d 93.

Federal regulation of sales for resale under this subchapter precludes concurrent state jurisdiction. Arkansas Power & Light Co. v. Federal Power Commission, C.A.Ark.1966, 368 F.2d 376.

By adopting this section giving Commission jurisdiction to regulate interstate electric rates, Congress clearly expressed an intention to preempt field of regulation of rates charged in interstate transmission of electricity. Appeal of New England Power Co., 1980, 424 A.2d 807, 120 N.H. 866, reversed on other grounds 102 S.Ct. 1096, 455 U.S. 331, 71 L.Ed.2d 188.

9. —— Exclusiveness

Where an electric company is properly found to be a public utility under this subchapter, the fact that a local agency may also have regulatory power does not preclude exercise of Commission's functions, but such a rejection of state control as a ground of exemption must be preceded by finding, giving due weight to policy declaration in doubtful cases, that the company is a public utility by reason of ownership of facilities not used in local distribution. Connecticut Light & Power Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

Fact that for more than 40 years the regulation of power company's sales of electric energy had been by the State of Indiana did not oust the Commission of jurisdiction. Indiana & Michigan Elec. Co. v. Federal Power Commission, C.A. 7, 1966, 365 F.2d 180, certiorari denied 87 S.Ct. 509, 385 U.S. 972, 17 L.Ed.2d 435, rehearing denied 87 S.Ct. 2027, 387 U.S. 926, 18 L.Ed.2d 985. See, also, Public Service Co. of Indiana, Inc. v.

375 F.2d 100, certiorari denied 87 S.Ct. 2054, 387 U.S. 931, 18 L.Ed.2d 992.

Jurisdiction over Indiana power company's sales to municipal and cooperative corporations was not reserved to Indiana to the exclusion of Commission. Public Service Co. of Indiana, Inc. v. Federal Power Commission, C.A.Ind.1967, 375 F.2d 100, certiorari denied 87 S.Ct. 2054, 387 U.S. 931, 18 L.Ed.2d 992.

10. —— Federal regulation of matters not subject to state regulation

Provision of subsec. (a) of this section that federal regulation should extend only to those matters which were not subject to regulation by states did not preserve exclusive state regulation of wholesale hydroelectric sales across state borders but established federal jurisdiction over wholesale sales in interstate commerce by licensees. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

The policy admonition of subsec. (a) of this section that federal regulation is to extend only to those matters which are not subject to regulation by the state is to be heeded in determining whether particular facilities make the owner a public utility rather than in exempting from specific regulatory provisions a company found to be a public utility. Connecticut Light & Power Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

Subsec. (a) of this section does not deprive the Commission of jurisdiction over wholesale sales of electrical energy for transmission in interstate commerce, notwithstanding the interstate transactions are carried on by facilities which are also used for intrastate commerce. Hartford Electric Light Co. v. Federal Power Commission, C.C.A.1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1026, 319 U.S. 741, 87 L.Ed. 1698.

The words "such Federal regulation", in subsec. (a) of this section, refer back to matters relating to generation of electricity and to that part of such business consisting of transmission of electric energy in interstate commerce and, hence, did not preclude installation by Commission of a system of accounting for an electric company on ground that states could regulate the accounting practices of an electric company. Northwestern Electric Co. v. Federal Power Commission, C.C.A.1942, 125 F.2d 652.

Under this chapter, it was the intention of

duced by licensee of water power project on navigable waters and moved in interstate commerce by state commissions using the federal agency set up by this chapter only where the state commissions did not or could not perform the functions expected of them. Safe Harbor Water Power Corporation v. Federal Power Commission, C.C.A.Pa.1941, 124 F.2d 800, appeal dismissed 61 S.Ct. 1084, 313 U.S. 546, 85 L.Ed. 1512, certiorari denied 62 S.Ct. 943, 316 U.S. 663, 86 L.Ed. 1740.

11. Public interest

The use of the words "public interest" in subsec. (a) of this section is not a directive to the Commission to seek to eradicate discrimination; but rather it is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. National Ass'n for Advancement of Colored People v. Federal Power Commission, Dist.Col.1976, 96 S.Ct. 1806, 425 U.S. 662, 48 L.Ed.2d 284.

Commission has active and independent duty to guard public interests, and this may require consideration of alternative courses other than those suggested by applicant but does not require that Commission always undertake exhaustive inquiries probing for every possible alternative if no viable alternatives have been suggested by parties or suggest themselves to agency. Citizens for Allegan County, Inc. v. Federal Power Commission, 1969, 414 F.2d 1125, 134 U.S.App.D.C. 229.

12. Jurisdiction of Commission generally

Certainty as to jurisdictional facts is not required to support the jurisdiction of the Commission. Federal Power Commission v. Florida Power & Light Co., Fla.1972, 92 S.Ct. 637, 404 U.S. 453, 30 L.Ed.2d 600, rehearing denied 92 S.Ct. 929, 405 U.S. 948, 30 L.Ed.2d 819.

Scope of Commission jurisdiction over interstate sales of gas and electricity at wholesale is not to be determined by case-by-case analysis of impact of state regulation on national interest, but Congress meant to draw bright line easily ascertained between state and federal jurisdiction. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Jurisdiction of Commission to regulate accounting practices of electric company depends on whether company owned facilities that were used in transmission of interstate power and which were not facilities used in er Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

The Commission, in exercise of its broad regulatory powers, may determine whether a particular electric power company is covered by this subchapter. Federal Power Commission v. Arizona Edison Co., C.A.Ariz.1952, 194 F.2d 679.

The Commission had jurisdiction under this section conferring authority upon Commission to regulate rates and services of all public utilities which own and operate facilities engaged in transmission of and sale of electric energy at wholesale in interstate commerce to issue order prescribing that the Commission's schedules of rates should be placed into effect for utility's services. Pennsylvania Water & Power Co. v. Federal Power Commission, 1951, 193 F.2d 230, 89 U.S. App.D.C. 235, affirmed 72 S.Ct. 843, 343 U.S. 414, 96 L.Ed. 1042.

This subchapter intends to confer federal jurisdiction over electric distribution systems which normally would operate as interstate businesses. Connecticut Light & Power Co. v. Federal Power Commission, 1944, 141 F.2d 14, 78 U.S.App.D.C. 356, reversed on other grounds 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

Under this subchapter, the Commission had jurisdiction over electric company engaged in interstate wholesale sales of electrical energy, notwithstanding the company had no facilities for transmission in interstate commerce, since the company's corporate organization, contracts, accounts, memorandum, papers, and other records so far as they were utilized in connection with such sales constituted "facilities." Hartford Electric Light Co. v. Federal Power Commission, C.C.A.1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698.

Federal Energy Regulatory Commission's jurisdiction is plenary and extends to all wholesale sales in interstate commerce. Northern States Power Co. v. Minnesota Public Utilities Com'n, Minn.1984, 344 N.W.2d 374, certiorari denied 104 S.Ct. 3546, 82 L.Ed.2d 850.

13. Exclusiveness of Commission's jurisdiction

The Commission's jurisdiction over wholesale electric rates is not limited to those sales which are placed beyond state regulation by U.S.C.A.Const. Art. I, § 8, cl. 3. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161,

Where interconnection agreement between two power companies provided for transmission for resale of electric energy in interstate commerce, Commission had exclusive jurisdiction under this subchapter, to exclusion of Utah Public Service Commission, as to agreement between power companies to interconnect their transmission systems. State of Utah v. F.E.R.C., C.A.10, 1982, 691 F.2d 444.

Where electric company was admittedly a public utility within this subchapter, Commission had exclusive regulatory jurisdiction over all of company's sales in interstate commerce. Arkansas Power & Light Co. v. Federal Power Commission, C.A.Ark.1966, 368 F.2d 376.

Commission had exclusive jurisdiction over "availability agreement" under which plaintiff's subsidiary power companies agreed to pay operating expenses of a corporation formed to build nuclear power generating plant and which was amended to fix the allocations of power from project to subsidiary companies, in that agreement and amendment thereto were agreements for the purchase of wholesale power in interstate commerce or integrally related to such purchases. Middle South Energy, Inc. v. Arkansas Public Service Com'n, D.C.Ark.1984, 593 F.Supp. 363.

This section vesting Federal Power Commission with exclusive authority to regulate rates governing interstate sales of electricity for resale did not preempt Rhode Island Public Utilities Commission from reducing expense claimed by electric utility in rate proceeding for purchasing power from a parent company and, hence, from proceeding, not from an analysis of parent's cost of service data, an analysis within the exclusive jurisdiction of the Federal Power Commission, but rather from an analysis of electric utility's cost of service and comparison with alternative costs of purchased power. County Light and Power Co.—Elec. Div. v. Pennsylvania Public Utility Com'n, 1983, 465 A.2d 735, 77 Pa.Cmwlth. 268.

Superior Court does not have authority to determine rates to be paid by borough to utility company for its electric power, such authority resting exclusively in Commission. Philadelphia Elec. Co. v. Borough of Lansdale, 1981, 424 A.2d 514, 283 Pa.Super. 178.

The Board of Public Utility Commissioners was not without jurisdiction to grant electric utility right to condemn certain lands for a right-of-way to be used to construct overhead transmission facilities on ground that project involved sale of electric energy in interstate Federal Power Commission. Petitions of Public Service Elec. & Gas Co., 1966, 211 A.2d 15, 160 N.J.Super. 1.

Commission did not have exclusive jurisdiction over construction of interstate transmission line for purpose of power pooling or interchange. Dunk v. Pennsylvania Public Utility Commission, 1967, 232 A.2d 231, 210 Pa.Super. 183, affirmed 252 A.2d 587, 441 Pa. 41, certiorari denied 90 S.Ct. 97, 396 U.S. 839, 24 L.Ed.2d 89.

Federal Energy Regulatory Commission's jurisdiction is plenary and extends to all wholesale sales in interstate commerce. Northern States Power Co. v. Minnesota Public Utilities Com'n, Minn.1984, 344 N.W.2d 374, certiorari denied 104 S.Ct. 3546, 82 L.Ed.2d 850.

14. Exceptions to Commission's jurisdiction—Generally

Under subsec. (b) of this section providing in effect that the Commission shall have jurisdiction over all facilities for interstate transmission or sale of electric energy but shall not have jurisdiction, except as specifically provided over facilities used in local distribution, the "but" clause should be read in harmony with the policy provision of subsec. (a) of this section and, when so read states circumstances under which the Commission shall not have jurisdiction. Connecticut Light & Power Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

Subsec. (b) of this section grants to Commission jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by this section. Philadelphia Elec. Co. v. Borough of Lansdale, 1981, 424 A.2d 514, 283 Pa.Super. 178.

15. —— Generating facilities

State regulation of wholesale rates charged by electric cooperative to its members was well within scope of "legitimate local public interests," particularly considering that, although cooperative was tied into interstate grid, its basic operation consisted of supplying power from generating facilities located within state to member cooperatives, all of whom were located within the state. Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n, Ark.1983, 103 S.Ct. 1905, 461 U.S. 375, 76 L.Ed.2d 1.

This chapter did not provide an affirmative grant of authority to New Hampshire to be inconsistent with the commerce clause. U.S.C.A.Const. Art. I, § 8, cl. 3, to restrict interstate transportation of hydroelectric power

ly since nothing in legislative history or language of this chapter evinced a congressional intent to alter the limits of state power otherwise imposed by such clause. New England Power Co. v. New Hampshire, N.H.1982, 102 S.Ct. 1096, 455 U.S. 331, 71 L.Ed.2d 188.

In determining whether State Power Commission or Federal Power Commission had jurisdiction over rates of electricity in interstate commerce, nature of generating facilities, whether licensed under this chapter or otherwise, was without function or significance. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

Generation of electricity, its local distribution, or its transmission in intrastate commerce are not within purview of this subchapter or the jurisdiction of Commission. Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

Public Utility Regulatory Policies Act of 1978, section 2601 et seq. of this title, does not preempt state from requiring electric utilities to offer to buy energy from those alternate energy producers, that qualify under both federal and state law, at a rate in excess of maximum rate under such Act; however, state is preempted by provisions of this chapter from requiring electric utilities to offer to purchase power from purely state-qualifying alternate energy facilities. Consolidated Edison Co. of New York, Inc. v. Public Service Com'n of State, N.Y.1984, 472 N.E.2d 981, 63 N.Y.2d 424, 483 N.Y.S.2d 153.

Generating electrical energy within the state is a purely local and intrastate activity, subject to state control and taxation, but in transmitting such electrical energy across state line into another state, producer thereof is engaged in interstate commerce. Gross Income Tax Division, Indiana Dept. of State Revenue v. Chicago Dist. Elec. Generating Corp., 1956, 139 N.E.2d 161, 236 Ind. 117.

16. —— Local distribution facilities

No bar to assertion of jurisdiction by Arkansas Public Service Commission to regulate rates of rural power cooperative was found either in this chapter itself or in administrative decision by the Federal Power Commission. Arkansas Elec. Co-op. Corp. v. Arkansas Public Com'n, Ark.1983, 103 S.Ct. 1905, 461 U.S. 375, 76 L.Ed.2d 1.

The exemption of facilities used in local distribution of electric energy from jurisdiction energy, but test is whether facilities are local distribution facilities and they may carry no energy except extra-state energy and still be exempt under subsec. (b) of this section. Connecticut Light & Power Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

Evidence would not sustain utility's contention that sales were made from local distribution facilities and were therefore exempt under subsec. (b) of this section. Cincinnati Gas & Elec. Co. v. Federal Power Commission, C.A.Ohio 1967, 376 F.2d 506, certiorari denied 88 S.Ct. 77, 389 U.S. 842, 19 L.Ed.2d 106.

Where electric public utility sold electric energy, some of which came from out of the state, to 23 wholesalers in one state, company was not exempt from jurisdiction of Commission on basis of provision of subsec. (b) of this section that Commission shall not have jurisdiction over facilities used in local distribution. Arkansas Power & Light Co. v. Federal Power Commission, C.A.Ark.1966, 368 F.2d 376.

Commission was not without jurisdiction to require a power company to file its rate schedules covering wholesale sales to municipal electric systems and rural electric cooperative systems on ground that facilities used to deliver electricity to company's wholesale customers were "facilities used in local distribution" and that therefore such sales were exempt from Commission's jurisdiction since exemption for local distribution facilities applies to a company's status as a public utility and not as to Commission's jurisdiction over sales in interstate commerce for resale. Indiana & Michigan Elec. Co. v. Federal Power Commission, C.A.7, 1966, 365 F.2d 180, certiorari denied 87 S.Ct. 509, 385 U.S. 972, 17 L.Ed.2d 435, rehearing denied 87 S.Ct. 2027, 387 U.S. 926, 18 L.Ed.2d 985.

This subchapter was intended to regulate only those matters pertaining to the interstate exchange of wholesale electric power, and was not intended to confer authority on Commission to regulate local rates or local services of public utility companies. Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission, 1939, 200 A. 866, 132 Pa.Super. 178, reversed on other grounds 5 A.2d 133, 333 Pa. 265.

Federal Power Commission's approval of electric energy sale does not exclude Public Service Commission from using the plant used in connection therewith in the rate base for rate-making purposes, since interstate sale

useful to its rate payers are entirely different functions and do not conflict in their purposes. L. S. Ayres & Co. v. Indianapolis Power & Light Co., 1976, 351 N.E.2d 814, 169 Ind.App. 652.

17. Interstate commerce —Generally

Under this subchapter, Congress intended to impose regulation upon those public utilities which operate facilities for transmission of electricity in interstate commerce, "transmission in interstate commerce" being defined as electricity transmitted from a state and consumed at any point outside its borders. Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

18. —— Tracing source of energy

Engineering and scientific evidence acquired by Commission from its own experts afforded substantial evidence upon which to base findings tracing out-of-state electric energy to intrastate wholesale customer. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Where California power company sold electricity to Navy and county in Nevada, part of which electricity was resold, Commission had authority to regulate rates of sales by power company, and fact that portion of electricity which was resold was transmitted from California to Nevada commingled with the power which was directly consumed by the Navy and county did not deprive Commission of jurisdiction. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

Where multi-state energy was pooled, each sale of electricity by utility was in effect a pool sale and hence interstate in nature, and proof of source of electrical current supplied from pool was not necessary to Commission's authority to require filing of rate schedules. Cincinnati Gas & Elec. Co. v. Federal Power Commission, C.A.Ohio 1967, 376 F.2d 506, certiorari denied 88 S.Ct. 77, 389 U.S. 842, 19 L.Ed.2d 106.

Commission may apply "power pool" test in determining whether sales of electricity were in interstate commerce, without employing point-to-point tracing studies. Public Service Co. of Indiana, Inc. v. Federal Power Commission, C.A.Ind.1967, 375 F.2d 160.

Although jurisdiction under this subchapter follows flow of electric energy on basis of engineering and scientific rather than any legalistic or governmental test, employment of studies based on manual or computer tracing techniques of electric power transmission is not required in every instance to show federal jurisdiction. Arkansas Power & Light Co. v. Federal Power Commission, C.A.Ark.1966, 368 F.2d 376.

Fact that electric energy transmitted by power company in interstate commerce to wholesalers from plant in Michigan to plant in Wisconsin was, after arrival in Wisconsin, continued in transmission, reduced in voltage and commingled with relatively larger quantities of Wisconsin generated energy, did not destroy interstate character of resulting mixture so as to exclude power company from jurisdiction of Commission. Wisconsin Michigan Power Co. v. Federal Power Commission, C.A.7, 1952, 197 F.2d 472, certiorari denied 73 S.Ct. 794, (2 mems) 345 U.S. 934, 97 L.Ed. 1362.

Ordinary meter readings which measure electric current are sufficient data to determine interstate transmission of electric energy under this subchapter. Connecticut Light & Power Co. v. Federal Power Commission, 1944, 141 F.2d 14, 78 U.S.App.D.C. 356, reversed on other grounds 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

19. —— Volume or proportion of interstate energy

Whether any out-of-state electric energy involved in intrastate wholesale sale was de minimis would have been relevant only on question of whether wholesaler was public utility of which Commission in its discretion should assume jurisdiction, and where wholesaler was concededly a public utility within this subchapter, Commission had no discretion to reject jurisdiction. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Under this subchapter, the jurisdiction of the Commission has not been conditioned on any particular volume or proportion of interstate energy involved, and such jurisdictional limitations cannot be supplied by construction. Connecticut Light & Power Co. v. Federal Power Commission, 1945, 65 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150. See, also, Federal Power Commission v. Florida Power & Light Co., Fla.1972, 92 S.Ct. 637, 404 U.S.

ownership of facilities used in transmission of electric energy in interstate commerce. Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

Colorado nonprofit cooperative association, which was financed with loans from rural electrification administration, and which engaged in generation, transmission, and interstate sale of electric energy at wholesale to its member-owners who were electric cooperatives except for one state governmental agency, was not a "public utility" within jurisdiction of Commission under this subchapter. Salt River Project Agr. Imp. and Power Dist. v. Federal Power Commission, 1968, 391 F.2d 470, 129 U.S.App.D.C. 117, certiorari denied 89 S.Ct. 104, 393 U.S. 857, 21 L.Ed.2d 126.

A power company which sold to Wisconsin municipalities a supply of electric energy, some of which originated out of state, for resale by municipalities to their residents, was a "public utility" within jurisdiction of Commission, since company was engaged in sale of electric energy at wholesale in interstate commerce within meaning of this subchapter. State of Wis. v. Federal Power Commission, C.A.D.C.1952, 201 F.2d 183, 91 U.S.App.D.C. 307, certiorari denied 73 S.Ct. 795, (2 mems), 345 U.S. 934, 97 L.Ed. 1362.

A power company which operated to interconnected plants in Michigan and Wisconsin to produce, transmit, coordinate and distribute electricity, with one plant supplementing the other when necessary, was a "public utility" within jurisdiction of Commission since company was engaged in "sale of electric energy at wholesale" in "interstate commerce" within meaning of this subchapter. Wisconsin-Michigan Power Co. v. Federal Power Commission, C.A.7, 1952, 197 F.2d 472, certiorari denied 73 S.Ct. 794, (2 mems) 345 U.S. 934, 97 L.Ed. 1362.

Arizona electric power company, which had all its facilities located within Arizona and all its customers in Arizona, and which made no sales of electricity for resale, but which received electricity from the United States Bureau of Reclamation from generators in California and Nevada, was "a public utility" within meaning of this subchapter and hence subject to regulations of the Commission. Federal Power Commission v. Arizona Edison Co., C.A.Ariz.1952, 194 F.2d 679.

Where Connecticut electric company sold electricity to buyer and such sales were indis- [illegible] arrangements resulting

chusetts for resale to consumers, the electric company was a "public utility" within jurisdiction of Commission, since it was engaged in the "sale of electric energy at wholesale" in "interstate commerce" within meaning of this subchapter. Hartford Electric Light Co. v. Federal Power Commission, C.C.A.1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698.

25. Government instrumentality

Rural Electrification Administration financed cooperative is not a "government instrumentality" for purposes of subsec. (f) of this section exempting government instrumentalities from regulation. City of Paris, Ky. v. Federal Power Commission, 1968, 399 F.2d 983, 130 U.S.App.D.C. 250.

26. Antitrust policy and considerations

Fact that allegations of anticompetitive conduct similar to those raised by cities objecting to Commission approval of bond issue by public utility could be made in other proceedings related to interconnections, to dispositions and mergers, to rates and rate-making practices and to adequacy of service was not determinative of the scope of Commission inquiry under section 824c of this title empowering Commission to authorize issue only if such issue is for some lawful object, within corporate purposes of the applicant and compatible with the public interest. Gulf States Utilities Co. v. Federal Power Commission, Dist.Col.1973, 93 S.Ct. 1870, 411 U.S. 747, 36 L.Ed.2d 635, rehearing denied 93 S.Ct. 2767, 412 U.S. 944, 37 L.Ed.2d 405.

Fact that Commission has authority to compel involuntary interconnections of power did not insulate electric power company from antitrust regulation for refusing to wholesale, or "wheel" power to municipal distribution systems. Otter Tail Power Co. v. U.S., Minn.1973, 93 S.Ct. 1022, 410 U.S. 366, 35 L.Ed.2d 359, rehearing denied 93 S.Ct. 1511, 411 U.S. 910, 36 L.Ed.2d 201, on remand 366 F.Supp. 451.

Where it has been determined in prior litigation under antitrust laws that certain phases of contractual arrangements between electric utility and others constituting an interstate interconnected electrical transmission system were illegal, Commission's rate reduction orders were not improper as compelling the continuance of, or as being based upon such contractual arrangements, which the utility could not carry into effect without violating the antitrust laws or the laws of Pennsylvania forbidding surrender by [illegible]

pendence. Pennsylvania Water & Power Co. v. Federal Power Commission, App.D.C. 1952, 72 S.Ct. 843, 343 U.S. 414, 96 L.Ed. 1042.

Commission was entitled to consider possible anticompetitive nature of provisions of contract between electric utility and state power authority, despite status of the power authority as subdivision of state, where there was no articulation of state policy underlying the challenged provision of the contracts, and there was no suggestion that the challenged restraint was mandated by, or even related to, state policy. New York State Elec. & Gas Corp. v. Federal Energy Regulatory Commission, C.A.2, 1980, 638 F.2d 388, certiorari denied 102 S.Ct. 105, 454 U.S. 821, 70 L.Ed.2d 93.

Where only antitrust violation justified temporary injunctive control of wholesale rates of electric utility by court, when assuming utility did not engage in other anticompetitive activities, the utility demonstrated good-faith effort to comply with its obligations so as to avoid anticompetitive effects, court should return rate control to regulating commissions established by Congress and state legislatures for that purpose. City of Mishawaka, Ind. v. American Elec. Power Co., Inc., C.A.Ind.1980, 616 F.2d 976, certiorari denied 101 S.Ct. 892, 449 U.S. 1096, 66 L.Ed.2d 824, rehearing denied 101 S.Ct. 1421, 450 U.S. 960, 67 L.Ed.2d 385.

Although the Commission lacks authority to adjudicate antitrust violations, the Commission must consider competitive factors when acting under the public interest mandate of this chapter. Central Iowa Power Co-op v. Federal Energy Regulatory Commission, 1979, 606 F.2d 1156, 196 U.S.App.D.C. 249.

While the Commission does not have authority to adjudicate antitrust actions, antitrust considerations are relevant when it exercises its discretion subject to a public interest mandate. Central Power & Light Co. v. Federal Energy Regulatory Commission, 1978, 575 F.2d 937, 188 U.S.App.D.C. 56, certiorari denied 99 S.Ct. 508, 439 U.S. 981, 58 L.Ed.2d 652.

Although the Commission lacks principal responsibility for the implementation of antitrust policy, the Commission retains an obligation to give reasoned consideration to the bearing of antitrust policy on matters within its jurisdiction. Alabama Power Co. v. Federal Power Commission, 1974, 511 F.2d 383, 167 U.S.App.D.C. 145.

Although Commission is not bound by the [illegible] of the antitrust laws, antitrust concerns are intimately involved in the determination of what action is in the public interest with respect to the transmission of electricity and therefore the Commission is obliged to weigh antitrust policy. City of Huntingburg, Indiana v. Federal Power Commission, 1974, 498 F.2d 778, 162 U.S.App.D.C. 230.

Where electric power contract between three public utility companies violated section 1 of Title 15 and was illegal in its inception, it could not become a valid contract because the Commission thereafter approved the contract by an order as a rate schedule after an investigation in a formal rate proceeding. Consolidated Gas Elec. Light & Power Co. of Baltimore v. Pennsylvania Water & Power Co., C.A.Md.1952, 194 F.2d 89, certiorari denied 72 S.Ct. 1036, (2 mems) 343 U.S. 965, 96 L.Ed. 1042.

This subchapter evidences congressional recognition that competition can assure protection of public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies, because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business. Pennsylvania Water & Power Co. v. Federal Power Commission, 1951, 193 F.2d 230, 89 U.S.App.D.C. 233, affirmed 72 S.Ct. 843, 343 U.S. 414, 96 L.Ed. 1042.

It is not a violation of the Sherman Antitrust Act, sections 1 to 7 of Title 15, to refuse to cooperate in an area where there is currently no competition between the parties, hence, defendant electric utilities' refusal to cooperate with plaintiff utilities in an interconnection program did not violate the Act where any competition occurred at markets "downstream" of the coordinated services market, which was not really a market where competition occurred but, rather, an area of competition, and gist of suit was failure of defendants to cooperate in the so-called coordinated services market which then had an indirect effect on the downstream markets. West Texas Utilities Co. v. Texas Elec. Service Co., D.C.Tex.1979, 470 F.Supp. 798.

Vertically integrated electric power company's willful refusal to apply regulatory criteria established by this chapter constituted violation of its duties under this chapter and under antitrust laws. City of Mishawaka, Ind. v. American Elec. Power Co., Inc., D.C.Ind. 1979, 465 F.Supp. 1320, affirmed in part, vacated in part on other grounds 616 F.2d 976, certiorari denied 101 S.Ct. 892, 449 U.S. 1096, 66 L.Ed.2d 824, rehearing denied 101 S.Ct. 1421, 450 U.S. [illegible]

The Commission was not without jurisdiction to regulate sale of stock by New Jersey electric company, which owned and operated facilities for transmission of electricity through another company to a New York electric company, because of small quantities of electricity which passed into New York company's lines or because such electricity was not paid for by any consideration passing from New York company to the New Jersey company, since the electricity was transmitted in "interstate commerce" within this section. Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

The net flow of energy into electric system was not controlling in determining the existence of out-of-state energy in system's sales of electricity, especially in view of benefits accruing to system under pooling arrangement. Public Service Co. of Indiana, Inc. v. Federal Power Commission, C.A.Ind.1967, 375 F.2d 100, certiorari denied 87 S.Ct. 2054, 387 U.S. 931, 18 L.Ed.2d 992.

That volume of interstate energy passing over transmission lines of electric company was at times small in comparison with its intrastate generated energy was factor for Commission to consider in determining whether to exercise its jurisdiction and courts will not construct jurisdictional limitation on amount of interstate energy involved. Arkansas Power & Light Co. v. Federal Power Commission, C.A.Ark.1966, 368 F.2d 376.

Jurisdiction of Commission over sale of electric energy at wholesale in interstate commerce is not conditioned upon any particular volume or proportion of interstate energy involved and fact that amount of out-of-state energy is small in proportion to total amount of energy involved is unimportant. Wisconsin-Michigan Power Co. v. Federal Power Commission, C.A.7, 1952, 197 F.2d 472, certiorari denied 73 S.Ct. 794, (2 mems) 345 U.S. 934, 97 L.Ed. 1362.

20. —— Particular transactions constituting interstate commerce

Commission properly asserted jurisdiction over sale of electric energy at wholesale within state by public utility within this subchapter which Commission found obtained part of the energy involved in adjoining state. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

California power company, in making sales to United States Navy and county in Nevada by delivering power to company's substation on buyers' lines at the same high voltage to city in Nevada where voltage was stepped down for local distribution and consumption, was engaged in "interstate commerce" so as to come within regulatory jurisdiction of Commission. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935 (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

Evidence established that electric utility sales at wholesale were in interstate commerce so as to be subject to federal regulation under this subchapter notwithstanding that 83 percent of its sales were made to intrastate customers where such sales were sales of output of integrated interstate lectric system of which the utility facilities were an integral part. Pennsylvania Water & Power Co. v. Federal Power Commission, App.D.C.1952, 72 S.Ct. 843, 343 U.S. 414, 96 L.Ed. 1042.

Where New Jersey electric company transmitted electricity from generating plant through its line to another company which transmitted the electricity to a New York company in interstate commerce, the flow of electricity from the New Jersey company would be subject to federal regulation as "affecting interstate commerce". Jersey Central Power & Light Co. v. Federal Power Commission, 1943, 63 S.Ct. 953, 319 U.S. 61, 87 L.Ed. 1258.

Neither evidence concerning occasional intrastate reverse flow from local electric generating facility located on stream to county public utility district power system, nor evidence of facility's effect on amount of power purchased by city power project from interstate power administration, supported finding by Commission that the facility, which was operated by the city, had requisite effect on interstate commerce so as to be within licensing jurisdiction of the Commission. City of Centralia, Wash. v. Federal Energy Regulatory Commission, C.A.9, 1981, 661 F.2d 781.

Evidence supported inference, to a reasonable scientific certainty, that interstate energy entered all of electrical system's sales and commingled with energy generated by system itself, as basis for Commission's jurisdiction over such sales. Public Service Co. of Indiana, Inc. v. Federal Power Commission, C.A.Ind.1967, 375 F.2d 100, certiorari denied 87 S.Ct. 2054, 387 U.S. 931, 18 L.Ed.2d 992.

Evidence justified Commission's holding that sales by power company, which was a member of integrated seven-state electric power system which met its system loads with power generated in various states, were in interstate commerce and hence were subject to jurisdiction of Commission. Indiana & Michigan Elec. Co. v. Federal Power Commission, C.A.7, 1966, 365 F.2d 180, certiorari denied 87 S.Ct. 509, 385 U.S. 972, 17 L.Ed.2d 435, rehearing denied 87 S.Ct. 2027, 387 U.S. 926, 18 L.Ed.2d 985.

Rates of California company operating interconnected system for generation of electric power, which was sold to the Navy and transmitted by the Navy through its lines from California into Nevada, and which was sold to Nevada County for transmission across state border for resale to its consumers, were subject to order of the Commission. California Elec. Power Co. v. Federal Power Commission, C.A.9, 1952, 199 F.2d 200, certiorari denied 73 S.Ct. 794, 345 U.S. 934, 97 L.Ed. 1362, rehearing denied 73 S.Ct. 936, 345 U.S. 961, 97 L.Ed. 1381.

Sale and transmission of electrical energy by producer across state line for delivery to distributor in a state other than that in which such energy was produced constituted transactions in "interstate commerce" and gross receipts therefrom were not taxable under Burns' Ann.St. § 64-2603 et seq. Gross Income Tax Division, Indiana Dept. of State Revenue v. Chicago Dist. Elec. Generating Corp., 1956, 139 N.E.2d 161, 236 Ind. 117.

21. Sale of electric energy at wholesale—Generally

Where California power company delivered electricity to its substation in California from where buyers transmitted power to town in Nevada for local distribution and consumption, there was a "sale for resale" subject to regulation by Commission, though purchase contracts did not state the electricity would be resold. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

Where Connecticut electric company sold electricity to buyer and such sales were indispensable to exchange arrangements resulting in transmission of electric energy to Massachusetts for resale to consumers, in determining whether the electric company was subject to jurisdiction of Commission, it was immaterial that sales were made within state to buyer for transmission and sale outside state, that quantities of energy sold were variable or small or were part of the company's surplus production, that sales were made at company's place of business, that sales were made without prior obligation, or that energy in course of transmission passed through buyer's substations where voltage was changed. Commission, C.C.A.1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698.

22. —— Cooperatives

Inclusion of electric cooperative corporations within term "person" within provision of subsec. (d) of this section that "sale" of electric energy at wholesale means sale of electric energy to any person for resale was a permissible administrative interpretation and therefore Commission did not err in finding that electric utilities' sales to four electric cooperatives were sales at wholesale for resale within this subchapter, even if relationship of electric cooperatives and their members was not that of buyer and seller, but was that of principal and agent. Arkansas Power & Light Co. v. Federal Power Commission, C.A.Ark.1966, 368 F.2d 376.

23. —— Municipality

Within definition of term "sale of electricity energy at wholesale" under subsec. (d) of this section as meaning a sale of electric energy to any "person" for resale, Congress attached no significance of substance to word "person" and did not intend use of such word as a limitation on Commission's jurisdiction, and did not prohibit regulation of sales to municipalities, though such word was equated with term "individual or corporation" and "corporation" was defined in section 796 of this title as not including municipalities. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

This section giving Commission jurisdiction over sale of electric energy at wholesale in interstate commerce and defining a "sale at wholesale" as a "sale to any person for resale," includes sales made to distributing municipalities. Wisconsin-Michigan Power Co. v. Federal Power Commission, C.A.7, 1952, 197 F.2d 472, certiorari denied 73 S.Ct. 794 (2 mems) 345 U.S. 934, 97 L.Ed. 1362.

24. Public utility

Status of electric company as public utility within this subchapter by virtue of ownership of interstate transmission line did not determine whether Commission could assert jurisdiction over rates of its wholesale interstate sale. Federal Power Commission v. Southern Cal. Edison Co., Cal.1961, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

The fact that a company is engaged in business of transmitting and selling electric

Note 26

An exemption from antitrust laws by reason of a coercive regulatory scheme under this chapter, even when appropriate, is to be narrowly drawn. City of Groton v. Connecticut Light & Power Co., D.C.Conn.1978, 456 F.Supp. 360.

27. Construction of transmission lines

Under this chapter, Commission does not have exclusive jurisdiction to authorize construction, maintenance and operation of an electric transmission line, which crosses lands of United States, regardless of basic nature, purpose and function reserved by such line, and has jurisdiction only if line is part of a power project. Pacific Power & Light Co. v. Federal Power Commission, C.A.1950, 184 F.2d 272, 87 U.S.App.D.C. 261.

Issue whether electric company had right to condemn land for construction and operation of high voltage line was not within jurisdiction of Commission regardless of whether line, which was to run solely within state but which arguably would be part of or offshoot of interstate network, was in interstate commerce within meaning of this subchapter as, in situation which did not involve waterways improvement, Commission did not have jurisdiction over construction of new facilities. Dunk v. Pennsylvania Public Utility Commission, 1969, 252 A.2d 589, 434 Pa. 41, certiorari denied 90 S.Ct. 99, 396 U.S. 839, 24 L.Ed. 89.

28. Taxation

Acquisition of common stock of private power company by citizens' nonprofit corporation in furtherance of plan to have political subdivision of State of Nebraska eventually acquire ownership of Nebraska property of private power company did not bring about "public ownership" of the Nebraska property, and, therefore, imposition of federal excise taxes on sales of electrical energy following such acquisition was proper. Omaha Public Power Dist. v. O'Malley, C.A.Neb.1954, 216 F.2d 764.

Though not binding upon state court in action to recover gross income and bonus taxes paid under protest on income derived from sale of electrical energy, finding of Commission that plaintiff was engaged in the business of transmitting and selling electrical energy at wholesale in interstate commerce within meaning of this subchapter had some persuasive effect in determining nature of agreement under which plaintiff supplied electrical energy to distributor in another state. Gross Income Tax Division, Indiana Generating Corp., 1956, 139 N.E.2d 161, 236 Ind. 117.

29. Burden of proof

Since Congress has made wheeling voluntary, an individual decision of a utility to wheel electricity for one customer but not for another is not automatically discriminatory; hence, refusal of nation's largest power system and its affiliate to wheel another utility's excess energy to coal-by-wire customers was not unlawful discrimination per se; burden was on the complaining utility to present a prima facie case that affiliate's actions were the result of anticompetitive actions or, perhaps, were at least unreasonable. Richmond Power and Light of City of Richmond, Ind. v. Federal Energy Regulatory Commission, 1978, 574 F.2d 610, 187 U.S.App.D.C. 399.

The Commission has burden of proving its asserted jurisdiction over a power company on theory that it is a public utility within this subchapter. Florida Power & Light Co. v. Federal Power Commission, C.A.Fla.1970, 430 F.2d 1377, reversed on other grounds 92 S.Ct. 637, 404 U.S. 453, 30 L.Ed.2d 600, rehearing denied 92 S.Ct. 929, 405 U.S. 948, 30 L.Ed.2d 819.

30. Weight and sufficiency of evidence

Evidence that three affiliated public utilities purchased electric power from each other, even if only on intermittent basis, supported Federal Energy Regulatory Commission's finding that coordinating agreement among utilities established wholesale rate for resale of electric power in interstate commerce, and thus, Commission had jurisdiction to rule on amendment to coordinating agreement which proposed methodology for determining rate of return on investment. State of Minn. by Atty. Gen. v. F.E.R.C., C.A.8, 1984, 734 F.2d 1286.

Where Connecticut corporation generating and selling electric energy, sold energy to buyer which was member of an exchange formed by Massachusetts and Connecticut utilities for purpose of exchanging electric energy, the corporation was a former member of the exchange, it had directors and officers interlocking with the buyer and owned a sizable block of the buyer's stock, the facts were sufficient to show "knowledge" of fact that sales by corporation to the buyer were indispensable to the exchange arrangement which culminated in transmission to Massachusetts, and sale therein of considerable quantities of electric energy, for purpose of determining whether the corporation was a public utility subject to the jurisdiction of the Commission. Hartford Electric Light Co. v. Federal Power Commission, C.C.A.1942, 131 F.2d 953, certiorari denied 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698.

31. Questions for Commission

Whether facilities are used in local distribution of electric energy--although a limitation on Commission jurisdiction over wholesale electric rates and a legal standard that must be given effect in addition to technological transmission test--involves a question of fact to be decided by the Commission as an original matter. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Subsec. (b) of this section, providing that the Commission shall not have jurisdiction except as specifically provided over facilities used in local distribution is a limitation on jurisdiction of Commission and a legal standard that must be given effect in addition to technological transmission test in determining whether Commission has jurisdiction to regulate accounting practices of electric companies. Connecticut Light & Power Co. v. Federal Power Commission, 1943, 63 S.Ct. 749, 324 U.S. 515, 89 L.Ed. 1150.

32. Certiorari to Supreme Court

Certiorari was granted in case presenting question of jurisdiction of Commission over wholesale sale of electricity because of importance of question in administration of this subchapter. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638, rehearing denied 84 S.Ct. 1161, 377 U.S. 913, 12 L.Ed.2d 183.

Where question whether sales of electricity in interstate commerce for consumption by buyers and sales for resale were separate transactions was not presented to State Power Commission such question would not be determined by United States Supreme Court on writ of certiorari to state Supreme Court affirming, in effect, the Commission's determination that all sales were subject to such Commission's regulation. U.S. v. Public Utilities Commission of Cal., Cal.1959, 79 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 79 S.Ct. 935, (2 mems.) 345 U.S. 961, 97 L.Ed. 1380.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts, establishment; notice to State commissions

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

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and

Change of Name. The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of Act July 26, 1947, c. 343, Title II, 61 Stat. 501. Section 205(a) of Act July 26, 1947, was repealed by section 53 of Act Aug. 10, 1956, c. 1041, 70A Stat. 641. Section 1 of Act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3011 to 3013 continued the military Department of the Army under the administrative supervision of a Secretary of the Army.

Transfer of Functions. The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Cross References

Definition of "payment law", see section 6903 of Title 31, Money and Finance.
Reduction of payment for entitlement land by amounts received under this section, see section 6903 of Title 31, Money and Finance.
Reimbursement by licensee of other licensees, see section 803 of this title.

§ 811. Operation of navigation facilities; rules and regulations; penalties

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825o of this title.

(June 10, 1920, c. 285, § 18, 41 Stat. 1073; Aug. 26, 1935, c. 687, Title II, § 209, 49 Stat. 845; 1939 Reorg.Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; June 4, 1956, c. 351, § 2, 70 Stat. 226; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

1956 Amendment. Act June 4, 1956 substituted "Secretary of the Department in which the Coast Guard is operating" for "Secretary of War" in the first sentence.

1935 Amendment. Act Aug. 26, 1935 added first sentence, eliminated clause which read: "Such rules and regulations may include the maintenance and operation by such licensee at its own expense of such lights and signals as may be directed by the Secretary of the Army or by the Secretary of Commerce.", and substituted section "825o" for section "819".

Change of Name. The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of Act July 26, 1947, c. 343, Title II, 61 Stat. 501. Section 205(a) of Act July 26, 1947, was repealed by section 53 of Act Aug. 10, 1956, c. 1041, 70A Stat. 641. Section 1 of Act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3011 to 3013 continued the military Department of the Army under the administrative supervision of a Secretary of the Army.

Transfer of Functions. The Federal Power Commission was terminated and its functions, personnel, property, funds, etc. were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Reference to Secretary of Commerce was inserted in view of: the creation of the National Oceanic and Atmospheric Administration in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the Office of Director of such Bureau; transfers of functions, including functions formerly vested by law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological Laboratory, and Trans-Alaska pipeline investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, set out in Appendix I to Title 5, Government Organization and Employees.

The Coast Guard was transferred to the Department of Transportation and all functions, powers, and duties, relating to the Coast Guard, of the Secretary of the Treasury and of other offices and officers of the Department of the Treasury were transferred to the Secretary of Transportation by section 6(b)(1) of Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 938. See section 108 of Title 49, Transportation.

Reorg. Plan No. II of 1939 set out in Appendix I to Title 5, Government Organization and Employees, transferred the Bureau of Fisheries in the Department of Commerce and its functions to the Department of the Interior, to be administered under the direction and supervision of the Secretary of the Interior.

Legislative History. For legislative history and purpose of Act June 4, 1956, see 1956 U.S.Code Cong. and Adm.News, p. 2416.

Library References

Navigable Waters ⇐22.
C.J.S. Navigable Waters §§ 36, 43.

§ 812. Public-service licensee; regulations by State or by Commission as to service, rates, charges, etc.

As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or

other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

(June 10, 1920, c. 285, § 19, 41 Stat. 1073.)

Historical Note

Transfer of Functions. The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Code of Federal Regulations

Application form pertaining to transactions involving securities of public utility, see 18 CFR 33.1 et seq.
Issuance of securities, see 18 CFR 20.1 et seq.

Library References

Electricity ⇐1, 10.
C.J.S. Electricity § 1 et seq.

Notes of Decisions

Purpose 1
Regulation of rates of municipal licensees 2
Valuation of property 3

1. Purpose

This section with section 821 of this title, evidences intention of Congress to respect reserved power of the states. Alabama Power Co. v. Gulf Power Co., D.C.Ala.1922, 283 F. 606.

2. Regulation of rates of municipal licensees

This section does not confer jurisdiction on Commission to regulate rates of licensees which are municipalities. State ex rel. Wash. Water Power Co. v. Superior Court for Chelan County, 1949, 208 P.2d 849, 34 Wash.2d 196, appeal dismissed 70 S.Ct. 572, 339 U.S. 907, 94 L.Ed. 1335.

3. Valuation of property

In proceeding under 82 Okl.St.Ann. § 861 et seq. to condemn land for power site, provisions of this section and section 813 of this title with respect to allowance of a valuation for the power project as part of rate base of a federal licensee were immaterial in determining value of land for condemnation purposes. Grand River Dam Authority v. Grand-Hydro, Okl.1948, 69 S.Ct. 114, 335 U.S. 359, 93 L.Ed. 64, rehearing denied 69 S.Ct. 298, 335 U.S. 900, 93 L.Ed. 435.

§ 813. Power entering into interstate commerce; regulation of rates, charges, etc.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the

enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in subtitle IV of Title 49 and the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this chapter.

(June 10, 1920, c. 285, § 20, 41 Stat. 1073.)

Historical Note

Codification. "Subtitle IV of Title 49" was substituted in text for "the Act to regulate commerce approved February 4, 1887, as amended" on authority of Pub.L. 95-473, § 3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

Transfer of Functions. The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Code of Federal Regulations

Application form pertaining to transactions involving securities of public utility, see 18 CFR 33.1 et seq.
Issuance of securities, see 18 CFR 20.1 et seq.

Library References

Notes of Decisions

1. Construction with other laws

Power of Secretary of the Interior over sales of electric energy generated at Hoover Dam under Boulder Canyon Project Act, section 617 et seq. of Title 43, is similar in scope to power of Commission under this subchapter to regulate rates based on national power over navigable waters and public lands rather than over interstate commerce, such merely assume a breadth of state regulatory power which made unnecessary all but interstitial federal regulation. Federal Power Commission v. Southern Cal. Edison Co., Cal.1964, 84 S.Ct. 644, 376 U.S. 205, 11 L.Ed.2d 638.

This section is not conflicting with sections 824d, 824e, and 824g of this title dealing with rates and charges, power of Commission to fix rates and charges, and ascertainment of cost of property and depreciation. Safe Harbor Water Power Corp. v. Federal Power Commission, C.A.3, 1949, 179 F.2d 179, certiorari denied 70 S.Ct. 980, 339 U.S. 957, 94 L.Ed. 1368.

2. Power of Congress

This section, providing that, when power produced by licensee of water power project upon navigable waters enters into interstate commerce the rate charged and services rendered shall be reasonable, and, conferring jurisdiction over such matters on Commission whenever any of the states directly concerned has not provided a commission to enforce this section or the states are unable to agree through their properly constituted authorities on services to be rendered or on rates, conveys the consent of Congress to the states to make agreements of cooperation, i.e., a "compact", under U.S.C.A. Const. Art. I, § 10, cl. 3. Safe Harbor Water Power Corporation v. Federal Power Commission, C.C.A.Pa.1941, 124 F.2d 800, appeal dismissed 61 S.Ct. 1084, 1085, 313 U.S. 540, 85 L.Ed. 1512, certiorari denied 62 S.Ct. 943, 316 U.S. 663, 86 L.Ed. 1740.

3. State regulation or control

This section relating to regulation of rates contemplated state regulation of interstate commerce in electric power. U.S. v. Public Utilities Commission of Cal., Cal.1953, 73 S.Ct. 706, 345 U.S. 295, 97 L.Ed. 1020, rehearing denied 73 S.Ct. 935, (2 mems) 345 U.S. 961, 97 L.Ed. 1380.

Order of State Public Utilities Commission attempting to regulate a portion of the rates which were charged by water power company and which were already regulated by Commission's order was void. Consolidated Gas Elec. Light & Power Co. v. Siggins, D.C.Pa. 1951, 99 F.Supp. 151.

4. Dual federal and state regulation

In enacting this chapter, Congress did not intend that federal government should occupy the field completely, or that the state should be excluded, but this chapter contemplates a dual system of control and the exercise of appropriate powers by the state as well as by the federal government. First Iowa Hydro-Elec. Co-op. v. Federal Power Commission, 1945, 151 F.2d 20, 80 U.S.App.D.C. 211, reversed on other grounds 66 S.Ct. 906, 328 U.S. 152, 90 L.Ed. 1143, rehearing denied 66 S.Ct. 1336, 328 U.S. 879, 90 L.Ed. 1647.

5. Interstate compacts

Under this section giving Commission authority to regulate rates and services of licensee of water power project on navigable waters, only when states concerned have not provided a commission to enforce requirements of this section or where states are unable to agree on services and rates, where power produced by licensee in Pennsylvania was used in Pennsylvania, Maryland, and District of Columbia, the Maryland Public Service Commission could regulate rates and services charged for the energy generated by the licensee and consumed in Maryland or delivered at the district line for the District of Columbia, and Pennsylvania Public Utilities Commission could regulate electrical energy designed for consumption in Pennsylvania and U.S.C.A. Const. Art. I, § 10, cl. 3, afforded the opportunity to the respective states of Pennsylvania and Maryland to regulate under their "police power" the rates and services as part of an integrated system of hydroelectric energy. Safe Harbor Water Power Corporation v. Federal Power Commission, C.C.A.Pa.1941, 124 F.2d 800, appeal dismissed 61 S.Ct. 1084, 1085, 313 U.S. 540, 85 L.Ed. 1512, certiorari denied 62 S.Ct. 943, 316 U.S. 663, 86 L.Ed. 1740.

6. Authority of Commission to regulate rates

Where letter of chairman of the Public Service Commission of Maryland to the Commission made it clear that such Public Service Commission had no intention of proceeding to cooperate with Pennsylvania Commission to endeavor to regulate wholesale electric power rates of water power company furnishing electricity in Maryland and Pennsylvania, Commission had authority to regulate rates under this section. Safe Harbor Water Power Corp. v. Federal Power Commission, C.A.3, 1949, 179 F.2d 179, certiorari denied 70 S.Ct. 980, 339 U.S. 957, 94 L.Ed. 1368.

Under this subchapter providing for regulation as to service, rates, and charges, Commission had jurisdiction to fix rates and charges for water power company's interstate electric system. Consolidated Gas Elec. Light & Power Co. v. Siggins, D.C.Pa.1951, 99 F.Supp. 151.

Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, have authority under this chapter to regulate wholesale sales of electricity in interstate commerce, no matter how small the interstate effect. Consolidated Edison Co. of New York, Inc. v. Public Service Com'n, 1983, 471 N.Y.S.2d 684, 98 A.D.2d 377, appeal denied 62 N.Y.2d 602, 465 N.E.2d 47, 476 N.Y.S.2d 1026, affirmed in part, modified on other grounds, 63 N.Y.2d 424, 472 N.E.2d 981, 483 N.Y.S.2d 153.

7. Lack of state regulatory agency

The Commission was without authority to regulate directly rates and services of electric company in State of Kentucky, where Kentucky had a commission which was actually regulating company's rates, services and securities, as well as its accounting system. Louisville Gas & Electric Co. v. Federal Power Commission, C.C.A.1942, 129 F.2d 126, certiorari denied 63 S.Ct. 559, 318 U.S. 761, 87 L.Ed. 1133, rehearing denied 63 S.Ct. 708, 318 U.S. 800, 87 L.Ed. 1164.

This chapter does not delegate to the Commission any authority to fix rates for intrastate power where there is an existing state agency for that purpose. Niagara Falls Power Co. v. Maltbie, 1943, 41 N.Y.S.2d 424, 181 Misc. 19.

8. Inability of states to agree

A finding of the Commission that states in which electricity was furnished by water power company were unable to cooperate for unable to agree on rates, could properly be bottomed on a long continued failure of the states to cooperate. Safe Harbor Water Power Corp. v. Federal Power Commission, C.A.3, 1949, 179 F.2d 179, certiorari denied 70 S.Ct. 980, 339 U.S. 957, 94 L.Ed. 1368.

Where licensee under this subchapter produced in Pennsylvania electrical energy which was consumed in Pennsylvania, Maryland, and District of Columbia, in absence of finding by Commission that the States of Pennsylvania and Maryland were unable to agree through their properly constituted authorities on the services to be rendered or on rates to be charged for the electrical energy produced by the licensee, jurisdiction to regulate remained in the state commissions of those states and not in the Commission, so that regulatory order of the Commission was beyond its jurisdiction. Safe Harbor Water Power Corporation v. Federal Power Commission, C.C.A.Pa.1941, 124 F.2d 800, appeal dismissed 61 S.Ct. 1084, 1085, 313 U.S. 540, 85 L.Ed. 1512, certiorari denied 62 S.Ct. 943, 316 U.S. 663, 86 L.Ed. 1740.

9. Binding effect of Commission's order on state agency

Orders of the Commission in regard to a power utility project licensed in accordance with this subchapter, would not be binding upon State Public Utility Commission in fixing rates, and the acts of the state Commission would not be binding upon the Commission, each commission being empowered to act within its own field. Northern States Power Co. v. Federal Power Commission, C.C.A.1941, 115 F.2d 141.

10. Annulling or setting aside state rates

Where Commission granted power company right to divert additional waters from Niagara River for production of power for war industries at cost on condition that the spread between cost and revenue from existing rates be deposited in a fund to be credited to the United States towards cost of acquiring the utility at end of license period, power rate fixed by State Public Service Commission based on cost would not be annulled on ground that such rate would not enable power company to make deposits required by federal license, since such rate accomplished the purpose of furnishing power at cost and the license required such deposit only in event of a surplus. Niagara Falls Power Co. v. Maltbie, 1943, 41 N.Y.S.2d 424, 181 Misc. 19.

Note 11

sions of section 812 of this title and this section with respect to allowance of a valuation for the power project as part of rate base of a federal licensee were immaterial in determining value of land for condemnation purposes. Grand River Dam Authority v. Grand-Hydro, Okl.1948, 69 S.Ct. 114, 335 U.S. 359, 93 L.Ed. 64, rehearing denied 69 S.Ct. 298, 335 U.S. 900, 93 L.Ed. 435.

§ 814. Exercise by licensee of power of eminent domain

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 10, 1920, c. 285, § 21, 41 Stat. 1074.)

Historical Note

Transfer of Functions. The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), and 7293 of Title 42, The Public Health and Welfare.

Cross References

Jurisdiction of federal courts, amount to exceed $10,000, see section 1332 of Title 28, Judiciary and Judicial Procedure.

Federal Rules

Procedure in condemnation proceedings, see rule 71A, Federal Rules of Civil Procedure; Title 28, Judiciary and Judicial Procedure.

Federal Practice and Procedure

Condemnation procedure, see Wright & Miller: Civil § 3041 et seq.
Jurisdiction of district courts and state courts over condemnation proceedings, see Wright, Miller & Cooper: Jurisdiction 2d § 3577.
Right to eminent domain, see Wright, Miller & Cooper: Jurisdiction § 3814.

West's Federal Forms

Eminent domain proceedings, matters pertaining to, see § 5711 et seq.

Note 2

Library References

Eminent Domain ⟨⟩1011
C.J.S. Eminent Domain § 24

Notes of Decisions

1. Construction with state laws

Provision of this section conferring upon licensees right of eminent domain should be construed together with laws of New York in determining the power of eminent domain possessed by the Port Authority of New York which was licensed under section 836 of this title. Superintendent of Public Works v. Paonessa, 1958, 182 N.Y.S.2d 223, 14 Misc.2d 787.

Provisions of this section conferring right of eminent domain upon licensees thereunder and R.S.1943, § 70-670 conferring right of determining the power of eminent domain possessed by a Nebraska public power and irrigation district which was licensed under this subchapter. Burnett v. Central Neb. Public Power & Irr. Dist., 1946, 23 N.W.2d 661, 147 Neb. 458.

2. Law governing

Lands which were owned in fee simple by Tuscarora Indian Nation were not subject to treaties protecting the lands from condemnation for licensed federal power projects. Federal Power Commission v. Tuscarora Indian Nation, App.D.C.1960, 80 S.Ct. 543, 362 U.S. 99, 4 L.Ed.2d 584, rehearing denied 80 S.Ct. 858, 362 U.S. 956, 4 L.Ed.2d 873 (2 items)

Law of Georgia, where condemned property was located, would be adopted as federal rule in determining measure of compensation for property condemned by licensee of Federal Energy Regulatory Commission exercising eminent domain power in federal court under authority of this chapter, overruling Georgia Power Company v. 54.20 Acres of Land, 563 F.2d 1178. Georgia Power Co. v. Sanders, C.A.Ga.1980, 617 F.2d 1112, 51 A.L.R.Fed. 903, certiorari denied 101 S.Ct. 1403, 450 U.S. 936, 67 L.Ed.2d 372.

Notwithstanding requirement of this section that practice and procedure in action to enforce federal power of eminent domain must conform as nearly as may be with practice and procedure in similar state actions, substance of federal eminent domain power delegated to licensee may not be diminished by state law. Chapman v. Public Utility Dist. No. 1 of Douglas County, Wash., C.A.Wash.1966, 367 F.2d 163.

In federal court proceedings by public power and irrigation district, as licensee under this subchapter to condemn lands in Nebraska, the law and procedure of such state are controlling. Central Nebraska Public Power & Irrigation Dist. v. Harrison, C.C.A.Neb.1942, 127 F.2d 588.

The right of landowners to interest on a verdict in condemnation proceedings by power and irrigation district, organized under state law, as a licensee authorized to condemn lands under this section, is controlled by state law. Central Nebraska Public Power and

(c) Department of Energy recommendations

The Secretary, in consultation with the Commission, and after opportunity for public comment, may recommend industry standards for reliability to the electric utility industry, including standards with respect to equipment, operating procedures and training of personnel, and standards relating to the level or levels of reliability appropriate to adequately and reliably serve the needs of electric consumers. The Secretary shall include in his annual report—

(1) any recommendations made under this subsection or any recommendations respecting electric utility reliability problems under any other provision of law, and

(2) a description of actions taken by electric utilities with respect to such recommendations.

(Pub.L. 95–617, Title II, § 209, Nov. 9, 1978, 92 Stat. 3143.)

Historical Note

References in Text. The Secretary and the Commission, referred to in subsecs. (a)(1), (b), and (c), mean the Secretary of Energy and the Federal Energy Regulatory Commission, respectively. See section 2602(3) and (14) of this title.

Codification. Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

Legislative History. For legislative history and purpose of Pub.L. 95–617, see 1978 U.S. Code Cong. and Adm. News, p. 7659.

§ 824a–3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities [1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C.A. § 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C.A. § 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together with any other facilities located at the

megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C.A. § 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C.A. § 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C.A. § 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C.A. § 791a et seq.], any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1). Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the require-

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C.A. § 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C.A. § 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C.A. § 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section [1] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) Definitions

For purposes of this section, the terms "small power production facility",

eration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C.A. § 796(17), (18)].

(Pub.L. 95-617, Title II, § 210, Nov. 9, 1978, 92 Stat. 3144; Pub.L. 96–294, Title VI, § 643(b), June 30, 1980, 94 Stat. 770.)

[1] So in original. Probably should be followed by a comma.

Historical Note

References in Text. The Commission, referred to in subsecs. (a), (c)(1), (2), (f), and (h), means the Federal Energy Regulatory Commission. See section 2602(3) of this title.

The Federal Power Act, referred to in subsecs. (c) and (h), is Act June 10, 1920, c. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter (section 791a et seq.). Part I of the Federal Power Act is classified generally to subchapter I (section 791a et seq.) of this chapter. Part II of the Federal Power Act is classified generally to this subchapter (section 824 et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables volume.

The Public Utility Holding Company Act, referred to in subsec. (c), probably means the Public Utility Holding Company Act of 1935, Act Aug. 26, 1935, c. 687, Title I, 49 Stat. 838, as amended, which is classified generally to chapter 2C (section 79 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 79 of Title 15 and Tables volume.

The Secretary, referred to in subsec. (g)(2), means the Secretary of Energy. See section 2602(14) of this title.

Codification. Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

1980 Amendment. Subsec. (a). Pub.L. 96–294, § 643(b)(1), added provisions relating to encouragement of geothermal small power production facilities.

Subsec. (c)(1). Pub.L. 96–294, § 643(b)(2), added provisions relating to applicability to geothermal small power production facilities.

Subsec. (c)(2). Pub.L. 96–294, § 643(b)(3), added provisions respecting a qualifying small power production facility using geothermal energy as the primary energy source.

Legislative History. For legislative history and purpose of Pub.L. 95-617, see 1978 U.S. Code Cong. and Adm. News, p. 7659. See, also, Pub.L. 96–294, 1980 U.S. Code Cong. and Adm. News, p. 1743.

Cross References

Grants to state utility regulatory commissions and nonregulated electric utilities to carry out this section, see section 6807 of Title 42, The Public Health and Welfare.

West's Federal Forms

Intervention, motion for leave, see § 3111 et seq.
Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.

Notes of Decisions

1. Constitutionality

Subsec. (c) of this section authorizing the Commission to exempt qualified power facilities from state laws and regulations does not run afoul of U.S.C.A. Const. Amend. 10 as it does nothing more than preempt conflicting state enactments in the traditional way. F.E.R.C. v. Mississippi, Miss.1982, 102 S.Ct.

2. Capacity payments

Requirement of subsec. (f) of this section that each state authority implement such rule or revised rule, as promulgated by Commission, for each electric utility for which it has ratemaking authority does not violate U.S.C.A. Const. Amend. 10 as this section and regulations simply require Mississippi authorities to adjudicate disputes arising under this section, and dispute resolution of such kind was the very type of activity customarily engaged in by the Mississippi Public Service Commission. F.E.R.C. v. Mississippi, Miss.1982, 102 S.Ct. 2126, 456 U.S. 742, 72 L.Ed.2d 532, rehearing denied 103 S.Ct. 15, 73 L.Ed.2d 1401.

3. State regulation or control

This section and the regulations promulgated thereunder by the Federal Energy Regulatory Commission preempted the field in the area of cogeneration of electricity; thus, state regulatory agency could not require an electric utility to purchase electricity from a cogenerator at a rate greater than the federal regulated rate, which was based on avoided cost to the utility from purchasing electric energy from cogenerator, without first obtaining a waiver from the Federal Energy Regulatory Commission. Kansas City Power & Light Co. v. State Corp. Com'n, 1984, 676 P.2d 764, 234 Kan. 1052.

4. Public interest

Small hydroelectric generating facility was entitled under this section and Colorado Public Utility Commission rules to have "capacity payments" to it by electric utility, based on capacity component of electric utility's "avoided costs" of alternative power generated its own production facilities, increase during the term of power purchase contract where capacity component of utility's avoided costs would also increase. Public Service Co. of Colorado v. Public Utilities Com'n of State of Colo., Colo.1984, 687 P.2d 968.

5. Interconnection of facilities

In adopting rules governing purchase of electricity from cogenerators, Commission must consider rules' impact on consumers and public interest in striking proper balance. American Elec. Power Service Corp. v. Federal Energy Regulatory Commission, 1982, 675 F.2d 1226, 219 U.S.App.D.C. 1, reversed on other grounds 103 S.Ct. 1921, 461 U.S. 402, 76 L.Ed.2d 22.

6. Filed rate doctrine

Enforcement of any provision of this chapter relating to procedure to be followed by Commission when an electric utility, federal power marketing agency, cogenerator, or small power producer applies for an order requiring another such facility to make interconnection could be reasonably interpreted to forbid Commission to exempt qualifying facilities from being the "target" of interconnection applications by other facilities under this chapter but not as forbidding Commission to grant qualifying facilities the right to obtain interconnection under this section. American Paper Institute, Inc. v. American Elec. Power Service Corp., Dist.Col.1983, 103 S.Ct. 1921, 461 U.S. 402, 76 L.Ed.2d 22.

Commission did not abuse its discretion in refusing to disturb facially valid self-certification filing of small power production facility under regulations notwithstanding contractual dispute over ownership of the facility, where Commission was willing to reconsider in event ownership or operation changed following resolution of pending state court contract dispute. Florida Power & Light Co. v. F.E.R.C., 1983, 711 F.2d 219, 228 U.S.App.D.C. 433.

7. Cogenerator and small power producer contracts

Public Utility Regulatory Policies Act of 1978, Pub.L. 95-617, Nov. 9, 1978, 92 Stat. 3117, as amended, regulating the purchase of hydroelectric electricity by power utilities from small power production facilities and cogeneration facilities expressly excludes from its rules all otherwise binding contracts between utilities and cogenerators of small power producers, and therefore, Public Utilities Commission correctly determined that it had no congressionally delegated authority to decide dispute between small power producer and public utility concerning sale price of electricity, where parties had contractually agreed to a specified price. Bates Energy, Inc. v. Public Utilities Com'n, Me.1982, 447 A.2d 1211.

8. Maximum rate

It was reasonable for Commission to prescribe the maximum rate authorized by Congress and thereby provide maximum incentive for development of cogeneration and small power production, thus, Commission's role in promulgating the rule requiring utilities to purchase electric energy from a qualifying facility at a rate equal to utility's "full avoided costs" was not arbitrary, capricious, or an abuse of discretion. American Paper Institute, Inc. v. American Elec. Power Service Corp., Dist.Col.1983, 103 S.Ct. 1921, 461 U.S. 402, 76 L.Ed.2d 22.

Note 8

Federal Energy Regulatory Commission's acceptance of initial rate filing by operator of small power production facility under this section did not violate City of Cleveland requiring adjudication of claim that utility's rate filing conflicts with contractual rates, where Commission did not accept rates as just and reasonable but conditioned acceptance on an agreement for a refund depending on outcome of state court proceedings challenging rate structure, notwithstanding the "filed rate doctrine." Florida Power & Light Co. v. F.E.R.C., 1983, 711 F.2d 219, 228 U.S.App.D.C. 433.

This section and the regulations promulgated thereunder by the Federal Energy Regulatory Commission preempted the field in the area of cogeneration of electricity; thus, state regulatory agency could not require an electric utility to purchase electricity from a cogenerator at a rate greater than the federal regulated rate, which was based on avoided cost to the utility from purchasing electric energy from cogenerator, without first obtaining a waiver from the Commission. Kansas City Power & Light Co. v. State Corp. Com'n, 1934, 676 P.2d 764, 234 Kan. 1052.

9. Nondiscriminatory rates

Subsecs. (b) and (c) of this section requiring nondiscriminatory rate for cogeneration could compel simultaneous transaction rule which enables new qualifying small power producers and cogenerators to sell to utility all of their electric output at purchasing utility's full avoided cost and to purchase from utility any electricity they may need at traditional retail rate. American Elec. Power Service Corp. v. Federal Energy Regulatory Commission, 1982, 675 F.2d 1226, 219 U.S. App.D.C. 1, reversed on other grounds 103 S.Ct. 1921, 461 U.S. 402, 76 L.Ed.2d 22.

§ 824a–4. Seasonal diversity electricity exchange

(a) Authority

The Secretary may acquire rights-of-way by purchase, including eminent domain, through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada if he determines—

(1) after opportunity for public hearing—

(A) that the exchange is in the public interest and would further the purposes referred to in section 2611(1) and (2) of this title and that the acquisition of such rights-of-way and the construction and operation of such transmission facilities for such purposes is otherwise in the public interest,

(B) that a permit has been issued in accordance with subsection (b) of this section for such construction, operation, maintenance, and connection of the facilities at the border for the transmission of electric energy between the United States and Canada as is necessary for such exchange of electric power, and

(C) that each affected State has approved the portion of the transmission route located in each State in accordance with applicable State law, or if there is no such applicable State law in such State, the Governor has approved such portion; and

(2) after consultation with the Secretary of the Interior and the heads of other affected Federal agencies, that the Secretary of the Interior and the heads of such other agencies concur in writing in the location of such portion of the transmission facilities as crosses Federal land under the jurisdiction of such Secretary or such other Federal agency, as the case may be.

The Secretary shall provide to any State such cooperation and technical

selection of a transmission route. If the transmission route approved by any State does not appear to be feasible and in the public interest, the Secretary shall encourage such State to review such route and to develop a route that is feasible and in the public interest. Any exercise by the Secretary of the power of eminent domain under this section shall be in accordance with other applicable provisions of Federal law. The Secretary shall provide public notice of his intention to acquire any right-of-way before exercising such power of eminent domain with respect to such right-of-way.

(b) Permit

Notwithstanding any transfer of functions under the first sentence of section 301(b) of the Department of Energy Organization Act [42 U.S.C.A. § 7151(b)], no permit referred to in subsection (a)(1)(B) of this section may be issued unless the Commission has conducted hearings and made the findings required under section 202(e) of the Federal Power Act [16 U.S.C.A. § 824a(e)] and under the applicable execution order respecting the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country. Any finding of the Commission under an applicable executive order referred to in this subsection shall be treated for purposes of judicial review as an order issued under section 202(e) of the Federal Power Act.

(c) Timely acquisition by other means

The Secretary may not acquire any rights-of-way under this section unless he determines that the holder or holders of a permit referred to in subsection (a)(1)(B) of this section are unable to acquire such rights-of-way under State condemnation authority, or after reasonable opportunity for negotiation, without unreasonably delaying construction, taking into consideration the impact of such delay on completion of the facilities in a timely fashion.

(d) Payments by permittees

(1) The property interest acquired by the Secretary under this section (whether by eminent domain or other purchase) shall be transferred by the Secretary to the holder of a permit referred to in subsection (b) of this section if such holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs. The Secretary may accept, and expend, for purposes of such acquisition, amounts from any such person before acquiring a property interest to be transferred to such person under this section.

(2) If no payment is made by a permit holder under paragraph (1) within a reasonable time, the Secretary shall offer such rights-of-way to the original owner for reacquisition at the original price paid by the Secretary. If such original owner refuses to reacquire such property after a reasonable period, the Secretary shall dispose of such property in accordance with applicable provisions of law governing disposal of property of the United States.

(e) Federal law governing Federal land

ATTACHMENT B

House Research Memorandum 85.250 - Regulation of Cooperative Utilities in Other States

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

April 5, 1985

MEMORANDUM

TO: Representative Mike Davis

ATTN: Tom Moyer

FROM: Jonathan Sherwood
Legislative Analyst

RE: Regulation of Cooperative Utilities in Other States
Research Request 85-250

You requested that we determine what provisions other states have for regulating the rates of cooperative public utilities. We contacted Geneva Beierline, with the National Association of Regulatory Utility Commissioners (NARUC), who provided us with information on the regulation of cooperative electric and telephone utilities. This information was provided in table form for all states, some U.S. possessions, and a few Canadian provinces and is included as an attachment to this memorandum. Information for the fifty states and the District of Columbia is summarized below.

Electric Utilities. In 25 states, a public utility regulatory body has the authority to regulate the rates of cooperative electric utilities for electricity sold to consumers. These states are listed below.

Alaska	Indiana	Michigan	Texas
Arizona	Iowa	New Hampshire	Utah
Arkansas	Kansas	New Jersey	Vermont
Colorado	Kentucky	New Mexico	Virginia
Connecticut	Maine	Oklahoma	West Virginia
Delaware	Maryland	Rhode Island	Wyoming
Florida			

Two of these states, Connecticut and Rhode Island, have no electric cooperatives. In Alaska, cooperative electric utilities may exempt themselves from rate regulation by a majority vote of at least 15 percent of their members. Florida regulates only the basic rate structure, not the actual rates charged.

In the other 25 states and the District of Columbia, regulatory agencies do not have the authority to regulate rates. The District of Columbia, Hawaii, Massachusetts, and Pennsylvania have no electric cooperatives.

SECTION A

NUMBER OF UTILITIES

Tables 1 and 2 show the number of utilities operating within each State as well as the number and various types of utilities subject to an agency's review. Some utilities operate in more than one State and therefore are represented in the totals of more than one State. Also, some utilities provide more than one type of utility service--such as gas and electric service--and therefore could be considered in more than one total. The degree of each agency's regulatory authority over the various utilities is presented in subsequent sections of Part III.

Source: 1973 NARUC Annual Report on Utility & Carrier Regulation

Table I - NUMBER OF ELECTRIC, GAS, COMBINATION ELECTRIC AND GAS, AND PETROLEUM PIPELINES

Agency	Number of Electric, Gas, Combination Electric Gas, and Petroleum Pipelines Under Agency Jurisdiction					
	Electric					
	Cooperative	Citation of Jurisdictional Authority	Private	Citation of Jurisdictional Authority	Public	Citation of Jurisdictional Authority
FERC	22/	16 U.S.C. 791 et. seq.	217 1/	16 U.S.C. 791 et. seq.	22/	16 U.S.C. 791 et. seq.
ALABAMA PSC	3		1	Sec. 37, Code of Ala., 1975	0	
ALASKA PUC	13	Sec. 6, Ch. 113 S.L.A. 1970	21	Sec. 6, Ch. 113 S.L.A. 1970	14	Sec. 6, Ch. 113 S.L.A. 1970
ALBERTA PMC						
ALBERTA PUB	114	Hydro and Electric Energy Act	4	P.U.B. Act	9 16/	Sec. 291, Municipal Govt. Act
ARIZONA CC	11	Article XV, Ariz. Constitution	4	Article XV, Ariz. Constitution	0	
ARKANSAS PSC	19	Acts of Ark. Act 324 of 1967	4	Acts of Ark. Act 324 of 1935	1 3/	Acts of Ark. Act 324 of 1935
CALIFORNIA PUC	4 20/	Calif. P. U. Code Sec. 216, 217, 218, 2777.	8	Calif. P.U. Code Sec. 216, 217, 218	0 3/	Calif. P.U. Code Sec. 3039.1-3057.
COLORADO PUC	10	Sec. 40-1-103 CRS 1973	3	Sec. 40-1-103 CRS 1973	13	Sec. 40-1-103 CRS 1973
CONNECTICUT DPUC	0		1	Title 16, Conn. Gen. Stat.	0	
DELAWARE PSC	1	Delaware Code, Title 16	1	Delaware Code, Title 26	0	
D.C. PSC	1		1	D.C. Code, Title 43, et. seq.	0	
FLORIDA PSC	16	Ch. 366 (limited)	5	Ch. 366	14	Ch. 366 (limited)
GEORGIA PSC	43 3/	Title 46	2	Title 46	3/	Title 46
HAWAII PUC	0		5	Ch. 269, Hawaii Revised Stat.	5	
IDAHO PUC	0		3	Title 61, Idaho Code	0	
ILLINOIS CC	0	Ill. Revised Statutes, Ch. 111 2/3, Sec. 401 et. seq.	13	Ill. Revised Statutes, Ch. 111 2/3, Sec. 1 et. seq.	0	
INDIANA PSC	46	Ind. Code of 1971, 8-1-13-18, 8-1-2-1	9	Ind. Code of 1971, 8-1-8-1	69 21/	Ind. Code of 1971, 8-1-2-1
IOWA SCC	51	478 and 476	10	478 and 476	141 25/	478 and 476
KANSAS SCC	37	Ch. 66, Kan. Stat. Ann.	7	Ch. 66, Kan. Stat. Ann.	15	Ch. 66, Kan. Stat. Ann.
KENTUCKY PSC	24	Ch. 278, Ky. Rev. Stats.	9	Ch. 278, Ky. Rev. Stats.	0	
LOUISIANA PSC	0	Revised Statutes	5	State Constitution	0	Revised Statutes
MAINE PUC	5	35 M.R.S.A.	6	35 M.R.S.A.	6	35 M.R.S.A.
MARYLAND PSC	4	Article 78	5	Article 78	5	Article 78
MASSACHUSETTS DPU			8	Chapter 164	40	Ch. 164 (limited)
MICHIGAN PSC	14	Act 106, PA 1909, Amended	12	Act 106, PA 1909, Amended	0	
MINNESOTA PUC 18/	49	Ch. 216B (1974)	7	Ch. 216B (1974)	123	Ch. 216B (1974)
MISSISSIPPI PSC	28	Public Utilities Act of 1956, Amended, Public Utilities Act of 1983.	2	Public Utilities Act of 1956, Amended, Public Utilities Act of 1983.	21	Public Utilities Act of 1956, Amended, Public Utilities Act of 1983.
MISSOURI PSC	0		11	Sec. 386.250, RSMo, 1978	0	
MONTANA PSC	0		5	Title 69, MCA 1979	0	
NEBRASKA PSC	0		0		0	
NEVADA PSC	11		3		0	
NEW HAMPSHIRE PUC	1	RSA 362.2	5	RSA	3 13/	RSA
NEW JERSEY BPU	1	NJSA 48:2-13, et. seq.	4	NJSA 48:2-13, et. seq.	9 9/	
NEW MEXICO PSC	21	NMSA 1953, Sec. 68-3-1.1	6	NMSA 1953, Sec. 68-3-1, 68-3-1.1	0	NMSA 1953, Sec. 68-3-2, 68-3-3
NEW YORK PSC	5 14/		11 17/	Public Service Law Sec. 2(12) (13), 5(1)(b) and Article 4	4	Public Service Law, Sec. 2(16), 5(1)(b) and Article 4 13/
NORTH CAROLINA UC		N.C. Gen. Stats. Ch. 62, 110.2 et. seq.	6	N.C. Gen. Stats., Ch. 62, 3(23)a.1	0	
NORTH DAKOTA PSC	0		3		0	
NOVA SCOTIA PUB	0		0		9	
OHIO PUC	0		9	Title 49, Ohio Revised Code	0	
OKLAHOMA CC	32	Title 17, Sec. 138.21, et. seq.	4	Title 17, Sec. 151 et. seq.	0	
ONTARIO EB	0		0		0	
OREGON PUC	18	19/	4	Oregon Revised Statutes, Ch. 756, 757	13 19/	
PENNSYLVANIA PUC	0		13		4 11/	
PUERTO RICO PSC	0		0		0	
QUEBEC EB	0		25	L R Q, Chapter R-6	0	
RHODE ISLAND PUC	0		4	Title 39, Chapter 2	1	Title 39, Chapter 2
SOUTH CAROLINA PSC	0		6		0	
SOUTH DAKOTA PUC	22/	49-34A and 49-41B	6	SDCL 49-34A and 49-4113	22/	49-34A and 49-41B
TENNESSEE PSC	12 20/	67-901	4	65-4-101	0	
TEXAS PUC	87	Art. 1446c, Tex. Rev. Civ. Stat. Ann. as amended	14	Art. 1446c, Tex. Rev. Civ. Stat. Ann.	71 14/	Art. 1446c, Tex. Rev. Civ. Stat. Ann.
TEXAS RC						
UTAH PSC	11	Utah Code, Sec. 54-2-1(19)	3	Utah Code, Sec. 54-2-1(19)	3	
VERMONT PSB	2	30 V.S.A.	10	30 V.S.A.	15	30 V.S.A.
VIRGIN ISLANDS PSC	3		0		1	Title 30, VIC, Sec. 1 Amended
VIRGINIA SCC	13	Virginia Code, Title 56	6	Virginia Code, Title 56	3	
WASHINGTON UTC	3		3	Title 80, Rev. Code of Wash.	3	
WEST VIRGINIA PSC	2	W. Va. Code, Ch. 24	17	W. Va. Code, Ch. 24	2	
WISCONSIN PSC	3		13	Chapter 196	85	Chapter 196
WYOMING PSC	19	Sec. 37-1-101 Wyo. Stats. 1977	5	Sec. 37-1-101 Wyo. Stats. 1977	9	Sec. 37-1-101 13/

Footnotes -

Table 2 - NUMBER OF ELECTRIC, GAS, COMBINATION ELECTRIC AND GAS, AND PETROLEUM PIPELINES (continued)

1/ Approximately.
2/ Jurisdiction limited to sales outside municipal limits.
3/ Pipeline safety only on total system; regular jurisdiction on sales outside municipal limits.
4/ Regulated by the Transportation Division of the Public Utilities Commission.
5/ Included with gas and electric figures.
6/ Public gas companies regulated only as to safety practices.
7/ Territory and finance only.
8/ Territory only.
9/ Limited jurisdiction.
10/ Jurisdiction limited to cost of service.
11/ Municipal.
12/ Municipal and District.
13/ Outside municipal limits.
14/ Rural Electric Cooperative Law Sec. 67.
15/ Section 1014 of the Public Authorities Law exempts the Power Authority of the State of New York from regulation by the Commission except as to the siting of transmission and generation facilities under Article 7 and 8 of the Public Service Law and Section 18(a) of the Public Service Law. Municipalities which buy power from the Power Authority are also exempted from regulation by the Public Service Commiseion under Sec. 1005(5)(g) of the Public Authorities Law.
16/ One municipally owned utility also under Board jurisdiction pursuant to the Electric Energy Marketing Act.
17/ Seven combination gas/electric companies included in total of private gas and private electric companies.
18/ Includes 11 municipalities. The PUC does not regulate municipally owned or operated utilities.
19/ The PUC regulates safety, area allocation and curtailment. Full regulation is at violation of cooperative.
20/ Electric cooperatives are under the Commission's jurisdiction only for ad valorem assessment.
21/ Pipelines - gas and petroleum.
22/ Certification and safety only.
23/ Also counted as "electric, private" and as "gas, private."
24/ When municipally owned gas systems operate outside county in which municipality is located, Commission has jurisdiction over rates, service and safety.
25/ Service regulation only; not rates;
26/ Under partial Board jurisdiction.
27/ Jurisdiction exists but no regulatees come under this category. However, under other authority, the FERC exercises jurisdiction over the rates of DOE's five power marketing agencies.
28/ Gas and electric regulation established April 12, 1974; rate regulation became effective Jan. 1, 1975.
29/ Under the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 F.R. 46267 (September 15, 1977), functions formerly vested in the Interstate Commerce Commission were transferred to FERC, where the regulatory function establishes rates or charges for the transportation of oil by pipeline or the valuation of oil pipelines, effective October 1, 1977.
30/ Seventeen under full Board jurisdiction; nine under partial Board jurisdiction.
31/ Seventy-three operating in State but four voted out of Commission jurisdiction leaving sixty-nine still under Commission.
32/ Territorial and siting.
33/ This number includes two LPG only utilities.
34/ Certification only.

SECTION B

REGULATION OF ELECTRIC, GAS AND TELEPHONE RATES

Tables 3 through 12 show the extent of the authority of regulatory agencies over the various facets of the rate regulation of electric, gas and telephone utilities. Data is included on all 50 States, the District of Columbia, Puerto Rico and the Virgin Islands, as well as the Federal Energy Regulatory Commission, the Federal Communications Commission, and the regulatory authorities of Nova Scotia, Ontario, Alberta, and Quebec, Canada.

Absence of agency control over rates does not necessarily mean complete lack of governmental regulation. Under common law public utilities must render service at reasonable rates and without undue discrimination. In the States where the agency lacks authority over one or more services the statutes often provide other methods of regulating utility sales and service. For instance, Table 3 shows that relatively few State agencies have control over the rates of publicly owned or cooperatively owned utilities. However, regulatory authority over these utilities is generally vested within a municipal government or other governmental agency. Table 4 supplies further information on municipal utility regulation.

State agencies with authority to regulate rates of privately owned electric, gas and telephone utilities also generally have the authority to require prior authorization of rate changes, to suspend proposed rate changes, and to initiate rate investigations. In a majority of the States, the agencies have the authority to prescribe interim rates and to establish sliding scale (i.e., the authority to establish a plan for automatic periodic changes in rates), and to make other adjustments. Also, State agencies generally provide for representation of the consumer interest during regulatory proceedings on both a formal basis (representation by a People's Counsel or State Attorney General), and informal basis (the right of intervention by interested parties).

Details of the authority of the various State agencies to control rate changes and other aspects of the operation of the ownership classes of utilities are shown in the following tables of this Section.

Table 3 - REGULATION OF RATES: ELECTRIC, GAS AND TELEPHONE UTILITIES (Continued)

AGENCY	The Agency has authority to regulate or control rates on sales to -																			
	Public authorities for resale					U.S. Government for resale					Privately owned utilities for resale					Publicly owned utilities for resale				
	Electric			Gas		Electric			Gas		Electric			Gas		Electric			Gas	
	Private 44/	Public	Cooperative	Private	Public	Private	Public	Cooperative	Private	Public	Private 44/	Public	Cooperative	Private	Public	Private	Public	Cooperative	Private	Public
FCC																				
FERC	X	1/		X		X	1/		X		X	1/		X		X	1/			
ALABAMA PSC																			X	
ALASKA PUC	X	X3/	X66/	X	X	X	X3/	X66/	X	X	X	X3/	X66/	X	X	X	X3/	X66/	X	X
ALBERTA PUB	X	53/		X	53/						X	53/	X	X	X					53/
ARIZONA CC	X		X	X		X		X	X		X		X	X		X		X	X	
ARKANSAS PSC																				
CALIFORNIA PUC				X					X					X					X	
COLORADO PUC	X	X3/	X	X	X3/	X	X3/	X	X	X3/	X	X3/	X	X	X3/	X	X3/	X	X	X3/
CONNECTICUT DPUC																				
DELAWARE PSC											X		X	X						
D.C. PSC																				
FLORIDA PSC																				
GEORGIA PSC	X			X		X			X		X			X						
HAWAII PUC	X			X		X			X		X			X		X			X	
IDAHO PUC																				
ILLINOIS CC	X			X		X			X		X			X						
INDIANA PSC																X	X	X		
IOWA SCC																				
KANSAS SCC	X	4/	X	X	4/	X	4/	X	X	4/	X	4/	X	X	4/	X	4/	X	X	4/
KENTUCKY PSC	X		X			X		X	X		X		X	X				X	X	
LOUISIANA PSC																				
MAINE PUC				X	X12/					12/			X	X	X12/			X	X	X12/
MARYLAND PSC																				
MASSACHUSETTS DPU	X	5/		X	5/	24/	24/		24/	24/	24/	24/		24/	24/	24/	24/		24/	24/
MICHIGAN PSC	22/		22/	22/		22/		22/	22/		22/		22/	22/		22/		22/	22/	
MINNESOTA PUC																				
MISSISSIPPI PSC																				
MISSOURI PSC											X			X						
MONTANA PSC	X	X		X	X	X	X		X	X	X	X		X	X	X	X		X	X
NEBRASKA PSC 63/																				
NEVADA PSC	X	6/	68/	X	6/	X	6/	55/	X	8/	X	6/	65/	X	4/	X	6/	65/	X	6/
NEW HAMPSHIRE PUC	X	X3/	X	X		X	X3/	X	X		X	X3/	X	X		X	X3/	X	X	
NEW JERSEY BPU	X		X	X		X		X	X		X		X	X		X		X	X	
NEW MEXICO PSC	X23/	9/	X23/	X23/		X23/	8/	X23/	X23/		X23/	9/	X23/	X23/		X23/	8/	X23/	X23/	
NEW MEXICO SCC																				
NEW YORK PSC	X	X 9/		X	X	X	X 9/		X	X	X	X 9/		X	X	X	X 9/		X	X
NORTH CAROLINA UC																				
NORTH DAKOTA PSC																				
NOVA SCOTIA PUB	X	X	X	X 13/	X 13/						X	X	X	X 13/	X 13/	X	X	X	X 12/	X 13/
OHIO PUC											X			X						
OKLAHOMA CC	X			X		X			X		X			X		X			X	
ONTARIO EB				X										X					X	
ONTARIO TSC																				
OREGON PUC					13/					13/					13/					13/
PENNSYLVANIA PUC	X	X11/		X	X11/															
PUERTO RICO PSC																				
QUEBEC BRB	X			X							X			X						
QUEBEC RSP																				
RHODE ISLAND PUC	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
SOUTH CAROLINA PSC				X					X					X					X	
SOUTH DAKOTA PUC																				
TENNESSEE PSC	X			X		X			X		X			X		X			X	
TEXAS PUC	X	X48/	X			X	X48/	X			X	X48/	X			X	X48/	X		
TEXAS RC 46/				X	X				X	X				X	X				X	X
UTAH PSC	X		X	X		X		X	X		X		X	X		X		X	X	
VERMONT PSB																				
VIRGIN ISLANDS PSC		X					X					X					X			
VIRGINIA SCC														X						
WASHINGTON UTC	X			X		X			X		X			X		X			X	
WEST VIRGINIA PSC	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
WISCONSIN PSC	X	X	14/	X	X	X	X	14/	X	X	X	X	14/	X	X	X	X	14/	X	X
WYOMING PSC	X	X65/	X	49/	49/	X	X65/	X	49/	49/	X	X65/	X	49/	49/	X	X65/	X	49/	49/

Table 1 - REGULATION OF RATES: ELECTRIC, GAS AND TELEPHONE UTILITIES (Continued)

AGENCY	The Agency has authority to -													
	Suspend proposed rate changes							Initiate rate investigation upon its own motion						
	Electric			Gas				Electric			Gas			
	Private	Public	Cooperative	Private	Public	Telephone	Maximum period of rate change suspension	Private	Public	Cooperative	Private	Public	Telephone	
FCC						X16/	5 months						X16/	
FERC	X			X			5 months	X			X			
ALABAMA PSC	X			X		X	6 months	X			X		X	
ALASKA PUC	X	X	X	X	X	X	61/	X	X	X	X	X	X	
ALBERTA PUB	X	54/		X	X	X	Not fixed	X	54/		X	X	X	
ARIZONA CC 57/								X		X	X		X	
ARKANSAS PSC	X		X	X		X	6 months	X		X	X		X	
CALIFORNIA PUC	X			X		X		X			X		X	
COLORADO PUC	X	X3/		X	X3/	X	120 + 90 days	X	X3/	X	X	X3/	X	
CONNECTICUT DPUC	X			X		X	150 days	X			X		X	
DELAWARE PSC	X		X	X		X	Indefinite	X		X	X		X	
D.C. PSC	X			X		X		X			X		X	
FLORIDA PSC	X			X		X	8 months	X	43/	43/	X		X	
GEORGIA PSC	X			X		X	5 months	X			X		X	
HAWAII PUC							Indefinite 36/	X			X		X	
IDAHO PUC	X			X		X	7 months 52/	X			X		X	
ILLINOIS CC	X			X		X	10 months	X			X		X	
INDIANA PSC	X	X	X	X	X	X		X	X	X	X	X	X	
IOWA SCC	X		X	X		X35/	10 months 47/	X		X	X		X35/	
KANSAS SCC	X	4/	X	X	4/	X	8 months	X	4/	X	X	4/	X	
KENTUCKY PSC	X		X	X		X	5 months	X		X	X		X	
LOUISIANA PSC	X			X		X	12 months	X			X		X	
MAINE PUC	X	X	X	X	X12/	X	8 months	X	X	X	X	X12/	X	
MARYLAND PSC	X	X	X	X	X	X	180 days	X	X	X	X	X	X	
MASSACHUSETTS DPU	X	X		X	X	X	6 months	X	X		X	X	X	
MICHIGAN PSC	34/		34/	34/		34/	34/	X		X	X		X	
MINNESOTA PUC	X	6/	56/	X	6/	X16/	9 months	X	5/	56/	X	5/	X	56/
MISSISSIPPI PSC	X	64/		X	64/	X	4 months	X	64/		X	64/	X	
MISSOURI PSC	X			X		X	10 months	X			X		X	
MONTANA PSC	X	X		X	X	X	9 months	X	X		X	X	X	
NEBRASKA PSC 42/						X	6 months						X	
NEVADA PSC	X	6/	65/	X	6/	X	150 days	X	6/	65/	X	6/	X	
NEW HAMPSHIRE PUC	X	X3/	X	X		X	6 months	X	X3/	X	X		X	
NEW JERSEY BPU	X		X	X		X	8 months	X		X	X		X	
NEW MEXICO PSC	X	8/	X	X			10 months	X	8/	X	X			
NEW MEXICO SCC						X	6 months						X	
NEW YORK PSC	X	X 9/		X	X	X	10 months	X	X 9/		X	X 9/	X	
NORTH CAROLINA CC	X			X		X	9 months	X		40/	X		X	
NORTH DAKOTA PSC	X			X		X	11 months	X			X		X	
NOVA SCOTIA PUB	X	X	X	X12/	X12/	X		X	X	X	X12/	X12/	X	
OHIO PUC	X			X		X	9 months	X			X		X	
OKLAHOMA CC	X		X	X		X	No limit	X		X	X		X	
ONTARIO EB				34/							X			
ONTARIO TSC						X							X	
OREGON PUC	X			X	13/	X	10 months	X			X	13/	X	
PENNSYLVANIA PUC	X	X11/		X	X11/	X	7 months 15/	X	X11/		X	X11/	X	
PUERTO RICO PSC						19/					X		19/	
QUEBEC EUB	X			X				X			X			
QUEBEC RSP						X							X	
RHODE ISLAND PUC	X	X	X	X	X	X	8 months	X	X	X	X	X	X	
SOUTH CAROLINA PSC	X			X		X	5 months	X			X		X	
SOUTH DAKOTA PUC	X			X		X	6 months 37/	X			X		X	
TENNESSEE PSC	X			X		X	90 days 29/	X			X		X	
TEXAS PUC	X	X48/	X			X	150 days 30/	X		X			X	
TEXAS RC				X			150 days				X	X		
UTAH PSC	X		X	X		X	8 months	X		X	X		X	
VERMONT PSB	X	X46/	X	X	X	X	5 months	X	X	X	X	X	X	
VIRGIN ISLANDS PSC		X				X	5 months		X				X	
VIRGINIA SCC	X		X	X		X	150 days	X		X	X		X	
WASHINGTON UTC	X			X		X	10 months	X			X		X	
WEST VIRGINIA PSC	X	X	X	X	X	X	270 days	X	X	X	X	X	X	
WISCONSIN PSC	34/	34/	34/	34/	34/	34/	34/	X	X		X	X	X	
WYOMING PSC	X	X45/	X	X	X45/	X	10 months	X	X45/	X	X	X45/	X	

Footnotes - Table 3 - REGULATION OF RATES; ELECTRIC, GAS AND TELEPHONE UTILITIES (continued)

53/ If for resale outside municipal boundaries. Pursuant to the Electric Energy Marketing Act the Alberta PUB has jurisdiction to fix the price at which one publicly (municipal) owned utility sells to the Alberta Electric Energy Marketing Agency.
54/ Only if the municipality has passed a by-law approved by the Lieutenant Governor in Council, bringing itself under the Alberta PUB or if the public body is the Government of the Province of Alberta.
55/ Review rate structure changes and comment on their compatability with common rate structure guidelines.
56/ Has authority only at the election of the cooperative.
57/ Rates cannot be increased without hearings and a subsequent order of the Commission, consequently, no suspension is required.
58/ PUC does not regulate rates of rural telephone cooperatives or of thirteen independants and three municipals.
59/ Commission has limited review authority over rate changes by municipally owned utilities.
60/ One hundred and fifty days beyond automatic 15 days and two additional days for each day of hearings on merit beyond 15 days.
61/ One year for utilities with $3 million or less annual gross revenues; indefinite for utilities with over $3 million in annual gross revenues. Interim rates must be acted upon within five months for utilities with $3 million or less annual gross revenues; no statutory requirements for large utilities.
62/ Rates become effective after seven months if Commission does not take action.
63/ May be extended to nine months if just cause is shown in the Record.
64/ Only with that service which extends one mile beyond the corporate limits.
65/ Rates of cooperatives providing services to members only are not regulated.
66/ May become deregulated upon majority vote of at least 15 percent of eligible members.
67/ Only intrastate WATS.

ATTACHMENT C
Alaska Statute 42.05.711 - 712

(b) The commissioner of administration shall separately account for investigation and hearing costs collected under this section that the commission deposits in the general fund. The annual estimated balance in the account may be used by the legislature to make appropriations to the commission to carry out the purposes of this section. (§ 6 ch 113 SLA 1970; am § 63 ch 138 SLA 1986)

Effect of amendments. — The 1986 amendment, effective July 1, 1986, added subsection (b).

Article 10. General Provisions.

Section
711. Exemptions
720. Definitions

Sec. 42.05.711. Exemptions. (a) The provisions of this chapter do not apply to a person who furnishes water, gas or petroleum or petroleum products by tank, wagon, or similar conveyance, unless the person is thereby supplying water, gas, petroleum or petroleum products to a public utility in which the person has an "affiliated interest."

(b) Except as otherwise provided in this subsection, public utilities owned and operated by a political subdivision of the state, or electric operating entities established as the instrumentality of two or more public utilties owned and operated by political subdivisions of the state, are exempt from this chapter, other than AS 42.05.221 — 42.05.281 and 42.05.385. However,

(1) the governing body of a political subdivision may elect to be subject to this chapter; and

(2) a utility or electric operating entity that is owned and operated by a political subdivision and that directly competes with another utility or electric operating entity is subject to this chapter and any other utility or electric operating entity owned and operated by the political subdivision is also subject to this chapter.

(c) The ownership in whole or part, of the corporate stock of a public utility does not make the owner a public utility.

(d) The commission, on a finding that no legitimate public interest will be served, may exempt a utility from all or any portion of this chapter.

(e) Notwithstanding any other provisions of this chapter, any electric or telephone utility that does not gross $50,000 annually is exempt from regulation under this chapter unless 25 percent of the subscribers petition the commission for regulation.

(f) Notwithstanding any other provisions of this chapter, an electric or telephone utility that does not gross $325,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221 — 42.05.281 under the procedure described in AS 42.05.712.

(g) A utility, other than a telephone or electric utility, that does not gross $100,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221 — 42.05.281 under the procedure described in AS 42.05.712.

(h) A cooperative organized under AS 10.25 may elect to be exempt from the provisions of this chapter, other than AS 42.05.221 — 42.05.281, under the procedure described in AS 42.05.712.

(i) A utility which furnishes collection and disposal service of garbage, refuse, trash, or other waste material and has annual gross revenues of $200,000 or less is exempt from the provisions of this chapter, other than the certification provisions of AS 42.05.221 — 42.05.281, unless 25 percent of the subscribers or subscribers representing 25 percent of the gross revenue of the utility petition the commission for regulation.

(j) The provisions of this chapter do not apply to sales, exchanges or gifts of energy to an electric utility certificated under this chapter when the energy which is the subject of the sale, exchange or gift is waste heat, electricity, or other energy which is surplus or the by-product of an industrial process. In an area in which no electric utility is certificated for service, energy provided by sale, exchange or gift may be provided to any utility which is certificated for service to that area. A contract for the sale, exchange or gift of energy exempt under this subsection does not make the supplier a public utility, and does not transfer the responsibility to provide utility services from a certificated utility to any other person.

(k) A utility which furnishes cable television service is exempt from the provisions of this chapter other than AS 42.05.221 — 42.05.281 unless 25 percent of the subscribers petition the commission for regulation.

(l) A person, utility, or cooperative that is exempt from regulation under AS 42.05.711(a) or (d) — (k) is not subject to regulation by a municipality under AS 29.35.060 and 29.35.070. (§ 6 ch 113 SLA 1970; am § 3 ch 76 SLA 1973; am § 8 ch 83 SLA 1980; am §§ 7 — 9 ch 136 SLA 1980; am § 89 ch 59 SLA 1982; am § 1 ch 30 SLA 1983; am § 68 ch 74 SLA 1985; am § 1 ch 80 SLA 1985; am § 2 ch 107 SLA 1986)

Effect of amendments. — The first 1985 amendment substituted "AS 29.35.060 and 29.35.070" for "AS 29.48.060 — 29.48.090" at the end of subsection (l).

The second 1985 amendment in subsection (b) inserted the language beginning "electric operating entities" and ending "subdivision of the state."

The 1986 amendment rewrote subsection (b).

Opinions of attorney general. — An electrical utility owned and operated by a regional electrical authority would continue to qualify for the broad exemption from the Alaska Public Utilities Commission Act, AS 42.05, available to political subdivisions under AS 42.05.711(b) once it had completed its proposed organization as a nonprofit corporation pursuant to AS 10.20. June 7, 1976 Op. Att'y Gen.

(f) A person, utility, or cooperative that is exempt from regulation under AS 42.05.711(a) or (d) — (k) is not subject to regulation by a municipality under AS 29.48.060 — 29.48.090. (§ 6 ch 113 SLA 1970; am § 3 ch 76 SLA 1973; am § 8 ch 83 SLA 1980; am §§ 7-9 ch 136 SLA 1980; am § 89 ch 59 SLA 1982; am § 1 ch 30 SLA 1983)

Cross references. — For limitations on these exemptions, see AS 42.05.321(b) and AS 42.05.381(c).

Effect of amendments. — The first 1980 amendment added subsection (j).

The second 1980 amendment deleted "excepting the furnishing of collection and disposal service of garbage, refuse, trash or other waste material" following "none of whose utilities" near the beginning of subsection (b), deleted the former second sentence in subsection (b), which read: "Notwithstanding any other provisions of this chapter, municipalities providing collection and disposal service of garbage, refuse, trash or other waste material within their corporate boundaries are not subject to regulation by the Alaska Public Utilities Commission unless the municipality elects to be subject to the provisions of this chapter," substituted "$50,000" for "$25,000" following "does not gross" near the middle of subsection (e), substituted "under this chapter" for "hereunder" following "exempt from regulation" near the middle of subsection (e), and added subsections (f) through (j).

The 1982 amendment, effective May 28, 1982, deleted "on June 30, 1980" preceding "a utility," and inserted "annual" preceding "gross revenue" in subsection (i).

The 1983 amendment added subsections (k) and (l).

Opinions of attorney general. — An electrical utility owned and operated by a regional electrical authority would continue to qualify for the broad exemption from this chapter, available to political subdivisions under subsection (b) of this section once the regional electrical authority had completed its proposed organization as a nonprofit corporation pursuant to AS 10.20.005 et seq. June 7, 1976, Op. Att'y Gen.

NOTES TO DECISIONS

Municipally owned utilities in competition with other utilities subjected to full gamut of regulation pertaining to other utilities, with exception relating to bond covenants. — See Alaska Pub. Utils. Comm'n v. Municipality of Anchorage, Sup. Ct. Op. No. 1326 (File No. 2940), 555 P.2d 262 (1976).

Sec. 42.05.712. Deregulation ballot. (a) A utility or cooperative which may elect to be exempt from the provisions of this chapter shall poll its subscribers or members in the manner described in this section.

(b) The votes of a majority of those voting in an election in which at least 15 percent of the eligible subscribers or members return ballots are required for a utility or cooperative to elect exemption under (a) of this section.

(c) Each subscriber or member of the utility or cooperative shall receive notice of an election under this section with the subscriber's or member's regular bill for service at least 60 days before the date set for the election. The notice shall contain impartial language informing the subscribers or members that an election on the option of deregulation or regulation by the Alaska Public Utilities Commission will be held within 60 days and that a ballot to participate in that election will be mailed or delivered to each subscriber or member of the utility or cooperative with the regular bill for service. The notice shall also state

that a subscriber or member of the cooperative is entitled to vote in the election without regard to whether the subscriber's or member's account with the utility or cooperative is current and that the ballot must be postmarked or returned to the commission within 30 days after it was mailed or otherwise delivered to the subscriber or member. The notice shall also announce the schedule for one or more public meetings which shall provide an opportunity for the subscribers or members to discuss this election. The public meeting or meetings shall be held not more than 30 days before the ballots are mailed or distributed to those eligible to vote. A cooperative may satisfy this requirement by including a discussion of this election on the agenda of an annual meeting if the annual meeting is scheduled to be held not more than 30 days before the election.

(d) A ballot with return postage paid shall be mailed or delivered to each subscriber or member of the utility or cooperative with the subscriber's or member's bill for service and shall contain only the following language:

"Shall . . . . . (name of utility or cooperative) be exempt from regulation by the Alaska Public Utilities Commission?

[ ] YES [ ] NO"

(e) The results of an election under this section shall be certified by the commission within 60 days after the ballots are mailed or delivered to the subscribers or members.

(f) During the 60 days immediately preceding an election under this section a list of subscribers or members of the utility or cooperative shall be made available at cost to any subscriber or member of the utility or cooperative who requests one. The list shall be in the same form that is available to the utility or cooperative.

(g) The board of directors of a utility or cooperative may call an election under this section on its own initiative and shall call an election upon receipt of a valid petition from its subscribers or members. A petition shall be considered valid if it is signed by not less than the number of subscribers or members equal to ten percent of the first 5,000 subscribers or members and three percent of the subscribers or members in excess of 5,000. An election under this section may only be held once every two years.

(h) A utility or cooperative which is already exempt from regulation under this section may elect to terminate its exemption in the same manner. (§ 10 ch 136 SLA 1980)

Sec. 42.05.720. Definitions. In this chapter

(1) "affiliated interest" includes:

(A) a person owning or holding directly or indirectly five per cent or more of the voting securities of a public utility engaged in intrastate business in this state;

(B) a person, other than those specified in (A) of this paragraph, in a chain of successive ownership of five per cent or more of voting

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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Mail Stop 3100
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May 8, 1987

MEMORANDUM

TO: Representative John Sund

ATTN: John Hartle

FROM: Ginny Fay
Legislative Analyst

RE: Alaska Public Utilities Jurisdiction and Senate Bill 22
Research Request 87.291

You requested that we analyze the effect of Senate Bill 22 (SB 22), attached on the Alaska Public Utilities Commission's (APUC) statutory authority to regulate utilities in the public interest. You were specifically interested in: the regulatory process for setting wholesale power rates; the role of other states' public utility commissions in regulating wholesale electric power sales agreements; and whether state public utility commissions can annul or retroactively change wholesale power rates. You also asked that we provide information regarding the Alaska Power Authority's (APA) statement that failure to pass SB 22 would "kill" the Bradley Lake project because the APA's bonds would be considered "junk bonds" by financial institutions.

Senate Bill 22 would affect the regulation of utilities in Alaska in the following ways:

1. exempting wholesale power sales agreements between the APA and public utilities from the APUC's jurisdiction (Bill Section 1; Alaska Statute 42.05.431);

2. statutorily providing that all costs incurred by a utility in connection with a contract with the APA are prudent and allowable when the APUC sets that utility's rates (Bill Section 3; Alaska Statute 42.05.511);

3. exempting small electric and telephone utilities from APUC regulation unless 25 percent of the utility's subscribers petition the commission for regulation [Bill Section 4; AS 42.05.711(e)];

4. exempting the APA from APUC regulation by specifying that the APA is not a utility (Bill Section 5; AS 42.05.711); and

5. specifying that military costs or kilowatt-hour sales are excluded from power cost equalization sales calculations (Bill Section 7; Alaska Statute 44.83.162).

Jurisdiction Over Wholesale Electrical Power Sales

Wholesale Power Rate Setting. In the contiguous states, all wholesale electrical power sales transactions are regulated by the Federal Energy Regulatory Commission (FERC). The FERC was given jurisdiction over wholesale power rates as a result of a 1964 U.S. Supreme Court decision. The Court's decision was based on the physical property of electricity--that one electron is indistinguishable from another. When electricity is sold at wholesale across state boundaries on large, integrated power grids, the state of origin--and thus, the state with regulatory jurisdiction--is indeterminable. As a result of this decision, the "bright line rule" was established; the role of the FERC is wholesale jurisdiction while retail jurisdiction is left to the states.

The FERC sets wholesale power rates in much the same manner as retail rate setting is conducted by state public utility commissions (PUCs). Rate filings, terms and agreements are entered before the FERC, which then files a docket with its rate determination. It is not unusual for state public utility commissions to appear before the FERC to present state regulatory policy and practices to assure coordination of wholesale and retail rates. Part II of 16 USC exempts government facilities from FERC regulation of rates. Part I, however, provides for FERC regulation of all FERC licensees which are not otherwise regulated under state jurisdiction. Wholesale power sales agreements between the APA and regulated public utilities would fall under the jurisdiction of FERC if APUC regulatory jurisdiction is removed.[1]

Role of PUCs in Other States. In all states, public utility commissions have full jurisdiction over retail rate setting of regulated utilities. The majority of regulated utilities in this country fall into the group of investor-owned utilities (IOUs). The IOUs often have their own retail customers in addition to selling wholesale power to other IOUs, public utilities, municipal utilities, and electrical cooperatives. Most wholesale power sales agreements are indirectly regulated by public utilities commissions through the planning and retail rate setting process. Because they have control at the planning and retail stages of power production, PUCs are generally not concerned about jurisdiction over wholesale rates.

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[1]Robert Fitzgibbons, Associate General Counsel, Federal Energy Regulatory Commission, personal communication, May 7, 1987.

In contrast to Section 3 of SB 22, utilities in other states are held accountable for any "mistakes" made in wholesale agreements; the retail rate setting process includes a review of wholesale agreements for prudence. Because PUCs do not directly regulate wholesale agreements, they cannot annul or retroactively change these agreements.

Most public utilities commissions coordinate or conduct statewide planning and demand forecasting and have the authority to certify the construction of electrical generation facilities and transmission lines. Certification by the PUC is based on additional supply facilities being consistent with the statewide plan and the demand forecast. In a growing number of states, certification also requires demonstration that all demand-side management and reduction options have been utilized and the supply option is the least-cost option. In California, Wisconsin, and the Pacific Northwest, compliance with the statewide energy plan assures that additional supply capacity will be considered "prudent"--and therefore eligible for inclusion in the utility's rate base. The policy of these states implies that if only required supply facilities are constructed and these are consistent with the long-term objective of preventing expensive over-capacity, then wholesale and retail electrical rates will be as low as possible.

Officials at the National Association of Regulatory Utility Commissions (NARUC), National Conference of State Legislatures (NCSL), and in Wisconsin, New York, California, and the Pacific Northwest states indicated that portions of SB 22 reflect Alaska's lack of energy planning and poor organizational structure of energy agencies.[2] They believe that the bill attempts to pass the cost of poor planning on to consumers by removing the APUC's authority to regulate. Section three of SB 22 results in the effective removal of APUC retail regulatory authority. They believe it is unlikely that federal laws and regulations will allow such a drastic measure or that this is ultimately in the public interest.

All of these officials were most concerned about section three of the bill. That section provides that all utility costs associated with APA contracts and/or projects are prudent. Charles Gray, with the NARUC, called it a "drastic provision that takes all possible authority away from the commission [APUC] and is not very desirable." Jerry Mendel, of Wisconsin, referred to it as an automatic carry through--something that most states are actively trying to prevent. Mr. Mendel stated that "more importantly, this type of guarantee will make it hard to avoid sweetheart deals between the State and utilities." Julian Ajelo, of California, stated that section three "hamstrings the public utilities commission and essentially does away with the APUC. The basis of utility regulation is the determination of prudence and the ability to make that determination is in the public interest." Tom Foley, with the Northwest Planning Council, said

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[2]These states were contacted because their regulation of public utilities have been identified as models for the country.

that section three "provides utilities with a carte blanche." Terry Fox, of the New York Power Authority (NYPA), indicated that he had "never heard of any provision like that before." He said the New York Public Utilities Commission in no way exempts or automatically deems prudent any purchases of NYPA power by New York utilities. The NYPA electrical power contracts are treated no differently than other wholesale power contracts in the state.

In regard to state regulation of the APA, it is difficult to compare this with other states because other states do not have agencies similar to the APA. The closest approximation is the New York Power Authority. The major difference between the APA and the NYPA, however, is the fact that the NYPA does not receive state funding. The NYPA must operate in a competitive environment; if they cannot compete with IOUs and fully pay for the construction, operation, and administration of state facilities, then they cannot build them. The NYPA bonds for construction of generating and transmission facilities; its own revenues are used to secure the bonds. The state of New York incurs no expenses or liabilities from the NYPA.

Julian Ajelo, of California, suggested that rather than worry about which state agency has authority over the other, it would make more sense to give the APUC facility siting authority over all utilities including the APA. In addition, he indicated that the APUC should perform the state's energy planning and demand forecasting functions. This would balance the roles and authority of the APUC and APA, which would result in improved energy policy and management. He stated that the apparent nature of the APA results in it acting like a utility and noted that utilities throughout the country have historically over built generating capacity and overestimated energy demand. California's certification and planning process eliminates the ability of utilities to over build.

In regard to the statement that APUC jurisdiction over APA wholesale power sales agreements would result in APA having a junk bond rating, Mr. Fred Eoff stated that this "sounded a little extreme."[3] He stated that financial institutions prefer regulatory stability but are not adverse to regulatory oversight. Only extreme regulatory oversight that would jeopardize a financial institution's ability to receive payment would be avoided. Mr. Eoff did not believe APUC jurisdiction would considered extreme regulatory oversight. As a historical note, Mr. Eoff said that in the Washington Public Service Supply Company (WPSSC) situation, over capacity, the inability to sell electrical power and rate shock were much larger considerations to financial institutions and resulted in their withdrawal of financial backing for the Washington projects. The devastating effect on rate payers and utilities of these projects resulted in the planning effort currently under way in the Pacific Northwest.

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[3]Fred Eoff is the manager of northwest regional bond activities of Boettcher & Company, Inc. which is a stock and bond brokerage firm. Mr. Eoff is located in the firm's Seattle office.

The APA position paper on SB 22 (attached) states that the statutes as currently written present a conflict because the APUC has no jurisdiction over the APA but has jurisdiction over the wholesale power sales agreements to which the APA is a party. The APUC's jurisdiction over contracts involving the APA stems from its jurisdiction over the regulated utilities that are party to the contracts. This does not constitute a statutory conflict; the fact that the APUC does not have jurisdiction over the APA does not imply that it should not have jurisdiction over any activity to which the APA is a party.

The exemption of wholesale power sales agreements from APUC jurisdiction is not objectionable from the standpoint of the public interest--PUCs in most states do not regulate wholesale power sales. However, to extend the exemption to retail rate setting by automatically deeming prudent all APA activities and projects is a rather radical provision and, according to the utility regulators I contacted, is clearly not in the public interest.

Given the current excess generating capacity in the Railbelt, it is possible that the APUC would consider utility purchases of relatively expensive Bradley Lake power imprudent and, thus, would not allow Bradley Lake costs to be considered in the utilities' rate structure. In this sense, the statement that failure to pass SB 22 could kill Bradley Lake is accurate, but the reason is not that junk bonds will raise the price of power and prevent an agreement on power sales. In fact, passage of SB 22 does not ensure that Bradley Lake can proceed unhindered by regulatory oversight.

Removal of APUC jurisdiction over wholesale power sales agreements will not solve the Bradley Lake power sales agreement problem. One problem with sales agreements stems from planned Public Utility Regulatory Policy Act (PURPA) energy projects in the Railbelt (see attached memorandum on PURPA facilities and their regulation). Because of dockets already filed with the APUC by PURPA facilities, either the APUC or FERC will be required to intervene under federal law in the Bradley Power Sales Agreement. In effect, PURPA requires utilities to purchase power from PURPA facilities before purchasing more expensive power.

As mentioned above, Part I of 16 USC requires that FERC regulate all FERC licensees that are not regulated by states. In effect, either the State must regulate its utilities or the federal government will intervene. It is highly unlikely that Railbelt utilities will sign a power sales agreement for Bradley Lake power unless jurisdictional complexities are resolved. While passage of SB 22 would remove APUC oversight, the problem would not be resolved because the FERC would be required to step in and assert its authority under PURPA and Part I of 16 USC. Ultimately, planned PURPA facilities and excess capacity in the Railbelt may render the Railbelt utilities unable to include the purchase of Bradley Lake power in their rate structure. This conclusion implies that the APA's estimate of a 2 percent interest rate increase could be optimistic; Bradley Lake bonds may be difficult to sell even at much higher interest rates. The issue is not who has jurisdiction over Bradley Lake power sales, but that any regulatory authority might question the prudence of the Bradley Lake project because of PURPA facilities and existing over capacity.

Regulation of Small Electrical and Telephone Utilities

Section 4 of SB 22 provides for the automatic regulatory exemption of electric and telephone utilities that gross less than $50,000 annually or have fewer than 500 subscribers. As of June 30, 1986 there were 307 certificated utilities in Alaska, of which 117 are regulated. This section provides for the exemption of 17 of these 117 regulated utilities. Under Alaska Statute 42.05.712, a utility or a cooperative can--by a vote of its subscribers or members--be deregulated. This statute also allows for exempt utilities or cooperatives to become regulated by the same process. At least two of the 17 utilities that would automatically be deregulated by the passage of SB 22 were previously exempt but voted to be regulated. It is unclear whether this law would again deregulate them and require another vote for deregulation It has been suggested that this statutory exemption removes the financial burden of regulation from small utilities. In cases where a financial burden does exist, the voting procedure of AS 42.05.712 can deregulate the utility. The APUC currently encourages a deregulation vote when it determines that the cost of regulation exceeds the benefits.

Removal of Military Costs from Power Cost Equalization Calculations

While the APUC believes that it is reasonable to remove the cost of military power from power cost equalization calculations, the APUC would like to conduct a cost of service investigation on a case-by-case basis to assure that power cost equalization revenues are allocated fairly between rural communities with and without military electrical utility clients. This is because military power purchases may lower the cost of electrical services in the community and any cost margin received by the utility should also be considered.

I hope you find this information useful. If you have any questions or would like additional information, please call.

Attachments

ALASKA POWER AUTHORITY

Position Paper

SPONSOR SUBSTITUTE FOR SENATE BILL NO. 22

The Alaska Power Authority supports enactment of SSSB 22. Specifically, Sections 1, 2, 4 and 5 of the bill, provide for amendments which would exempt wholesale power agreements between the Alaska Power Authority and a public utility from review or approval by the Alaska Public Utilities Commission (APUC). Enactment of this legislation is essential to the program of revenue bond financing of the Bradley Lake Hydroelectric Project.

The need for enactment of SSSB 22 is due to a 1986 amendment to APUC legislation. The amendment gives the APUC authority to review in advance and approve wholesale power agreements between public utilities. Once the agreements are in effect, the APUC may also order the parties to the agreement to renegotiate the agreement if the APUC determines that the retail power rates are not just. Where the parties are unable to agree to an amendment, the APUC may order the parties to proceed under the agreement's dispute resolution procedures.

The 1986 amendment was part of a complex, lengthy and controversial package of amendments within the "sunset" reauthorization bill for the Alaska Public Utilities Commission. The effect of the amendment on the Alaska Power Authority, its wholesale power agreements, and the Bradley Lake agreement in particular, was never addressed to the 1986 Legislature. Consequently, we are now presented with a statutory conflict. The Power Authority is exempt by statute from the APUC's jurisdiction. On the other hand, the APUC has jurisdiction over wholesale power agreements to which the Power Authority is a party.

Without an amendment to correct this anamoly, general civil construction cannot commence this season. Bond financing will be jeopardized for at least two reasons. The lengthy hearing process and any subsequent litigation arising out of the APUC's orders would delay construction of Bradley and ultimately jeopardized timely bond financing of the project. Moreover, if the APUC can order negotiation of power sales contracts in effect, bondholders will not be able to rely on the power sales contracts and the rates which are the basis for the contracts.

The Alaska Power Authority Board of Directors met on February 27, 1987, and unanimously adopted attached Resolution 1987-05, which supports legislation to be introduced during the 1987 Legislative session, for the purposes of clarification that the Alaska Power Authority and its wholesale power agreements would be specifically excluded from the jurisdiction of APUC.

Additional background information outlining the need for enactment of SSSB 22 is provided in the attached memorandum (dated March 9, 1987) from the Alaska Power Authority bond counsel of Wohlforth, Flint, and Gruening.

8629/663/1

Alaska Power Authority

Addendum to Alaska Power Authority Position Paper
SSSB 22

If SB 22 is enacted:

- Allows Bradley contracts to be signed and executed in a timely basis for construction to meet utilities' schedules of need.
- Provides certainty to wholesale power rate based on terms and provisions fixed in contract and not subject to future adjustment.
- Prevents duplication of review by State agencies. Public interest already served by Alaska Power Authority involvement.
- Lowers costs to consumers through lower interest rates on long-term debt.
- Lowers APUC review costs.
- Eliminates possibility of conflicting interpretations of contractual terms by two state agencies both assisted by the Dept. of Law

If not enacted:

- The provision for adjusting rates in the future lowers the rating of the long-term debt to less than investment grade (A-rated to "junk" bond.)*
- Unable to have former contracts until APUC re-reviews all power supply option studies already performed by OMB, legislature, utilities and their respective boards, and Alaska Power Authority and its Board (including four commissioners).
- No basis for future decisions.
- Delaying Bradley Lake by one year could increase construction costs by approximately $10 million (less any additional arbitrage earnings.)

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*. Interest rate could increase 1.5 to 2.0 percent. Based on $175 million in debt and 8.0 percent and 9.75 percent interest rate for with and without exemption, respectively, debt service would increase by approximately $2.7 million per year - $81 million over life of bonds.

8652/723/1

Offered: 4/21/87
Referred: Rules

5-0101X

Original sponsor: Coghill

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 22 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act exempting certain telephone and electric utilities and certain transactions from regulation by the Alaska Public Utilities Commission; restricting the authority of the Alaska Public Utilities Commission in considering certain costs in connection with rates charged by a utility and with calculating power cost equalization; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.05.431(b) is amended to read:

(b) Except as provided in (c) of this section, a [A] wholesale power agreement between public utilities is subject to advance approval of the commission. After a wholesale power agreement is in effect, the commission may not invalidate any purchase or sale obligation under the agreement. However, if the commission finds that rates set in accordance with the agreement are not just and reasonable, the commission may order the parties to negotiate an amendment to the agreement and if the parties fail to agree, to use the dispute resolution procedures contained in the contract.

* Sec. 2. AS 42.05.431 is amended by adding a new subsection to read:

(c) A wholesale agreement for the sale of power between the Alaska Power Authority and a public utility is not subject to review or approval by the commission.

* Sec. 3. AS 42.05.511 is amended by adding a new subsection to read:

(d) All costs incurred by a utility in connection with a contract with the Alaska Power Authority, including power costs, wheeling charges for facilities owned or leased by the state, and overhead costs associated with the contract, are considered prudent and are allowed in the rates charged by the utility.

* Sec. 4. AS 42.05.711(e) is amended to read:

(e) Notwithstanding any other provisions of this chapter, an [ANY] electric or telephone utility that does not gross $50,000 annually or that has fewer than 500 subscribers is exempt from regulation under this chapter unless 25 percent of the subscribers petition the commission for regulation. The commission may not combine the revenue or subscribers of different utilities owned by the same company when determining whether a utility is exempt under this subsection.

* Sec. 5. AS 42.05.711 is amended by adding a new subsection to read:

(m) The Alaska Power Authority is not a public utility under this chapter.

* Sec. 6. AS 44.83.090(b) is amended to read:

(b) The authority is not subject to the jurisdiction of the Alaska Public Utilities Commission. Nothing in this chapter [AS 44.83.010 - 44.83.425] grants the authority any jurisdiction over the services or rates of any public utility or diminishes or otherwise alters the jurisdiction of the Alaska Public Utilities Commission with respect to any public utility, including any right the commission may have to review and approve or disapprove contracts for the purchase of electricity by a public utility other than a wholesale power agreement for the purchase of power from the authority.

* Sec. 7. AS 44.83.162 is amended by adding a new subsection to read:

(p) In calculating power cost equalization, the commission may

not consider costs or kilowatt-hour sales associated with a United States Department of Defense facility.

* Sec. 8. Sections 1, 2, and 5 - 7 of this Act are retroactive to June 7, 1986.

* Sec. 9. This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

April 8, 1987

MEMORANDUM

TO: Representative Sam Cotten

FROM: Ginny Fay
Legislative Analyst

RE: Railbelt Energy Analysis
Research Request 87.114 (Supplemental Information)

As part of this agency's analysis of Railbelt energy, you requested that we provide additional information on cogeneration and small electrical power facilities that are covered under the Public Utilities Regulatory Policy Act (PURPA) of 1978. These facilities were generally referred to as PURPA generators in our memorandum of March 18. This memorandum initially covers the regulatory authority pursuant to PURPA and an overview of how these alternative energy regulations have affected electrical power generation in the United States. This is followed by a discussion of the potential effects of State financing of the Bradley Lake project on these types of facilities in the Railbelt. This includes a discussion of the role of the Alaska Public Utilities Commission (APUC) and Federal Energy Regulatory Commission (FERC) in the Bradley Lake Power Sales Agreement.

Regulatory Background and Authority

Precipitated by the Arab oil embargo in 1973 and further accentuated by the inability of pipelines to deliver natural gas to meet winter demands, legislation was proposed by President Carter to curb America's use of oil and gas. The legislation was designed to eliminate the country's dependence on foreign oil while simultaneously conserving "scarce" natural resources. The result of the administration's legislative package was the passage of the National Energy Acts which were signed into law by the President on November 9, 1978.[1]

Contained within the Public Utilities Regulatory Policy Act of 1978 (PURPA) were two sections regarding small power production and cogeneration.[2] The PURPA was designed to encourage conservation and efficiency in energy use, regulate wheeling of bulk power, and provide incentives for industrial cogenerators and small power producers.[3]

At present, small-scale renewable technologies are not a major factor in the nation's overall electricity supply, accounting for less than one-half of one percent of total generating capacity. Traditional utility forecasts of electricity supplies have not even included these resources in capacity planning.[4] Currently, with oil prices falling, renewable energy tax credits being phased out, and cutbacks in federal research and development support, there is a tendency to down play the future role of renewable technologies.[5] Market penetration of renewable technologies is growing, however, and most have attractive features--including short lead time, modular design characteristics, reduced environmental impacts, and inflation-proof fuel costs--that make them especially appropriate for deployment in today's uncertain utility planning environment.[6]

Although the portion of electrical power generation provided by cogeneration and small power facilities remains small, tremendous growth has occurred in the application of these technologies during the years since enactment of PURPA (Figure 1). Whether measured by the increase in total dollars expended on cogeneration equipment and related systems, by the number of applications for qualifying facility status filed with the Federal Energy Regulatory Commission (FERC), or by the increase in the nation's electrical capacity contributed by PURPA systems, it is clear that these facilities are beginning to contribute significantly to America's energy supply and have become an important factor in planning for the nation's energy needs to the year 2000.[7] Table 1 provides information regarding potential electrical power production by cogeneration.

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[2]Section 201, 92 Stat. 3134, 16 U.S.C. § 796(16) through (22), and §210, 92 Stat. 3144, 16 U.S.C. § 824a-3.

[3]Cogeneration is the sequential production of both electrical (or mechanical) energy and thermal energy from the same primary energy source.

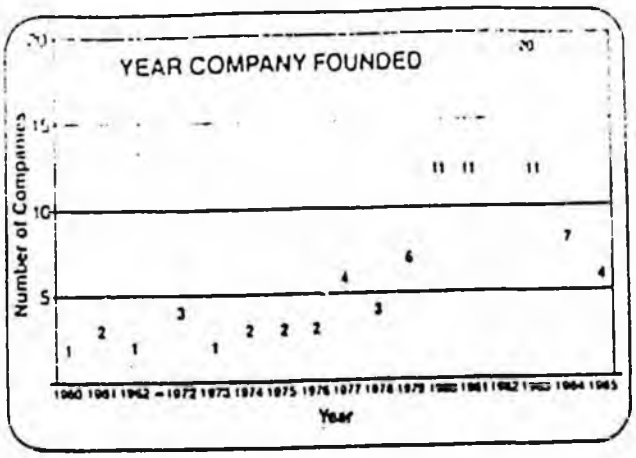
[4]The exception to this is California, which has adopted an avoided cost methodology for electrical capacity production.

[5]Scott A. Fenn, "Renewable Power Generation: Beyond the Shakeout," Public Utilities Fortnightly, November 13, 1986, p. 24.

[6]Ibid., p. 25.

[7]Michael J. Zimmer and Beverly E. Jones, "Cogeneration: Boon or Bane to Consumers?" Public Utilities Fortnightly, June 12, 1986, p. 23.

Figure 1



Source: Fenn, op. cit., p. 27

TABLE 1

Summary of Cogeneration Potential Compared to Current Capacity of Operating Power Plants as of 1983 (Megawatts)

STATE	POTENTIAL INSTALLED COGEN. CAPACITY (1)	TOTAL CURRENT INSTALLED ELEC. CAPACITY (2)	COGEN. AS A PERCENT OF TOTAL ELEC. CAPACITY
ALABAMA	1,017	19,199	5.30
ALASKA	185	1,464	12.81
ARIZONA	145	11,015	1.32
ARKANSAS	353	8,796	4.01
CALIFORNIA	3,944	39,821	9.90
COLORADO	135	6,501	2.08
CONNECTICUT	258	6,107	4.23
DELAWARE	188	2,053	9.16
DIST OF COLUMBIA	1	868	0.12
FLORIDA	1,016	31,093	3.19
GEORGIA	920	17,562	5.24
HAWAII	147	1,482	9.92
IDAHO	21	2,020	1.04
ILLINOIS	1,408	29,710	4.74
INDIANA	502	18,700	2.68
IOWA	482	8,815	5.47
KANSAS	583	9,488	6.14
KENTUCKY	534	15,965	3.34
LOUISIANA	3,298	15,695	21.01
MAINE	529	2,396	22.08
MARYLAND	410	9,816	4.18
MASSACHUSETTS	533	9,910	5.38
MICHIGAN	631	22,058	2.86
MINNESOTA	370	8,610	4.30
MISSISSIPPI	165	5,825	6.61
MISSOURI	371	15,720	1.72
MONTANA	0	3,219	0
NEBRASKA	217	5,895	3.68
NEVADA	5	4,564	0.11
NEW HAMPSHIRE	250	1,536	16.28
NEW JERSEY	1,418	13,785	10.29
NEW MEXICO	204	5,393	3.82
NEW YORK	2,124	32,040	6.64
NORTH CAROLINA	882	18,419	4.79
NORTH DAKOTA	221	3,829	5.77
OHIO	2,103	29,467	7.14
OKLAHOMA	475	12,560	3.78
OREGON	454	10,576	4.29
PENNSYLVANIA	2,512	34,824	7.21
RHODE ISLAND	82	270	30.35
SOUTH CAROLINA	940	12,316	1.79
SOUTH DAKOTA	0	2,432	0
TENNESSEE	654	16,268	3.60
TEXAS	5,110	57,615	8.87
UTAH	72	1,832	2.38
VERMONT	38	949	4.00
VIRGINIA	784	11,513	6.81
WASHINGTON	700	21,808	3.21
WEST VIRGINIA	260	15,156	1.72
WISCONSIN	1,741	10,771	11.58
WYOMING	108	5,920	5.20
TOTALS	38,344 MW	655,493 MW	6.50

SOURCES: (1) Dun & Bradstreet Technical Economic Services and TRW Energy Development Group, Prepared for U.S. Dept. of Energy, Industrial Cogeneration Potential (1980-2000) for Application of Four Commercially Available Prime Movers at the Plant Site (August 1981).

(2) As reported by all utilities to Department of Energy.

This growth in cogeneration and renewable energy facilities has not been achieved without some difficulties. The struggle often has involved a portion of the energy industry which could stand to gain the most from a cooperative partnership with these budding technologies--the electric utilities.[8] The suppliers and developers of these newer energy technologies have not been dominated by the traditional utility industry. The utility industry, with a few notable exceptions, has been content to allow nonutility companies to develop and serve as a proving ground for these high-risk new technologies. Development of renewable technologies is being carried out principally by a diverse group of nonutility developers ranging from multinational aerospace and petroleum companies to small, entrepreneurial firms founded on the work of a single investor.[9] One of the principal intents of PURPA was to facilitate the incorporation of these technologies into the electrical regulatory process and markets and thereby encourage their development.

The resistance of utilities is, in part, a result of a broader restructuring of the electrical production industry. Traditionally, electric utilities have enjoyed geographic monopolies under conditions of rapidly growing power consumption. The nationwide decline in growth of electrical demand, coupled with increased competition from unregulated industries (such as the producers of insulation and more efficient lighting systems) and other utilities marketing surplus power, has made the production of electricity a more competitive industry. Perhaps the most important new form of competition for electric utilities in the long run, however, is the emergence of nonutility power producers selling power to the grid under provisions of the PURPA.[10]

With the development of PURPA, Congress gave the FERC a mandate to prescribe rules as it determined necessary to encourage cogeneration and renewable power production. Those rules were to require electric utilities to offer to purchase electric energy from PURPA facilities (referred to as "qualifying facilities"). The regulations were to ensure that the rates for such purchases would be just and reasonable to the consumers of the electric utilities and in the public interest, would not discriminate against the PURPA facility, and would result in a rate which would require the utility's customers to pay no more than they would have paid for electricity had the utility produced the electricity or purchased it from another source.[11] Thus, the price a utility would pay for electricity produced by a qualifying facility would equal the utility's "avoided cost."

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[8]Ibid.

[9]Scott A. Fenn, "Renewable Power Generation: Beyond the Shakeout," p. 26.

[10]Ibid., p. 24.

[11]PURPA § 210(b), 16 U.S.C. § 824a-3(b).

Rates for electricity purchased from qualifying facilities (QF) by electric utilities based on avoided costs fall generally into two categories: capital costs and running or operating costs. The QF is entitled to a capacity payment when the utility can avoid the capital costs of building a new generating unit by purchasing electricity from the QF. Whether or not the utility must incur capital costs to supply the needs of its customers, the utility is expected to save operating costs when it purchases electricity from a QF instead of producing the electricity from its own plants. The operating cost savings are intended to be passed on to the QF in the form of energy payments.[12] The conditions under which capacity costs should be included in avoided costs calculations has been the source of considerable debate on both the state and federal utility regulatory level. The debate is a result of both the regulatory complexities of determining avoided costs and the balancing the interests of utilities, qualified facilities, and electric consumers.

Bradley Lake Project Financing and Power Sales Agreement

The PURPA requires a public utility to purchase electric power and energy from qualifying facilities at the utility's avoided cost. As mentioned above, these avoided costs are the cost a utility would avoid by purchasing power from a qualifying facility rather than generating power itself or purchasing the power elsewhere. As a result of the State subsidy of the Bradley Lake project, avoided cost calculations for the four planned Railbelt PURPA facilities can be expected to be lower than otherwise would be likely.

The developers of all four of the PURPA projects have filed complaints with the Alaska Public Utilities Commission (APUC) against the utility to which they seek to sell power.[13] Each complaint requests the APUC to determine the avoided cost the utility is required to pay to qualifying facilities under PURPA. The complaints, and particularly the SGI complaint, also seek to prohibit the utilities from making power purchases, such as from the Bradley Lake project, that would eliminate the need for power from the private project.

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[12]Robert D. Stewart, Jr., "The Law of Cogeneration in Oklahoma," Public Utilities Fortnightly, November 27, 1986, p. 24.

[13]The four private sector power projects proposed in the Railbelt include AEM Corp. with a 25 Mw "waste coal" project in Healy selling to GVEA; SGI, Inc. with a 50 Mw waste coal project selling to AML&P; Mat-SU Energy Corp. with 20 Mw peat facility selling to MEA; and Valley Energy Corp. with a 15 Mw project fired by wood chips selling output to MEA.

Under current State law--which requires the APUC to review wholesale power sales agreements--the significance of these filings are twofold. First, because the qualifying facilities have filed dockets prior to the APUC review of the Bradley Lake Power Sales Agreement, capital costs of the Bradley Lake project would be included in the calculation of avoided costs. The second factor, however, is that because the Bradley Lake project is the "competing" incremental power purchase, the avoided capital cost would be reduced to the extent that the State subsidizes the construction of Bradley Lake. Given the APUC's authority under the current State law, Bradley Lake capital costs would be included in the calculation of avoided costs for the qualifying facilities in the Railbelt.

If Senate Bill 22--which retroactively removes APUC's authority to review wholesale power sales agreements--is passed, a second scenario results in which Bradley Lake capital costs would not be included in the calculation of avoided costs for power purchases from qualified facilities. This is based on the assumption that the Railbelt utilities will have entered into the Bradley Lake Power Sales Agreement and will have no further need for electrical power generation capacity. Once a generating facility (e.g., Bradley Lake) has been constructed, its capital cost cannot be considered part of a utility's avoided costs.[14] After the completion of the Bradley Lake project, our analysis of Railbelt demand (see our March 18 memorandum) indicates that there will be no additional generating capacity requirements until approximately 1998. Therefore, there would be no avoided capital costs for PURPA facilities. Removal of capital costs in the avoided cost calculations can be expected to have a significant impact on the economic feasibility of planned PURPA generators in the Railbelt.

Avoided costs are calculated on an individual utility basis. If SSSB 22 is passed, only operating costs would be included in the calculation of avoided costs. Because of the complexities and the variability of factors influencing these avoided cost calculations (such as what portion of each utility's electrical generation and/or purchases is Bradley Lake power), it is difficult to estimate the affect of Bradley Lake power on avoided operating costs in the Railbelt. In a recent letter,[15] Ted Moninski, of the APUC, indicated that after the seven Railbelt utilities have signed a contract requiring them to purchase Bradley Lake power, the avoided operating cost to be paid to a qualified facility would most likely be the price of Bradley Lake power--providing the purchasing utility required

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[14] Even though Bradley Lake will not have been completed, the take or pay provision of the power sales agreement will commit the signing utilities to Bradley Lake generating capacity.

[15] T.S. Moninski II, letter to Rep. Kay Brown, March 31, 1987.

additional power.[16] The price at which the Alaska Power Authority sells electricity to the Railbelt utilities becomes the incremental cost for the purchase of additional power. If the utility had no power requirements in addition to Bradley Lake power, the avoided costs would probably be below the cost of Bradley Lake power.

The public financing of the Bradley Lake project would lower the cost of Bradley Lake power. A qualifying facility under private financing might not be able to provide power at the avoided cost resulting from the public financing of the Bradley Lake project. Economic theory suggests that private financing of and production from PURPA qualifying facilities will be less with public funding of the Bradley Lake project than without. This implies that, ultimately, the State's financing of Bradley Lake will probably displace or delay at least a portion of private financing and construction of PURPA facilities in the Railbelt. This is based on the assumption that the cost of Bradley Lake power would be considered the the incremental avoided cost.

It is unlikely that Bradley Lake capital costs would be excluded from avoided cost calculations, however, because the PURPA also requires the APUC to enforce the obligated, regulated utilities to purchase power from qualifying facilities at avoided cost. Because this is a federal regulation, this aspect of the APUC's review of the Bradley Lake Power Sales Agreement cannot be eliminated by the Alaska State Legislature's removal of APUC's authority to review wholesale power sales agreements as proposed by SSSB 22. If APUC authority is removed, affected parties would most likely petition the APUC under the federal statute. Ultimately, the qualifying facilities would have standing in federal district court and the matter would pass out of State jurisdiction to the FERC. It appears that the State would retain the greatest level of control over the Bradley Lake Power Sales Agreements by not passing SSSB 22.

While there are relatively few cases regarding the application of FERC regulations in a situation analogous to the Railbelt's Bradley Lake project and qualifying facilities, one similar ruling should be noted. In a docket pertaining to the Oglethorpe Power Corporation (REB1-56), the FERC decided that when a utility sells power at wholesale to utilities who in turn distribute electricity at retail, it may collectively excuse the individual retail utilities from the obligation to purchase power from the qualifying facilities and instead allow the obligation to fall upon the wholesale generation and transmission company. Under this FERC ruling, the Oglethorpe Power Corporation was required to purchase power and resell it. This ruling implies that as part of the Bradley Lake Power Sales Agreement, the Alaska Power Authority, as the wholesale distributor of electric power, could be required to purchase and resell power from qualifying facilities.

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[16] It is uncertain, however, why the APUC would consider Bradley Lake power to be the basis for determining avoided costs rather than any of the utilities' more expensive increments of power.

The Oglethorpe decision is founded on the idea that the FERC ought to enjoy considerable latitude in making sure that the goals of PURPA--the fostering and encouragement of cogeneration and small power production--will not be compromised. Thus, even though there is no specific PURPA provision or regulation allowing for a waiver of the obligation to purchase electricity from a QF, the FERC decided that such authority was implicit where necessary to accomplish the stated statutory objective. In Oglethorpe, that authority rested upon a catchall clause in PURPA allowing the FERC to adopt "such rules as it determines necessary" to encourage cogeneration development.[17]

In the case of Oglethorpe Power, the system was operated in such a way that it was economically practical for the central wholesale arm to coordinate all QF purchases rather than to incur the expense and inconvenience of requiring each retail utility to develop and install an administrative and engineering staff for QF purchase operations. Therefore, the system was allowed to concentrate QF purchases in one spot.[18]

It should be noted that small hydroelectric projects can be qualifying facilities under PURPA. The Bradley Lake project, however, exceeds the 80 Mw capacity limit.

I hope this information is useful. If you have additional question, please do not hesitate to contact me.

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[17] Bruce W. Rastford, "Pages from the Editor," Public Utilities Fortnightly, November 28, 1985, p. 4.

[18] Ibid.

Testimony of Ralph (Andy) Johnson
May 6, 1987 House Judiciary Committee
SB 22

My name is Ralph (Andy) Johnson. I am a Native Alaskan by birth and inheritance. I am now a retired power engineer who has over forty years of experience in the production, transmission, and distribution of electricity. I received my technical education from college extension courses, correspondence courses and home study.

My power plant experience started in a small hydro-electric power plant at Sisters Lake on Chichagof Island in 1941. (I had worked as a lineman for O.E. Schombel in Haines, Alaska before that.) 1942-1947 in own oil-fired steam powerplant on Japonski Island, Sitka. 1945-1953 electrical contractor, Sitka and Anchorage. 1953-1973 Chugach Electric Association in Anchorage, Knik Arm, 1953-1966 coal-fired steam, 1966-1973 gas-fired, 1957-1973 construction and operation of Cooper Lake Hydro. 1961 and 1973 Bernice Hot Springs power plant, oil then oil or gas-fired gas turbine with waste heat boiler. 1963-1973 International Station power plant in Anchorage, oil, then oil or gas. 1965-1973 Beluga power plant natural gas fired turbines, construction and operation.

In a utility that was growing as fast as CEA was, we could not get money fast enough and would use up at least two year's money every year. We grew from a 9 megawatt peak in 1953 to an 180 megawatt peak in 1972. Part of my job at CEA at that time was to estimate the cost of hydro, diesel, steam and gas turbine power plants, run them on paper for thirty-five years, then recommend to the general manager which type to build, because of the big difference in capital costs of each type. The difference in interest costs more than bought the fuel for a gas turbine.

I was president of CIRI (Cook Inlet Region, Inc.) 1973 to 1975. Under my leadership, the corporation changed from one everyone thought would fail to a start of what it is today.

1975-1979 I was General Superintendent for Homer Electrical Association.

1977 to present I am President of Salamatof Native Association, Inc.

After Dale Teels introduction, I must say I am a friend of Mr. Teel and that I have no connection with his company. In fact, in 1959, before Anchorage Natural Gas was in existence, I tried to get CEA to build a gas turbine power plant in Kenai using cheap Kenai gas. The engineer for CEA and the manager at that time couldn't see a plant in Kenai. But Bud Schultz put the plan in operation in Beluga when he became manager.

Regarding Bradley Lake, two years ago, I proposed to build a gas turbine powered plant in Kenai if the State of Alaska would let me use the $250 million for thirty-five years. I would have given the utilities the 352 million KWH Bradley Lake would produce, sell them 270 million at $.02 per KW, then give them back the $250 million and the power plant.

I made a slightly different proposal this year, copies of which I am giving to you for later reading, plus a cost comparison I made of Bradley Lake versus a gas-turbine.

I am not hear to speak on any of the proposals. I am here to speak against the passage of SB 22.

First, I agree with what Mr. Barnes and Mr. Teel have already stated.

Second, the state of the art has progressed to the point where gas turbines with regeneration are the most cost effective and efficient thermal generation units today. CEA's plant at BLPP was, the, or one of the, first gas turbines that was used for base load power generation.

I am now going to comment on several statements made by previous speakers. A statement was made that the production of Bradley Lake (40 MW firm, 90 MW peak) was insignificant in the total Railbelt power system. I agree with this, but why should it cost almost as much as all the rest of the system. We need the APUC to be our watchdog and protect us from this kind of management.

A speaker stated that not knowing what the APUC would do about Bradley Lake cause the utilities to build Soldotna No. 1, a plant that is not going to be needed and cannot be economically run for at least three years. Then he stated that the REA's were very good at looking out for their consumers and a majority of them were in favor of their form of management. All the Germans were for Hitler, but was his management good? We, the consumer, have to pay for all the mistakes REA management makes, so again, we need an unbiased, professional, APUC watchdog.

The report by the Legislative Research Agency, dated 3/18/87, on page 25, shows construction cost of a gas turbine at 350 KW as $325 million and Bradley Lake at $244.6 million. Nowhere in the report can I find how these figures were derived. An 80 MGW GT installed cost $30 million today. Gas turbine life has been listed as 20-25 years.

Both CEA and Anchorage Municipal Utility have gas turbines that are over 25 years old and could be used as long as needed. As long as the proper annual repairs are made, a gas turbine will last as long as a hydro plant.

Proper management of a growing utility dictates base loading the most efficient unit and using the older, smaller (usually) unit for peaking. There will usually come a time when the smaller units are so insignificant that the space they occupy is more valuable to be used for some other purpose.

Using existing proposed contract prices today, an 80 MW gas turbine with switch gear and transformer can be turn-keyed for $30 million. If the balance of the $250 million Bradley Lake costs is invested and the interest used by the plant, 630,720,000 KWH can be produced for the system for $0.015 each and save the consumers of the Railbelt about $1 billion in 35 years, then return the $250 million.

The fact that a gas turbine of 80 MW capacity which can peak at 90 MW and produce almost twice as many KWH's as Bradley Lake has never mentioned in any of the report seems to me to be a deliberate omission to make Bradley Lake look better.

People say gas is too valuable for other purposes to burn for electrical generation, but it is okay to send it to Japan to use. Why shouldn't we be able to use it for cheap power generation?

Everyone says that Bradley Lake will be cheap power after fifty years. Who knows what we will be using for power fifty years from now? Many things that are commonplace today were not even dreamed of fifty years ago. We might be using fusion, solar, or even dropping rocks in a box.

Please don't remove what little protection a consumer has between him and the utilities.

No government dam has ever been built within the estimated cost. Some of you are quite familiar with Four Dam Pool, sometimes referred to as the Four Damn Fools. Do you want to subject us to the same problems?

Help us to keep a watchdog between us and the REA or APA. Don't pass SB 22 or any other bill that finances Bradley Lake.

It was also brought out in the testimony of those from the Railbelt that they would not sign a "take or pay" contract without the intertie line, another $200 million. The intertie is something that will be needed. Why blackmail the people into paying for Bradley Lake to get it?

Why should we spend $500 million dollars to get cheaper gas turbine generated power up the Railbelt?

If the state has more money than it knows what to use it for, build Bradley Lake and the intertie.

If you want to do something that will help Alaska, stop Bradley Lake. Build the intertie and pay for it out of the savings in the next 35 years.

Added on May 10, 1987

I see by today's paper that the Finance Committee approved $4.8 million to study a steam plant (105 MW) at Nenana; to let them spend $234 million in revenue bonds to give 600 people three years of construction and 500 people permanent jobs, this is what we can expect if SB 22 is passed. Another example why we need a watch dog. Is there no end to what the electrical industry is trying to do to us consumers? As long as anything can be part of the rate, there is no hope for us.

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TESTIMONY OF ALASKA CONSUMER ADVOCACY PROGRAM
ON CS FOR SPONSOR SUBSTITUTE FOR SB NO. 22

Good afternoon, members of the committee. My name is Joel Rothberg, and I am the staff attorney for the Alaska Consumer Advocacy Program (ACAP). On behalf of ACAP I would like to thank the committee for the opportunity to speak here today.

My purpose is to speak first against adoption of those portions of the bill before the committee which would remove wholesale power contracts between the Alaska Power Authority and a public utility from the jurisdiction of the Alaska Public Utilities Commission. Removal of these contracts from APUC jurisdiction would be a severe blow to the interests of Railbelt utility consumers and of the public at large.

ACAP also objects to those parts of the bill which would exempt from regulation utilities with fewer than 500 subscribers unless 25 per cent of the subscribers petitioned the APUC for regulation.

The obvious interest of the utilities in promoting this legislation is that its passage would free them to negotiate wholesale power agreements with the APA for Bradley Lake power without having to subject those contracts openly to the scrutiny of the APUC staff, competing power producers, and other energy production and conservation experts.

Evaluating the benefits of Bradley Lake power necessarily entails resolving extremely complex questions relating to estimation of demand over long periods of time, the costs of various power production methods, possibilities for energy conservation, financing costs, and rates. Difficult as these questions would

be were the main issue only the cost of Bradley Lake power, they are greatly complicated by the claims of alternative energy producers now before the APUC that they can produce power at lower cost than that from Bradley Lake or any existing conventional source.

One of these alternative producers, Valley Energy Corporation, argues that under the federal Public Utility Regulatory Policy Act, or PURPA, because the electricity it will produce from wood chips is more economical than any other source over a 20-year period, MEA, which is in the market for power, must purchase Valley Energy power and will have to do so even if it contracts for power from other sources. Thus, the effect of passage of this legislation is that MEA could be obligated to buy Bradley Lake power under a contract with the APA at the same time that it is obligated to buy Valley Energy power under an order from the APUC.

Utility consumers are entitled to the determination of all these issues by an expert, neutral adjudicator, as it is they who will pay the cost of unnecessarily expensive power and excess power. That adjudicator is the APUC. It cannot be the APA, which is not empowered to adjudicate competing claims of utilities and the public and which makes no pretense of expertise in, for example, demand estimation. The APA certainly cannot claim neutrality; for months the chairman of the APA and members of its staff have worked tirelessly to promote Bradley Lake. The APA has a valuable role to play in the process of deciding whether utilities should be able to buy power from Bradley Lake but it must not be the final decision-maker.

There is no good reason for removing the APA contracts from APUC jurisdiction. The utilities will argue that the delay entailed by APUC review will make financing of Bradley Lake either more expensive or even unavailable. That argument begs the question of why the people of this state should be denied the most thorough, expert, independent evaluation possible from the APUC in evaluating these contracts.

Just as entitled to regulatory protection are consumers in utilities with fewer than 500 subscribers. There is no reason to assume that just because a utility is small its service will always be adequate and its rates reasonable.

These small utilities are usually remote and rural in character. An indication of the kinds of problems that can arise in these settings can be found in the recently issued report of the APUC staff on AVEC operations. The report shows that although AVEC is improving, numerous problems remain in the areas of supervision. accountability, and training of village operators, maintenance, materials management, construction and engineering.

The communities that would lose the benefit of APUC regulation are similar to those in the AVEC system. Without Commission monitoring or effective competition, when service problems arise or rates go up, consumers have no alternative but to take what they are given. In the absence of an indication from these consumers that they do not need the APUC to deal with their utilities, the legislature should not turn its back on them.

MEMORANDUM

State of Alaska

TO: Larry Crawford
Executive Director
Alaska Power Authority

DATE: July 31, 1984

FILE NO: 166-568-84

TELEPHONE NO: 276-3550

FROM: Norman C. Gorsuch
Attorney General
By: Carolyn E. Jones
Assistant Attorney General

SUBJECT: APUC jurisdiction over APA power sales agreements

You have asked what jurisdiction, if any, the Alaska Public Utility Commission (APUC) has to review and approve an agreement in which a local utility regulated by the APUC contracts to buy power from the Alaska Power Authority (APA). As we understand the facts, the APA anticipates selling and five local utilities intend to buy hydroelectric power generated by the "Four Dam Pool." One of the regulated utilities has questioned whether the APUC has jurisdiction to approve a wholesale agreement for hydroelectric power and the rates charged under the agreement. We conclude that the APUC has statutory jurisdiction to examine the terms of a local utility's wholesale power agreement with the APA only if the APUC has reason to investigate, as set out in AS 42.05.511, the local utility's management practices involved in entering the wholesale agreement. The APUC does not have authority to review rates or practices of the APA, and does not, in ordinary circumstances, approve a utility's wholesale power purchase agreements.

When the legislature first created the Alaska Power Authority, it provided that any contracts to sell power would be subject to review by the APUC. AS 44.56.090(8). This provision was consistent with the APUC's general authority, set out in AS 42.05.370 1/ to review contracts for the sale of electric power by a public utility because the APA was a public utility as defined in the APUC Act.

1/ AS 42.05.370 provides, in part,

> [E]very public utility shall file with the Commission . . . its complete tariff . . . and all classifications, rules, regulations, and terms and conditions under which it furnishes its services and facilities . . . to regulated or municipally owned utility for resale to the public, together with a copy of every special contract with customers which in any way affects or

(Footnote Continued)

Two years later, however, the legislature substantially amended AS 44.56.090 to provide, in part, that the APA would not be subject to the jurisdiction of the APUC. AS 44.56.090(b) (Renumbered in 1981 as AS 44.83.090(b). In his April 6, 1977 transmittal letter, Governor Hammond stated that the purpose of the proposed amendment was to clarify the relationship between the authority and the APUC by providing that the APUC would not have jurisdiction over the APA. Committee Report - House Finance, April 19, 1978 at . A review of the testimony before both the House and Senate Finance Committees reveals that the practical effect of this clarification was to eliminate problems the authority was having in financing its projects through the sale of bonds. Committee Minutes - House Finance, April 10, 1978 at 374; testimony of Eric Yould, Executive Director, Alaska Power Authority, id at 374, 376; testimony of Argetsinger, ("Bond people get very nervous when any outside agency gets into control.").

A second question is whether, in spite of AS 44.83.090(b), the APUC has jurisdiction to review the APA wholesale power agreements as part of its regulation of the purchasing utility. If so, the intent of AS 44.83.090(b) could be defeated. If the APUC has authority to approve or disapprove a wholesale power agreement that the purchasing utility intended to sign with the APA, the practical effect would be the same as if the APA had to submit the agreement to the APUC. The APA would not be able to market its bonds and finance construction of its power projects. Furthermore, while the APUC clearly has the authority to investigate a utility's rates when the utility is the selling utility, we can find no authority in AS 42.05 which would permit the APUC to review these wholesale purchase agreements from the point of view of the utility as a purchaser. See AS 42.05.141 (general powers and duties of APUC include investigating utility's rates and making and requiring just, fair and reasonable rates); AS 42.05.431 (APUC may fix just and reasonable rate after investigation and hearing).

The APUC does, however, have broad statutory authority to examine the management practices of a utility, AS 42.05.511 2/

(Footnote Continued)
relates to the serving utility's rates, tolls, charges, rentals, classifications, services or facilities.

2/ Sec. 42.05.511. Unreasonable management practices. (a)
(Footnote Continued)

. This broad authority has never been interpreted by the Alaska Supreme Court. It is conceivable that the APUC could rely on this power to investigate the wholesale power purchase agreement if it perceived that the utility had engaged in imprudent management by entering the APA agreement. This action, however, would have to be considered extraordinary, and be supported by some evidence of imprudence or inefficiency. Even if the APUC were to conduct such an investigation, it is not clear that disapproving or setting aside a wholesale power agreement with the APA would be a permissible remedy.

CONCLUSION

The APUC lacks the authority to approve or disapprove a wholesale power agreement by which the APA sells its hydroelectric power to a regulated electric utility. Once the APA and the purchasing utility have agreed to the sale and the rates charged under the agreement, no further authorization is necessary to enter into such an agreement. However, this conclusion does not suggest that the APUC would be precluded from examining the APA wholesale power agreements under its broad "management practices" authority in appropriate circumstances.

CEJ:cah

(Footnote Continued)
The commission may investigate the management of a public utility, including but not limited to staffing patterns, wage and salary scales and agreements, investment policies and practices, purchasing and payment arrangements with affiliated interests, for the purpose of determining inefficient or unreasonable practices which adversely affect the cost or quality of service of the public utility.

(b) Where unreasonable practices are found to exist, the commission may, after providing reasonable notice and opportunity for hearing, take appropriate action to protect the public from the inefficient or unreasonable practices and may order the public utility to take the corrective action the commission may require to achieve effective development and regulation of public utility services.

Offered: 4/21/87 5-0101X
Referred: Rules

Original sponsor: Coghill

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 22 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act exempting certain telephone and electric utilities and certain transactions from regulation by the Alaska Public Utilities Commission; restricting the authority of the Alaska Public Utilities Commission in considering certain costs in connection with rates charged by a utility and with calculating power cost equalization; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.05.431(b) is amended to read:

(b) Except as provided in (c) of this section, a [A] wholesale power agreement between public utilities is subject to advance approval of the commission. After a wholesale power agreement is in effect, the commission may not invalidate any purchase or sale obligation under the agreement. However, if the commission finds that rates set in accordance with the agreement are not just and reasonable, the commission may order the parties to negotiate an amendment to the agreement and if the parties fail to agree, to use the dispute resolution procedures contained in the contract.

* Sec. 2. AS 42.05.431 is amended by adding a new subsection to read:

(c) A wholesale agreement for the sale of power between the Alaska Power Authority and a public utility is not subject to review or approval by the commission.

* Sec. 3. AS 42.05.511 is amended by adding a new subsection to read:

(d) All costs incurred by a utility in connection with a contract with the Alaska Power Authority, including power costs, wheeling charges for facilities owned or leased by the state, and overhead costs associated with the contract, are considered prudent and are allowed in the rates charged by the utility.

* Sec. 4. AS 42.05.711(e) is amended to read:

(e) Notwithstanding any other provisions of this chapter, an [ANY] electric or telephone utility that does not gross $50,000 annually or that has fewer than 500 subscribers is exempt from regulation under this chapter unless 25 percent of the subscribers petition the commission for regulation. The commission may not combine the revenue or subscribers of different utilities owned by the same company when determining whether a utility is exempt under this subsection.

* Sec. 5. AS 42.05.711 is amended by adding a new subsection to read:

(m) The Alaska Power Authority is not a public utility under this chapter.

* Sec. 6. AS 44.83.090(b) is amended to read:

(b) The authority is not subject to the jurisdiction of the Alaska Public Utilities Commission. Nothing in this chapter [AS 44.83.010 - 44.83.425] grants the authority any jurisdiction over the services or rates of any public utility or diminishes or otherwise alters the jurisdiction of the Alaska Public Utilities Commission with respect to any public utility, including any right the commission may have to review and approve or disapprove contracts for the purchase of electricity by a public utility other than a wholesale power agreement for the purchase of power from the authority.

* Sec. 7. AS 44.83.162 is amended by adding a new subsection to read:

(p) In calculating power cost equalization, the commission may

not consider costs or kilowatt-hour sales associated with a United States Department of Defense facility.

* Sec. 8. Sections 1, 2, and 5 - 7 of this Act are retroactive to June 7, 1986.

* Sec. 9. This Act takes effect immediately under AS 01.10.070(c).